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

DOUGLAS GUILFOYLE*

[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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* BA (Hons), LLB (Hons) (ANU), LLM (Cantab); PhD candidate, Trinity Hall, University of Cambridge. An earlier version of this article was submitted in partial fulfilment of the requirements for the degree of Master of Law at the University of Cambridge. I would like to thank Dr Christine Gray for her comments and advice on that earlier version, and also the anonymous referees for their comments on the present article. Any errors or omissions remain, of course, my own.

I INTRODUCTION

> [I]nterception 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 Sea*[3] 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 Principles*[4] 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);

[1] 'US Efforts to Stop the Spread of Weapons of Mass Destruction', Testimony before the House International Relations Committee, Congress of the United States of America, Washington DC, 4 June 2003 (John R Bolton, Under Secretary for Arms Control and International Security) <http://www.state.gov/t/us/rm/21247.htm>.

[2] White House, *The National Security Strategy of the United States of America* (2002) pt V <http://www.whitehouse.gov/nsc/nss.pdf>; US Department of State, *National Strategy to Combat Weapons of Mass Destruction* (2002) <http://www.state.gov/documents/organization/16092.pdf> ('*National Strategy*').

[3] Opened for signature 10 December 1982, 1833 UNTS 3, arts 27–8 (entered into force 16 November 1994) ('*UNCLOS*').

[4] PSI, *Statement of Interdiction Principles* (2003) <http://www.fco.gov.uk/Files/kfile/PSIStatement,0.pdf> ('*PSI Principles*').

[5] On interdiction and the principle of innocent passage, see *UNCLOS*, opened for signature 10 December 1982, 1833 UNTS 3, arts 17, 19, 27–8 (entered into force 16 November 1994); see also Rob McLaughlin, 'United Nations Mandated Naval Interdiction Operations in the Territorial Sea?' (2002) 51 *International and Comparative Law Quarterly* 249, 265–70.

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

6 CNN, 'US Lets Scud Ship Sail to Yemen', 12 December 2002 <http://archives.cnn.com/2002/WORLD/asiapcf/east/12/11/us.missile.ship/index.html>.

7 CNN, 'Goodman: Scud Ship Investigations', 11 December 2002 <http://archives.cnn.com/2002/WORLD/europe/12/11/scud.goodman.otsc/index.html>; CNN, 'Shots Fired to Stop Scud Ship', 10 December 2002 <http://archives.cnn.com/2002/WORLD/asiapcf/east/12/10/ship.boarding/index.html>.

8 CNN, 'US Lets Scud Ship Sail to Yemen', above n 6.

9 See Ari Fleischer, White House Press Secretary (Press Briefing, 11 December 2002) <http://www.whitehouse.gov/news/releases/2002/12/20021211-5.html#2>; CNN, 'Shots Fired to Stop Scud Ship', above n 7; Kevin Drew, CNN, 'Law Allows Search, but Does Not Address Seizure of Cargo', 11 December 2002 <http://archives.cnn.com/2002/LAW/12/11/missiles.legal>.

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)

[10] CNN, 'Scud Missiles Are Ours, Says Yemen', 11 December 2002 <http://archives.cnn.com/2002/WORLD/asiapcf/east/12/11/scud.ship/index.html>. See also CNN, 'Shots Fired to Stop Scud Ship', above n 7.

[11] CNN, 'Scud Missiles Are Ours, Says Yemen', above n 10.

[12] Al Goodman, CNN, 'Official: Spain Perplexed by Scud Decision', 11 December 2002 <http://archives.cnn.com/2002/WORLD/europe/12/11/spain.ship.reax/index.html>.

[13] CNN, 'Shots Fired to Stop Scud Ship', above n 7.

[14] CNN, 'Spanish Official Details High Seas Drama', 11 December 2002 <http://archives.cnn.com/2002/WORLD/europe/12/11/missile.ship.spain/index.html>; see also Michael Byers, 'Policing the High Seas: The Proliferation Security Initiative' (2004) 98 *American Journal of International Law* 526, 526 fn 5.

[15] CNN, 'Spain: US Apologises over Scud Ship', 11 December 2002 <http://archives.cnn.com/2002/WORLD/asiapcf/east/12/12/missile.ship/index.html>.

[16] Fleischer, above n 9; CNN, 'US Lets Scud Ship Sail to Yemen', above n 6.

[17] Goodman, above n 12.

[18] Fleischer, above n 9.

[19] CNN, 'Spain: US Apologises over Scud Ship', above n 15.

[20] 'Pyongyang Broadcast Accuses USA of Piracy', *Lloyd's List* (London), 30 December 2002, 1.

[21] Byers, above n 14, 528; Fleischer, above n 9.

formed the PSI.[22] By March 2004, it had held six joint military exercises and five formal meetings.[23] Canada, Norway, Singapore and Russia have since joined,[24] and Denmark and Turkey have participated in meetings.[25] The Australian Foreign Minister has referred to 60 countries 'committed' to PSI principles and a smaller group of 'core members'.[26] While statements have been made that the PSI was not established to target North Korea,[27] a PSI declaration refers to Iran and North Korea as 'countries of proliferation concern'.[28]

On 4 September 2003, the PSI released its non-binding *Statement of Interdiction Principles*.[29] 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 [taking interdiction measures] … consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council.'[30]

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 and 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: …

22 George W Bush, 'Remarks by the President on Weapons of Mass Destruction Proliferation' (Speech delivered at the National Defense University, Washington DC, 11 February 2004) <http://www.whitehouse.gov/news/releases/2004/02/20040211-4.html>.

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

24 Bush, 'Remarks by the President on Weapons of Mass Destruction Proliferation', above n 22. On Russia's membership, see John R Bolton, Under Secretary for Arms Control and International Security (Press Conference, 31 May 2004) <http://www.state.gov/t/us/rm/33556.htm>.

25 John R Bolton, Under Secretary of State for Arms Control and International Security, 'Proliferation Security Initiative' (Press Release, 17 December 2003) <http://www.state.gov/r/pa/prs/ps/2003/27365.htm>.

26 Alexander Downer, Minister for Foreign Affairs, 'The Threat of Proliferation: Global Resolve and Australian Action' (Speech delivered at the Lowy Institute, Sydney, 23 February 2004) <http://www.foreignminister.gov.au/speeches/2004/040223_lowy.html>.

27 Department of Foreign Affairs and Trade, *Background Briefing by a Senior DFAT Official — Proliferation Security Initiative Meeting to Be Held in Brisbane 9–10 July* (8 July 2003) <http://www.dfat.gov.au/media/transcripts/2003/030708_security_briefing.html>; Foreign and Commonwealth Office, *Terrorism & Security: Frequently Asked Questions* <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1065432161871>.

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 waters, territorial seas, or contiguous zones … vessels … reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation 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.[31] 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,[32] Panama,[33] the Marshall Islands,[34] Croatia,[35] Cyprus[36] and Belize[37] 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*').

[32] *Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 11 February 2004, KAV 7065 (entered into force 9 December 2004).

[33] *Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice*, opened for signature 12 May 2004 (entered into force 1 December 2004) <http://www.state.gov/t/np/trty/32858.htm>.

[34] *Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 13 August 2004, KAV 7064 (entered into force 24 November 2004).

[35] *Agreement between the Government of the United States of America and the Government of the Republic of Croatia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials*, opened for signature 1 June 2005 (not yet in force) <http://www.state.gov/t/np/trty/47086.htm>.

[36] *Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 25 July 2005 (not yet in force) <http://www.state.gov/t/np/trty/50274.htm>.

[37] *Agreement between the Government of the United States of America and the Government of Belize concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 4 August 2005 (not yet in force) <http://www.state.gov/t/np/trty/50809.htm>.

> 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 …[38]

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.[39] 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*.'[40]

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.[41]

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.

38 J Ashley Roach, 'Proliferation Security Initiative (PSI): Countering Proliferation by Sea' (Paper presented at the Law of the Sea Issues in the East and South China Seas Panel VII: Commercial Shipping in the Region, Xiamen, 11 March 2005) 7.

39 The Australian Foreign Minister has indicated a willingness to conduct such interdictions: Alexander Downer, Minister for Foreign Affairs, *Doorstop re Proliferation Security Initiative Meeting, Brisbane* (9 July 2003) Department of Foreign Affairs and Trade <http://www.dfat.gov.au/media/transcripts/2003/030709_security_initiative_meeting.html>; see also Alexander Downer, Minister for Foreign Affairs, *Question and Answer Session following Address to the National Press Club* (2003) <http://parlinfoweb.aph.gov.au/piweb/|Repository1/Media/pressrel/8TZA60.pdf>.

40 'Deterring North Korea', *The Daily Telegraph* (London), 28 August 2003, 23.

41 John R Bolton, Under Secretary for Arms Control and International Security, '"Legitimacy" in International Affairs: The American Perspective in Theory and Operation' (Speech delivered to the Federalist Society, Washington DC, 13 November 2003) <http://www.state.gov/t/us/rm/26143.htm>.

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 1540[45] 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

[42] Council of the European Union, *EU Strategy against Proliferation of Weapons of Mass Destruction* (2003) <http://ue.eu.int/uedocs/cmsUpload/st15708.en03.pdf> ('*EU Strategy*'). The relevant press release refers expressly to supporting the PSI: Council of the European Union, 'Non-Proliferation: Support of the Proliferation Security Initiative (PSI)' (Press Release, 1 June 2004) <http://ue.eu.int/uedocs/cmsUpload/st10052.en04.pdf>.

[43] Council of the European Union, *EU Strategy*, above n 42, [30(A)(6)].

[44] Ibid [15].

[45] SC Res 1540, UN SCOR, 59th sess, 4956th mtg, UN Doc S/Res/1540 (2004).

[46] Ibid [10] (first emphasis in original).

[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

48 *UNCLOS*, opened for signature 10 December 1982, 1833 UNTS 3, art 87(1) (entered into force 16 November 1994); George K Walker, *The Tanker War, 1980–88: Law and Policy* (2000) 349, 357.

49 *UNCLOS*, opened for signature 10 December 1982, 1833 UNTS 3, art 110 (entered into force 16 November 1994) (emphasis added).

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).

52 I A Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *International and Comparative Law Quarterly* 320, 336; see *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11, art 22 (entered into force 30 September 1962).

53 Thomas and Duncan, above n 31, 22.

54 CNN, 'US Lets Scud Ship Sail to Yemen', above n 6.

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.[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.[57] Throughout the Cold War experience of Security Council paralysis, neutrality remained important in naval warfare and was widely respected.[58] Even the flagrant disregard for neutral shipping's rights in the Tanker War[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.[60]

During the Iran–Iraq War, it could be said that the modern laws of naval warfare were largely uncodified.[61] Since then, the US Navy has promulgated the *Commander's Handbook* (used by 25 other countries as a 'principal legal guide'),[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*.[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,[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.'[65]

[56] Colin Warbrick, 'The British Position in regard to the Gulf Conflict' (1988) 37 *International and Comparative Law Quarterly* 420, 421. See also Ross Leckow, 'The Iran–Iraq Conflict in the Gulf: The Law of War Zones' (1988) 37 *International and Comparative Law Quarterly* 629, 629–30; D P O'Connell, *The Influence of Law on Sea Power* (1975) 114–15; International Institute of Humanitarian Law ('IIHL'), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995) 79–80 ('*San Remo Manual*').

[57] Thomas and Duncan, above n 31, 369; IIHL, above n 56, 87–8; Boleslaw Adam Boczeh, 'Law of Warfare at Sea and Neutrality: Lessons from the Gulf War' (1989) 20 *Ocean Development and International Law* 239, 241, 254–5.

[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.

[59] IIHL, above n 56, 160. See below Part III(D).

[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.

[61] Warbrick, above n 56, 422.

[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/ioppleadings/iop_ipleadings_19970623_counterm em_us_04.pdf>, ('*US Counter-Memorial*').

[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) i, x.

[64] See below Part III(C)(1).

[65] *US Counter-Memorial*, above n 62, 130 fn 292.

2 *Is There a Separate UK View of Naval and* Charter *Law's Interaction?*

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).

68 See Yehuda Lancry, *Letter Dated 4 January 2002 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General*, 56th sess, UN Docs A/56/766; S/2002/25 (2002); Yehuda Lancry, *Letter Dated 9 May 2001 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General*, 56th sess, UN Docs A/56/69; S/2001/459 (2001).

69 IIHL, above n 56, 156.

70 Andrea de Guttry and Natalino Ronzitti (eds), *The Iran–Iraq War (1980–88) and the Law of Naval Warfare* (1993) 244–5.

71 *Nicaragua* [1986] ICJ Rep 14, 94; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 245; *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [2003] ICJ Rep 161, 182, 198 ('*Oil Platforms*').

right to intercept weapons shipments as 'absolute contraband'.[72] 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.[73] (Both Iran and Iraq disputed the convoy doctrine.)[74]

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.[75] Contraband goods liable to seizure are goods 'susceptible to use in armed conflict' and 'ultimately destined for [enemy] territory'.[76] 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.[77] 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).

[73] De Guttry and Ronzitti, above n 70, 145, 188, 197, 455, 459–60, 525; Leckow, above n 56, 639, 641; see also Walker, above n 48, 360; Francis V Russo Jr, 'Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law' (1988) 19 *Ocean Development and International Law* 381, 385.

[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/ioppleadings/iop_ipleadings_19930608_memoria_ir_01.pdf> ('*Iranian Memorial*').

[75] Michael Bothe, 'The Law of Neutrality' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 485, 506, 508; IIHL, above n 56, 212–16; cf J Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes- and War-Law* (1954) 480.

[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).[78] Conditional contraband was only subject to capture when destined for the enemy state's administration or armed forces. However, such distinctions have become nebulous, if not irrelevant.[79] In total warfare, where entire national economies may be redeployed to sustain a war effort, the supply of potentially any and all goods is integral to a state's war-waging capacity.[80] Thus, on one view, all trade with an enemy state could be contraband (a theory of 'total contraband'). This was effectively the belligerents' position in World War II,[81] and seemingly that of Iran in the Iran–Iraq War.[82] Such an approach eclipses distinctions between contraband and blockade,[83] 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.[84]

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 … resist[ing] 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). … [H]owever, 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 … deem[ed] … essential for war. Any goods destined for the administration or the armed forces of the opposing party … will likewise be deemed contraband ('conditional contraband').[85]

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

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.
84 IIHL, above n 56, 37; Wolff Heintschel von Heinegg, 'The Law of Armed Conflict at Sea' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 405, 435–6; Thomas and Duncan, above n 31, 384.
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.[86] The *Commander's Handbook* suggests that publishing lists of 'free goods' (all other trade being contraband) might fulfil any requirement to publish contraband lists.[87] 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.[88] 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.[89] 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.[90] While historically a blockade was required to be conducted close to the

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.

coastline ('close blockade'), it is now recognised that blockading forces may be stationed at a distance ('long-distance blockade').[91] 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.[92] 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*.[93] 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.[94] Iran searched suspected vessels,

91 Heintschel von Heinegg, above n 84, 470; Leckow, above n 56, 630, 636.

92 Cf Leckow, above n 56, 632; IIHL, above n 56, 181–3.

93 Heintschel von Heinegg, above n 84, 464–7; IIHL, above n 56, 181; W J Fenrick, 'The Exclusion Zone Device in the Law of Naval Warfare' (1986) 24 *Canadian Yearbook of International Law* 91, 124–5; see also Leckow, above n 56, 644.

94 *Iranian Memorial*, above n 74, 20–2.

detained 'many … found to be trading in contraband' and impounded cargoes.[95] However, the Iranian communiqué of 22 September 1980 establishing these measures prohibited all merchant shipping passing through its waters from transporting *any* Iraqi-destined cargo, regardless of its nature.[96] This was essentially a blockade or implementation of 'total contraband'.[97] Regardless, many states acknowledged Iran's belligerent right to conduct visit and search measures,[98] and one can conclude that the Tanker War 'strengthened traditional visit and search rules'.[99]

Some argue, however, that Security Council Resolution 552[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.[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'.[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[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 *may* restrict shipping.[104] While the Security Council reaffirmed the doctrine of 'free navigation in international waters',[105] it has already been noted that *peacetime* rights of visit and inspection under the *UNCLOS* qualify that doctrine.[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.

E *The Cuban Missile Crisis and 'Quarantine'*

The Cuban Missile Crisis is factually distinguishable from ad hoc *So San*-type interdictions, PSI arrangements and high seas interdictions during continuing

95 Ibid 23.
96 Ibid 109; de Guttry and Ronzitti, above n 70, 26.
97 De Guttry and Ronzitti, above n 70, 26. See above Part III(C)(1).
98 See above Parts III(B)(2), (3).
99 Walker, above n 48, 364, 612.
100 SC Res 552, UN SCOR, 39th sess, 2546th mtg, UN Doc S/Res/552 (1984).
101 De Guttry and Ronzitti, above n 70, 527.
102 SC Res 552, UN SCOR, 39th sess, 2546th mtg, [2], UN Doc S/Res/552 (1984).
103 UN SCOR, 39th sess, 2541st mtg, UN Doc S/PV.2541 (1984); UN SCOR, 39th sess, 2542nd mtg, UN Doc S/PV.2542 (1984); UN SCOR, 39th sess, 2543rd mtg, UN Doc S/PV.2543 (1984); UN SCOR, 39th sess, 2546th mtg, [31], UN Doc S/PV.2546 (1984).
104 'Attacks on Ships in the Gulf Debated in Security Council' (1984) 21(5) *UN Chronicle* 5, 8; Russo, above n 73, 395; Boczeh, above n 57, 260.
105 SC Res 552, UN SCOR, 39th sess, 2546th mtg, [2], UN Doc S/Res/552 (1984).
106 See above Part III(A).

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-

107 President of the United States of America, *Proclamation No 3504: Interdiction of the Delivery of Offensive Weapons to Cuba*, 27 Fed Reg 10 401 (25 October 1962) ('*Kennedy Proclamation*'); Todd Cranshaw, 'A Test for Freedom: The Cuban Missile Crisis Revisited' (1988) 1 *St Thomas Law Forum* 1, 7.

108 Cranshaw, above n 107, 8; Carl Q Christol and Charles R Davis, 'Maritime Quarantine: The Naval Interdiction of Offensive Military Weapons and Associated Matériel to Cuba, 1962' (1963) 57 *American Journal of International Law* 525, 530.

109 Leonard C Meeker, 'Defensive Quarantine and the Law' (1963) 57 *American Journal of International Law* 515, 515.

110 *Kennedy Proclamation*, above n 107, 10 401.

111 Richard N Gardner, 'Neither Bush nor the "Jurisprudes"' (2003) 97 *American Journal of International Law* 585, 587–8.

112 Ibid; cf Miriam Sapiro, 'Iraq: The Shifting Sands of Preemptive Self-Defense' (2003) 97 *American Journal of International Law* 599, 601. For the argument that the Security Council gave tacit post facto approval, see Meeker, above n 109, 520–2.

113 SC Res 788, UN SCOR, 47th sess, 3138th mtg, [1], UN Doc S/Res/788 (1992) (Liberia); SC Res 1132, UN SCOR, 52nd sess, 3822nd mtg, [3], UN Doc S/Res/1132 (1997) (Sierra Leone).

114 Ruth Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense' (2003) 97 *American Journal of International Law* 576, 578.

115 Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 *American Journal of International Law* 824, 827–8.

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).
118 Stanimir A Alexandrov, *Self-Defense against the Use of Force in International Law* (1996) 98–101.
119 Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 701; cf Malcolm N Shaw, *International Law* (5th ed, 2003) 1030.
120 Ian Brownlie, *International Law and the Use of Force by States* (1963) 259.

attack and suggests that this threshold be interpreted flexibly.[121] However, in *Nicaragua*, the ICJ indicated that supplying weapons to a hostile non-state actor would not ordinarily constitute an 'armed attack'.[122] 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.[123] 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*:[124]

> 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 …[125]

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').[126] The second is the unclear distinction between 'armed attack'

121 Shaw, above n 119, 1029–30.

122 *Nicaragua* [1986] ICJ Rep 14, 104.

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.

124 GA Res 3314 (XXIX), UN GAOR, 29th sess, 2319th plen mtg, 143, UN Doc A/Res/3314 (XXIX) (1974).

125 *Nicaragua* [1986] ICJ Rep 14, 103–4.

126 Ibid 103.

and a 'mere frontier incident'.[127] 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.[128] 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.[129] 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.[130] This might seem to assume that a state's exclusive jurisdiction over flag vessels[131] is part of its art 2(4) 'territorial integrity'. This view is disputed,[132] 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.'[133] 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' but do involve force.[134]

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.'[135] 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)[136] 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.

127 Christine Gray, *International Law and the Use of Force* (2nd ed, 2004) 140, 145.
128 Alexandrov, above n 118, 137–9; Macdonald, above n 123, 159.
129 Gray, *International Law and the Use of Force*, above n 127, 143; Albrecht Randelzhofer, 'Article 51' in Bruno Simma (ed), *The* Charter of the United Nations*: A Commentary* (2nd ed, 2002) vol 1, 788, 801.
130 Brownlie, *International Law and the Use of Force by States*, above n 120, 433; cf *Oil Platforms* [2003] ICJ Rep 161, 191.
131 *UNCLOS*, opened for signature 10 December 1982, 1833 UNTS 3, art 91 (entered into force 16 November 1994).
132 See, eg, Yoram Dinstein, *War, Aggression and Self-Defence* (3rd ed, 2001) 180.
133 *Oil Platforms* [2003] ICJ Rep 161, 191.
134 *Nicaragua* [1986] ICJ Rep 14, 110.
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.[137] 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).[138] 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.[139] 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.[140] 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).[141] However, in most cases the Security Council condemned the conduct and these states were regarded as illegally occupying the territory they were purportedly defending.[142] 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 …

137 Gray, *International Law and the Use of Force*, above n 127, 111, 115.

138 See above Part III(B)(2).

139 See Derek Jinks, 'September 11 and the Laws of War' (2003) 28 *Yale Journal of International Law* 1, 35–7; Gardner, above n 111, 589; SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (2001); SC Res 1368, UN SCOR, 56th sess, 4370th mtg, preamble, UN Doc S/Res/1368 (2001); NATO, 'Statement by NATO Secretary General, Lord Robertson' (2001) 40 ILM 1268; Sean D Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the *UN Charter*' (2002) 43 *Harvard International Law Journal* 41, 47–51.

140 Gray, *International Law and the Use of Force*, above n 127, 111–15; Macdonald, above n 123, 148–9.

141 Gray, *International Law and the Use of Force*, above n 127, 111–12.

142 Ibid 113.

though a large-scale campaign where armed bands were virtually de facto state forces could be.[143]

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 …[144]

Franck sees this 'expanded reading' as having crystallised into a new rule following September 11 and, placing reliance on the Security Council's 'recogni[tion of] the culpability of those "harbouring the perpetrators, organizers and sponsors" of terrorist acts',[145] 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.[146]

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.[147]

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,[148] which is clearly outside the scope of the *Charter*.[149] That is, as the

143 Ian Brownlie, 'International Law and the Activities of Armed Bands' (1958) 7 *International and Comparative Law Quarterly* 712, 731; cf Brownlie, *International Law and the Use of Force by States*, above n 120, 279; *Nicaragua* [1986] ICJ Rep 14, 103.

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.

145 Franck, *Recourse to Force*, above n 144, 66, citing SC Res 1368, UN SCOR, 56th sess, 4370th mtg, preamble, [3], UN Doc S/Res/1368 (2001); SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (2001).

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.

147 Steven R Ratner, '*Jus ad Bellum* and *Jus in Bello* after September 11' (2002) 96 *American Journal of International Law* 905, 909–10.

148 Christopher Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego International Law Journal* 7, 23; A Cassese, *International Law* (2nd ed, 2005) 355–6; Gray, *International Law and the Use of Force*, above n 127, 163–4.

149 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the* Charter of the United Nations, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/Res/2625 (XXV) (1970).

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 imminent[156] 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.

152 SC Res 188, UN SCOR, 19th sess, 1111th mtg, UN Doc S/Res/188 (1964).

153 Dinstein, above n 132, 200.

154 See above Part IV(B).

155 See below Part V(B).

156 Greenwood, above n 148, 23; see also John D Negroponte, *Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, 56th sess, UN Doc S/2001/946 (2001); Stewart Eldon, *Letter Dated 7 October 2001 from the Chargé d'Affaires ai of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council*, 56th sess, UN Doc S/2001/947 (2001).

157 Jackson Nyamuya Maogoto, 'War on the Enemy: Self-Defence and State-Sponsored Terrorism' (2003) 4 *Melbourne Journal of International Law* 406, 427.

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 *Charter*[161] 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' precondition[163] 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-

158 *Nicaragua* [1986] ICJ Rep 14, 103.
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, 275–8.
164 Ibid 270.
165 D W Bowett, *Self-Defence in International Law* (1958) 184–9.

ing 'no additional obligation to that contained in Art 2(4)'.[166] Thus, art 2(4) not imposing a limit on self-defence, the reference *in an abundance of caution* to self-defence in the merely declaratory art 51 cannot limit the right.[167] His supporters argue that the phrase 'armed attack' is included by way of example.[168] This seems unconvincing, as the *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.[169]

Even if these arguments were accepted by most states, which they are not,[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 *Caroline* test, there being 'no indication that the Soviet Union would use … [the missiles] immediately, or even in the near term.'[171] Significantly, the Kennedy administration did not invoke the *Caroline* argument.[172] Proponents of the Cuban quarantine as a valid measure in *individual* (not ch VIII) self-defence must plead a right of pre-emption when faced with an overwhelming *threat*[173] or revive the notion of blockade as a measure short of war[174] (contrary to the *Resolution on the Definition of Aggression*).[175]

One must therefore consider the validity of a doctrine of pre-emptive self-defence. Arguably, when the *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.[176] Some argue that the novel threat of non-state actors with WMD requires the reinterpretation of *Charter* law to allow pre-emptive self-defence.[177] Such claims should not be accepted without scrutiny. WMD have been a feature of international relations since at least 1945 (and possibly

166 Ibid 188.
167 Ibid 187.
168 See, eg, Myers S McDougal, 'The Soviet–Cuban Quarantine and Self-Defense' (1963) 57 *American Journal of International Law* 597, 599.
169 Dinstein, above n 132, 167–8.
170 Gray, *International Law and the Use of Force*, above n 127, 98.
171 John Yoo, 'International Law and the War in Iraq' (2003) 97 *American Journal of International Law* 563, 573. Cf Franck, *Recourse to Force*, above n 144, 107–8.
172 Gardner, above n 111, 587.
173 Cranshaw, above n 107, 12–13 .
174 Ibid 9–10.
175 GA Res 3314 (XXIX), UN GAOR, 29th sess, 2319th plen mtg, art 3(c), UN Doc A/Res/3314 (XXIX) (1974).
176 Anne-Marie Slaughter and William Burke-White, 'An International Constitutional Moment' (2002) 43 *Harvard International Law Journal* 1, 1–4; Norman Menachem Feder, 'Reading the *UN Charter* Connotatively: Toward a New Definition of Armed Attack' (1987) 19 *New York University Journal of International Law and Politics* 395, 396; cf Brownlie, *International Law and the Use of Force by States*, above n 120, 436.
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 *American Journal of International Law* 82, 86–90.

earlier).[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.[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'[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.[181] Focusing on an attack's 'probability' and 'magnitude',[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.[183] The *Caroline* formula is reduced to 'something like a balancing of reasonable

[178] See the practice cited in International Committee of the Red Cross ('ICRC'), *Declaration (IV, 2) concerning Asphyxiating Gases* (1899) 'Introduction' <http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/b0625f804a9b2a64c12563cd002d66ff?OpenDocument>; ICRC, *Appeal on Biotechnology, Weapons and Humanity* (2002) <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList515/274D020806432963C1256C3E005C4338>.

[179] Dale Klein, 'Combating Terrorism in the Environmental Trenches' (2003) 9 *Widener Law Symposium Journal* 237, 238, 241.

[180] David K Linnan, 'Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense and State Responsibility' (1991) 16 *Yale Journal of International Law* 245, 338.

[181] See, eg, Reisman, above n 177, 87; Brownlie, *International Law and the Use of Force by States*, above n 120, 259–60.

[182] Yoo, above n 171, 572, 575.

[183] Anne-Marie Slaughter and Lee Feinstein, 'A Duty to Prevent' (2004) 83 *Foreign Affairs* 136.

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 order[191] and

184 Thomas M Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 *American Journal of International Law* 607, 619.
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.'[192]

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.[193] Israel's 1981 bombing of the Iraqi Osirak reactor remains controversial (though less so since Iraq's 1990 invasion of Kuwait),[194] 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.[195] Few states have expressed political support for pre-emption. Notable exceptions, however, include Australia[196] 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).[197]

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.

192 Tom J Farer, 'Beyond the *Charter* Frame: Unilateralism or Condominium?' (2002) 96 *American Journal of International Law* 359, 363.

193 Cf Wedgwood, above n 114, 584.

194 Franck, *Recourse to Force*, above n 144, 105–7.

195 George W Bush, 'Remarks by the President in Address to the United Nations General Assembly' (Speech delivered at the United Nations General Assembly, New York, 12 September 2002) <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>. In the Security Council, the US's position was that Resolution 1441 'does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions and protect world peace and security': UN SCOR, 57th sess, 4644th mtg, 3, UN Doc S/PV.4644 (2002); Memorandum of Advice from Attorney-General's Department and Department of Foreign Affairs and Trade to the Prime Minister, *Use of Force against Iraq*, 18 March 2003 <http://www.pm.gov.au/iraq/displayNewsContent.cfm?refx=96>; United Kingdom, *Parliamentary Debates*, House of Lords, 17 March 2003, WA3 (Lord Goldsmith, Attorney-General).

196 ABC Radio, 'Australia Reveals Shift in Defence Policy', *PM*, 18 June 2002 <http://www.abc.net.au/pm/stories/s584532.htm>; Channel Nine, 'Interview: John Howard', *Sunday*, 1 December 2002 <http://sunday.ninemsn.com.au/sunday/political_transcripts/article_1192.asp?s=1>.

197 Tony Blair, 'Speech on the Threat of Global Terrorism' (Speech delivered on 5 March 2004, London) <http://www.number-10.gov.uk/output/Page5461.asp>.

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

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

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 Handbook*'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 2000'[200] 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).
200 White House, 'Dr Condoleezza Rice's Opening Remarks to Commission on Terrorist Attacks' (Press Release, 8 April 2004) <http://www.whitehouse.gov/news/releases/2004/04/20040408.html>.
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.[202] 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.[203]

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*.[204] The *National Strategy* contemplates targeting shipments destined for any state of 'concern',[205] 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[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.[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*[208] or have voiced objections to its potential to impose principles derived from the *Treaty on the Non-Proliferation of Nuclear Weapons*[209] upon non-parties.[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.[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.

206 ('*SUA Protocol*'). For the final text of the Protocol as adopted by the IMO Legal Committee diplomatic conference, see *Consideration of a Draft Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation: Texts Examined and Approved by the Drafting Committee*, IMO Doc LEG/CONF.15/DC/1 (2005). See also *Draft Final Act of the International Conference on the Revision of the SUA Treaties: Text Examined and Approved by the Drafting Committee*, IMO Doc LEG/CONF.15/DC/3 (2005).

207 See above nn 32–7 and accompanying text.

208 *Consideration of a Draft Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation: Statement of the Delegation of the Russian Federation on Subparagraph 1(b)(iv) of the Article 3*bis *of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988*, IMO Doc LEG/CONF.15/18 (2005).

209 Opened for signature 1 July 1968, 729 UNTS 168 (entered into force 5 March 1970) ('*Non-Proliferation Treaty*').

210 *Review of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and Its Protocol of 1988 relating to Fixed Platforms Located on the Continental Shelf (SUA Convention and Protocol): Statement by India*, Annex 2, IMO Doc LEG 90/15 (2005).

211 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, arts 34–5 (entered into force 27 January 1980).