Policing the Sea and the Proportionality Principle
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I. Incidents

- Two Types of Threat to the safety of navigation:
  1) criminal pirates
  2) uniformed coastal states law enforcement officials

- Which one is more dangerous?
Similarity

- Armed vessels attacks
- Un-anticipated, unlimited detention
- Monetary payment (pirates’ are more flexible, but much less predictable)
- Damage to properties
- Physical injury / Corporal punishment
The New Star Case, 2009

- The *New Star*, a Chinese-owned cargo vessel flying the flag of Sierra Leone
- arrived at Nakhodka, 65 miles east-western to Vladivostok, Russia, to unload 4,978 tons of packed eggs.
- Disputes -- not allowed to leave the harbor
- Decided to leave without finishing the administrative procedures.
- On 12 February 2009, shortly before midnight at about 23:30 p.m., the ship quietly lifted her anchor and sailed out of the harbor.
- Irritated Russian Coast Guard caught up with the vessel the next morning and fired 515 shots at the *New Star* and sunk the ship.
- Among the 16 crewmembers, 8 were rescued, and the other 8 disappeared in the sea
Model Two: Without use of force

The MV *Louisa Case*, 2010

- On **24 November, 2010**, Saint Vincent and the Grenadines instituted proceedings with the ITLOS against Spain
- dispute concerning the MV *Louisa*
- Was arrested on **1 February 2006** by the Spanish authorities
- Having been held without bond in the port of El Puerto de Santa Maria for **5 years**.
The “illegal, unreported and unregulated” (“IUU”) law enforcement practice

- From 2001 to 2010, a total of 217 Taiwanese fishing vessels were reported attacked or arrested by various coastal states’ law enforcement – many should not have been so treated ….

- while only about a dozen were attacked or kidnapped by pirates in the Indian Ocean or other waters around the world.
Min-jin-yu No. 5179 Case near Diao-yu-tai Islands.

- was arrested by the Japanese Coast Guard on 7 September 2010.
- The Japanese alleged that the damaged fishing boat tried to collide twice against the Japanese patrolling ship when the latter was trying to stop it from entering the Japanese claimed territorial sea around the small islands.
- The Chinese side insisted, on the contrary, that it was the Japanese Coast Guard vessels which intentionally caused the collision, and caused serious damage to the Chinese fishing boat before arresting the latter in the Chinese claimed territorial sea around the small islands.
- Under very unusual circumstances, the Prime Misters of China and Japan exchanged harsh remarks over the incident.
Who was closer to the truth?
There is no fishing boat in the world that would dare collide against coastal guard armed ships made in steel – unless they were forced to do so.

Later on, the Japanese released video footage proving that the Japanese patrol ship was making quick turns closely in front of the Chinese fishing vessel, attempting to force it to either stop or make immediate turns.
Taiwanese Experience

• In the first eight months of 2010, a total of 7 Taiwanese fishing vessels have already been arrested by the Japanese Coast Guard. These 7 cases all involved Taiwanese fishing boats sailing through the overlapping EEZs between Taiwan and Japan, in the vicinity of Diao-yu-tai Islands, which has been a traditional fishing ground for the Chinese Taiwanese fishermen.
The key to a possible solution?

- A more practical new international convention for policing the sea under the proportionality principle.
II. What Is the Proportionality Principle?

- **The Principle of Relevancy:**
  -- the measure must be purpose-oriented

- **The Principle of Necessity:**
  -- “the least intrusive principle”

- **The Principle of the Balance of Interests:**
  -- “the strictly defined proportionality principle.”

  -- 1963 German Union member Case:
  extraction of bone marrows by spinal tap v. 1000 DM
III. Application of the Proportionality Principle in Contemporary International Law
• **The United Nations Charter**, as signed on 26 June 1945:

• -- **Article 2(4):** “All members shall refrain in their international relations from the threat or use of force against the territorial or political independence of any states, or in any other manner inconsistent with the purposes of the United Nations.”
The 1979 Code of Conduct for Law Enforcement Officials, as adopted by the UN Assembly on 17 December 1979:

-- Article 3: Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.
The 1982 UNCLOS:

-- Article 301: “In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any States, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”
• **Article 225** (Duty to avoid adverse consequences in the exercise of the powers of enforcement):

“In the exercise under this Convention of their powers of enforcement against foreign vessels, states shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.”
• The 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, as adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990:
-- Points 4 (non-violent means)、
5 (restraint, minimize, medical aids)、
9 (defense of imminent threat)、
10 (pre-warning)、
11 (appropriate use and reporting)、
13 (non-violent assemblies – no use)、
14 (violent assemblies – necessary use)、
15 (persons in custody – no use) and
16 (persons in custody – strictly necessary)
--- all relevant to the restriction on the use of force by the law enforcement officials
• -- Article 22-1-(f) : “...avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.”
• **Article 8bis -9:** “When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.”
Some classical judicial precedents are also noteworthy. Among them, the 1937 case of *The Caroline* clearly described the Principle of Necessity and the Principle of Balance of Interests by mentioning that

“... a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation; did nothing unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by the necessity, kept clearly within it.”
The M/V Saiga (No.2) Case, 1999, is another landmark

- On the issue of use of force during hot pursuit, the Court interpreted the text of the UNCLOS and stated that “although the convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law ....”
Some Conclusions:

1) Having the above cases and materials reviewed, we are sure that the principle of proportionality is already part of the statutory and customary law for both domestic and international practice of use of force, on the land or at the sea.
2) Coastal states are supposed to be familiar with the application of these principles in their constitutional law and administrative law arenas; but should be urged to apply these same principles to international marine incidents.
3) To satisfy the requirement of the Principle, the following three points are essential:

- (1) the use of force must be compatible with its purpose;
- (2) the use of force must be compatible with the seriousness of the crimes/violations committed by the foreign vessel; and
- (3) a balanced choice must be made between the action to be taken and the value of life on board.
- (4) Even all these three factors are met, if there is no sufficiently proper warning before the actual use of force, it should still be regarded as violating the international law.
IV. What Are Needed for A Safer Navigational Environment?

• 1) To urge various coastal States to improve their law enforcement practice by strictly applying the Proportionality Principle defined in the statutory and customary international and domestic law.
2) To create a new marine law enforcement convention on the basis of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, making this new convention an enforceable comprehensive statutory law for every States in the world.
3) To include in the new convention a set of **detailed practicable rules** on measures to be taken by coastal states’ law enforcers when they are policing the sea.
Taking the model of the USCG rule

Under the basic guidelines of Proportionality Principle, the USCG rule classifies the subjects, the weapons to be use, the different levels of situations; and has created a rather reasonable schedule of levels of force for the law enforcers to follow step by step against non-compliant vessels. Exceptional rules of restraint are also made for the USCG to deal with fishing vessels and vessels with migrants on board.
4) To improve trainings of the law enforcement officials of various coastal States.

-- should bring to their attention of all the currently applicable statutory and customary international law.
5) **Encouraging and assisting litigations** to help establish sufficient applicable precedents on proportional use of force and proportional law enforcement at the sea.
Thank You