THE PROLIFERATION SECURITY INITIATIVE: 
INTERDICTING VESSELS IN INTERNATIONAL WATERS 
TO PREVENT THE SPREAD OF WEAPONS OF MASS 
DESTRUCTION?

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[Can a state stop and search vessels suspected of carrying weapons of mass destruction in international waters? The Proliferation Security Initiative, a US-led coalition, aims to contain the spread of weapons of mass destruction through a variety of measures based on uncontroversial heads of state jurisdiction. But when might high seas interdictions be lawful, if suspect vessels do not pass through territory within the Proliferation Security Initiative’s reach? Ordinarily, merchant vessels in international waters can only be stopped and searched without flag state consent in very limited circumstances. This article, however, argues that insofar as the ‘War on Terror’ is a conflict with ascertained non-state actors, the law of belligerent contraband could allow high seas interdiction of weapons shipments bound for organisations such as al-Qa’eda.]

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I INTRODUCTION

[Interception of critical technologies while en route can prevent hostile states and non-state actors from acquiring ... dangerous capabilities ...]

The So San episode ... illustrates that proliferators are vulnerable to having their shipments interdicted by the US and our allies.¹

Containing the proliferation of weapons of mass destruction ("WMD") — chemical, biological and nuclear weapons — has become a major foreign policy objective of the US.² However, can states lawfully use force to stop and search foreign-flagged merchant vessels in international waters on suspicion of carrying WMD or WMD-associated matériel and confiscate such cargoes? The United Nations Convention on the Law of the Sea³ contains no such exception to the principle of freedom of navigation. The question is raised by Spain’s 2002 interception of the So San, a vessel transporting Scud missiles (a potential WMD delivery system) between North Korea and Yemen, and the subsequent establishment of the Proliferation Security Initiative ("PSI") by the US.

While the PSI’s Statement of Interdiction Principles⁴ only expressly deals with interdictions within waters or upon vessels under member states’ jurisdiction, the So San incident illustrates that intercepting shipments is sometimes only practical in international waters. If the PSI conducts future high seas interdictions, it will raise questions regarding the limits of self-defence under the Charter of the United Nations ("Charter"), the applicable laws of armed conflict in international waters ("naval law"), and the protection afforded to neutral shipping during armed conflicts. This article will not discuss any PSI implications for interdictions in territorial waters.⁵

WMD interdictions may occur in several scenarios, such as where:

1 one state transports WMD to an ally, shipment of which is intercepted by another state claiming that it is militarily threatened by this development, although no attack appears imminent (for example, the Cuban Missile Crisis);

2 a state claims self-defence (preventing terrorist attacks) when intercepting individual WMD shipments destined for hostile non-state actors (‘ad hoc interdictions’); or
3 a state is engaged in an armed conflict (such as ‘Operation Enduring Freedom’ in Afghanistan) and intercepts WMD shipments destined for state or non-state actors in that conflict.

It will be argued that the legality of ad hoc interdictions in international waters depends upon acceptance of the problematic doctrine of pre-emptive self-defence. Different considerations, however, apply where a state is already involved in armed conflict, be it with another state or a non-state actor. In such cases it will be argued that customary naval law applies to the use of force in self-defence under art 51 of the Charter, and that such interdictions would be permitted under the law of contraband.

This article will examine the So San incident as a model for future high seas interdictions and consider:

1 the So San incident and the PSI’s foundation;
2 the characterisation, under naval law, of the interdiction by warships of vessels on the high seas and the legality of the So San incident;
3 Charter law and interdictions involving military force; and
4 whether such interdictions may find support in Charter-era United Nations (‘UN’) or state practice, especially the Cuban Missile Crisis and the Iran–Iraq ‘Tanker War’.

II THE SO SAN INCIDENT AND THE PSI’S FOUNDATION

A The So San Incident

On 9 December 2002, the So San was interdicted 960 kilometres from its destination in Yemen by a Spanish frigate, the Navarra, acting on US intelligence.6 The Navarra was patrolling as part of Operation Enduring Freedom, intercepting contraband cargo and searching for al-Qa’eda members fleeing Afghanistan.7 The So San was engaged in transporting 15 Scud missiles from North Korea to Yemen.8

The So San displayed no flag or identifying markings.9 Responding to radio queries, its captain identified his cargo as concrete before attempting to ‘speed

away’, and the *Navarra* fired warning shots.\(^{10}\) Spanish special forces then boarded the *So San* by helicopter.\(^{11}\) The missiles were discovered under sacks of concrete, along with 85 drums of chemicals, 23 of which contained nitric acid.\(^{12}\) The vessel was diverted to a naval base, apparently in Bahrain, where US ordinance disposal specialists examined it.\(^{13}\) Inspection revealed it to be Cambodian flagged.\(^{14}\) The Spanish Defence Ministry stated that the 25-page declaration of cargo aboard neither listed the Scud missiles nor identified Yemen as a destination.\(^{15}\) Yemen, however, claimed that it had purchased the missiles legally and guaranteed to the US that they were intended for defence and not for sale to third parties.\(^{16}\) Consequently, the *So San* was released, despite Spain’s public dissatisfaction.\(^{17}\)

The White House cited the lack of any basis in international law allowing seizure of otherwise legal weapons as the reason for releasing the vessel.\(^{18}\) Other factors may have weighed into the decision. The missiles were being transported to an ally, although Yemen is clearly not a traditional US ally. Indeed, one US official stated that the decision reflected the new bilateral relationship with Yemen.\(^{19}\) Thus, the incident may have served to warn a new ally that its activities were being monitored. There may also have been an intended message for North Korea, given that the incident occurred during the dispute over the fuel oil agreement and the Yongbyon nuclear reactor. Regardless of the *So San*’s Cambodian registration, its cargo and crew were North Korean, and Pyongyang claimed it as a North Korean merchant vessel, denouncing the interdiction as ‘violently infringing’ its sovereignty.\(^{20}\) Further, the incident also focused world attention on the potential traffic in WMD and may thus have contributed to the PSI’s formation.\(^{21}\)

**B Formation of the PSI**

Following the *So San* episode, a US-led coalition (including Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, and the UK)
formed the PSI. By March 2004, it had held six joint military exercises and five formal meetings. Canada, Norway, Singapore and Russia have since joined, and Denmark and Turkey have participated in meetings. The Australian Foreign Minister has referred to 60 countries ‘committed’ to PSI principles and a smaller group of ‘core members’. While statements have been made that the PSI was not established to target North Korea, a PSI declaration refers to Iran and North Korea as ‘countries of proliferation concern’.

On 4 September 2003, the PSI released its non-binding Statement of Interdiction Principles. The PSI Principles outline domestic law methods by which member states might stop and search their flag vessels or vessels within their territorial jurisdiction. The preamble states: ‘PSI participants are committed to...’

The PSI Principles express member states’ commitment to:

1. Undertake effective measures, either alone or ... with other states, for interdicting the transfer ... of WMD, their delivery systems, and related materials to ... from states and non-state actors of proliferation concern. ‘States or non-state actors of proliferation concern’ generally refers to those countries or entities that the PSI participants involved establish ... are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

... 4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law ... to include: ...

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23 PSI, ‘Chairman’s Statement’ (Fifth Meeting of the PSI, Lisbon, 5 March 2004) <http://www.state.gov/t/np/rls/other/30960.htm>.


28 PSI, ‘Chairman’s Statement’ (Second Meeting of the PSI, Brisbane, 10 July 2003) <http://www.state.gov/t/np/rls/other/25377.htm>.

29 PSI, PSI Principles, above n 4.

30 Ibid preamble.
b. At their own initiative, or … [on] good cause shown by another state … 
to board and search any vessel flying their flag in their internal waters or 
territorial seas or areas beyond the territorial seas of any other state that is 
reasonably suspected of transporting such cargoes to or from states or 
non-state actors of proliferation concerns, and to seize such cargoes …

c. To seriously consider providing consent … to the boarding and searching 
of its own flag vessels by other states and to the seizure of such 
WMD-related cargoes in such vessels …

d. To take appropriate actions to … stop and/or search in their internal wa-
ters, territorial seas, or contiguous zones … vessels … reasonably suspected 
of carrying such cargoes to or from states or non-state actors of prolifera-
tion concern and to seize such cargoes …

f. If their ports … are used as transshipment points for … such cargoes to or 
from states or non-state actors of proliferation concern, to inspect vessels 
… reasonably suspected of carrying such cargoes, and to seize [any] such 
cargoes …

The measures in para 4 are all uncontroversial, being based on territorial or 
flag state jurisdiction. Indeed, the US has been at the forefront of using 
conventional international law means to expand the PSI’s reach, entering 
bilateral agreements with Liberia, Panama, the Marshall Islands, Croatia, 
Cyprus and Belize that provide for consensual boarding of vessels suspected 
of transporting WMD. The one reported PSI interdiction to date, that of the BBC China, was also conducted consistently with the idea of national jurisdiction:

31 A R Thomas and James C Duncan (eds), Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations (1999) 221 (‘Commander’s Handbook’).
The BBC China was a German-owned ship (flagged in Antigua and Barbuda) that the UK and US had information was carrying uranium centrifuge parts to Libya. In early October 2003 a request was made to the German Government to search the ship. The German government agreed and had the owner … bring the ship in to the Italian port of Taranto where centrifuge parts were removed by Italian customs before permitting the ship to continue …

The incident is suggestive of what will probably be the PSI’s usual mode of operation: action involving only some PSI members, based on existing national and international law.

However, the PSI Principles and bilateral agreements do not preclude future interdictions of foreign-flagged vessels in international waters — although their implementation may diminish the need for such interdictions. It is hard to imagine a situation where a PSI member, knowing that a WMD cargo bound for a state or non-state actor ‘of concern’ was travelling through international waters on a vessel not covered by a PSI bilateral treaty or flagged by a PSI member, on a route not passing through any PSI member’s territorial jurisdiction, would choose to do nothing. Indeed, US officials have reportedly stated that ‘there could be a legal case for interdiction … [as] self-defence under Article 51 of the UN Charter.’

The drafting of the PSI Principles leaves this issue open. The para 4 measures seem to be minimum commitments, and not necessarily an exhaustive statement of available measures. This suggests a spectrum of views among PSI members about the limits of legal action. One US official commented that:

Participating countries have exchanged extensive information about what we believe our respective national authorities are, and the Statement of Interdiction Principles makes clear that the steps it calls for will be taken consistent with those authorities.

This diversity of views among PSI members, and their apparent capacity to act outside the enumerated PSI Principles, makes it relevant to enquire whether there is an arguable Charter foundation for high seas interdiction of flag vessels of foreign states.


A further reason to ask the question is the European Union’s Strategy against Proliferation of Weapons of Mass Destruction.42 The EU Strategy contemplates ‘[s]upporting international initiatives aimed at … interception of illegal shipments’,43 and notes that

coercive measures under Chapter VII of the UN Charter and international law (sanctions, selective or global, interceptions of shipments and, as appropriate, the use of force) could be envisioned. The UN Security Council should play a central role.44

The language could allow a distinction to be drawn between action under ch VII and other action justifiable under international law, indirectly suggesting that ‘interceptions’ could occur under international law other than under ch VII. While acknowledging the Security Council’s role, its approval is not expressly required. Again, the text leaves open the prospect of individual member states interdicting WMD shipments if they considered that international law supported such action.

This also appears to be the position under the recent Security Council resolution on the issue. Security Council Resolution 154045 prohibits state assistance to non-state actors seeking to acquire WMD, WMD delivery systems or WMD matériel without providing automatic consequences for breaching this regime or creating any new international law counter-proliferation mechanisms. It calls for greater national safeguards to prevent sale or transhipment of WMD matériel and greater multilateral cooperation. Specifically, Resolution 1540 ‘calls upon all States, … consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials’.46 The Resolution clearly does not modify existing law applicable to warship-conducted interdictions in international waters. It thus rests with individual states to act within their interpretation of the applicable law.

III LEGAL CLASSIFICATION OF NAVAL ‘INTERDICTION’

A The Legal Basis for the So San Interdiction

The US’s principal justification for interdicting the So San was that it flew no flag.47 This seems a strong argument as the UNCLOS permits, upon reasonable suspicion, a right of visit to ascertain whether a vessel is stateless. Indeed, art 110 apparently codifies the ‘right of visit’ in international waters (subject to

43 Council of the European Union, EU Strategy, above n 42, [30(A)(6)].
44 Ibid [15].
47 Fleischer, above n 9. See above Part II(A).
laws of armed conflict, boarding rights created under treaty and ‘other rules of international law’ limiting the freedom of the high seas),\(^48\) by prohibiting warships from boarding other ships except where ‘there is reasonable ground for suspecting’ that the ship is engaged in piracy, slave-trading or unauthorised broadcasting; is, despite appearances, of the warship’s nationality; or is without nationality.\(^49\) In such cases, ‘the warship … may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination’.\(^50\)

Though statelessness as a ground for boarding vessels in international waters did not appear in the 1958 Convention on the High Seas,\(^51\) it ‘was probably [omitted by] an oversight’ as the principle is uncontroversial, historically well-established and probably represents custom.\(^52\) Article 110’s codifying nature is reflected in its direct incorporation into the US’s Commander’s Handbook,\(^53\) which is especially significant as the US has yet to ratify the UNCLOS.

Thus, if a warship reasonably suspects that a ship is without nationality (prima facie the case where it flies no flag), it may exercise a right of visit to ascertain its status. However, following this incident, it seems unlikely that vessels carrying WMD-related cargoes would invite boarding by not flying a flag.

In other statements, Spain claimed that it could impound the So San as a ‘pirate’ vessel.\(^54\) Such an argument is hard to base on the UNCLOS, given piracy’s highly restrictive definition under art 101. However, had it been a pirate vessel, there would have been a clear right to seize it.\(^55\)

The next issue arising is whether such interdictions could be justified under naval law, as an exception to art 110 of the UNCLOS.

**B The Scope of Charter-Era Naval Law**

1 **Introduction**

Naval law provides three doctrines which justify warships stopping and searching merchant vessels and seizing cargo: contraband, blockade and ‘exclusion zones’. Contraband and blockade arise from traditional laws of neutrality, based on the principle that belligerent operations should cause the minimum disruption to neutral states’ peaceful use of the seas and legitimate trade (even

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\(^{50}\) *UNCLOS*, opened for signature 10 December 1982, 1833 UNTS 3, art 110 (entered into force 16 November 1994).

\(^{51}\) Opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).


\(^{53}\) Thomas and Duncan, above n 31, 22.


\(^{55}\) Thomas and Duncan, above n 31, 225; *UNCLOS*, opened for signature 10 December 1982, 1833 UNTS 3, art 105 (entered into force 16 November 1994).
with enemy belligerents). This is significant, given debate concerning whether UN member states can claim neutrality once the Security Council has held a state ‘responsible for a breach of the peace’ and called for measures against it.\textsuperscript{56} If the Charter effectively prohibits neutrality, it may abolish blockade and contraband as creations of the law of neutrality.

Clearly, under art 103 of the Charter, a state cannot assert rights incompatible with its Charter duties. However, where the Security Council has not taken or specified enforcement action, nor made findings of aggression, there is no obvious conflict between Charter obligations and neutrality.\textsuperscript{57} Throughout the Cold War experience of Security Council paralysis, neutrality remained important in naval warfare and was widely respected.\textsuperscript{58} Even the flagrant disregard for neutral shipping’s rights in the Tanker War\textsuperscript{59} is not fatal to this view, as one can see in the international community’s reaction the reassertion of traditional rules in the face of contrary belligerent conduct.\textsuperscript{60}

During the Iran–Iraq War, it could be said that the modern laws of naval warfare were largely uncodified.\textsuperscript{61} Since then, the US Navy has promulgated the Commander’s Handbook (used by 25 other countries as a ‘principal legal guide’),\textsuperscript{62} an international round table has drafted the San Remo Manual, and a chapter on naval warfare was included in The Handbook of Humanitarian Law in Armed Conflicts.\textsuperscript{63} While these works lack codifying power, they take a relatively common and expert view of the rules governing interdictions during a Charter-era armed conflict,\textsuperscript{64} and represent (in the military manuals’ case) statements of opinio juris. Regarding the San Remo Manual, the US submitted before the International Court of Justice (‘ICJ’) that ‘most of its provisions reflect customary international law.’\textsuperscript{65}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} Leckow, above n 56, 630; D R Humphrey, ‘Belligerent Interdiction of Neutral Shipping in International Armed Conflict’ (1997) 2 Journal of Armed Conflict Law 23, 29–32.
\item \textsuperscript{59} IIHL, above n 56, 160. See below Part III(D).
\item \textsuperscript{60} Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)(Merits) [1986] ICJ Rep 14, 98 (‘Nicaragua’); Humphrey, above n 58, 36.
\item \textsuperscript{61} Warbrick, above n 56, 422.
\item \textsuperscript{62} Oil Platforms (Islamic Republic of Iran v United States of America) (Counter-Memorial and Counter-Claim Submitted by the United States of America), 23 June 1997, 136–7 fn 310 <http://www.icj-cij.org/icjwww/idocket/iop/Ippeadings/iop_tpleadings_19970623_countern em_us_04.pdf>, (‘US Counter-Memorial’).
\item \textsuperscript{63} Dieter Fleck (ed), The Handbook of Humanitarian Law in Armed Conflicts (1995) (‘German Handbook’), being an annotated English translation of the German Joint Services Regulations (ZDv) 15/2; Dieter Fleck, ‘Introduction’ in Dieter Fleck (ed), The Handbook of Humanitarian Law in Armed Conflicts (1995) 1, x.
\item \textsuperscript{64} See below Part III(C)(1).
\item \textsuperscript{65} US Counter-Memorial, above n 62, 130 fn 292.
\end{itemize}
\end{footnotesize}
In answer to a 1986 parliamentary question on the Tanker War, the UK Foreign Secretary replied that

under article 51 of the United Nations charter [sic] a state such as Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self-defence, to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict.66

This answer was repeated in 1988.67 Israel appeared to take a similar position in May 2001 and January 2002 when it boarded foreign-flagged vessels and seized Palestinian Authority weapons shipments, citing Charter self-defence, rather than customary law.68 Two interpretations of the UK position have been put forward:

1. that it suggests a trend towards restricting the right of visit and search to situations involving self-defence;69 or
2. that by tying the right to art 51 armed conflict, the UK asserted that the situation was exclusively Charter-governed, and by not acknowledging the conflict as a fully-fledged war, it did not concede traditional, broader belligerent rights to the parties.70

The first proposition does not conflict with the survival of naval law under the Charter. It logically posits that, as measures involving the use of force, these traditional rules can now only be asserted in self-defence.

The second proposition wrongly presumes that once a conflict has commenced, art 51 restricts parties more than the customary laws of war. Article 51 restricts the occasion for the use of force (jus ad bellum), not the substantive rules governing its use during conflicts (jus in bello). Customary law largely sets the limits of lawful action taken under art 51, most notably through requirements of necessity and proportionality.71 It is consistent with the UK Foreign Secretary’s statement to suggest that customary naval law applies under art 51. Indeed, the Foreign Secretary seems to be asserting that any party to an armed conflict has, in self-defence, an inherent right to stop and search vessels suspected of taking weapons to the enemy. This appears to draw on the historical belligerent

66 United Kingdom, Parliamentary Debates, House of Commons, 28 January 1986, 426 (Timothy Renton, Minister of State, Foreign and Commonwealth Office).
67 United Kingdom, Parliamentary Debates, House of Commons, 15 February 1988, 424 (David Mellor, Minister of State, Foreign and Commonwealth Office).
69 IIHL, above n 56, 156.
right to intercept weapons shipments as ‘absolute contraband’. Rather than asserting narrower rights than those provided by custom, the UK Foreign Secretary — and Israel — appear to have asserted precisely those rights.

3 Customary Naval Law’s Survival

During the Tanker War, the traditional belligerent right of visit and search over unescorted merchant ships was acknowledged by the US, Italy, the Netherlands, France and the Soviet Union. Most then resorted to the ‘doctrine of convoy’ to render merchant shipping under military escort immune from such interdiction. (Both Iran and Iraq disputed the convoy doctrine.) In practice, then, the belligerent right of visit and search has been acknowledged as still being applicable to naval conflicts. This is consistent with the Commander’s Handbook, the San Remo Manual, and the German Handbook. One can thus proceed on the basis that the law of naval interdiction during armed conflict can be ascertained from both the manuals and state practice.

C Classifying Interdiction Strategies under Naval Law

As noted above, naval law distinguishes between the belligerent right to seize enemy vessels or contraband cargoes, the right to blockade enemy waters to prevent any vessel entering defined ports, and the modern practice of declaring ‘exclusion zones’. In each context, a right of interdiction may be asserted.

1 Contraband

The law of contraband allows belligerents to visit and search merchant vessels of neutral states — outside neutral waters — and seize their cargoes in whole or in part. Contraband goods liable to seizure are goods ‘susceptible to use in armed conflict’ and ‘ultimately destined for [enemy] territory’. Thus, contraband deprives the enemy of war-waging matériel and may be considered a defensive measure. Any vessel carrying exclusively contraband cargo may also itself be forfeit. Thus, if the So San had been carrying contraband goods to enemy forces in an armed conflict, the Spanish position that it was liable to confiscation would have been stronger.

72 See below Part III(C)(1).
74 De Guttry and Ronzitti, above n 70, 52, 95; Oil Platforms (Islamic Republic of Iran v United States of America) (Memorial of the Government Submitted by the Islamic Republic of Iran), 8 June 1993, 45–6 <http://www.icj-cij.org/icjwww/idocket/iop/pleadings/iop_ipleadings_19930608_memoria_ir_01.pdf> (‘Iranian Memorial’).
76 IIHL, above n 56, 215; see also Bothe, above n 75, 508; Thomas and Duncan, above n 31, 381; cf Stone, above n 75, 480; George P Politakis, Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality (1998) 415.
77 Bothe, above n 75, 509; IIHL, above n 56, 205; cf Stone, above n 75, 490–1.
Historically, a distinction was made between ‘absolute contraband’ (goods bound for enemy territory deemed ‘essential for war’) and ‘conditional contraband’ (goods susceptible to peaceful or warlike uses). The proliferation security initiative: interdicting vessels. The right of control shall not apply to merchant ships flying neutral flags and escorted by a neutral warship (convoy). Such an approach eclipses distinctions between contraband and blockade, or sees blockade as simply enforcing contraband. That said, any theory of ‘total contraband’ must be qualified by humanitarian concerns. Intentional starvation of the civilian population would be unlawful, and the military manuals allow for the passage of food and other supplies vital to the survival of the civilian population.

The German Handbook provides a convenient formulation of the right of visit and search:

[1138] Warships of a party to the conflict are entitled to stop, visit, and search merchant ships flying the flag of a neutral state on the high seas and control the contents and destination of their cargo. …

[1139] Warships of a party to the conflict may use only such force as is necessary against neutral merchant ships … In particular, neutral merchant ships … resisting inspection may be damaged or destroyed if it is not possible to prevent them from continuing …

[1141] The right of control shall not apply to merchant ships flying neutral flags and escorted by a neutral warship (convoy). … However, a warship of a party to the conflict may request the commander of the neutral warship to specify the type and destination of the cargo. …

[1142] If the cargo contains goods essential for war … destined for the port of an adversary, such goods may be captured … (‘absolute contraband’). The parties to the conflict may notify to the neutral states lists of the goods … deemed essential for war. Any goods destined for the administration or the armed forces of the opposing party … will likewise be deemed contraband (‘conditional contraband’).

This approach is also taken with only minor variations in the Commander’s Handbook and the San Remo Manual. The San Remo Manual additionally

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78 Politakis, above n 76, 415; Bothe, above n 75, 508–9.
79 Boczeh, above n 57, 261; Humphrey, above n 58, 27.
80 See Stone, above n 75, 481; Politakis, above n 76, 417; IIHL, above n 56, 215–16; cf Bothe, above n 75, 509.
81 Stone, above n 75, 504–7.
82 See below Part III(D).
83 This distinction is doubted in O’Connell, above n 56, 114.
85 Bothe, above n 75, 506–9.
specifies that the right is preconditioned upon reasonable suspicion that the neutral vessel is carrying contraband or supporting the enemy, and lists of contraband goods must be published in advance. The Commander’s Handbook suggests that publishing lists of ‘free goods’ (all other trade being contraband) might fulfil any requirement to publish contraband lists. The German Handbook seems to suggest by omission that the right of search and seizure is not preconditioned upon reasonable suspicion that a vessel is carrying contraband.

Thus, the right of visit, search and seizure could be summarised as:

1. belligerent warships may visit and search any neutral ship outside neutral waters if there is a reasonable suspicion that the vessel is carrying contraband ultimately destined for territory under enemy control;
2. this right cannot be exercised against neutral vessels escorted under convoy, though the convoy’s leader may be asked to give particulars of, and destinations for, their cargoes;
3. neutral nations should be forewarned what goods will constitute contraband — though weapons shipments will clearly always constitute contraband; and
4. force may be used to execute an interdiction, subject to the rules of proportionality and necessity, though force should be avoided if at all possible.

This would appear to be the minimum position all three manuals would accept. In relation to an armed conflict with non-state actors (‘armed bands’), one must note the manuals’ requirement that contraband subject to capture must be ‘ultimately destined’ for enemy territory. To interpret this formalistically, and hold that where an armed band controls no territory contraband cannot be enforced, would be mistaken. The very expression ‘ultimately destined’ exposes a purposive approach: the rule acknowledges the right to look behind intermediate recipients to a final destination. Therefore, ‘territory under enemy control’ expresses less an additional requirement than an available presumption — of ‘end use’ of warlike matériel by enemy forces in such territory. Thus, the rule’s purposive interpretation would allow contraband enforcement even against an armed band not formally occupying territory if a weapons shipment is ascertainably destined for that band.

2. **Blockades**

While contraband targets movements of prohibited goods to enemy-controlled territory, blockade, a method of economic warfare, aims to exclude all maritime commerce with enemy ports. Traditionally, the minimum requirements for a legal blockade are that it have a declared geographical extent and commencement date, is notified to all affected states, is impartially applied, and is effective. While historically a blockade was required to be conducted close to the

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86 IIHL, above n 56, 212–19.
87 Thomas and Duncan, above n 31, 383. See also Walker, above n 48, 357–64.
88 IIHL, above n 56, 215. See also Bothe, above n 75, 508; Thomas and Duncan, above n 31, 381.
89 Leckow, above n 56, 630–1.
90 IIHL, above n 56, 177–80; Thomas and Duncan, above n 31, 390–4; Stone, above n 75, 496; Heintschel von Heinegg, above n 84, 470–4.
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coastline (‘close blockade’), it is now recognised that blockading forces may be stationed at a distance (‘long-distance blockade’). Theoretically, the law of visit and search is irrelevant to a blockade, which aims to exclude all shipping. In practice, administering long-distance blockades requires boarding and inspection of neutral vessels to ascertain whether cargo is contraband destined for the enemy.

The obvious problem in classifying ad hoc high seas interdictions as a ‘blockade’ is that the affected area lacks concrete definition. Transnational terrorists and other non-state actors do not confine their activities to a readily ascertainable area, nor has the PSI sought to establish any continuous and effective naval operation to control shipping entering ports controlled by states of proliferation concern.

3 Exclusion Zones

‘Exclusion zone’ is a loose term covering everything from German zones of unrestricted submarine warfare in both World Wars, to the divergent Tanker War practices of Iran and Iraq, to the UK’s ‘operational zone’ during the Falklands conflict. In declaring an exclusion zone, belligerents may purport to disclaim responsibility for shipping’s safe passage or simply intend to warn vessels of the scope of a theatre of operations, thus aiming to limit numbers of surface vessels in an area. These measures have much in common with blockade, except that rather than excluding shipping from enemy ports, they purport to exclude all shipping from defined areas of the sea, be it areas relatively close to a belligerent’s own territory, or much wider areas. In exclusion zones where some vessels are permitted safe passage upon conditions, visit and inspection may be needed to confirm their credentials.

Exclusion zones lack established rules of implementation and are at best lex ferenda. Regardless, it would be manifestly impractical for any state to declare all international waters an exclusion zone during a ‘War on Terror’ in order to justify interdicting WMD shipments. For present purposes they indicate only a form of state practice in which visit and search measures have been implemented; state practice in the Iranian-declared exclusion zone and during the US’s Cuban ‘quarantine’ may assist in assessing the range of circumstances in which rights of visit, search and seizure are actually invoked in self-defence.

D Iranian Tanker War Practice

Iran stated in its Oil Platforms memorial that it initiated visit and search measures to prevent contraband passing into Iraq within a ‘defence exclusion zone around its coasts’ on 22 September 1980. Iran searched suspected vessels,
detained ‘many … found to be trading in contraband’ and impounded cargoes.\textsuperscript{95} However, the Iranian communiqué of 22 September 1980 establishing these measures prohibited all merchant shipping passing through its waters from transporting \textit{any} Iraqi-destined cargo, regardless of its nature.\textsuperscript{96} This was essentially a blockade or implementation of ‘total contraband’.\textsuperscript{97} Regardless, many states acknowledged Iran’s belligerent right to conduct visit and search measures,\textsuperscript{98} and one can conclude that the Tanker War ‘strengthened traditional visit and search rules’.\textsuperscript{99}

Some argue, however, that Security Council Resolution 552\textsuperscript{100} suggests that rights of visit and search cannot be exercised against neutral vessels engaged in trade with ‘States that are not parties to the hostilities’ even when carrying cargo ultimately destined for a belligerent.\textsuperscript{101} The relevant passage is para 2, which ‘[r]eaffirms the right of free navigation in international waters … for shipping en route to and from all ports and installations of the littoral States that are not parties to the hostilities’.\textsuperscript{102} If encompassing visit and search measures, this could constitute a significant departure from prior customary law. No such conclusion should be drawn. While Iran was stopping and searching vessels at the time, and although this drew protest, nothing in Resolution 552 refers to visit and search procedures, it being entirely concerned with repeated ‘attacks’ on neutral shipping. Indeed, the Security Council debates\textsuperscript{103} focused almost entirely on alleged missile attacks by Iranian warplanes on Kuwaiti and Saudi Arabian shipping, the only express reference to interdictions being the Netherlands’ acknowledgment that belligerents \textit{may} restrict shipping.\textsuperscript{104} While the Security Council reaffirmed the doctrine of ‘free navigation in international waters’,\textsuperscript{105} it has already been noted that \textit{peacetime} rights of visit and inspection under the \textit{UNCLOS} qualify that doctrine.\textsuperscript{106} There is no reason to suppose that the Security Council intended ‘free navigation’ to mean ‘absolutely free’ in the context of an armed conflict and art 51 measures.

\section*{E The Cuban Missile Crisis and ‘Quarantine’}

The Cuban Missile Crisis is factually distinguishable from ad hoc \textit{So San}-type interdictions, PSI arrangements and high seas interdictions during continuing
armed conflict. The events surrounding it are too extensively discussed elsewhere to warrant detailed repetition here. Simply put, on discovering Soviet nuclear missile launch facilities under construction in Cuba, on 24 October 1962, President Kennedy declared a ‘defensive quarantine’ of Cuba to be enforced by naval interdiction of shipping carrying military matériel, which resulted in a number of ships being ‘visually inspected’ or boarded before being allowed to proceed.\(^{107}\) The stand-off was resolved by 28 October and ‘quarantine’ ended on 20 November.\(^{108}\) While closely resembling contraband enforcement, belligerent rights were deliberately not claimed.\(^{109}\)

At the time, the US State Department argued that the ‘quarantine’ was authorised by the Organization of American States (‘OAS’) as a Charter regional security arrangement acting under ch VIII. The OAS had recommended that members take all necessary measures, including the use of armed force, to ensure that ‘Cuba [could not] … receive … military material … threaten[ing] the peace and security of the Continent’.\(^{110}\) As one US official admitted subsequently, this requires a strained interpretation of the ‘quarantine’ as something other than ‘enforcement’, given the art 53 requirement that ch VIII organisations not conduct enforcement action without Security Council approval.\(^{111}\) However, this was thought preferable to asserting a right of pre-emptive self-defence, which would have allowed the USSR to strike at US missile installations in Turkey.\(^{112}\)

One could argue that the Economic Community of West African States’ interventions in Liberia and Sierra Leone in the 1990s, and the Security Council’s subsequent commendation of these unauthorised actions,\(^{113}\) show the evolution of ch VIII practice to a point where regional organisations may authorise the use of force to preserve regional peace and security.\(^{114}\) North Atlantic Treaty Organisation (‘NATO’) intervention in Kosovo also led to calls for the reinterpretation of ch VIII to allow similar action.\(^{115}\) However, even if ch VIII could now be regarded as supporting ‘Cuban quarantine’ interdictions, it would not presently be relevant as the PSI is neither a treaty body nor a regional arrange-


\(^{110}\) Kennedy Proclamation, above n 107, 10 401.


ment and there is no suggestion that PSI member states would seek its ‘authorisation’ before conducting high seas interdictions.

IV INTERDICTION AS A USE OF FORCE: ARTICLE 51 AND SELF-DEFENCE

A Introduction

If warship-conducted interdictions use force, one might conclude that they must fall within art 51 to be legal — the presumption being that only art 51 self-defence and Security Council-authorised ch VII measures are exempt from the art 2(4) prohibition on ‘the threat or use of force against the territorial integrity or political independence of any state’.116

Article 51 preserves a state’s right to use force in self-defence ‘if an armed attack occurs’. A literal reading constrains self-defence to actions responding to an attack that has already occurred or commenced. Anticipatory self-defence, understood as a necessary and proportionate use of force to forestall imminent attack, under the so-called Caroline doctrine,117 is controversial as it envisages action based on presumptions regarding future events.118 As Brownlie notes, ‘on its face … Article 51 is incompatible with anticipatory action’.119 Pre-emptive (or ‘preventive’)120 self-defence is even more doctrinally controversial, as it would allow forcible action in self-defence to destroy a putative enemy’s capacity to mount a possible attack.

Interdiction is a term covering a range of scenarios, and the critical question is which ones are capable of fitting within art 51 and upon what theory. Several theories justifying ad hoc interdictions of discrete WMD shipments are possible, including pre-emptive self-defence or reinterpreting the art 51 precondition of an ‘armed attack’. An alternative analysis may apply if the ‘War on Terror’ is seen as a continuing exercise of art 51 self-defence against ascertained non-state belligerents.

Thus, the characterisation of any interdiction becomes crucial. If the use of force can only ever follow an actual, prior armed attack, two questions then arise. The first is whether the ‘War on Terror’ is an exercise of collective self-defence under art 51, which in turn depends upon the characterisation of the US’s conflict with al-Qa’eda or its operations within Afghanistan. If there is a continuing art 51 armed conflict, then customary contraband law applies and pre-emption does not arise.

The second question is: what constitutes ‘armed attack’? Shaw notes that most states are reluctant to countenance anticipatory self-defence prior to an armed

116 Charter art 2(4).
117 For a discussion of the Caroline incident, see below Part IV(D).
120 Ian Brownlie, International Law and the Use of Force by States (1963) 259.
attack and suggests that this threshold be interpreted flexibly. However, in Nicaragua, the ICJ indicated that supplying weapons to a hostile non-state actor would not ordinarily constitute an ‘armed attack’. Thus it seems difficult to argue that naval WMD interdictions can be brought within art 51 by a credible process of reinterpretation.

A central issue is the meaning of ‘use of force’ (as prohibited by art 2(4)) and ‘armed attack’ (triggering art 51 rights). Indeed, an obvious corollary of the difference in language between the art 2(4) prohibition on the use of force and the art 51 precondition of an ‘armed attack’ is that states may be obliged to tolerate ‘low level’ incidents, constituting a use of force less than an armed attack, without recourse to art 51 self-defence. The threshold between using force and an ‘armed attack’ is not particularly clear.

B The Nicaragua Case

It is convenient to start with traditional interpretations of art 51. The relevant passage in Nicaragua quotes, in part, the Resolution on the Definition of Aggression:

In the case of individual self-defence, the … right is subject to the State concerned having been the victim of an armed attack. … There appears now to be general agreement on the nature of … armed attacks. In particular, … an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’. … [I]n customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of ‘armed attack’ includes … assistance to rebels in the form of provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force …

The first point to emphasise is the ICJ’s preference to read art 51 as requiring an ‘armed attack’ prior to any action in self-defence (although it notes elsewhere that the lawfulness of responding to ‘the imminent threat of armed force has not been raised’). The second is the unclear distinction between ‘armed attack’

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121 Shaw, above n 119, 1029–30.
123 R St J Macdonald, ‘The Nicaragua Case: New Answers to Old Questions?’ (1986) 24 Canadian Yearbook of International Law 127, 154. It has, however, been suggested that states may take ‘proportionate countermeasures’ falling short of the exercise of art 51 self-defence, as long as these measures comply with the principles of necessity and proportionality: Alexandrov, above n 118, 138–9.
126 Ibid 103.
and a ‘mere frontier incident’.

While the decision considered only collective self-defence, the commonly-understood implication is that not all uses of armed force (only those of sufficient ‘scale and effects’) justify recourse to art 51 measures, including in cases of individual self-defence. In particular, it is generally understood that the Court contemplated that the provision of weapons could amount to a threat of force, but not an armed attack. Thus, supplying weapons to hostile non-state actors located in another state may breach art 2(4) but will generally not give rise to a right of self-defence, with the consequence that the use (or threatened use) of force to interdict a vessel transporting weapons would not be justifiable as self-defence.

Further, armed attacks against even a flagged merchant vessel, on Brownlie’s view, could give rise to a right of self-defence. This might seem to assume that a state’s exclusive jurisdiction over flag vessels is part of its art 2(4) ‘territorial integrity’. This view is disputed, but finds some support in ICJ dicta from Oil Platforms, where the Court seemed to indicate that attacks on merchant vessels could be equated to attacks on their flag state in saying: ‘the Texaco Caribbean … was not flying a United States flag, so that an attack on that vessel is not itself to be equated with an attack on that State.’ Even if this were the case, would placing troops on a foreign vessel without causing significant damage constitute merely an ‘incident’ insufficiently grave to invoke art 51 rights? As the issue was not raised, the Nicaragua judgment itself does not address what countermeasures are available to a state following interventions which do not constitute an armed attack.

However, even if a flagged merchant vessel is not protected from the use of force by art 2(4), art 51 may be the only source of law capable of displacing the general rule that vessels in international waters ‘are immune from the jurisdiction of any country other than the flag State’. That is, in order to conduct interdictions, some positive permissive rule must be found to overcome the general prohibition against boarding the other state’s flag vessel under UNCLOS art 110, given that the prohibition (which probably has customary force) is subject to rights provided for in any other treaty. This obviously includes art 51, and state practice surrounding Iran’s defensive enforcement of contraband during the Tanker War supports this view.

128 Alexandrov, above n 118, 137–9; Macdonald, above n 123, 159.
135 Walker, above n 48, 357.
136 See above Part III(A).
C Self-Defence against Non-State Actors

Two conventional arguments on self-defence remain, both commencing from the uncontroversial proposition that states can exercise self-defence against attacks by armed bands. The first is that in actions against armed bands, visit and search rights accrue to the victim state either as belligerent rights under traditional naval law, or by virtue of art 51 self-defence (the UK view discussed above). On this theory, even if a flag state transporting weapons was entirely innocent of any involvement with the armed band, boarding the vessel to enforce contraband would be legal.

This approach seems unproblematic as nothing in the Charter requires that an ‘armed attack’ be committed by a state. Indeed, following September 11, both the Security Council and NATO affirmed the right of individual and collective self-defence, necessarily implying that al-Qa’eda atrocities within the US constituted an armed attack. This recent practice suggests that art 51 rights can accrue against non-state actors perpetrating armed attacks against a state.

The second possibility is that, even if contraband law does not apply, a state could take action in self-defence against an armed band while it is present within another state’s territory and, by extension, against its supply lines, including foreign-flagged merchant shipping. This is clearly more controversial.

Gray’s assessment of relevant state practice prior to 11 September 2001 would indicate an implicit international community consensus that unless there is some state involvement, one cannot claim to act in self-defence against the state in which hostile bands are present. Border incursions by colonial Portugal into neighbouring African states (Guinea, Senegal and Zambia) and the apartheid-era South Africa (Angola, Botswana, Mozambique and Zambia) were partially justified on the grounds that these states were allowing terrorists to operate from their territory (Israel raised a similar justification for its 1967 incursion into Lebanon). However, in most cases the Security Council condemned the conduct and these states were regarded as illegally occupying the territory they were purportedly defending. Similarly, Brownlie’s conclusion on practice before 1958 was that

[i]t is extremely unlikely if negligence in permitting armed bands to operate from State territory constitutes an ‘armed attack’ … and isolated or sporadic operations … with government complicity are [also] probably not sufficiently serious …

138 See above Part III(B)(2).
141 Ibid 113.
though a large-scale campaign where armed bands were virtually de facto state forces could be.  

However, in Franck’s view, practice may have changed:

There are other instances in which states have asserted a right of self-defense against insurgents, including the right to strike back at territory from which the attackers originate. In the 1990s, Senegal invaded Guinea-Bissau, Thailand conducted incursions into Burma, and Tajikistan pursued irregulars into Afghanistan. These are no longer exceptional claims, and the international system now appears increasingly to acquiesce in this expanded reading of … self-defense …

Franck sees this ‘expanded reading’ as having crystallised into a new rule following September 11 and, placing reliance on the Security Council’s ‘recognition of the culpability of those “harbouring the perpetrators, organizers and sponsors” of terrorist acts’, suggests that

a victim-state may invoke Article 51 to take armed countermeasures in accordance with international law and UN practice against any territory harboring, supporting or tolerating activities that culminate in, or are likely to give rise to, insurgent infiltrations or terrorist attack.

While this practice has likely expanded views of what constitutes active state support to include a broad notion of ‘harbouring’ armed bands (for example, the Taliban’s refusal to close al-Qa’eda camps in its territory), it remains controversial whether Operation Enduring Freedom has consolidated a new rule or was an ‘exception’ which the international community allowed the US in extraordinary circumstances.

A contrary argument, however, can be made that Operation Enduring Freedom was an illegal reprisal. This analysis proceeds from the presumption that art 51 only allows the use of force to repel a continuing attack, and that any punitive or deterrent use of force following an attack that is ‘over and done’ will constitute a reprisal, which is clearly outside the scope of the Charter. That is, as the

144 Thomas M Franck, Recourse to Force: State Action against Threats and Armed Attacks (2002) 64 (citations omitted); cf Gray, International Law and the Use of Force, above n 127, 115, who notes these instances as relatively ‘more straightforward claims to self-defence’ without necessarily reaching a conclusion as to their legality.
146 Franck, Recourse to Force, above n 144, 67. See also Yehuda Z Blum, ‘State Responses to Acts of Terrorism’ (1976) 19 German Yearbook of International Law 223, 236.
attack against the US on 11 September 2001 was completed at a stroke, the operation in Afghanistan was not justified as no further attack was imminent.

The Harib Fort incident of 1964 provides a concrete example of an action actually condemned as a reprisal. In that case, the UK launched air strikes ‘against the Harib Fort in the [sic] Yemen in response to a series of shootings incidents and cross-border raids against Bedouin in the South Arabian Territory from persons in … Yemen.’ 150 This action was justified by the UK as defensive, intended ‘to deter further attacks from the Yemeni side.’ 151 The Security Council condemned the reprisals as ‘incompatible with the purposes and principles’ of the UN, and ‘[d]eplore[d]’ the British action, effectively branding it an unlawful reprisal.152

The reprisal analysis of Afghanistan is ultimately unconvincing. First, as Dinstein points out, this approach is untenable if it means no right of self-defence accrues if an attack is completed in a single strike: that would simply encourage blitz warfare.153 Of course, this point is only valid where the attack is, on the Nicaragua standard, of such ‘scale and effects’ as to constitute an armed attack, not merely a frontier incident.154 Indeed, the Harib Fort case would seem to exemplify the ICJ paradigm of limited cross-border skirmishes insufficient to constitute an armed attack. September 11, by contrast, was acknowledged by the Security Council and NATO as being of sufficient scale and effects to constitute an armed attack. Second, as noted below, al-Qa’eda’s attack on 11 September 2001 may be viewed as part of a campaign against US targets extending back to 1995:155 there was good reason to presume further attacks were imminent156 and that the Taliban posed a threat either through harbouring al-Qa’eda or by enjoying an active and ‘symbiotic’ relationship with it.157

The argument made in this article, on the basis of historic practice, is that self-defence against non-state actors is available under art 51. Further, self-defence will permit action against bands present within another state’s territory if there is at least some active complicity by that territorial state, though this requirement may now be less onerous than once thought. Two arguments are thus available. The weaker and more limited is that if action may, following

150 Written evidence to House of Commons Select Committee on Foreign Affairs, Parliament of the United Kingdom, London, 7 June 2004, [22] (Daniel Bethlehem QC, Director of Lauterpacht Research Centre for International Law, University of Cambridge) <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060808.htm>.
151 Ibid.
153 Dinstein, above n 132, 200.
154 See above Part IV(B).
155 See below Part V(B).
Afghanistan, be taken against ‘harbouring states’, it may clearly also be taken against their flag vessels. The stronger and broader argument is that where there is a continuing armed conflict between an armed band and a state, it seems a logical application of Charter practice to allow the belligerent state visit and search rights over ‘neutral’ shipping to enforce contraband against the non-state actor, regardless of whether those ‘neutral’ states are ‘harbouring’ the non-state actor. That is, such belligerent rights are an exception both to flag state jurisdiction over shipping and to any presumption that a use of force against flag vessels may give rise to a right of self-defence. In the absence, however, of such a continuing conflict, the legality of interdictions under other doctrines must be examined.

D Anticipatory Self-Defence and Pre-Emption

Whether any right of anticipatory self-defence survives the Charter is controversial. The issue was not considered in Nicaragua.158 That the phrase ‘inherent right of individual … self-defence’ in art 51 preserves the 1945 customary law of self-defence is relatively uncontroversial.159 The remaining controversies (still well-represented by the writings of Bowett and Brownlie) are whether this custom includes a right of anticipatory self-defence, and whether the seeming precondition of an ‘armed attack’ leaves any such right unmodified.160 Brownlie answers both questions ‘no’, claiming that there was little or no state practice supporting anticipatory self-defence in the decades prior to the Charter161 and that a customary prohibition on the first use of force had arisen by 1945.162 He further argues that any doctrine of anticipation is inconsistent with both the ‘armed attack’ precondition163 and the clear intent of the Charter’s drafters that the UN would enjoy a ‘near monopoly’ on the use of force.164 Bowett, on the other hand, answers both questions ‘yes’, asserting that the relevant customary law is that of the Caroline incident and arguing that no prior armed attack is needed to trigger rights of self-defence.165 The Caroline incident is normally seen, among the proponents of anticipatory self-defence, as supporting a customary rule that states may use necessary and proportionate force to forestall an imminent attack. Does this rule survive the Charter?

Bowett’s argument runs that as nothing in art 2(4) limits the right of self-defence (as it could not be breached by actions in defence of a state’s own territorial integrity and political independence), there is no general prohibition on self-defence such that art 51 should be read as the sole exception. Indeed, as art 51 commences ‘[n]othing in the present Charter shall impair the inherent right of … self-defence’, he considers art 51 to be a ‘declaratory clause’ import-

159 Ibid.
160 On the debate, see Alexandrov, above n 118, 98–101.
161 Brownlie, International Law and the Use of Force by States, above n 120, 258–61.
162 Ibid 108–10; Brownlie, Principles of Public International Law, above n 119, 701.
163 Brownlie, International Law and the Use of Force by States, above n 120, 278–8.
164 Ibid 270.
ing ‘no additional obligation to that contained in Art 2(4)’\textsuperscript{166}. Thus, art 2(4) not imposing a limit on self-defence, the reference \textit{in an abundance of caution} to self-defence in the merely declaratory art 51 cannot limit the right.\textsuperscript{167} His supporters argue that the phrase ‘armed attack’ is included by way of example.\textsuperscript{168} This seems unconvincing, as the \textit{Charter} would have to be read as implicitly incorporating a wider doctrine of anticipation but only referring expressly to one narrow instance of self-defence, it not being a usual principle of interpretation that the lesser includes the greater.\textsuperscript{169}

Even if these arguments were accepted by most states, which they are not,\textsuperscript{170} naval WMD interdictions would seldom meet the test of imminence. Even in the Cuban Missile Crisis, the preferable view is that the threat of attack was too remote to satisfy the \textit{Caroline} test, there being ‘no indication that the Soviet Union would use … [the missiles] immediately, or even in the near term.’\textsuperscript{171} Significantly, the Kennedy administration did not invoke the \textit{Caroline} argument.\textsuperscript{172} Proponents of the Cuban quarantine as a valid measure in \textit{individual} (not ch VIII) self-defence must plead a right of pre-emption when faced with an overwhelming threat\textsuperscript{173} or revive the notion of blockade as a measure short of war\textsuperscript{174} (contrary to the \textit{Resolution on the Definition of Aggression}).\textsuperscript{175}

One must therefore consider the validity of a doctrine of pre-emptive self-defence. Arguably, when the \textit{Charter} was drafted it could be assumed that significant armed attacks upon a state could only be conducted by another state and that any such attack would require the visible mobilisation of conventional military resources.\textsuperscript{176} Some argue that the novel threat of non-state actors with WMD requires the reinterpretation of \textit{Charter} law to allow pre-emptive self-defence.\textsuperscript{177} Such claims should not be accepted without scrutiny. WMD have been a feature of international relations since at least 1945 (and possibly

\textsuperscript{166} Ibid 188.
\textsuperscript{167} Ibid 187.
\textsuperscript{168} See, eg, Myers S Mc Doug al, ‘The Soviet-Cuban Quarantine and Self-Defense’ (1963) 57 \textit{American Journal of International Law} 597, 599.
\textsuperscript{169} Dinstein, above n 132, 167–8.
\textsuperscript{170} Gray, \textit{International Law and the Use of Force}, above n 127, 98.
\textsuperscript{172} Gardner, above n 111, 587.
\textsuperscript{173} Cran shaw, above n 107, 12–13 .
\textsuperscript{174} Ibid 9–10.
\textsuperscript{175} GA Res 3314 (XXIX), UN GAOR, 29th sess, 2319th plen mtg, art 3(c), UN Doc A/Res/3314 (XXIX) (1974).
\textsuperscript{177} Yoo, above n 171, 571–4; Wedgwood, above n 114, 582–5; and, more cautiously, W Michael Reisman, ‘Editorial Comment: Assessing Claims to Revise the Laws of War’ (2003) 97 \textit{American Journal of International Law} 82, 86–90.
earlier).\textsuperscript{178} What has changed is the significantly greater ease with which state and non-state actors might acquire such weapons, particularly chemical and biological weapons.

September 11 demonstrated that non-state actors could mount attacks that conventional state forces may have little ability to intercept before extraordinary casualties occur. Similarly, WMD may allow non-state actors or less-developed belligerent states to ‘punch above their weight’, mounting attacks inflicting devastation disproportionate to their slight conventional military strength.\textsuperscript{179} Proponents of pre-emption argue that as a WMD ‘first strike’ is entirely devastating, any doctrine of self-defence constraining victim states to ‘absorb … [the] first blow’\textsuperscript{180} only reinforces this asymmetric advantage. As a defensive measure, interdicting vessels suspected of transporting WMD is starkly pre-emptive — aiming by use of force to control the availability of weapons contributing to this perceived threat.

The argument in favour of interdictions is that as WMD could devastate civilian populations, and could be deployed without any effective ability to anticipate the strike, the only effective defence is targeting hostile actors’ capability to mount such attacks. Any effective self-defence response to WMD cannot merely follow an armed attack, nor can it be constrained to cases of necessary and proportionate action to prevent imminent attack, as in either case victim states must wait too long and risk devastating consequences. Pre-emptive action thus extends well beyond either the literal ‘prior attack’ reading of art 51, or even the traditional understanding of anticipatory self-defence.

Pre-emption cannot be reconciled with all three Caroline principles (imminence, necessity and proportionality). In anticipatory self-defence, imminence and necessity share a close temporal link: the attack’s imminence creates the necessity of the response. The critical justification for pre-empting WMD is the attack’s potential scale, not its temporal imminence. ‘Necessity’ becomes a state’s subjective evaluation of the risk of an attack and the potential gravity of the result.\textsuperscript{181} Focusing on an attack’s ‘probability’ and ‘magnitude’,\textsuperscript{182} pre-emption’s proponents are engaged in a calculus of negligence, almost advocating a duty to forcefully pre-empt WMD attacks where the risk of such attacks is sufficiently high and the potential consequences would be sufficiently grave.\textsuperscript{183}

The Caroline formula is reduced to ‘something like a balancing of reasonable

\textsuperscript{181} See, eg, Reisman, above n 177, 87; Brownlie, International Law and the Use of Force by States, above n 120, 259–60.
\textsuperscript{182} Yoo, above n 171, 572, 575.
probabilities. ‘184 If the proposed doctrine is justified by the inherent dangers of a WMD capacity and the inability to foresee or deter an attack, traditional notions of imminence must inevitably be abandoned.

Despite, by their own logic, having to relinquish Caroline standards of imminence and necessity, some pre-emption advocates still cling to proportionality as the touchstone of legality. Some have claimed, given the possibility or probability that Saddam Hussein had WMD in Iraq, regime change was proportionate to the threat posed by Iraq, as removing Hussein removed Iraq’s hostile intent.185 This is untenable. While proportionality does not constrain a state to using only the minimum necessary force in self-defence, it does circumscribe the choice of targets. The proportionate target is the WMD capacity. Regime change as a pre-emptive tactic is not only disproportionate but risks being ineffectual, as any new regime may be equally hostile. Take away its WMD and a government’s hostile intent is of significantly less concern. Proportionality itself may run contrary to pre-emption as, arguably, ‘to commit a state to an actual conflict [upon] only circumstantial evidence of impending attack’ is an entirely disproportionate response to the existing situation.186 If a doctrine of pre-emption were justifiable, it would have to construe proportionality narrowly.

Perhaps interdicting another state’s flag vessel can be seen as a restrained measure, likely to be considered proportionate. Arguably, a flag vessel is not so closely tied to the flag state’s ‘territorial integrity’ that visit and search measures would infringe art 2(4).187 The fact that the UNCLOS does not provide that flag states exercise sovereign territorial jurisdiction over their vessels may support this view.

The greater problem is simply the doctrine’s assertion. Once conceded, it is a right exercisable ‘by Arab countries against Israel, by China against Taiwan, by India against Pakistan, and by North Korea against South Korea’.188 The doctrine unacceptably allows forceful measures upon one state’s assessment of the probability of future attack, which in a world of ‘radically different values and factual perceptions … will often look like a serious … misjudgment to some actors and … naked aggression to others’ and could provoke serious conflicts.189 Arguably, the doctrine would transfer the power to judge and act upon a threat to international peace and security from the Security Council to individual member states, contravening the principle that no state has ‘sole power to initiate [armed] action, except in response to an armed attack.’190 Pre-emption’s proponents fail to consider its destabilising consequences for world public order191 and

185 Reisman, above n 177, 87.
186 Brownlie, International Law and the Use of Force by States, above n 120, 259 (emphasis added).
187 See above Part IV(B).
188 Gardner, above n 111, 588.
189 Reisman, above n 177, 87; cf Brownlie, International Law and the Use of Force by States, above n 120, 259–60; Franck, Recourse to Force, above n 144, 107.
190 Franck, ‘What Happens Now?’, above n 184, 616 (emphasis in original).
191 Gardner, above n 111, 588.
the likely erosion of ‘the Charter consensus about the use of force … [creating] a corresponding loss of normative protection against intervention.’

Little state practice supports pre-emption as even emerging customary law. A doctrine of pre-emption was deliberately never articulated during the Cuban quarantine, and it is rather late to reread the US’s opinio juris from 1962. Israel’s 1981 bombing of the Iraqi Osirak reactor remains controversial (though less so since Iraq’s 1990 invasion of Kuwait), and the official justification offered for the 2003 invasion of Iraq was not a right of pre-emption but rather the enforcement of existing Security Council resolutions. Few states have expressed political support for pre-emption. Notable exceptions, however, include Australia and the UK, though Prime Minister Blair has avoided the term ‘pre-emption’, by speaking of a doctrine of ‘international community’ (seemingly an expansive concept of humanitarian intervention).

V CONCLUSION

A Overview

This article has argued that under limited circumstances, art 51 could justify interdicting WMD shipments in international waters. Three scenarios have been distinguished:

1. ‘ad hoc’ or ‘preventive’ interdictions occurring outside of any continuing armed conflict, capable of justification only as pre-emption;
2. ‘pre-conflict’ interdictions where, in narrow circumstances, intercepting a WMD shipment that is part of preparing an imminent attack could constitute anticipatory self-defence (but will more usually be seen as pre-emption); and
3. belligerent interdictions in the course of an actual armed conflict, such as the Tanker War, where state practice acknowledges a belligerent’s right of visit and search to enforce contraband, subject to convoy.

193 Cf Wedgwood, above n 114, 584.
It has been argued that pre-emption cannot fit within art 51 and that it is dubious (though debatable) whether anticipatory self-defence could either. Regardless, as demonstrated by the Cuban Missile Crisis, it will be quite difficult to find circumstances where a WMD shipment, while still in international waters, could constitute part of an *imminent* attack, rendering the second scenario largely theoretical. Only the third scenario is both reconcilable with *Charter* self-defence and likely to be of practical significance. Further, only under contraband law would there be no distinction between interdictions conducted against state-sponsored shipments and shipments occurring as private international trade without any active state involvement. Contraband does not require state complicity to legally effect interdictions. Absent an armed conflict, however, extra-territorial use of force against armed bands by a victim state only appears acceptable where there is some active state sanction of the band — a fortiori this must be required when seeking not to pursue the band, but merely to intercept its weapons.

These conclusions may be summarised in table form:

**Table 1: Legality of Different Interdiction Scenarios**

<table>
<thead>
<tr>
<th>State involvement in the shipment of WMD matériel to hostile state or non-state actors</th>
<th>Ad hoc</th>
<th>Pre-conflict</th>
<th>Belligerent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unlawful unless pre-emption is accepted (dubious as a matter of law and policy that it should be)</td>
<td>Anticipatory self-defence (if available under the <em>Charter</em>) may apply subject to proving imminence, otherwise unlawful unless pre-emption is accepted</td>
<td>Contraband law applies and interdiction will be lawful</td>
<td></td>
</tr>
<tr>
<td>Individuals acting without the neutral flag state’s complicity</td>
<td>Boarding another flag state’s vessel will lack legal foundation</td>
<td>Boarding another flag state’s vessel will lack legal foundation</td>
<td>Contraband will allow interdiction without flag state complicity</td>
</tr>
</tbody>
</table>

Thus, a belligerent right to enforce contraband not only offers relatively certain and well-established law for conducting interdictions, it is arguably the only doctrine which, in conflicts between states and non-state actors, will permit using force against a ‘neutral’ state’s flag vessel. Further, contraband law recognises a general right to interdict vessels *anywhere* in international waters. This makes it a well-adapted model for conflicts involving non-state actors that may not occupy ascertainable territory.

Excluding any pre-emption doctrine, the strongest argument for the legality of ad hoc interdictions in international waters is that, as a use of force against a flagged vessel without the flag state’s consent, such an action would violate either art 2(4) or the *UNCLOS* (either as a treaty or insofar as art 110 may represent custom). However, following *Nicaragua*, provided the ship was not
substantially damaged, and even if cargo were confiscated, such an incident might not constitute an ‘armed attack’ allowing the flag state to respond under art 51, especially if interdictions were accomplished with only a threat of force. It would then be for the Security Council to decide on any ‘enforcement’ measures in response — which, given that three of its five permanent members are PSI members, would seem unlikely.

B The So San Incident Reassessed

That the interdicting Spanish frigate was patrolling as part of Operation Enduring Freedom (an operation invoking art 51) might alone, on the German Hand- book’s view,198 have given it a right to stop and search vessels regardless of any suspicion they carried contraband. Even on the more restrictive approach, the only elements required to bring the incident within contraband enforcement as an art 51 measure, would be:

1 a continuing armed conflict between the US (and its allies) and the Taliban and/or al-Qa’eda; and

2 reasonable suspicion that cargo aboard included weapons (‘absolute contraband’) destined for these adversaries.

Further, the interdiction need not occur within any generally understood ‘Enduring Freedom’ operational area, as contraband may be enforced anywhere in international waters.

Nothing prevents action being taken in art 51 self-defence against armed bands, including contraband enforcement.199 The question would be the continuing existence of an international armed conflict, as enforcing contraband is a belligerent right. As against the Taliban, it could well be argued that the situation in Afghanistan is now an internal armed conflict only (with remaining international forces simply assisting the new, recognised government) and that belligerent rights have expired.

This would not necessarily mean that belligerent rights may no longer be asserted against al-Qa’eda. The question would be whether September 11, along with prior ‘attacks on American installations in Saudi Arabia in 1995 and 1996, the East Africa embassy bombings of 1998, the attack on the USS Cole in 2000200 and subsequent attacks against US interests and its allies (such as the bombings of 12 May 2003 in Riyadh, 11 March 2004 in Madrid, and 7 July and 23 July 2005 in London) constitute a continuing armed conflict sufficient to proportionately invoke such belligerent rights. One might consider the ledger-like doctrine of proportionate response to a series of ‘pinprick’ terrorist attacks, on the theory that, cumulatively, these may reach the ‘armed attack’ threshold.201

198 See above Part III(C)(1).
199 See above Part IV(B).
201 Dinstein, above n 132, 182, 203; Blum, above n 146, 233–5; Feder, above n 176, 415–17; cf Shaw, above n 119, 1032.
A stronger case, however, could follow from characterising September 11 as an armed attack of sufficient gravity to make recourse to action on the scale of war proportionate and subsequent al-Qa’eda attacks as continuing that same international conflict. Thus, if the ‘War on Terror’ is a continuing self-defensive conflict with al-Qa’eda (an armed band), it would not be necessary to discretely justify each action taken against it under art 51. The applicable law should be that of international armed conflict.

The belligerent rights, if any, that a state may assert against a non-state actor (jus in bello) might strictly be considered a separate question to the capacity of a non-state actor to engage in an armed attack (jus ad bellum). The argument of this article has been, however, that it would be a peculiar result if a state could somehow lack standing to assert belligerent rights against a non-state actor following action of sufficient scale and effects to constitute an armed attack. A principal concern about applying the law of international armed conflicts to conflicts with non-state actors might be the potential for self-defensive action to impinge upon other states’ territorial integrity. However, as this article has canvassed, the law applicable to armed bands will only allow such territorial incursions where there is some degree of state complicity. The view taken here is aptly summarised by the UK’s stated view that:

under article 51 … a state … actively engaged in an armed conflict, is entitled in exercise of its inherent right of self-defence, to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict.

It is further submitted that there is no sound reason in policy that the same law would not be applicable to continuing international conflicts with armed bands.

Arguably, the international community’s acquiescence in the US launching operations in Afghanistan after its being the acknowledged victim of an armed attack creates a situation in which it may assert belligerent rights and prosecute that conflict to its conclusion. The law of contraband might then be asserted against al-Qa’eda and where there is a reasonable suspicion that a vessel in international waters is carrying weapons ultimately destined for it, those weapons may be interdicted. This is not a radical proposition. Indeed, it imposes considerably more restraint upon interdictions than the doctrine of pre-emption articulated in the US’s National Strategy. The National Strategy contemplates targeting shipments destined for any state of ‘concern’, regardless of whether they are enemy belligerents or complicit in aiding enemy non-state actors. Such an approach could only be justified by adding express enforcement provisions to the chemical, biological and nuclear weapons non-proliferation treaty regimes, creating boarding rights as contemplated by art 110 of the UNCLOS. A major step towards this goal has been the conclusion of a new Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime

202 See above Part IV(C).
203 United Kingdom, Parliamentary Debates, House of Commons, 28 January 1986, 426 (Timothy Renton, Minister of State, Foreign and Commonwealth Office).
204 US Department of State, National Strategy, above n 2, 3.
205 Ibid 10.
Navigation\textsuperscript{206} at the International Maritime Organisation (‘IMO’) in London on 13 October 2005. The new SUA Protocol creates crimes relating to the transport of biological, chemical and nuclear weapons on ships and makes provision for consensual boarding to interdict such shipments in a manner similar to the bilateral PSI treaties referred to above.\textsuperscript{207} However, it should be noted that the SUA Protocol is obviously not yet in force, and a number of nuclear states have expressed concerns about the ‘excessively wide’ definition of goods and technologies covered by the SUA Protocol\textsuperscript{208} or have voiced objections to its potential to impose principles derived from the Treaty on the Non-Proliferation of Nuclear Weapons\textsuperscript{209} upon non-parties.\textsuperscript{210} This raises the question, even once the SUA Protocol is in force among some of the 72 participants to its drafting, of what law will apply as between Non-Proliferation Treaty parties and non-party flag states. The obvious answer is customary law, such as that of belligerent contraband.\textsuperscript{211}

Thus, in the context of WMD interdictions, the law of contraband is a practical and viable measure capable of reconciling defensive concerns with Charter law, without resorting to dangerous pre-emption doctrines.


\textsuperscript{207} See above nn 32–7 and accompanying text.


\textsuperscript{209} Opened for signature 1 July 1968, 729 UNTS 168 (entered into force 5 March 1970) (‘Non-Proliferation Treaty’).
