

# TERRORIST THREAT ON THE HIGH SEAS ANALYSIS OF SOME ASPECTS OF THE RIGHT OF VISIT AND SELF-DEFENCE

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## Abstract

Vessels of all sizes can be used in a number of ways by terrorists, they can utilize a vessel as a means, a weapon, a bomb, or as a disruption tool. When a terrorist attack happens, it is already too late, hence the critical importance for the international community to take timely, accurate and efficient steps. Counter-terrorism measures implemented on the high seas to prevent maritime terrorist attacks from occurring are possible but limited by the international law and notably the law of the sea. To some extent, the law of the sea limits counter-terrorism efforts. On the high seas, enforcement measures against terrorists or terrorist-related activities on board foreign vessels are restricted by the principle of exclusivity of flag State jurisdiction (a). Nevertheless, the application of the principle can be derogated from by the right of visit which provides for, under certain conditions, some leeway to States in their fight against maritime terrorism (b). It is difficult to justify interdiction operations carried out in order to counter terrorist threats on the high seas by the right of self-defence. The first reason relates to the differences in rationale and legal regime between the force deployed during interdiction operations and the one used in self-defence (a); the second reason concerns the existence or not of a right of anticipatory self-defence (b).

**Keywords:** counter-terrorism, flag state jurisdiction.

## I. INTRODUCTION

Covering most of the world's surface, the oceans are a place for many commercial, recreational and military activities<sup>1</sup>. At the same time, the maritime domain, and notably the high seas, is vulnerable to terrorist activities. The hijacking of the Italian *Achille Lauro* in 1985, the suicide attack in 2000 against the US Navy destroyer *Cole*, the attack against the French supertanker *Limburg* in 2002, and the bombing of the Philippine *Super Ferry 14* in 2004 are examples amongst others of threat to maritime security posed by terrorism<sup>2</sup>. The Council for Se-

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<sup>1</sup> Robin Bowley, *Countering Terrorism in the Maritime Domain: a Contemporary Evaluation of the International Legal Framework*, PhD thesis, Australian National Center for Ocean Resources and Security, University of Wollongong, 2013, at 74, available at <http://ro.uow.edu.au/theses/4262>.

<sup>2</sup> For a non-exhaustive list of maritime terrorist activities, not only on the high seas, see id., Appendix G; RAND Database of Worldwide Terrorism Incidents, available at [http://smapp.rand.org/rwtid/search\\_form.php](http://smapp.rand.org/rwtid/search_form.php).

curity Cooperation in the Asia-Pacific's Working Group on Maritime Cooperation has proposed to explain maritime terrorism as follows:

*the undertaking of terrorist acts and activities within the maritime environment, using or against vessels or fixed platforms at sea or in port, or against any one of their passengers or personnel, against coastal facilities or settlements, including tourist resorts, port areas and port towns or cities.*<sup>3</sup>

This explanation does not define what terrorism is. For argument sake, as to date no internationally recognized definition of the term has been adopted, the present writer proposes to define terrorism as being a *modus operandi* consisting in an unlawful act of intentional violence which induces extreme fear among victims in order to compel a well identified target to do or to abstain from doing any act<sup>4</sup>.

Vessels of all sizes can be used in a number of ways by terrorists. Indeed, to further their aims, terrorists can utilize a vessel as a means, a weapon, a bomb, or as a disruption tool<sup>5</sup>. Using this classification, a range of maritime terrorism activities can be postulated, such as using commercial cargo containers to transport terrorists and smuggle materials and weapons, including weapons of mass destruction (WMD), for an unconventional attack on land (vessel as a means); ramming a high-speed boat into warship, cruise liner, ferry or oil tanker; seizing control of a ship and using it as a collision weapon for destroying offshore platforms, port facilities, bridges or other targets on the waterfront (vessel as a weapon); seizing and exploding ships with volatile cargoes in proximity to a land or offshore target (vessel as a bomb); sinking a large commercial cargo in a critical choke-point, or set ablaze to a chemical tanker in a busy strait or port to block traffic or cause pollution (vessel

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<sup>3</sup> Definition cited in Akiva Lorenz, *The Threat of Maritime Terrorism to Israel*, Sept. 24, 2007, available in <http://www.ict.org.il/Article/983/The%20Threat%20of%20Maritime%20Terrorism%20to%20Israel>.

<sup>4</sup> For a detailed explanation of the constitutive elements of this definition, see Eric Corthay, 'Le concept de terrorisme ou la définition d'un monstre polycéphale', *L'Observateur des Nations Unies*, spec. num. 20 & 21, 2006, at 136.

<sup>5</sup> Tanner Campbell, Rohan Gunaratna, 'Maritime Terrorism, Piracy and Crime', in Rohan Gunaratna (ed.), *Terrorism in the Asia-Pacific: Threat and Response*, Singapore, Eastern Universities Press, 2003, at 80. For Campbell and Gunaratna, vessels are also seen as a target to be destroyed.

as a disruption tool)<sup>6</sup>. The high seas might therefore be used as a domain from which, through which, or within which maritime terrorist attacks and activities are perpetrated. Even though they do not represent *per se* a terrorist attack, terrorist activities in preparation of a terrorist attack already represent a terrorist threat that needs to be dealt with by the international community.

When a terrorist attack happens, it is already too late, hence the critical importance for the international community to take timely, accurate and efficient *ante facta* steps. Counter-terrorism measures implemented on the high seas to prevent maritime terrorist attacks from occurring are possible but limited by the international law and notably the law of the sea. Indeed, vessels on the high seas are subject to the exclusive jurisdiction and authority of the State whose flag they lawfully fly. In other words, and *prima facie*, a State A's warship cannot take measures against State B's vessels sailing on the high seas. However, the exclusivity rule is not an absolute one from which no derogation is permitted. International law permits interference with non-national vessels in certain specific circumstances defined by customary or conventional law. One of the derogations or exceptions to the principle of exclusivity is the right of visit (*droit de visit*) enshrined in Article 110 of the 1982 UN Convention on the Law of the Sea<sup>7</sup> [hereinafter "the 1982 Convention"]. The right of visit authorizes warships on the high seas to conduct maritime interdiction operations against foreign vessels— i.e. visiting, boarding, searching and seizing vessels. From a terminological viewpoint, it must be stressed that the expression maritime 'interdiction' operation is also sometimes called maritime 'interception'

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<sup>6</sup> See, e.g., Michael Greenberg, et al., *Maritime Terrorism: Risk and Liability*, RAND Center for Terrorism Risk Management Policy, 2006, at 27; Michael Richardson, *A Time Bomb for Global Trade: Maritime-related Terrorism in an Age of Weapons of Mass Destruction*, Institute of Southeast Asian Studies, 2004, at 8; Anthony Bergin, Sam Bateman, *Future Unknown: The Terrorist Threat to Australian Maritime Security*, Australian Strategic Policy Institute, 2005, at 35; US Department of Homeland Security, *National Strategy for Maritime Security*, Sept. 1, 2005, at 4, available in <https://www.hsdl.org/?collection&id=4#Maritime> [hereinafter "2005 National Strategy for Maritime Security"]; John F. Frittelli, *Port and Maritime Security: Background and Issues for Congress*, Congressional Research Service, May 27, 2005, at 7.

<sup>7</sup> United Nations Convention on the Law of the Sea (opened for signature Dec. 10, 1982), 1833 UNTS 3.

operation. The definitions of the two terms – which are not present in the 1982 Convention – are not clear. Authors and States confer to them different definitions, use them sometimes interchangeably<sup>8</sup> and in order to refer to diverse situations (e.g. for the purpose of peacekeeping, to stop boat-people, to suppress threats, or to enforce UN sanctions)<sup>9</sup>. However, as observed by Papastavridis in general the term ‘interception’ seems to have a broader meaning than the term ‘interdiction’, in the sense that the former one is a “generic and commonly used term” that “encompass[es] all cases of interference with foreign vessels on the high seas and not only those excused under article 110 of LOSC [Law of the Sea Convention]”<sup>10</sup>.

To some extent, the law of the sea limits counter-terrorism efforts. Pursuant to Article 110 of the 1982 Convention, the right of visit can only be invoked in limited circumstances which actually do not explicitly cover maritime terrorism. States have therefore moved towards the adoption of treaties that provide for a right of visit in case of maritime terrorism-related threats. These treaties establish express and/or implied consent regimes, but also impose a series of constraints that weaken and slow down counter-terrorism efforts. After analysing the content and scope of application of the principle of exclusivity of flag State jurisdiction, the present paper aims at clarifying some aspects of the right of visit as set forth in the 1982 Convention and other treaties (I). Some States and authors have also justified the lawfulness of interdiction operations carried out to counter terrorist threats on the high seas by the right of self-defence enshrined in Article 51 of the UN Charter. At first sight, this legal path could be seen as an appropriate means to

<sup>8</sup> See, e.g. Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*, Leiden, Martinus Nijhoff, 2010, at 21: “the process of “interception” (or interdiction), the ordinary meaning of which is to prevent something from proceeding or arriving, is not limited solely to the migrant smuggling context, but is a tool used in the suppression of other threats”.

<sup>9</sup> For different definitions from authors or from States, see Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, Studies in International Law, Oxford and Portland, Hart Publishing, 2014, at 60-61.

<sup>10</sup> *Id.*, at 61-62. Examples of interference other than those excused under art. 110 of the 1982 Convention are, notably, interference justified by circumstances precluding wrongfulness like consent, state of necessity, or countermeasures.

circumvent the problem of the strict application of the right of visit and the constraints created by treaties authorising boarding under specific conditions. Nonetheless, the invocation of the right of self-defence to justify interdiction operations in anticipation of a terrorist attack is still highly dubious. This paper explains that such a perplexity is due to at least two main reasons which relate, firstly, to the different rationales (*telos*) behind – and therefore the legal regimes governing – the force deployed during interdiction and self-defence operations, and, then, to the question of the existence or not of a right of anticipatory self-defence (II).

## **II. THE PRINCIPLE OF EXCLUSIVITY OF FLAG STATE JURISDICTION AND THE RIGHT OF VISIT**

On the high seas, enforcement measures against terrorists or terrorist-related activities on board foreign vessels are restricted by the principle of exclusivity of flag State jurisdiction (a). Nevertheless, the application of the principle can be derogated from by the right of visit which provides for, under certain conditions, some leeway to States in their fight against maritime terrorism (b).

### **A. THE EXCLUSIVITY RULE**

As a general rule, vessels on the high seas<sup>11</sup> are subject to the exclusive jurisdiction of the State whose flag they lawfully fly. In other words, pursuant to the principle of exclusivity of flag State jurisdiction, on the high seas States may not interfere with and have no authority on the vessels of other States. This pillar of the international law of the sea has been invoked by the Permanent Court of International Justice in the *Lotus* case in these terms:

vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.<sup>12</sup>

<sup>11</sup> For a definition of “high seas”, see art. 86 of the 1982 Convention.

<sup>12</sup> The Case of the SS ‘*Lotus*’ (France v. Turkey), Judgment, PCIJ, Ser. A, No. 10

As Reuland observed, “the principle of exclusivity of flag-state jurisdiction[...] is firmly rooted in the axioms of state equality and the freedom of the high seas.”<sup>13</sup> Indeed, in *Le Louis* case, for example, Lord Stowell clearly stated that:

*[A]ll nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another.*<sup>14</sup>

The principle of exclusivity of flag State jurisdiction is codified in international treaties and notably in Article 92(1) of the 1982 Convention, which provides that “[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”<sup>15</sup> The exclusivity rule applies to ships with one nationality. According to Article 91(1) of the 1982 Convention, “[s]hips have the nationality of the State whose flag they are entitled to fly”. Article 92(2) of the same Convention states also that “[a] ship which sails under the flags of two or more States [...] may be assimilated to a ship without nationality.” These ships are assimilated to stateless ships – i.e. ships not sailing under the flag of any State – and as such are not protected under international law<sup>16</sup>.

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(1927), at 25.

<sup>13</sup> Robert C. F. Reuland, ‘Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction’, *Vanderbilt Journal of Transnational Law*, vol. 22, 1989, at 1164. The freedom of the high seas rule is codified in art. 87 of the 1982 Convention.

<sup>14</sup> *Le Louis*, 2 Dods. 210, 243, 165 Eng. Rep. 1464, 1475 (1817). See also, *United States v. Postal*, 589 F.2d 862, 878 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1979); *United States v. Hensel*, 699 F.2d 18, 27 (1st Cir. 1983), cert. denied, 461 U.S. 958 (1983).

<sup>15</sup> See also art. 6(1) of the 1958 Convention on the High Seas: “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.” *Convention on the High Seas* (opened for signature Apr. 29, 1958), 450 UNTS 11 [hereinafter “the 1958 Convention”].

<sup>16</sup> Satya N. Nandan, Shabtai Rosenne, Neal R. Grandy (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III, Center for Oceans Law and

### 1. An Exception To The Exclusivity Rule: The Right Of Visit

The exclusivity of flag State jurisdiction on the high seas in time of peace is not an absolute rule. Article 92(1) of the 1982 Convention points out that ships are subject to the exclusive jurisdiction of the flag State “save in exceptional cases expressly provided for in international treaties or in this Convention”. It is worth mentioning that exceptions to the exclusivity rule are not only conventional but might also be customary, as customary rules are sometimes codified in treaties and treaty provisions receive sometimes a customary character throughout time<sup>17</sup>. As noted in Article 92(1), circumstances of interference with non-national ships are of exceptional nature. Examples of international treaties that provide exceptions to the general rule of exclusive jurisdiction of the flag State on the high seas include the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties<sup>18</sup>, and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which allows interference with the consent of the flag State<sup>19</sup>. In the 1982 Convention, the exception to the general principle of the exclusive jurisdiction of the flag State over ships flying its flag on the high seas is the right of visit (*droit de visite*)<sup>20</sup> detailed in Article 110 of the said Convention<sup>21</sup>. Article 110 reflects customary international law<sup>22</sup>.

Article 110(1) of the 1982 Convention provides:

*Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspect-*

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Policy, The Hague, London, Boston, Martinus Nijhoff Publishers, 1995, at 125.

<sup>17</sup> Reuland, *supra* note 13, at 1167-68. North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgments, ICJ Reports 1969, at para. 69.

<sup>18</sup> See art. I of the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (concluded Nov. 29, 1969), 970 UNTS 211.

<sup>19</sup> See art. 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (concluded Dec. 20, 1988), 1582 UNTS 164.

<sup>20</sup> It seems that the French expressions of the different modes of interference are less confused than the English expressions. Reuland, *supra* note 13, at 1169, footnote 16.

<sup>21</sup> See also art. 22 of the 1958 Convention. The right of visit also applies to the exclusive economic zone, see arts 56, 58 and 60 of the 1982 Convention.

<sup>22</sup> Papastavridis, *supra* note 9, at 66.

*ing that:*

- (a) *the ship is engaged in piracy;*
- (b) *the ship is engaged in the slave trade;*
- (c) *the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;*
- (d) *the ship is without nationality; or*
- (e) *though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.*

## 2. Circumstances Authorising Interference

Article 110 (1) lists a very limitative series of circumstances under which, in time of peace, warships are competent to visit private vessels<sup>23</sup> flying the flag of another State. This is the case when the ship is suspected of being engaged in any one of the activities listed in sub-paragraphs (a) to (c) or of having a doubtful status as per sub-paragraphs (d) and (e). The right of visit has been limited to specific circumstances mainly because States wanted to jealously safeguard as much as possible their exclusive jurisdiction over their own shipping, as well as their rights of property, equality and independence on the high seas<sup>24</sup>.

As terrorism is not expressly listed in paragraph (1), it seems, *prima facie* and unless a treaty relationship authorises interference, that warships are not authorized to exercise their right of visit against a ship flying the flag of another State when they merely suspect it of being engaged in activities that represent a terrorist threat (e.g. the ship is transporting weapons or people to further terrorist aims). A possible explanation why terrorist threats and, more generally, acts hostile to the State of the warship, have not been included *expressis verbis* in the scope of Article 110(1) could be drawn from the commentary to the original draft of the 1958 Convention on the High Seas. In its report, the International Law Commission – organ responsible for the draft of the 1958 Convention – observed:

*The question arose whether the right to board a vessel should be recog-*

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<sup>23</sup> According to arts. 95 and 96 of the 1982 Convention, public ships (i.e. a warship or a ship used only on government noncommercial service) “have complete immunity from the jurisdiction of any State other than the flag State”.

<sup>24</sup> Reuland, *supra* note 13, at 1167.

*nized also in the event of a ship being suspected of committing acts hostile to the State to which the warship belongs, at a time of imminent danger to the security of that State. The Commission did not deem it advisable to include such a provision, mainly because of the vagueness of terms like “imminent danger” and “hostile acts”, which leaves them open to abuse<sup>25</sup>.*

*Secunda facie*, however, it seems that Article 110(1) of the 1982 Convention could indirectly lead a warship to interfere against a foreign ship that represents a terrorist threat. This could happen when, once visiting the ship suspected of being engaged in one of the activities listed in sub-paragraphs (a) to (c) or of having a suspicious status as per sub-paragraphs (d) and (e), evidence of proscribed terrorist activities is discovered (e.g. explosive devices ready to be activated, map with location of targets). Here, the interference is contingent upon the existence, first, of a reasonable suspicion that the foreign ship has an uncertain status or is engaged in one of the activities listed in paragraph (1). For example, crews of an interfering warship visit a ship that “sails under the flags of two or more States, using them according to convenience”<sup>26</sup>, or a ship that is “not flying a national flag or bearing equivalent markings identifying its nationality”<sup>27</sup>, and, when searching on board the interfered ship, some forms of preparation for a terrorist attack are detected. This occurred on December 9, 2002, on the high seas, off the coast of Yemen, when two Spanish Navy vessels intercepted and boarded the *So San*, a North Korean cargo ship. The Spanish Navy justified the boarding on grounds that the ship was not flying a flag and its national markings were obscured by paint<sup>28</sup>. When searching, the boarding crews found Scud missiles hidden beneath cargo. At the time of the discovery, it was not known whether the Scud missiles had been legally purchased by Yemen, or whether they were going to be delivered to terrorist organizations<sup>29</sup>. A similar scenario is when the warship’s crews

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<sup>25</sup> Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, Y.B. Int’l L. Comm’n, Vol. II, Part. One, 1956, at 284 (commentary 4 of art. 46 – Right of visit).

<sup>26</sup> Art. 92(2) of the 1982 Convention.

<sup>27</sup> Nandan, Rosenne, Grandy, *supra* note 16, at 245. Art. 110(1)(d) of the 1982 Convention.

<sup>28</sup> Thom Shanker, ‘Threats and Responses: Arms Smuggling; Scud Missiles Found on Ship of North Korea’, *The New York Times*, Dec. 11, 2002, at A1.

<sup>29</sup> Ian Patrick Barry, ‘The Right of Visit, Search and Seizure of Foreign Flagged Ves-

are ascertaining the status of a ship that, “though flying a foreign flag or refusing to show its flag, [...] is, in reality, of the same nationality as the warship”<sup>30</sup>, and then, once on board, they notice that the ship is engaged in terrorist activities. Acting this way, the ship certainly tries to hide its identity. Indeed, for the international Law Commission, when a ship conceals its nationality which is in reality the same nationality of the warship “it is permissible to presume that the ship has committed unlawful acts, and the warship should be at liberty to verify whether its suspicions are justified”<sup>31</sup>. Should suspicions of any engagement in terrorist activities be confirmed, it would be very surprising that the boarding warship be not allowed to bring the boarded vessel to account.

Article 110(1) of the 1982 Convention also refers to ‘acts of interference [that] derive from powers conferred by treaty’. It means that international treaties permit the right of visit in circumstances other than those specified in sub-paragraphs (a) to (e). Several international treaties have been signed in response to concerns regarding terrorism and/or the proliferation of WMD and related materials. Such treaties represent “an important advance in devising a lawful means for the exercise of the right of visit against a foreign flagged vessel on the high seas”<sup>32</sup>. Indeed, all these treaties establish express and/or implied consent regimes. Nevertheless, they also provide for some provisions that could significantly slow down the exercise of the right of visit.

At the multilateral level, it is worth mentioning the existence of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation<sup>33</sup> [hereinafter “the 2005 SUA Protocol”]. Articles 3, *3bis*, *3ter* and *3quarter* prohibit a wide range of activities spanning from the use of a ship as a weapon to the use of a ship as a mode of transport of terrorist material to the

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sels on the High Seas Pursuant to Customary International Law: a Defense of the Proliferation Security Initiative’, *Hofstra Law Review*, vol. 33, 2004-2005, at 299-300.

<sup>30</sup> art. 110(1)(e) of the 1982 Convention.

<sup>31</sup> Report of the International Law Commission covering the work of its eighth session, *supra* note 25, (commentary 1 of art. 46 – Right of visit).

<sup>32</sup> Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford, Oxford University Press, 2011, at 190.

<sup>33</sup> Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (opened for signature Oct. 14, 2005), IMO Doc LEG/CONF 15/21. As at Sept. 2016, only 35 States are Parties to the Protocol.

targeting of a ship in a terrorist attack<sup>34</sup>. When a State Party suspects a ship of being involved in the commission of an offence set forth in the Protocol, it shall request that the flag State confirm the claim of nationality<sup>35</sup>. As per Article 8bis(2), each request shall respect certain constraints, like containing the name of the suspect ship, the IMO ship identification number, etc. Also, if a request is initially made orally, it must be confirmed in writing as soon as possible. Then, pursuant to Article 8bis(5)(b), express consent for boarding and searching must be granted by the flag State:

*If nationality is confirmed, the requesting Party shall ask the first Party (hereinafter referred to as “the flag State”) for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding, and searching the ship, its cargo, and persons on board, and questioning the persons on board in order to determine if an offence set forth in article 3, 3bis, 3ter or 3quarter has been, is being or is about to be committed.*

It is important to mention that, in that case, the flag State may either decide to conduct the boarding and search itself, permit the other State to do so, or decide that both States may do so together, or the flag State has the option of denying permission to board and search<sup>36</sup>.

The 2005 SUA Protocol also provides an implied consent regime. Article 8bis(5)(e) states:

*Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed<sup>37</sup>.*

At the regional level, Member States of the Caribbean Community signed in 2008 the CARICOM Maritime and Airspace Security

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<sup>34</sup> See article 3, 3bis, 3ter or 3quarter of the 2005 SUA Protocol.

<sup>35</sup> Art. 8bis(5)(a) of the 2005 SUA Protocol.

<sup>36</sup> Art. 8bis(5)(c) of the 2005 SUA Protocol.

<sup>37</sup> See also art. 8bis(5)(d) of the 2005 SUA Protocol.

Cooperation Agreement [hereinafter “CARICOM Agreement”]<sup>38</sup>. As at August 2016 the Agreement is still not yet in force. The objective of the Agreement is to promote cooperation among States Parties to enable them to conduct law enforcement operations that relate to, *inter alia*, combating terrorism<sup>39</sup>. Like the 2005 SUA Protocol, the CARICOM Agreement sets forth an express and implied consent regime<sup>40</sup>. However, some provisions of the Agreement also negatively affect the efficiency of counter-terrorism efforts. For example, request for verification of nationality of a suspected vessel, before the actual boarding and search, “may be conveyed orally but shall later be confirmed by written communication” which contains specific indications<sup>41</sup>. Then, once the nationality of the vessel is verified, the flag State can still decide whether the boarding and search is conducted by its own forces, or by the requesting Party’s forces, or by both countries’ forces, or whether it prefers to deny permission to board and search<sup>42</sup>.

At the bilateral level, finally, the United States has signed bilateral boarding agreements with several States (Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Marshall Islands, Malta, Mongolia, Panama, St. Vincent and the Grenadines). The Agreements establish authority to board foreign vessels suspected of carrying illicit shipments of WMD and related material<sup>43</sup>; they establish implied and/or express consent regimes<sup>44</sup>, and some provisions also limit how quickly

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<sup>38</sup> CARICOM Maritime and Airspace Security Cooperation Agreement (opened for signature Jul. 4, 2008), available at [http://archive.caricom.org/jsp/secretariat/legal\\_instruments/agreement\\_maritime\\_airspace\\_security\\_cooperation.pdf](http://archive.caricom.org/jsp/secretariat/legal_instruments/agreement_maritime_airspace_security_cooperation.pdf).

<sup>39</sup> Art. II(1)(a) and art. II(2)(b) of the CARICOM Agreement.

<sup>40</sup> See art. IX(1) and art. IX(4)(b) of the CARICOM Agreement.

<sup>41</sup> Art. V(3) of the CARICOM Agreement.

<sup>42</sup> See art. IX(2) of the CARICOM Agreement.

<sup>43</sup> The agreements between the Government of the United States of America and other governments concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by seas are available at <http://www.state.gov/t/isn/c27733.htm>.

<sup>44</sup> Compare, e.g., art. 4 of the 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, with art. 4 of the Agreement Between the Government of the United States of America and the Government of the Republic of Antigua and Barbuda Concerning Cooperation to Suppress the Proliferation of Weap-

an intervention onboard the foreign ship may occur<sup>45</sup>.

#### 4. Modus Operandi

With regard to the *modus operandi* of the right of visit, Article 110(2) of the 1982 Convention states:

In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it 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 on board the ship, which must be carried out with all possible consideration.

According to paragraph (2), the right of visit is composed of two distinct operations: *ledroit d'enquête du pavillon* (right of investigation of flag) and the right of search<sup>46</sup>. Taken together, these two distinct phases are encompassed within the umbrella term of maritime interdiction operation. The purpose of the first phase of the right of visit – *ledroit d'enquête du pavillon* – is to “verify the ship's right to fly its flag”, i.e. to verify the true nationality of a vessel the warship encounters. *In concreto*, the warship verifies the papers of the ship, i.e. the documents issued by the flag State which granted to the ship the right to fly its flag<sup>47</sup>. The warship is authorized to exercise its right of investigation of flag only in the cases in which the ship is *reasonably* suspected of being engaged in some proscribed activity. The criterion of ‘reasonable ground’ for suspicion<sup>48</sup> is difficult to define *in abstracto*. It has to be assessed on a case by case basis. Authors converge, however, on the view that an appropriate reasonable ground standard lies somewhere between mere suspicion and actual knowledge of an infringement<sup>49</sup>. Nowadays, modern technologies facilitating surveillance, reconnaissance, intelligence-gathering and information-sharing, help establish the existence of a rea-

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ons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea.

<sup>45</sup> Id.

<sup>46</sup> Reuland, *supra* note 13, at 1171.

<sup>47</sup> See art. 91(2) of the 1982 Convention.

<sup>48</sup> See art. 110(1) of the 1982 Convention.

<sup>49</sup> See, e.g., Reuland, *supra* note 13, at 1172, Papastavridis, *supra* note 9, at 62; Ximena Hinrichs, ‘Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective’, *Revue Belge de Droit International*, vol. 36, 2003, at 434.

sonable suspicion<sup>50</sup>.

In order to ascertain whether or not the ship carries the proper papers on board, the ship must stop its journey. In case of absence of compliant or consensual boarding by the master of the vessel<sup>51</sup>, the warship adopts graduated measures in order to stop the ship. Reuland explains the procedure as follows: “[t]o effect a stoppage, the warship will hail the suspect vessel or, if this is impossible or ineffectual, fire across her bow. Should the suspect vessel prove obstinate, the warship may use reasonable force.”<sup>52</sup> After the stoppage, comes the actual boarding for verification of the papers and documentation of the ship. The warship “may send a boat under the command of an officer to the suspected ship”<sup>53</sup>. The officer may be a warrant officer or senior petty officer<sup>54</sup>. If

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<sup>50</sup> On some maritime security initiatives proposed or implemented by the US government, see, e.g., Yonah Alexander, Tyler B. Richardson (eds), *Terror on the High Seas, from Piracy to Strategic Challenge*, vol. 1, Praeger Security International, 2009, at 213 ff.

<sup>51</sup> Papastavridis, *supra* note 9, at 67 explains the difference between compliant boarding and consensual boarding. Compliant boarding is when “both the flag state and the master of the vessel consent to the interception”, while consensual boarding is “[w]hen the flag state has not replied to the request of the boarding state and the latter boards the suspect vessel on the basis of the consent of the master”. Since 2003, the rules of engagement of NATO Operation Active Endeavor in the Mediterranean Sea permit compliant boarding. See James Kraska, Raul Pedrozo, *International Maritime Security Law*, Leiden, Boston, Martinus Nijhoff Publishers, 2013, at 55.

<sup>52</sup> Reuland, *supra* note 13, at 1174 (footnotes omitted), Théodore Ortolan, *Règles Internationales et Diplomatie de la Mer*, Paris, H. Plon, 4th ed, 1864, at 252 ; see also Mallia, *supra* note 8, at 20; René-Jean Dupuy, Daniel Vignes, *Traité du nouveau droit de la mer*, Paris, Economica, Bruxelles, Bruylant, 1985, at 371; *M/V ‘Saiga’ (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Case No 2 (1999), 38 ILM 1323, at para. 156 [hereinafter “*M/V ‘Saiga’ (No. 2) case*”].

<sup>53</sup> Art. 110(2) of the 1982 Convention.

<sup>54</sup> Nandan, Rosenne, Grandy, *supra* note 16, at 245. Some authors note that the verification of papers may be conducted on board the warship. See, e.g., G. Gidel, *Le droit international public de la mer: le temps de paix*, Châteauroux, Mellottée, 1932-1934, at 289, reprint in Vaduz, Topos Verlag, Paris, E. Duchemin, 1981, at 290; Lassa Oppenheim, *International Law: a Treatise*, H. Lauterpacht ed, 8th ed., New York, McKay, 1955, at para. 268. However, Reuland, *supra* note 13, at 1175, footnote 33, expresses some concern with regard to such an option: “With respect, it does not seem prudent to require an officer of the suspect ship to carry the vessel’s papers to the warship for two reasons: first, the papers of a vessel should never be exposed to chance of loss; and second, suspicion may remain after the papers are examined and it may be

suspicious are dissipated after examination of the papers, the ship is allowed by the warship to go its way<sup>55</sup>.

If, after the documents have been checked, suspicion remains – or a new suspicion has arisen<sup>56</sup> – that the ship is engaged in some proscribed activity, the warship may proceed to a further examination on board the ship. Here, the warship proceeds to the second phase of the right of visit, i.e. the right of search. This second and more intrusive step aims at discovering evidence that would confirm the suspicions of the warship, and “must be carried out with all possible consideration”<sup>57</sup>.

The search leads to two different situations: either to the confirmation that the ship is engaged in proscribed activities, or to the dissipation of all suspicions. In the former case, “the warship may arrest the vessel or otherwise bring the vessel to account”<sup>58</sup>. Oppenheim explains:

*Arrest is effected through the commander of the arresting man-of-war appointing one of her officers and a part of her crew to take charge of the arrested vessel. This officer is responsible for the vessel, and for her cargo, which must be kept safe and intact. The arrested vessel, either accompanied by the arresting vessel or not, must be brought to such harbor as is determined by the cause of the arrest*<sup>59</sup>.

In the latter case, article 110(3) of the 1982 Convention provides that “[i]f the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.”<sup>60</sup>

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necessary to proceed to the merchantman in order to search her. In all cases, then, a warship exercising her droit de visite should do so aboard the suspect vessel.”

<sup>55</sup> Oppenheim, *id.*

<sup>56</sup> Reuland, *supra* note 13, at 1175, footnote 36.

<sup>57</sup> Oppenheim, *supra* note 54, at para. 269, explains: “Search is effected by an officer and some of the crew of the man-of-war, the master and crew of the vessel to be searched not being obliged to render any assistance whatever, except to open locked cupboards and the like. The search must take place in an orderly way, and no damage must be done to the cargo. If the search proves everything to be in order, the searching party must carefully replace everything removed, a memorandum of the search is to be made in the log-book, and the searched vessel is to be allowed to proceed on her course”.

<sup>58</sup> Reuland, *supra* note 13, at 1176.

<sup>59</sup> Oppenheim, *supra* note 54, at para. 270.

<sup>60</sup> An example of unfounded suspicion is given by the MV Nisha incident. It is worth

## B. SELF-DEFENCE TO JUSTIFY MARITIME INTERDICTION OPERATIONS AGAINST TERRORIST THREATS?

As noted above, the right of visit enshrined in Article 110 of the 1982 Convention provides limited leeway to States when they want to interdict a ship that poses a maritime terrorist threat. Indeed, if no ‘powers conferred by treaty’ exist, the warship’s interference must be contingent upon the existence of a reasonable suspicion that the foreign ship is engaged in one of the activities listed in the said Article, otherwise the interdicting operation cannot be carried out. Furthermore, the existence of a treaty authorizing a warship to visit a vessel suspected of being involved in terrorist activities is not always sufficient to enhance maritime security. Flag State delay or denial in authorisation of the visit, or request for obstructive conditions in conducting a boarding, for instance, all could increase the risk of missing the opportunity to thwart a terrorist attack. A certain number of authors<sup>61</sup>, but few States (see *infra*), have therefore decided to take another path to tackle maritime terrorist threats. They argue that the right of self-defence is appropriate to justify maritime interception operations (i.e. stopping, boarding, searching, seizing) against vessels engaged in terrorist activities or, more generally, vessels viewed as posing a security threat to them (e.g. vessels carrying nuclear or other sensitive materials and technologies for illicit purposes).

The customary right of self-defence is enshrined in Article 51 of the

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mentioning however that the incident did not happen on the high sea but in the English Channel. That cargo ship was carrying 26,000 tonnes of raw sugar to the Tate and Lyle sugar refinery in Silvertown, east London, when, suspected of carrying terrorist material, it was interdicted by British authorities. After a five-day search, suspicion proved unfounded and the ship was allowed to complete its journey. See House of Commons Select Committee on Defence, Sixth Report (Jul. 24 2002), available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmdfence/518/51802.htm>. Following the incident, the owners of the ship stated they would consider suing British authorities. See D. Brown, ‘Campaign against terrorism: owners of ship seized in Channel consider suing police’, *Independent*, Dec. 28, 2001, at 5.

<sup>61</sup> See, e.g., Barry, *supra* note 29, at 327; Douglas Guilfoyle, ‘The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction’, *Melbourne University Law Review*, vol. 29, 2005, 733-764; Reuland, *supra* note 13, at 1206-1223; Wolff Heintschel von Heinegg, ‘The Proliferation Security Initiative: Security vs. Freedom of Navigation?’, *International Law Studies*, vol. 81 (US Naval War college), 2006, at 65.

UN Charter. The first sentence provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

This provision subordinates recourse to the right of self-defence “to certain restrictions and to specific rules”<sup>62</sup>. In the opinion of the present writer, an action in self-defence can only be triggered in case of armed attack by a State. The requirement for an armed attack to exist was confirmed in the *Nicaragua* case by the International Court of Justice [hereinafter “the Court”] which held that such an attack is “the condition *sine qua non* required for the exercise of the right of [...] self-defence”<sup>63</sup>. The answer to the question whether a particular form of use of force by a State might be qualified as an armed attack depends upon the degree of gravity of the said act<sup>64</sup>. With regard to the question whether an armed attack must be attributed to a State or whether it may be carried out by non-State actors who have no sufficient connection with a State for attributing their violent conduct to that State, the Court has recalled for almost forty years that an armed attack is and must be understood as being an act of State. For example, in the *Wall* case, when answering the question whether the construction of a wall between Israel and Pal-

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<sup>62</sup> Roberto Ago, ‘Addendum to the eighth report on State responsibility: The internationally wrongful act of the State, source of international responsibility’, Y.B. Int’l L. Comm’n, Vol. II, Part. One, 1980, at 63, para. 108.

<sup>63</sup> Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986, para. 237 [hereinafter “*Nicaragua case*”]. See also *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, para. 51 [hereinafter “*Oil Platforms case*”].

<sup>64</sup> For a study on the degree of gravity of an armed attack, see Eric Corthay, *La lutte contre le terrorisme international, De la licéité du recours à la force armée, Bâle, Helbing Lichtenhahn, 2012, at 104-117*. In *Nicaragua case*, the Court held: “As regards certain particular aspects of the principle [prohibiting the use of force], it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.” *Nicaragua case*, id., para. 191. Referring to the Friendly Relations Declaration, the Court stated also that “organizing, instigating, assisting or participating in [...] terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts” are examples of what constitute “less grave forms” of use of force and not armed attacks. Id.

estine could be justified by the right of self-defence, the Court held that “Article 51 of the Charter [...] recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”<sup>65</sup> Then, as “Israel [did] not claim that the attacks against it are imputable to a foreign State” the Court concluded that Article 51 of the UN Charter had no relevance in this case<sup>66</sup>. Last but not least, the action taken in self-defence must comply with the customary<sup>67</sup> requirements of the necessity, proportionality and immediacy (see *infra*).

It is well known that, since the adoption of the UN Charter in 1945, almost every single point related to the conditions of invocation and the conditions of implementation of the right of self-defence are debated by the scholars and show divisions between States<sup>68</sup>. This paper does not intend to address all the issues surrounding this right but focuses on two reasons why it is difficult to justify interdiction operations carried out in order to counter terrorist threats on the high seas by the right of self-defence. The first reason relates to the differences in rationale and legal regime between the force deployed during interdiction operations and the one used in self-defence (a); the second reason concerns the existence or not of a right of anticipatory self-defence (b).

### 1. Two Types of Use of Force

As reflected in the Articles on Responsibility of States for Internationally Wrongful Acts<sup>69</sup>, self-defence is a circumstance precluding

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<sup>65</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, para. 139.

<sup>66</sup> *Id.* See also Oil Platforms case, *supra* note 63, para. 51 and 61. In 1986, in the Nicaragua case, the Court linked and quasi assimilated the concept of armed attack mentioned under Article 51 of the UN Charter with the concept of aggression used in the Annex (Definition of Aggression) to the Resolution 3314 (XXIX) of the General Assembly. Nicaragua case, *supra* note 63, para. 195. Article I of the Annex defines the concept of aggression as “[...] the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”.

<sup>67</sup> Nicaragua case, *id.*, para. 176.

<sup>68</sup> For an analysis of the debates and State practice on the right of self-defence, see Corthay, *supra* note 64, at 77-339, Tom Ruys, ‘Armed Attack’ and Article 51 of the UN Charter: Evolutions in Customary Law and Practice, Cambridge, Cambridge University Press, 2010.

<sup>69</sup> See Resolution 56/83 of Dec. 12, 2001, in which the General Assembly took note

wrongfulness<sup>70</sup>. However, it does not exclude the wrongfulness of any kind of conduct, but only the wrongfulness of an act of use of force banned by the international law. Ago observed that “self-defence is to be regarded as an exceptional circumstance precluding the wrongfulness of conduct inconsistent with a general obligation to refrain from the use of force”<sup>71</sup>.

The use of force which States have the obligation to refrain from is the one referred to in Article 2(4) of the UN Charter which codifies the fundamental principle prohibiting the use of force by States in their international relations. Article 2(4) provides:

*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*

The term ‘force’ mentioned in Article 2(4) of the UN Charter is limited to the notion of direct or indirect ‘armed force’<sup>72</sup>. A clear example of armed force is the military force deployed by the different components of the national defence forces (army, navy, air forces), as it is the case during wars, aggressions, and their counterpart: self-defence operations.

It should be noted, here, that interdiction operations, also, might imply the commitment of national defence forces and the recourse to armed force. With regard to the United States’ practice, Allen writes:

*Vessel interceptions and boarding by naval vessels are generally carried*

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of the Draft Articles on Responsibility of States for internationally Wrongful Acts [hereinafter “Draft Articles”].

<sup>70</sup> Art. 21 of the Draft Articles provides: “The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations”.

<sup>71</sup> Ago, *supra* note 62, at 52, para. 83.

<sup>72</sup> See notably Hans Wehberg, ‘L’interdiction du recours à la force. Le principe et les problèmes qui se posent’, *Collected Courses of the Hague Academy of International Law*, t. 78, 1951, at 69 [hereinafter “Collected Courses...”]; Dereck W. Bowett, *Self-Defence in International Law*, Manchester, Manchester University Press, 1958, at 148; Ian Brownlie, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, at 362. On the definition of the term ‘armed force’, see Corthay, *supra* note 64, at 94-104.

*out by visit, board, search and seizure (VBSS) teams drawn from the US Maritime Forces. Boarding teams from US navy platforms may include Navy, Marine Corps and Coast Guard personnel*<sup>73</sup>.

Allen also observes that interdiction (interception) operations might occasionally require the use of force:

*If the MIO [maritime interception operations] on scene commander concludes the boarding will be opposed or non-compliant, the VBSS team may be augmented by special operations forces. SEAL and Marine Corps Maritime Special Purpose Force (MSPF) members assigned to helicopter assault force teams are trained to fast-rope from helicopters to the deck of the ship (vertical take-downs), engage and neutralize any hostile forces aboard, and gain control of the vessel*<sup>74</sup>.

Even though the use of force that might be carried out during interdiction operations at sea is not generally prohibited<sup>75</sup>, it is not left at the sole discretion of the intercepting State but must rather respect specific requisites: the use of force must be avoided as far as possible, and, if unavoidable, it must respect the standards of reasonableness and necessity. In the *M/V 'Saiga' (No. 2)* case, for example, the International Tribunal for the Law of the Sea stated:

*Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law*<sup>76</sup>.

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<sup>73</sup> Craig H. Allen, 'Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives', *International Law Studies*, vol. 81 (US Naval War College), 2006, at 79 (footnotes omitted).

<sup>74</sup> *Id.*, at 81 (footnotes omitted).

<sup>75</sup> See *M/V 'Virginia G' (Panama v. Guinea-Bissau)*, Judgment, ITLOS Case No 19 (2014), para 360, available at <https://www.itlos.org/cases/list-of-cases/case-no-19/> [hereinafter "*M/V 'Virginia G' case*"]

<sup>76</sup> *M/V 'Saiga' (No. 2)* case, *supra* note 52, para. 155. The Tribunal relied in part on the *I'm Alone* and *Red Crusader* cases. See *S.S. I'm Alone* case (Canada/United States), *RIAA*, vol. 3, 1949, at 1615 and 1617; Investigation of certain incidents affecting the British trawler *Red Crusader*, Report of Mar. 23, 1962, of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and

In the same judgment, the Tribunal concluded that these three principles – unavailability, reasonableness and necessity<sup>77</sup> – “have been followed over the years in law enforcement operations at sea” and represent “[t]he basic principle[s] concerning the use of force in the arrest of a ship at sea”<sup>78</sup>.

Similarly, military operations conducted in self-defence must also comply with specific requirements. These “essential conditions for the admissibility of the plea of self-defence in a given case”<sup>79</sup> are the three requirements of necessity, proportionality, and immediacy (see *infra*). The requirement of necessity was described by Ago as follows: “[t]he reason for stressing that action taken in self-defense must be *necessary* is that the State attacked [...] must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force”<sup>80</sup>. With regard to the condition of proportionality, Ago contended that “[t]he requirement of the *proportionality* of the action taken in self-defense [...] concerns the relationship between that action and its purpose, namely – and this can never be repeated too often – that of halting and repelling the attack”<sup>81</sup>.

Notwithstanding the fact that both interdiction operations and actions in self-defence can be conducted by military personnel and must respect specific requisites, it is important to emphasise that the use of force authorized during interdiction operations, when boarding and searching a private vessel on the high seas in time of peace, is intrinsi-

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Northern Ireland and the Government of the Kingdom of Denmark on Nov. 15, 1961, RIAA, vol. XXIX, 1962, at 538. The standards referred to by the Tribunal in the M/V Saiga (No. 2) case are also reiterated by the Tribunal in the more recent M/V ‘Virginia G’ case, *supra* note 75, para. 359.

<sup>77</sup> Enrico Milano, Irini Papanicolopulu, ‘State Responsibility in Disputed Areas on Land and at Sea’, *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht*, vol. 71, 2011, at 623-624, wrote: “International judges have identified in the unavailability, reasonableness and necessity the conditions for the exercise of enforcement action. It therefore appears that law enforcement activities are permitted, in so far as force is used only as the last resort and is proportionate to the circumstances and the aim pursued.”

<sup>78</sup> M/V ‘Saiga’ (No. 2) case, *supra* note 52, para. 156.

<sup>79</sup> Ago, *supra* note 62, at 69, para. 119.

<sup>80</sup> *Id.*, para. 120.

<sup>81</sup> *Id.*, para. 121.

cally distinct from the use of force referred to in Article 2(4) of the UN Charter<sup>82</sup> and carried out during a self-defence operation in reaction to an armed attack. Indeed, the two notions of use of force are conceptually different<sup>83</sup> and governed by two different bodies of rules<sup>84</sup>. The use of force mentioned in Article 2(4) of the UN Charter refers to the conduct of a State directed against another State, and is covered by the relevant provisions of the UN Charter. In contrast, the limited use of force authorized in the course of interdiction operations in time of peace “refer[s] to the means used by authorized government vessels and their agents to compel individuals to comply with enforcement actions”<sup>85</sup>. The force used during interdiction operations relates, therefore, to maritime law enforcement activities (i.e. police measures) against private vessels. This form of use of force is governed by the law of the sea and does not violate Article 301 of the 1982 Convention which requires States to refrain from any threat or use of force inconsistent with the UN Charter. Furthermore, these two common usages of the term force have different rationales: while the purpose of the interdiction of the use of force under Article 2(4) of the UN Charter – and its exception: the right of self-defence – is the protection of “sovereign rights” (e.g. territorial integrity, political independence), the aim of the police force deployed during interdiction operations is “the advancement of the interests of international community”<sup>86</sup>.

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<sup>82</sup> Cristian DeFrancia, ‘Enforcing the Nuclear Nonproliferation Regime: the Legality of Preventive Measures’, *Vanderbilt Journal of Transnational Law*, vol. 45, 2012, at 769. Patricia Jimenez Kwast, ‘Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award’, *Journal of Conflict & Security Law*, vol. 13, 2008, at 58. Contra Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge, Cambridge University Press, 2009, at 275-276.

<sup>83</sup> Milano & Papanicolopulu, *supra* note 77, at 623.

<sup>84</sup> Olivier Corten, *The Law Against War, The Prohibition on the Use of Force in Contemporary International Law*, Oxford and Portland, Oregon, Hart Publishing, 2012, at 59.

<sup>85</sup> Allen, *supra* note 73, at 89 (footnote omitted).

<sup>86</sup> Eftymios D. Papastavridis, ‘The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)’, *The Journal of Territorial and Maritime Studies*, vol. 2, 2015, at 132.

## 2. The alleged right of anticipatory self-defence

In a world where oceans can be used by terrorists – or other actors who intend to support terrorists– who threaten members of the international community and have decided, in the not too distant future, to attack them, the question is raised of the legality of an action in self-defence in anticipation of their attacks.

### a. The doctrine of anticipatory self-defence

The doctrine of anticipatory self-defence, according to which an action in self-defence could be triggered before an armed attack occurs, has been supported by some scholars for a long time<sup>87</sup>. Even more support is given since the upsurge of counter-terrorism and counter-proliferation efforts<sup>88</sup>. The concept of anticipatory self-defence has also been referred to in the maritime security context<sup>89</sup>. For example, Bowett states:

*It can scarcely be contemplated that a state must remain passive whilst a serious menace to its security mounts on the high seas beyond its territorial sea. It is accordingly maintained that it is still permissible for a state to assume a protective jurisdiction, within the limits circumscribing every exercise of the right of self-defence, upon the high seas in order to protect its ships, its aircraft, and its rights of territorial integrity and political independence from an imminent danger or actual attack<sup>90</sup>.*

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<sup>87</sup> See, e.g., Humphrey Waldock, 'The Regulation of the Use of Force by Individual States in International Law', *Collected Courses...*, t. 81, 1952-II, at 498; Derek W. Bowett, *supra* note 72, at 187; Oscar Schachter, 'In Defense of International Rules on the Use of Force', *University of Chicago Law Review*, vol. 53, 1986, at 136; Thomas M. Franck, 'What Happens Now? The United Nations after Iraq', *American Journal of International Law*, vol. 97(3), 2003, at 619; Natalino Ronzitti, 'The Expanding Law of Self-Defence', *Journal of Conflict & Security Law*, vol. 11, 2006, at 347.

<sup>88</sup> Klein, *supra* note 32, at 271.

<sup>89</sup> See, e.g., Dominic Raab, 'Armed Attack' after the Oil Platforms Case', *Leiden Journal of International Law*, vol. 17, 2004, at 728; Michael Byers, 'Policing the High Seas: The Proliferation Security Initiative', *American Journal of International Law*, vol. 98, 2004, at 532; Barry, *supra* note 29, at 324; Vaughan Lowe, 'Clear and Present Danger: Responses to Terrorism', *International and Comparative Law Quarterly*, vol. 54, 2005, at 191; Patricia Jimenez Kwast, 'Maritime Interdiction of Weapons of Mass Destruction in an International Legal Perspective', *Netherlands Yearbook of International Law*, vol. 38, 2007, at 202.

<sup>90</sup> Bowett, *supra* note 72, at 71. His view is also supported by previous authors like William E. Hall, *A Treatise on International Law*, Oxford, Clarendon Press (ed. by J. B. Atlay), 1909, at 328; John Westlake, *International Law*, vol. 1, Cambridge, Cambridge

More specifically, anticipatory self-defence has been invoked as a legal justification for the interdiction of vessels engaged in unlawful activities. For example, Colombos contends:

*The right of self-defence, as recognized by the law of nations, will confer on a State, in a case where its safety is threatened, a self-protective jurisdiction which will entitle it to visit and arrest a vessel on the high seas and to send her in for adjudication*<sup>91</sup>.

From a semantic viewpoint and before analysing the validity in law of the doctrine of anticipatory self-defence, it must be stressed that the terms ‘anticipatory self-defence’, ‘preventive self-defence’, ‘pre-emptive self-defence’ have no recognized definitions in international law. Sometimes, authors and governments use the same term to express different ideas<sup>92</sup>. For the sake of clarification, in the present paper the term anticipatory self-defence embraces the two concepts of preventive self-defence and pre-emptive self-defence.

Preventive self-defence is invoked when the launch of an attack is imminent. Understanding the meaning of that term is helped by referring to the US doctrine. In the 2007 *Operational Law Handbook*, the US Government – who called it anticipatory self-defence – defines preventive self-defence as follows:

*Anticipatory self-defense justifies using force in anticipation of an ‘imminent’ armed attack. Under this concept, a State is not required to absorb the ‘first hit’ before it can resort to the use of force in self-defense to repel an imminent attack.*<sup>93</sup>

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University Press, 1910, at 171; Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, New York, G. A. Jennings, 1927, at 97-98; Charles C. Hyde, *International Law: chiefly as Interpreted and Applied by the United States*, Boston, Little, Brown, 1947, at 245; Herbert A. Smith, *The Law and Custom of the Sea*, London, Steven and Sons, 1959, at 70-71.

<sup>91</sup> Constantine J. Colombos, *The International Law of the Sea*, London, Longman, 1967, at 315. See also Heintschel von Heinegg, *supra* note 61, at 66; Jimenez Kwast, *supra* note 89, at 202; Matthew A. Fitzgerald, ‘Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas Under Article 51 of the UN Charter’, *Virginia Journal of International Law*, vol. 49, 2008-2009, at 481.

<sup>92</sup> See examples given in Corthay, *supra* note 64, at 291, footnote 862.

<sup>93</sup> International and Operational Law Department, *Operational Law Handbook*, The Judge Advocate General’s Legal Center & School, US Army, Charlottesville, Virginia, 2007, at 6, available at <http://www.jagcnet.army.mil> [hereinafter “2007 Operational

The 2007 *Operational Law Handbook* also contends that the right of preventive self-defence is a customary right “which was not ‘negotiated’ away under the Charter”<sup>94</sup>. According to the US Government, the roots of preventive self-defence were found in the now famous statement made by Secretary Webster during the 1837 *Caroline* case. Indeed, the 2009 *Operational Law Handbook* states:

*Secretary Webster posited that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances leading to the use of force are ‘instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation.’*<sup>95</sup>

For the US Government, the implementation of the right of preventive self-defence requests the fulfilment of certain conditions: “the right of anticipatory self-defense has been predicated upon knowing, with a reasonable level of certainty, the time and place of an enemy’s forthcoming attack”<sup>96</sup>.

Later on, in the aftermath of the 9/11 terrorist attacks, the Bush Administration explained that the United States “must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries”<sup>97</sup>. Two factors led to the adaptation of the concept of imminence: the devastating destructive nature of weapons of mass destruction that could fall from rogue States into the hands of terrorists (capabilities)<sup>98</sup>, and the very intention of terrorists and rogue States to

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Law Handbook”].

<sup>94</sup> Id.

<sup>95</sup> International and Operational Law Department, *Operational Law Handbook*, The Judge Advocate General’s Legal Center & School, US Army, Charlottesville, Virginia, 2009, at 6, available at [http://www.loc.gov/tr/frd/Military\\_Law/operational-law-handbooks.html](http://www.loc.gov/tr/frd/Military_Law/operational-law-handbooks.html).

<sup>96</sup> 2007 *Operational Law Handbook*, supra note 93, at 7.

<sup>97</sup> National Security Council, *The National Security Strategy of the United States of America*, Sept. 2002, at 15, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/> [hereinafter “2002 National Security Strategy”].

<sup>98</sup> In 2003, the Undersecretary of State, John Bolton, also known as the architect of the Proliferation Security Initiative, stated that his country had “a general right of self-defence” if there was a serious belief that the North Korean vessels were carrying material for use in WMDs. Greg Sheridan, ‘US “Free” to Board N Korea Shipping’, *The Australian*, Jul. 9, 2003, at 1.

use these weapons against the United States (objectives)<sup>99</sup>. Therefore, the Bush Administration expanded the use of force doctrine from preventive to pre-emptive self-defence. The new doctrine of pre-emptive self-defence is explained in the 2002 and 2006 US *National Security Strategy* as follows:

*If necessary, however, under long-standing principles of self-defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of preemption.*<sup>100</sup>

The important point is that the similarity between both doctrines (preventive and pre-emptive self-defence) lies in the fact that there is, in both cases, a high level of certainty that an attack will occur. The difference, however, concerns the level of certainty as to the time and place of the forthcoming attack<sup>101</sup>.

### 3. Rejection of a Right of Anticipatory Self-Defence

Even though the existence of a customary right of anticipatory self-defence is supported by some scholars and States, the analysis of the purpose of the customary law of self-defence as understood at the dawning of the adoption of the UN Charter, the interpretation of the letter and spirit of Article 51 of the said Charter, the actual State practice

<sup>99</sup> President Bush Delivers Graduation Speech at West Point, Jun. 1, 2002, available at <http://2001-2009.state.gov/r/pa/ei/wh/15425.htm> : “When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology - when that occurs, even weak states and small groups could attain a catastrophic power to strike great nations. Our enemies have declared this very intention, and have been caught seeking these terrible weapons. They want the capability to blackmail us, or to harm us, or to harm our friends [...]”

<sup>100</sup> National Security Council, *The National Security Strategy of the United States of America*, Mar. 2006, at 23, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/>. See also 2002 National Security Strategy, supra note 97, at 15: “The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”

<sup>101</sup> On the concept of imminence in relation with both doctrines, see Corthay, supra note 64, at 291-295, 317-318.

subsequent to the adoption of it, as well as the view of the International Court of Justice, all lead to the conclusion that to date the alleged right of anticipatory self-defence has no place in international law.

Acting in self-defence to prevent or deter a future attack is nothing more than implementing the nineteenth century concept of self-help (or self-preservation, self-protection). At that time, the two concepts – self-defence, self-help – were very similar; both expressed the right for the State to ensure its own security<sup>102</sup>. In the 1837 *Caroline* case, for instance, the two notions were indistinctly associated<sup>103</sup>. During the nineteenth century, self-defence (or self-help) was invoked in many differing situations. Humphrey Waldock observed that

*legitimate self-defense has three main requirements: (1) An actual infringement or threat of infringement of the rights of the defending State; (2) A failure or inability on the part of the other State to use its own legal powers to stop or prevent the infringement; and (3) Acts of self-defense strictly confined to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this object*<sup>104</sup>.

However, during the 1920s' and 1930s' the concept of self-defence has progressively emerged as an exception to the prohibition of the use of force. Simultaneously, the purpose of an action in self-defense has been significantly narrowed. Indeed, Linos-Alexandre Sicilianos, who analysed State practice during the inter-war period, came to the conclusion that self-defence was perceived at that time as only a reaction, a reaction against an attack, an armed attack or an invasion<sup>105</sup>. Therefore, during the 1930s and especially at the time of the adoption of the UN Charter in 1945, the purpose of the right of self-defence had been limited to the one of halting and repelling an actual armed attack.

With regards to the UN Charter, its Article 51 provides that “[n]othing in the present Charter shall impair the inherent right of individual

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<sup>102</sup> See Brownlie, *supra* note 72, at 43.

<sup>103</sup> See Robert Y. Jennings, ‘The Caroline and McLeod Cases’, *American Journal of International Law*, vol. 32(1), 1938, at 82 ff.

<sup>104</sup> Waldock, *supra* note 87, at 463-464.

<sup>105</sup> Linos-Alexandre Sicilianos, *Les réactions décentralisées à l’illicite: des contre-mesures à la légitime défense*, Paris, LGDJ, 1990, at 297.

or collective self-defence *if an armed attack occurs*<sup>106</sup>. The wording “if an armed attack occurs” is very restrictive; it does not mean “if the threat of an armed attack occurs”. In other words, a textual interpretation of Article 51 leads to the conclusion that the existence of an actual armed attack is an imperative condition for the exercise of the right of self-defence<sup>107</sup>. Kunz, who contended that the right of self-defence “does not exist against any form of aggression which does not constitute ‘armed attack’”, wrote:

*this term [armed attack] means something that has taken place. Art. 51 prohibits ‘preventive war’. The ‘threat of aggression’ does not justify self-defense under Art. 51. [...] The ‘imminent’ armed attack does not suffice under Art. 51.*<sup>108</sup>

In addition, purposive interpretation of the UN Charter also supports the argument of a rejection of a right of anticipatory self-defence. Indeed, the will of those who drafted the UN Charter was to limit as much as possible the right for States to use force in their international relations. Their aims were not to recognize a right of self-protection that could be invoked every time a State is threatened<sup>109</sup>. Use of force in case of threat to international peace and security can only be envisaged through the system of collective security. This system is, primarily<sup>110</sup>, in the hands of the Security Council which has the monopoly of the use of force in prevention of acts injurious to international peace and security<sup>111</sup>.

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<sup>106</sup> Emphasis added.

<sup>107</sup> See Hans Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems*, London, Stevens, 1950, at 797. Contra Myres S. McDougal, ‘The Soviet-Cuban Quarantine and Self-Defense’, *American Journal of International Law*, vol. 57(3), 1963, at 600.

<sup>108</sup> Josef L. Kunz, ‘Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations’, *American Journal of International Law*, vol. 41(4), 1947, at 878.

<sup>109</sup> See Louis Henkin, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 2nd ed., 1979, at 142; Albrecht Randelzhofer, ‘Article 51’, in: Bruno Simma (ed.), *The Charter of the United Nations, A Commentary*, vol. I, Munich, C. H. Beck, 2002, at 803.

<sup>110</sup> See art. 24 of the UN Charter.

<sup>111</sup> See Théodore Christakis, ‘Existe-t-il un droit de légitime défense en cas de simple ‘menace’? Une réponse au ‘groupe de personnalités de haut niveau’ de l’ONU’, in: *Société française pour le droit international, Les métamorphoses de la sécurité collec-*

It is therefore apparent that in 1945 the *ratione temporis* scope of the right of self-defence has received a very restrictive interpretation. The analysis of actual State practice subsequent to the adoption of the UN Charter confirms such a strict interpretation and the lack of evolution of a customary right that would authorize military operations in anticipation of an armed attack.

State's practice related to the invocation of anticipatory self-defence as a ground for the interdiction of vessels is limited to few cases<sup>112</sup>. In January 2002, Israel Defence Forces intercepted the *Karin A*, an Iraqi-flagged ship carrying, according to Israel, weapons for the Palestinian Authority. The Permanent Representative of Israel to the United Nations stated that "their seizure constitutes a vital act of self-defence and an important counter-terrorist measure"<sup>113</sup>. While most of the international community did not comment on the legality of the Israeli operation<sup>114</sup>, the then-US Defence Secretary, Donald Rumsfeld, qualified the Israeli operation as "a legitimate act of self-defense, noting that the US had conducted similar maritime operations"<sup>115</sup>. Indeed, after the 9/11 terrorist attacks, the United States boarded vessels in the Indian Ocean, the Red Sea and the Strait of Hormuz in search of Osama bin Laden and his henchmen<sup>116</sup>. Dyke notes that "[a]lthough the specific legal basis

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tive. Droit, pratique et enjeux stratégiques, Paris, Pedone, 2005, at 210, footnote 42. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, para. 148.

<sup>112</sup> In 1986, with regard to the Tanker War, the UK Foreign Secretary stated: "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". UK, Parliamentary Debates, House of Commons, Jan. 28, 1986, at 426, quoted in Douglas Guilfoyle, *supra* note 61, at 743. In the opinion of the present writer the interdiction operation conducted by Iran is governed by – and should be analyzed under – the belligerent right of visit applied in time of conflict, but not by the right of self-defense applied in time of peace.

<sup>113</sup> Letter dated Jan. 4, 2002 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, UN Doc. S/2002/25.

<sup>114</sup> Michael Byers, *supra* note 89, at 534.

<sup>115</sup> Cited in Jon M. Van Dyke, 'The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone', *Marine Policy*, vol. 29(2), 2005, at 118.

<sup>116</sup> Defense Institute of International Legal Studies (DILS), Conference on Maritime Operations Organized by the Russian Academy of Liberal Arts and Information Tech-

for these searches has never been articulated, U.S. President George W. Bush has said generally that U.S. actions to respond to the attacks by al Qaeda are “acts of self-defense”<sup>117</sup>. Dyke’s observations are somehow confirmed by the 2005 *National Strategy for Maritime Security*. Preventing terrorist attacks is one of the strategic objectives listed and explained in the 2005 official document which states:

*The United States will prevent potential adversaries from attacking the maritime domain or committing unlawful acts there by monitoring and patrolling [...] high seas areas of national interests, and by stopping such activities at any stage of development or deployment*<sup>118</sup>.

The document also clearly stresses that “[t]his approach does not negate the United States’ inherent right to self-defence or its right to act to protect its essential national security interests.”<sup>119</sup> It seems, therefore, that the 2005 *National Strategy for Maritime Security* envisages self-defence as lawful when carried out in order to prevent terrorist attacks.

In a context other than maritime, some States – notably the United States and Israel – have also resorted to the use of force in anticipation of terrorist attacks. All have invoked self-defence as a justification for their action. It was, *inter alia*, the case during the Israeli airstrikes against Palestinian camps in the North of Lebanon (1975), Israeli Operation *Litani* (1978), US Operation *Eldorado Canyon* (1986), and Operation *Enduring Freedom* (2001)<sup>120</sup>. These operations show a radical division between other members of the international community. Few of them accepted a legal right of anticipatory self-defence. Many condemned the resort to force *in concreto*, and qualified the military

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nologies Education and DIILS 11-8 (St. Petersburg, Russia, June 2003), cited in Jon M. Van Dyke, ‘Balancing Navigational Freedom with Environmental and Security Concerns’, *Colorado Journal of International Environmental Law and Policy*, vol. 15, 2004, at 25.

<sup>117</sup> See *id.*

<sup>118</sup> 2005 National Strategy for Maritime Security, *supra* note 6, at 8.

<sup>119</sup> *Id.*, at 7.

<sup>120</sup> See Corthay, *supra* note 64, at 241-250.

operations notably as aggressions<sup>121</sup> or acts of aggression<sup>122</sup>. Thus, it appears that States are divided on the question whether the right of anticipatory self-defence has a place in international law. The actual practice of the international community of States as a whole being not uniform, as well as not constant, a customary right of anticipatory self-defence has not (yet) been able to emerge<sup>123</sup>.

Same conclusions can be drawn from an analysis of the judgment of the International Court of Justice. Even though, in the *Nicaragua* case of 1986, the Court did not discuss “the lawfulness of a response to the imminent threat of armed attack” because of the circumstance in which the dispute had arisen between the Parties<sup>124</sup>, the wording used by the Court implicitly indicates a rejection of the right of anticipatory self-defence. Thus, in paragraph 176 of the judgment, the Court notes that the Charter “does not contain any specific rule whereby self-defence would warrant *only* measures which are proportional to the armed attack and necessary to *respond* to it, a rule well established in customary international law”<sup>125</sup>. In paragraph 195, she declares that “[i]n the case of

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<sup>121</sup> The following States have qualified Operation Litani as an aggression: Lebanon, UN Doc. S/PV.2071, Mar. 17, 1978, para. 12; Jordan, UN Doc. S/PV.2071, Mar. 17, 1978, para. 77; Syria, UN Doc. S/PV.2071, Mar. 17, 1978, para. 88; Egypt, UN Doc. S/PV.2072, Mar. 18, 1978, para. 7; Kuwait, UN Doc. S/PV.2072, Mar. 18, 1978, para. 34; Viet Nam, UN Doc. S/PV.2072, Mar. 18, 1978, para. 65; URSS, UN Doc. S/PV.2073, Mar. 18, 1978, para. 36.

<sup>122</sup> It was notably the case during the 1975 Israeli raid against Palestinian camps in Lebanon. See Egypt, UN Doc. S/PV.1859, Dec. 4, 1975, para. 113; URSS, UN Doc. S/PV.1860, Dec. 5, 1975, para. 6; Cameroun, UN Doc. S/PV.1861, Dec. 8, 1975, para. 13; China, UN Doc. S/PV.1861, Dec. 8, 1975, para. 37; Mauritania, UN Doc. S/PV.1861, Dec. 8, 1975, para. 44; Belarus, UN Doc. S/PV.1862, Dec. 8, 1975, para. 3; Iraq, UN Doc. S/PV.1862, Dec. 8, 1975, para. 16; Tanzania, UN Doc. S/PV.1862, Dec. 8, 1975, para. 38.

<sup>123</sup> In line with custom-formation requirements, actual practice of the international community of States as a whole, – a practice that reflects their *opinio juris* – must have been constant and uniform for a new customary law of anticipatory self-defence to emerge. See *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, ICJ Reports 1985, para. 27; *Colombian-Peruvian asylum case (Colombia v. Peru)*, Judgment, ICJ Reports 1950, at 276.

<sup>124</sup> *Nicaragua* case, *supra* note 63, para. 194.

<sup>125</sup> *Id.*, para. 176 (emphasis added). In French, the text is more explicit: “elle ne comporte pas la règle spécifique – pourtant bien établie en droit international coutumier – selon laquelle la légitime défense ne justifierait que des mesures proportionnées à

individual self-defence, the exercise of this right is subject to the State concerned *having been the victim* of an armed attack.”<sup>126</sup> And finally, in paragraph 232, the Court held that “[t]he exercise of the right of collective self-defence presupposes that *an armed attack has occurred*.”<sup>127</sup>

### III. CONCLUSION

The discrete circumstances under which the right of visit enshrined in Article 110 of the 1982 Convention can be invoked do not explicitly include maritime terrorism. However, terrorism is one of the major threats to maritime security. Members of the international community have therefore devised multilateral, regional and bilateral treaties to permit interdictions against ships suspected of being involved with terrorist acts on the high seas. These legal instruments are a significant addition to counter-terrorism efforts. Nevertheless, given the still primordial importance accorded by States to freedom of navigation and the exclusive jurisdiction of the flag State, ship boarding treaties have been drafted with many constraints that hinder their effectiveness (e.g. conditions for a valid request, emphasis on express consent of a flag State for boarding, possibility of obstructive conditions in conducting a boarding).

Given the limited room offered by Article 110 of the 1982 Convention and the weaknesses of the ship boarding treaties, it is understandable that States and authors are suggesting and following other paths to respond to maritime terrorist threats. Not all of them are however legal. The right of anticipatory self-defence, for example, still does not exist under international law, and therefore any maritime interdiction operations carried out to prevent or deter a maritime terrorist attack from occurring cannot be justified by that alleged right. That is not to say that the right of self-defence cannot be invoked by those fighting against terrorism on the high seas, but for that right to be properly invoked the conditions of its invocation and implementation must be fulfilled. In other word, to be lawful under the right of self-defence, the maritime

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l’agression armée subie, et nécessaires pour y riposter” (emphasis added).

<sup>126</sup> Id., para. 195 (emphasis added).

<sup>127</sup> Id., para. 232 (emphasis added).

operation must respect the requirements of necessity, proportionality and immediacy, and its aim must be limited to stopping or repelling an actual terrorist attack which is attributed to a State and has a sufficient level of gravity. But given that terrorist attacks are most of the time very swift, opportunities to invoke a right of self-defence are rare.

Successfully preventing and deterring maritime terrorist attacks definitely serve all States. The international community must therefore put all necessary efforts in that regard. One solution would be to give precedence to common interests (i.e. maritime security) over exclusive jurisdiction rules, by for example adopting new ship boarding treaties with fewer constraints. Other avenues to explore further could be to adopt efficient mechanisms to ensure full respect for UN Security Council decisions (e.g. Resolution 1373 (2001) and Resolution 1540 (2004)), to emphasize international cooperation and collaboration in the maritime domain (e.g. efficient intelligence gathering and sharing), and of course to address the root causes of terrorism.