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THE SO SAN INCIDENT

On 9 December 2002 the Spanish frigate *Navarra* was patrolling international waters, in the Arabian Sea, as part of OP ENDURING FREEDOM.

Acting on intelligence reports, the *Navarra* closed on a small, general-cargo vessel. This ship was neither flying a national flag nor displaying any identification markings. In response to radio requests, the Master of the vessel reported that he was bound for Djibouti with a cargo of cement. He refused to heave to and increased speed. The *Navarra* fired a shot across the freighter's bow and dispatched a boarding team by helicopter.

The boarding team discovered that the vessel was the *So San*, registered in Cambodia but beneficially owned by the Democratic Peoples Republic of Korea (DPRK).¹ Her Master and crew were all North Korean nationals.

On board the ship, concealed underneath bags of cement, the boarding party found 15 short-range (SCUD) ballistic missiles armed with conventional, high explosive war-heads and 85 drums of chemicals, including 23 containers of nitric acid, an oxidizer for rocket fuels. None of these goods were recorded in the vessel's 25 page cargo manifest.

The freighter was then seized and escorted towards the US base at Diego Garcia for further examination. At this point, the Yemeni Government sent a letter of protest to the United States protesting against the interception and seizure of the *So San*. The Yemeni Government explained that it had ordered the missiles and chemicals under a long-standing arrangement with North Korea and demanded their return. The Yemeni authorities also demanded to know on what authority the *So San* had been stopped, searched and seized.



Figure 1- SPS Navarra (F85). Source: www.en.wikipedia.org/wiki/spanish_frigate_navarra

On 11 December 2002 the US Government released the *So San* and permitted it to complete its voyage to Yemen with the missiles and chemicals still on board. A White House spokesman announced that this decision was based squarely on legal considerations. He explained that, 'While there is authority to stop and search, in this instance there is no clear authority to seize the shipment of SCUD missiles from North Korea to Yemen, and, therefore, the merchant vessel is being released.'²



Figure 2- Spanish special forces boarding the *So San* 9 December 2002. Source: www.en.wikipedia.org

On 13 December 2002, the DPRK Foreign Ministry condemned this incident, declaring that the interdiction had no legal basis and constituted 'an unpardonable piracy that wantonly encroached on the sovereignty of the DPRK'.³

The *Navarra's* actions in stopping and searching the *So San* were justified by reference to Article 110 (d) of the United Nations Convention of the Law of the Sea (UNCLOS). This article permits a foreign warship to stop a merchant vessel that appears, inter alia, to be 'without nationality'. Yet, while Art.110(d) permitted the *Navarra* to stop and search the *So San*, there was no 'clear authority' to justify its seizure. The carriage of missiles, in itself, was not unlawful and the cargo was destined for a non-belligerent. The *So San* incident, thus, poses the question - under what circumstances can a state lawfully use force to stop and search a foreign flagged merchant ship suspected of carrying WMD or components thereof?

The answer to this question depends, in large measure, upon the geographical position of the interdiction, the existence and nature of domestic legislation and whether the cargo constitutes an imminent military threat to the interdicting state.



Internal & Territorial Waters

A coastal state is entitled to enforce its laws against any merchant vessel that enters a port of the coastal state; thus, when a foreign vessel enters the port of a state, it subjects itself to the territorial jurisdiction of that state. In the past, interdictions have occurred whilst a foreign vessel has been alongside. In 1999 Indian officials boarded and searched a North Korean ship, the *Ku Wol San*, and seized missile components, apparently destined for Pakistan. The components were seized as they had not been declared under customs regulations.⁴

The same sovereignty extends to the coastal state's territorial sea, that is, those waters which extend to 12 NM from the coastal state's base-lines. Within the territorial sea, however, ships from all states have a right of 'innocent passage'. A passage is deemed to be innocent as long as it is not prejudicial to the peace and good order of the coastal state. UNCLOS Art.19 lists the circumstances in which a passage may be rendered non-innocent. This list does not specifically include the carriage of WMD components, provided that they are not intended to be used against the coastal state. Further, the mere carriage of dangerous goods cannot, in itself, render a passage non-innocent.⁵

Art 21 of UNCLOS permits a coastal state to make laws and regulations relating to the innocent passage of vessels through its territorial sea. The subject matter of this legislation is, however, restricted to either the safety of navigation or to the conservation of the sea's living resources. Furthermore, this legislation may not discriminate against the ships of any state or against ships carrying cargoes to, from or on behalf of any state.⁶

Generally, a coastal state's criminal jurisdiction may not be exercised on board a foreign ship transiting the state's territorial sea, when the state's intention is to investigate a suspected crime committed on board the ship during its passage. There are 4 exceptions to this rule:-

- (a) when the crime extends to the coastal state;
- (b) when the crime disturbs the peace of the state;
- (c) if the assistance of the coastal state's authorities have been requested by the Master or by diplomatic officials of the flag state; or
- (d) when necessary to suppress illicit trafficking in narcotics or psychotropic drugs.

There is no authority for the exercise of the coastal state's jurisdiction expressly in relation to the combating of WMD proliferation.

The Contiguous Zone

The contiguous zone extends 24 miles seaward from the baselines. In this zone the coastal state is authorized to exercise control to prevent infringements of its customs, fiscal, immigration or sanitary laws or to punish such infringements committed within its territory.⁷ These powers would not permit a coastal state to seize a vessel when there is no attempted infringement of the state's, customs, fiscal, immigration or sanitary laws, such as when a vessel is merely transiting the contiguous zone in the exercise of its right to innocent passage without intending to discharge any cargo or persons.

The EEZ

A coastal state may claim the waters to a distance of 200NM from its baselines as its Exclusive Economic Zone. The coastal state's sovereignty, however, is limited to the natural resources within the EEZ while foreign vessels still enjoy

freedom of navigation.⁸ Accordingly, the rights accorded to the coastal state over its EEZ would provide an insecure basis for its warships to interdict foreign vessels suspected of carrying WMD parts.

The High Seas

On the high seas, ships of all states are entitled to enjoy freedom of navigation. The general rule is that only the flag state may exercise enforcement jurisdiction over the flagged vessel. UNCLOS, however, permits non-flag states to exercise enforcement jurisdiction in limited circumstances.

These circumstances are restricted to:-

- (a) piracy (Art. 100-107);
- (b) unauthorised broadcasting (Art. 109);
- (c) slave trading (Art. 99); and
- (d) the trafficking of narcotics or psychotropic drugs (Art. 108)

The trafficking of WMD and related goods does not fall within the scope of any of these exceptions.

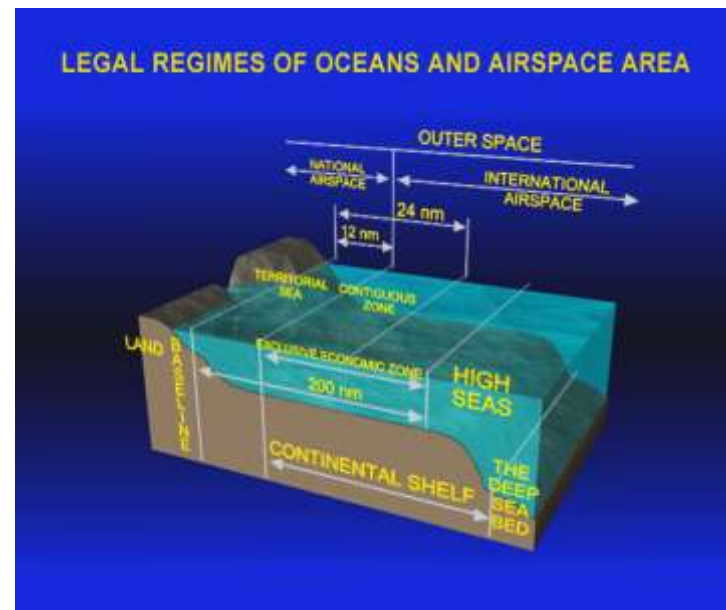


Figure 3- Maritime Zones under UNCLOS. Source: www.geospatial.blog

Other Grounds for Interdiction on the High Seas

The right of self-defence under Art.51 of the UN Charter has often been cited to justify the search and seizure of commercial shipping by a foreign state. This provision gives states the right to use military force in self-defence if an armed attack occurs. Thus, had the SCUD missiles aboard the *So San* been destined for the Taliban, or even al Qaeda, via Djibouti, the US and her allies would have had a basis for seizing the cargo, as a state of belligerency existed between the US and those groups.

There is some debate about whether this right may also arise from the more traditional belligerent right of blockade. Irrespective of whether it arises from Art 51 or from traditional law, most authorities accept that the interdicting state must have some reasonable suspicion that the vessel is carrying contraband goods.⁹

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traditional law, most authorities accept that the interdicting state must have some reasonable suspicion that the vessel is carrying contraband goods.⁹

Additionally, interdiction operations may be authorised by UN Resolution or pursuant to regional, multilateral or bilateral arrangements. The concept of 'anticipatory self-defence', that is the use of military force other than in the context of an existing conflict or as a response to an imminent threat of attack, has not yet achieved juridical acceptance.

The Proliferation Security Initiative (PSI) – the Legacy of the So San

The major legacy of the *So San* was the establishment of the PSI by the US Government in May 2003. It now has the support of over 80 countries (including Australia). Under the initiative, countries commit to disrupting illicit trade in WMD by interdicting in their territory or territorial waters, ships or other craft, reasonably suspected of carrying illicit cargoes. In addition, six nations with extensive shipping registers, namely, Liberia, Panama, the Marshall Islands, Croatia, Cyprus and Belize, have entered into bilateral agreements with the US to allow for consensual boardings of their flagged vessels in support of interdiction operations.¹⁰ Panama and Liberia are, respectively, the world's largest and second largest ship registries. In all, 60% of the world's shipping fleet (measured by DWT) is presently subject to PSI consensual boarding procedures.

As such, the PSI is not a magic bullet, capable of killing off the proliferation of WMD. At a more modest level, it aims to make the transportation of WMD more difficult through the incremental disruption of transportation options.

End Notes

1. 2,496 GRT; 85m LOA, formerly the *Pan Hope*, now the *Chang Dok*.
2. Ari Fleischer, White House Press Secretary, Press Briefing, 11 December 2002
www.whitehouse.gov/news/release/2002/12/20021211-5.html
3. Pyongyang Broadcast Accuses USA of Piracy' *Lloyds List*, 30 December 2002.
4. see Ahlstrom, C 'The Proliferation Security Initiative: International Law Aspects of the Statement of Interdiction Principles' p750, *SIPRI Yearbook 2005*
5. see UNCLOS Art.23
6. see UNCLOS Art. 24
7. see UNCLOS Art. 33
8. see UNCLOS Arts. 55 & 58
9. D.R. Humphrey, Belligerent Interdiction of Neutral Shipping in International Armed Conflict (1997) 2 *Journal of Armed Conflict Law* 23 at p.39
10. see D. Guilfoyle *The Proliferation Security Initiative* [2005] 29 *Melbourne University Law Review* pp733-764.

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Figure 4 – Over 80 nations have now indicated their support for the PSI. Source of image: www.cache.daylife.com

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