

LEGAL BASES FOR FORCIBLE MARITIME INTERDICTION OPERATIONS AGAINST TERRORIST THREAT ON THE HIGH SEAS

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1 Introduction

The maritime domain, and especially the high seas, represents an important place for many commercial, recreational and military activities.¹ From a commercial standpoint, for instance, seaborne trade has been deemed to be the 'lifeblood of the international economic system and the source of its wealth'.² Nonetheless, many maritime activities threaten security, prosperity and global stability. Alongside piracy and armed robbery, another major yet different threat to maritime security is (maritime) terrorism.³

So far, members of the international community have not yet been able – or willing – to define the concept of terrorism. For the sake of clarification, however, the present writer proposes to define terrorism as being a *modus operandi* consisting of an unlawful act of intentional violence which induces extreme fear among victims (secondary target) in order to compel a well identified entity (primary target) to do or to abstain from doing any act.⁴ With respect to the maritime environment in particular, the Council for Security Cooperation in the Asia-Pacific's Working Group on Maritime Cooperation has explained maritime terrorism in the following terms:

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.⁵

Vessels are used by terrorists in a number of different ways.⁶ To further their aims, they can notably utilize a vessel as a means, a weapon, a bomb, or as a disruption tool.⁷ Using this classification, a range of maritime terrorist activities can be postulated.⁸ Terrorists may use commercial cargo containers to transport terrorists and smuggle materials and weapons, including weapons of mass destruction (WMD), for an attack on land (vessel as a means). It has been reported, for example, that Al-Qaeda smuggled explosives into Mombasa on vessels to carry out the

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¹ 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) 74 <<http://ro.uow.edu.au/theses/4262>>.

² Sir James Eberle, 'Global Maritime Security: What Does it Mean?' in Fred W Crickard, Paul T Mitchell and Katherine Orr (eds), *Multinational Naval Cooperation and Foreign Policy into the 21st Century* (Ashgate, 1998) 22, 23-4.

³ See *Oceans and the Law of the Sea: Report of the Secretary General*, UN GAOR, 71st sess, Agenda Item 74(a), UN Doc A/71/74/Add.1 (6 September 2016) 11 [36]-[37]. For a definition of 'piracy', see *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 101 ('LOS Convention' or 'UNCLOS').

⁴ 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' (2006) 20-21 *L'Observateur des Nations Unies* 111, 136.

⁵ Definition cited in Akiva Lorenz, *The Threat of Maritime Terrorism to Israel* (24 September 2007) International Institute for Counter-Terrorism

<<http://www.ict.org.il/Article/983/The%20Threat%20of%20Maritime%20Terrorism%20to%20Israel>>. See also Md Saiful Karim, *Maritime Terrorism and the Role of Judicial Institutions in the International Legal Order* (Brill, Martinus Nijhoff, 2016) 40-6.

⁶ For a non-exhaustive list of maritime terrorist activities, not only on the high seas, see Bowley, above n 1, app G; RAND, *Database of Worldwide Terrorism Incidents* <http://smapp.rand.org/rwtid/search_form.php>.

⁷ Tanner Campbell and Rohan Gunaratna, 'Maritime Terrorism, Piracy and Crime' in Rohan Gunaratna (ed), *Terrorism in the Asia-Pacific: Threat and Response* (Eastern Universities Press, 2003) 70, 80. For Campbell and Gunaratna, vessels are also seen as a target to be destroyed.

⁸ See, eg, Michael D Greenberg et al (eds), *Maritime Terrorism: Risk and Liability* (RAND, 2006) 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 Publications, 2004) 8; Anthony Bergin and Sam Bateman, 'Future Unknown: The Terrorist Threat to Australian Maritime Security', *Strategy*, 19 April 2005, 35 <<https://www.aspi.org.au/publications/future-unknown-the-terrorist-threat-to-australian-maritime-security>>; US Department of Homeland Security, *National Strategy for Maritime Security* (September 2005) Homeland Security Digital Library, 4 <<https://www.hsd.org/?collection&id=4#Maritime>>; John F Frittelli, *Port and Maritime Security: Background and Issues for Congress* (27 May 2005) Congressional Research Service Reports on Homeland Security, 7 <<https://fas.org/sgp/crs/homesecc/index.html>>.

bombings of the US embassy in Kenya in 1998.⁹ It has to be noted that the transportation of weapons of mass destruction – biological, chemical or nuclear weapons and related materials – does not necessarily have to be linked to terrorist activities, but the possibility of such a connection cannot be excluded either. Terrorists may also ram a high-speed boat into warship, cruise liner, ferry or oil tanker; they may seize control of a ship and use it as a collision weapon for destroying offshore platforms, port facilities, bridges or other targets on the waterfront (vessel as a weapon). The suicide attack against the US Navy destroyer *Cole* in 2000¹⁰ and the attack against the French super tanker *Limburg* in 2002¹¹ are two examples where vessels were used as a weapon. Terrorists may also seize and explode ships with volatile cargoes in proximity to a land or offshore target (vessel as a bomb). Vessels are also used as a bomb when the purpose of the blasting is simply to sink them and to kill passengers in order to get a message across. This was the case of the bombing of the Philippine *SuperFerry 14* in 2004.¹² Last but not least, terrorists could decide to sink 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 as a disruption tool).

It appears that the high seas are a domain from which, through which, or within which maritime terrorist activities might be conducted and attacks perpetrated. Even though they do not represent *per se* terrorist attacks, 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 *ex ante facto* steps. Besides the establishment of effective control mechanisms in ports, States also carry out maritime interdiction operations against suspected vessels on the high seas.

Interdiction operations, however, are not left at the sole discretion of the interfering States. Counter-terrorism measures, such as maritime interdiction operations, implemented on the high seas to prevent (maritime) terrorist attacks from occurring are possible but limited by international law and notably the law of the sea. Indeed, oceans are governed by the principle of the freedom of the high seas¹³ which comprises, *inter alia*, the right to freedom of navigation.¹⁴ This right, recognised by customary international law, allows ships flying the flag of a State to enter upon the oceans and to pass them without suffering interference from other States.¹⁵ Both the principle and its consubstantial right are limited by the requirements that they ‘be exercised ... with due regard for the interests of other States in their exercise of the freedom of the high seas’¹⁶ and that the high seas ‘be reserved for peaceful purposes’.¹⁷ This latter requirement, read in conjunction with Article 301 of the 1982 *United Nations Convention on the Law of the Sea* (‘LOS Convention’ or ‘UNCLOS’) which notably prohibits any threat or use of force ‘inconsistent with the principles of international law embodied in the Charter of the United Nations’,¹⁸ is generally understood as forbidding military activities which are contrary to the *ius contra bellum*.¹⁹

Freedom of navigation on the high seas also leads to the principle of exclusive jurisdiction of the State whose flag ships lawfully fly. This customary principle, codified in international treaties,²⁰ means that States are not allowed to exert control or authority on the vessels of other States. As observed by the Permanent Court of International Justice in the *Lotus* case:

...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.²¹

In other words, a State A’s warship is *a priori* not allowed to 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.

⁹ Rohan Gunaratna, *Terrorist threat to shipping is ‘imminent and growing’* (29 September 2004) Lloyds’ List, cited in Philipp Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer, 2007) 27.

¹⁰ *Database of Worldwide Terrorism Incidents*, above n 6.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ For a definition of ‘high seas’, see art 86.

¹⁴ *Ibid* art 87(1).

¹⁵ René-Jean Dupuy and Daniel Vignes (eds), *A handbook on the new law of the sea* (Martinus Nijhoff, 1991) 836.

¹⁶ UNCLOS art 87(2).

¹⁷ *Ibid* art 88.

¹⁸ *Ibid* art 301.

¹⁹ See Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 151.

²⁰ UNCLOS art 92(1). See also *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art 6(1) (‘1958 Convention’).

²¹ *SS ‘Lotus’ (France v Turkey)* [1927] PCIJ (ser A) No 10, 25.

International law permits interference with non-national vessels in exceptional cases provided for by customary or conventional law.²² This means that the carrying out of maritime interdiction operations is allowed only if permitted by law. In order to be lawful, such operations must be permitted by law. After having defined the concept of maritime interdiction and clarified the nature of the force used during some operations (2), the present paper aims at identifying and analysing the legal bases that authorise States to interdict, forcibly if necessary, foreign flagged vessels involved in terrorist activities (3).

2 Maritime Interdiction Operations: Definition and Nature

Interdiction operations are composed of a series of consecutive phases. Before proceeding further, it is important to identify which measures are included in the definition of the notion (2.1). Moreover, interdiction operations are not always a walkover. National defence forces are sometimes obliged to use some degree of armed force when carrying out the different phases of a maritime interdiction operation. In order to delineate the legal bases that justify interdiction operations, it is necessary to determine whether the force deployed relates to the one used during law enforcement operations or the one used during military operations and governed by the *ius contra bellum* (2.2).

2.1 Defining Maritime Interdiction

Identifying the elements included within the concept of maritime interdiction – a notion not present in the *LOS Convention* – is a delicate exercise. While stopping, boarding and searching a foreign private vessel are all phases generally recognised as encompassed within the umbrella of maritime interdiction operations, the inclusion of other measures, such as seizure and forfeiture of the cargo or the vessel, arrest and detention of persons on board, and even prosecution of offenders, is more questionable.

After the stoppage of the vessel, due to suspicion that it is engaged in some proscribed activity, come the actual boarding and possible searching phases. Pursuant to Article 110(2) of the *LOS Convention*, boarding is to ‘verify the ship’s right to fly its flag’,²³ ie to verify the true nationality of a vessel the warship encounters. *In concreto*, the warship applies its right of investigation of flag (*le droit d’enquête du pavillon*) by verifying the papers of the ship, ie the documents issued by the flag State which granted to the ship the right to fly its flag.²⁴ To this end, the warship ‘may send a boat under the command of an officer to the suspected ship’.²⁵ The officer may be a warrant officer or senior petty officer.²⁶ If suspicions are dissipated after examination of the papers, the ship is allowed by the warship to go its way.²⁷ If, after the documents have been checked, suspicion remains – or a new suspicion has arisen – 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 right of search. This more intrusive step aims at discovering evidence that would confirm the suspicions of the warship, and ‘must be carried out with all possible consideration’.²⁸

Other international treaties provide differing purposes for the boarding phase. For instance, under some provisions of the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (‘2005 SUA Protocol’),²⁹ investigation of flag precedes the actual boarding. Indeed, pursuant to Article

²² See UNCLOS art 92(1).

²³ UNCLOS art 110(2).

²⁴ Ibid art 91(2).

²⁵ Ibid art 110(2).

²⁶ Satya N Nandan, Shabtai Rosenne and Neal R Grandy (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1995) vol III, 245. Some authors note that the verification of papers may be conducted on board the warship. See, eg, Gilbert Gidel, *Le droit international public de la mer: le temps de paix* (Mellottée, first published 1932-1934, 1981) 290; Lassa Oppenheim, *International Law: a Treatise* (Longmans, 2nd ed, 1912) vol I: Peace, 337 [268]. However, Reuland 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 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.’ Robert C F Reuland, ‘Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction’ (1989) 22(5) *Vanderbilt Journal of Transnational Law* 1161, 1175.

²⁷ Oppenheim, above n 26, 337 [268].

²⁸ UNCLOS art 110(2).

²⁹ *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Doc LEG/CONF 15/21 (entered into force 28 July 2010) (‘2005 SUA Protocol’).

8bis(5)(a) and (b) of the said Protocol, the nationality of the suspected ship shall first be confirmed by the flag State, and only then, 'if nationality is confirmed', boarding might be conducted if authorised by the flag State.³⁰ Here, the aim of boarding and searching the ship, cargo, and persons on board is to find evidence of illegal conduct as described and proscribed in the 2005 SUA Protocol.³¹

The question of whether subsequent measures such as seizure, arrest, detention, forfeiture and prosecution are included in the definition of maritime interdiction is less clear.³² Indeed, article 110(2) of the *LOS Convention* does not refer to such measures, while, in contrast, other treaties do mention some or all of these actions.³³ Considering that maritime interdiction operations are enforcement operations, the answer to the abovementioned question could come from the clarification of the notion of enforcement. Rayfuse states that

[t]he object of enforcement is to compel constraint of behaviour in such a way as to promote conformity with prescribed rules in order to make adherence to the rule ... Defined in this way, enforcement really consists of two elements: control and sanction. Control refers to the processes of invoking compulsion in order to achieve the sought-after compliance and includes, *inter alia*, policing activities such as surveillance, interdiction, boarding and inspection either at sea or in port, and possibly detention pending further investigation. Sanction refers to the formal application of the law through judicial or other processes and includes actions taken to prosecute and punish non-compliance.³⁴

Maritime interdiction is therefore classified as a 'control' measure distinct from the subsequent exercise of enforcement jurisdiction (ie sanction).³⁵ So, immediate seizure and temporary detention of a ship, cargo and person on board by the interfering State could seem to fall within the concept of maritime interdiction. In contrast, forfeiture and prosecution rather fall within the realm of 'sanction' measures, and as such they should not be included in the concept of maritime interdiction.³⁶ That being said, whatever the interdiction measures implemented by the interfering State – and not only board and search actions –, none of them can be taken without proper legal basis.³⁷

Finally, from a terminological viewpoint, it may be stressed that the notion of maritime 'interdiction' and the notion of maritime 'interception' do not seem to perfectly match, even though authors and States use them sometimes interchangeably.³⁸ Indeed, the latter one seems to be a more generic term, having a broader meaning and covering a wider spectrum of measures than the former one. In addition to measures such as stopping, boarding, searching, and potentially seizing and temporally detaining vessels, maritime 'interception' operations also involve other actions such as the surveillance and control of sea traffic, protection of endangered vessels, diversion, and the establishment of security zones.³⁹

2.2 Nature of Forcible Maritime Interdiction Operations

The different phases that constitute maritime interdiction operations may involve some degree of use of armed force by national defense forces. Stoppage, for example, is not always achieved without difficulties. In case of

³⁰ See, however, *ibid* art 8bis(5)(d).

³¹ See *ibid* art 3, 3bis, 3ter, 3quarter.

³² This list of measures is notably mentioned in *ibid* art 8bis(8).

³³ See *ibid* arts 8bis(6) and 8bis(8); see also *CARICOM Maritime and Airspace Security Cooperation Agreement*, opened for signature 3 July 2008, Caribbean Community <http://archive.caricom.org/jsp/secretariat/legal_instruments/agreement_maritime_airspace_security_cooperation.pdf> (not yet in force) art IX(1)(ii) ('*CARICOM Agreement*').

³⁴ Rosemary Rayfuse, 'Regulation and Enforcement in the Law of the Sea: Emerging Assertions of a Right to Non-flag State Enforcement in the High Seas Fisheries and Disarmament Contexts' (2005) 24 *Australian Year book of International Law* 181, 182 (footnotes omitted).

³⁵ Patricia Jimenez Kwast, *Maritime Interdiction of Weapons of Mass Destruction in International Legal Perspective* (11 December 2007) *Nederlands Juristenblad*, 8 ('*Maritime Interdiction*') <<http://njb.nl/Uploads/2014/4/Kwast.pdf>>.

³⁶ *Ibid*.

³⁷ See below pt 3.

³⁸ See, eg, Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff, 2010) 21. Mallia writes that '...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.' 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* (Hart Publishing, 2014) 60-61 ('*Interception of Vessels*').

³⁹ Wolff Heintschel von Heinegg, 'Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality' (2006) 80 *International Law Studies Series* (US Naval War college), 207, 209.

absence of compliance by the master of the vessel, the interfering warship might need to adopt graduated measures in order to stop the ship. Reuland explains that in order '[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.'⁴⁰ With regard to the United States' practice, Allen observes that '[v]essel interceptions and boardings by naval vessels are generally carried 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.'⁴¹ He also notes that in case of non-compliance

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.⁴²

Although maritime interdiction operations might involve the use of force by military personnel, in the opinion of the present writer they must be considered as law enforcement operations rather than military operations governed by the *ius contra bellum*.⁴³ It is indeed important to stress that the use of force authorized during interdiction operations is intrinsically distinct from the use of force referred to in Article 2(4) of the *Charter of the United Nations* ('*UN Charter*').⁴⁴ The two notions of use of force are conceptually different⁴⁵ and governed by two different bodies of rules.⁴⁶ Article 2(4) of the *UN Charter* 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.⁴⁷

The principle prohibiting the use of force enshrined in this provision, alongside its two exceptions – namely the right of self-defense and the use of force authorised by the UN Security Council – is part of the *ius contra bellum* which is essentially an inter-State regime proscribing military coercion – ie the threat or use of force – by a State against another one, in violation of the sovereignty of the latter.⁴⁸ This use of force 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'.⁴⁹ The force used during interdiction operations relates therefore to police measures against private vessels. This form of use of force is governed by the law of the sea

⁴⁰ Reuland, above n 26, 1174 (footnotes omitted); see also Théodore Ortolan, *Règles Internationales et Diplomatie de la Mer* (Plon, 4th ed, 1864) at 252; René-Jean Dupuy and Daniel Vignes, *Traité du nouveau droit de la mer* (Economica, Bruylant, 1985) 371; Mallia, above n 38, 20; *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea) (Judgment)* ITLOS Case No 2 (1999) 38 ILM 1323, 1355 [156].

⁴¹ Craig H Allen, 'Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives' (2006) 81 *International Law Studies* (US Naval War College) 77, 79 (footnotes omitted).

⁴² *ibid* 81 (footnotes omitted). Practice of Spanish Navy is described by Patricia Jimenez Kwast when referring to the interdiction of the *So San* in 2002: 'In established radio contact, the captain of the vessel purported that the vessel was carrying cement, but did not respond to identification requests, refused to stop and maintained full speed in an attempt to escape. The Spanish frigate *Navarra* subsequently fired three bursts of warning shot. Following the ignored warnings, snipers shot out metal cables that criss-crossed the deck to allow a helicopter to lower a Special Forces unit on board in order to stop and board the ship. The vessel's crew offered no resistance and a second team came aboard to search the *So San*. Under a cover of 40,000 sacks of dry cement, fifteen scud missiles and highly explosive warheads, eighty-five barrels of unidentified chemicals and twenty-three tanks of rocket fuel (nitric acid) were found.' Kwast, *Maritime Interdiction*, above n 35, 46.

⁴³ For a different opinion, see Andrew Murdoch, 'Forcible Interdiction of Ships Transporting Terrorists' (2009) 48 (3-4) *Military Law and the Law of War Review* 287, at 292-300.

⁴⁴ See Cristian DeFrancia, 'Enforcing the Nuclear Nonproliferation Regime: the Legality of Preventive Measures' (2012) 45(3) *Vanderbilt Journal of Transnational Law* 705, 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*' (2008) 13(1) *Journal of Conflict and Security Law* 49, 58. *Contra* Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009) 275-6.

⁴⁵ See Enriko Milano and Irini Papanicopolu, 'State Responsibility in Disputed Areas on Land and at Sea' (2011) 71 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 587, 623.

⁴⁶ See Olivier Corten, *The Law Against War, The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2012) 59.

⁴⁷ Charter of the United Nations, open for signature 26 June 1945, 59 Stat 1031 (entered into force 24 October 1945) art 2(4) ('*UN Charter*').

⁴⁸ Corten, above n 46, 169.

⁴⁹ Allen, above n 41, 89 (footnote omitted).

and does not violate Article 301 of the *LOS Convention* which requires States to refrain from any threat or use of force inconsistent with the *UN Charter*.⁵⁰

Furthermore, these two common usages of the term force have different rationales. While the purpose of the use of armed force proscribed by Article 2(4) of the *UN Charter* is mainly to protect or preserve an individual interest perceived by the acting State as important, if not essential, the aim of the deployment of police force during interception operations is deemed to be ‘the advancement of the interests of international community’.⁵¹

In addition, the use of these two forms of force leads to differing legal consequences. The use of armed force covered by the *ius contra bellum* is generally prohibited, unless otherwise permitted under strict conditions.⁵² In contrast, the use of force carried out during interdiction or interception operations at sea ‘is not generally prohibited’.⁵³ The carrying out of maritime operations, nonetheless, is not left at the sole discretion of the intercepting/interdicting State. It must respect the requisites of unavailability, reasonableness and necessity.⁵⁴ In the *M/V Saiga (No. 2)* case, for example, the International Tribunal for the Law of the Sea stated that international law

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.⁵⁵

One last point merits some attention. Alongside maritime interdiction operations construed as law enforcement operations and generally not prohibited, the use of armed force against ships – eg when a ship is attacked – is, unless otherwise permitted, prohibited when contrary to Article 2(4) of the *UN Charter*. For this to be the case, as the *ius contra bellum* is an inter-State regime, a strong connection is required between the ship victim of military coercion and a State, in order to consider the said military coercion against the ship to be a military coercion against a State and therefore a violation of Article 2(4).⁵⁶ In the *Oil Platforms* case, the International Court of Justice has identified this nexus as being the flag of the ship. Indeed, the Court held that ‘the *Texaco Caribbean* [a tanker], whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State’.⁵⁷ Through this statement, plus the one that ‘the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the *Sea Isle City* [a tanker], has not been discharged’,⁵⁸ the Court also implicitly gave a positive answer to the debated question of whether the use of force against a merchant vessel – and not only a warship or a marine fleet – flying the flag of a State might be considered as an armed attack justifying a reaction in self-defense.⁵⁹ In other words, the Court seemed to have confirmed that an attack against a merchant vessel flying the flag of a State can be equated with an attack against that State in violation of the principle prohibiting the use of force. Finally, in view of the above,

⁵⁰ *UNCLOS* art 301 provides: ‘In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.’

⁵¹ Efthymios Papastavridis, ‘The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)’ (2015) 2 *Journal of Territorial and Maritime Studies* 119, 132.

⁵² Concerning the conditions of invocation and implementation of the right of self-defense, see, eg, Eric Corthay, *La lutte contre le terrorisme international, De la licéité du recours à la force armée* (Helbing Lichtenhahn, 2012), 85-343 (*‘La lutte contre le terrorisme international’*). With regard to the authorization to use force granted by the UN Security Council, see, eg, the same author: at 369-415.

⁵³ See *M/V ‘Virginia G’ (Panama v Guinea-Bissau) (Judgment)* ITLOS Case No 19 (2014) 53 ILM 1161, 1213 [360].

⁵⁴ Milano and Papanicolopulu, above n 45, 623-4 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.’

⁵⁵ *M/V ‘Saiga’ (No 2) (Saint Vincent and the Grenadines v Guinea) (Judgment)* ITLOS Case No 2 (1999) 38 ILM 1323, 1355 [155]. The Tribunal relied in part on the *I’m Alone* and the *Red Crusader* cases. See *SS I’m Alone (Canada, United States)* (1935) 3 RIAA 1609, 1615 (Joint interim Report of the Commissioners), 1617 (Joint Final Report of the Commissioners); *The Red Crusader (Commission of Enquiry Denmark v United Kingdom)* (1962) 29 RIAA 521, 538. The standards referred to by the Tribunal in the *M/V ‘Saiga’ (No. 2)* are also reiterated by the Tribunal in the *M/V ‘Virginia G’* ITLOS Case No 19 (2014) 53 ILM 1161, 1212-13 [359].

⁵⁶ See Murdoch, above n 43, 292-8.

⁵⁷ *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, 191 [64].

⁵⁸ *Ibid* 190 [61].

⁵⁹ *Contra* ‘Reply and Defense to Counter-Claim submitted by the Islamic Republic of Iran’, *Oil Platforms (Islamic Republic of Iran v United States of America)*, International Court of Justice, 10 March 1999, 145-6 [7.37]. For an analysis of the doctrinal debates and State practice, see notably Tom Ruys, ‘Armed Attack’ and Article 51 of the *UN Charter*, *Evolutions in Customary Law and Practice* (Cambridge University Press, 2010), 204-13.

it is also worth noting that stateless ships⁶⁰ – ie ships not sailing under the flag of any State – are not protected by Article 2(4) of the *UN Charter*.⁶¹

3 Legal Bases Justifying Forcible Maritime Interdiction Operations

The fact is that certain States conduct maritime interdiction operations on the high seas against private foreign vessels engaged in maritime terrorist activities. As mentioned in the introduction, the lawfulness of their operations is considerably limited by the principle of exclusivity of jurisdiction of the flag State. This principle has been codified, notably, by Article 92(1) of the *LOS 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.'⁶² As mentioned in this provision, the exclusivity rule applies to ships having one nationality only. With regard to the issue of the nationality of the vessel, Article 91(1) and Article 92(2) respectively clarify that '[s]hips have the nationality of the State whose flag they are entitled to fly' and that '[a] ship which sails under the flags of two or more States ... may be assimilated to a ship without nationality.'⁶³ This latter category of vessels is not protected under international law and does not have the right to sail on the seas.⁶⁴

That said, the exclusivity of flag State jurisdiction is not an absolute rule. Article 92(1) of the *LOS 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'.⁶⁵ 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.⁶⁶ As noted in Article 92(1), circumstances of interference with non-national ships are of exceptional nature. The purpose of the present part is therefore to clarify the strict legal framework in which States can interdict, forcibly if necessary, foreign flagged vessels involved in terrorist activities and causing threats to maritime security and global stability.

A preliminary comment must be made. A certain number of authors,⁶⁷ and some States also,⁶⁸ have argued that the right of self-defence is appropriate to justify maritime interception operations against vessels engaged in terrorist activities or, more generally, vessels viewed as posing a security threat to them (eg vessels carrying nuclear or other sensitive materials and technologies for illicit purposes). In the opinion of the present writer, however, the right of self-defence – an exception to the principle prohibiting the use of force⁶⁹ – cannot serve as a legal basis for maritime interdiction operations carried out in order to counter terrorist threats on the high seas.

⁶⁰ According to *UNCLOS* art 91(1): '[s]hips have the nationality of the State whose flag they are entitled to fly'.

⁶¹ Robin Churchill and Vaughan Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) 214.

⁶² *UNCLOS* art 92(1). See also *1958 Convention* art 6(1): '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.'

⁶³ *UNCLOS* art 92(2).

⁶⁴ Nandan, Rosenne and Grandy, above n 26, 125.

⁶⁵ *UNCLOS* art 92(1).

⁶⁶ Reuland, above n 26, 1167-8. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Judgments)* [1969] ICJ Rep 3, 41 [69].

⁶⁷ See, eg, Ian Patrick Barry, 'The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: a Defense of the Proliferation Security Initiative' (2004-2005) 33 *Hofstra Law Review* 299, 327; Douglas Guilfoyle, 'The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?' (2005) 29(3) *Melbourne University Law Review* 733; Reuland, above n 26, 1206; Wolff Heintschel von Heinegg, 'The Proliferation Security Initiative: Security vs Freedom of Navigation?' (2006) 81 *International Law Studies Series* (US Naval War college) 55, 65.

⁶⁸ In 2002, the Permanent Representative of Israel to the United Nations justified by the right of self-defence the seizure of the *Karin A* – an Iraqi-flagged ship carrying, according to Israel, weapons for the Palestinian Authority. See *Letter Dated 4 January 2002 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General*, UN GAOR, 55th sess, Agenda Item 166; UN SCOR 56th sess, UN Docs A/56/766 and S/2002/25 (4 January 2002). 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'. Statement cited in Jon M Van Dyke, 'The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone' (2005) 29 *Marine Policy* 107, 118.

⁶⁹ See, eg, 'Addendum to the eighth report on State responsibility, by Mr Roberto Ago: The internationally wrongful act of the State, source of international responsibility' [1980] II(1) *Yearbook of the International Law Commission* 13, 53 [87] ('Ago, *Addendum*): 'The State finds itself in a position of self-defence when it is confronted by an armed attack against itself in breach of international law. It is by reason of such a state of affairs that, in a particular case, the State is exonerated from the duty to respect, vis-à-vis the aggressor, the general obligation to refrain from the use of force.'

This is not the place to analyse the scope of application of the right of self-defence in details.⁷⁰ Suffice to repeat that military actions in self-defence and maritime interdiction operations are intrinsically different as they are governed by two different legal regimes and have different rationales.⁷¹

Even though the right of self-defence cannot be invoked to justify maritime interdiction operations, other legal bases are available under international law. The present paper identifies five of them which are the right of visit (3.1), consent conferred by treaty (3.2), *ad hoc* consent from the flag State (3.3), state of necessity (3.4), and the authorisation to interdict granted by the UN Security Council (3.5).

3.1 The Right of Visit

An exception to the exclusivity rule is the right of visit detailed in Article 110 of the *LOS Convention*.⁷² Paragraph (1) of Article 110 – a provision that reflects customary international law⁷³ – 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 suspecting 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.⁷⁴

Then, paragraph (2) provides some clarifications on the *modus operandi* of the interdiction operation:

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.⁷⁵

Article 110(1) lists a very limitative series of circumstances under which, in time of peace, warships are competent to visit private ships on the high seas⁷⁶: interference is justified 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). Under Article 110(2) interference consists (only) in stopping, boarding and searching private ships 'in the cases provided for in paragraph 1'.⁷⁷ It has also to be noted that warships are authorized to exercise the right of visit only when the private ship is *reasonably* suspected of being engaged in some proscribed activity. Authors seem to converge on the view that an appropriate 'reasonable ground' standard lies somewhere between mere suspicion and actual knowledge of an infringement.⁷⁸

It is noticeable that terrorism is not expressly listed in paragraph (1) of Article 110. Therefore, it could be argued, *prima facie* and unless a treaty relationship authorises interference, that warships are not allowed to interdict a ship flying the flag of another State when they merely suspect it of being engaged in activities that represent a terrorist threat (eg the ship is transporting weapons or people to further terrorist aims). *Secunda facie*, nevertheless,

⁷⁰ For a detailed analysis of the right of self-defence, readers can consult, *inter alia*, Corthay, *La lutte contre le terrorisme international*, above n 52; Ruys, above n 59; Stanimir A Alexandrov, *Self-Defense Against the Use of Force in International Law* (Kluwer Law International, 1996); Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011).

⁷¹ See above nn 43-55 and accompanying text.

⁷² See also 1958 *Convention* art 22. The right of visit also applies to the exclusive economic zones, see *UNCLOS* arts 56, 58 and 60.

⁷³ Papastavridis, *Interception of Vessels*, above n 38, 66.

⁷⁴ *UNCLOS* art 110.

⁷⁵ *Ibid* art 110(2).

⁷⁶ According to *ibid* arts 95 and 96, public ships (ie warships or ships used only on government noncommercial service) 'have complete immunity from the jurisdiction of any State other than the flag State'.

⁷⁷ *Ibid* art 110 (2).

⁷⁸ See, eg, Reuland, above n 26, 1172; Papastavridis, *Interception of Vessels*, above n 38, 62; Ximena Hinrichs, 'Measures against Smuggling of Migrants at Sea: A Law of the Sea Related Perspective' (2003) 36(2) *Revue Belge de Droit International* 413, 434.

it seems reasonable to suggest that Article 110(1) of the *LOS Convention* could in some way lead a warship to interfere against a foreign ship that represents a terrorist threat. In such cases, the interference is contingent upon the existence, first and foremost, of a reasonable suspicion that the ship is engaged in one of the activities listed in paragraph (1) of Article 110 or has an uncertain status as per to the same paragraph.

A first scenario – the ‘we did not know’ case – is when Article 110 *incidentally* leads warships to interfere against vessels engaged in terrorist activities.⁷⁹ Here, the right of visit works like an unwitting pass that allows the warship to implement counter-terrorist measures on the high seas. This could happen when, once visiting a 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) of Article 110(1), evidence of proscribed terrorist activity is discovered by chance. For example, crews of a warship visit a ship that ‘sails under the flags of two or more States, using them according to convenience’,⁸⁰ or a ship that is ‘not flying a national flag or bearing equivalent markings identifying its nationality’⁸¹ and, when searching on board the interfered ship, the crews detect some forms of preparation for a terrorist attack (eg explosive devices ready to be activated and maps with location of targets to be destroyed).

A second scenario – the ‘we know’ case – is when Article 110 provides for a legal ground to embark on a board and search operation on a vessel reasonably known to be engaged in terrorist activities. This was the case with the interdiction of the *So San* conducted in the context of counterterrorism Operation *Enduring Freedom*. On 9 December 2002, on the high seas, off the coast of Yemen, two CTF 150 Spanish Navy vessels intercepted and boarded the *So San*, a North Korean cargo ship suspected of carrying illicit weapons. It appeared that the US intelligence services knew of the cargo several weeks before the operation by the Spanish Navy but were searching for a legal justification to board and search the *So San* before triggering the naval intervention. When it was noticed that the cargo ship was not flying a flag on the high seas, and that no ship was registered under the name ‘*So San*’, the Spanish Navy boarded the vessel on the grounds that it was without nationality.⁸² When searching, the boarding crews found Scud missiles, highly explosive warheads, barrels of chemicals, and tanks of rocket fuel hidden under sacks of dry cement.⁸³ 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.⁸⁴

It should be recalled, finally, that Article 110 of the *LOS Convention* provides a legal basis for only stopping, boarding and searching vessels under specific and limitative circumstances listed in paragraph (1). Article 110 does not expressly authorise interfering States to adopt subsequent interdiction measures such as seizing shipments. Additional authority to bring the boarded vessel into account (eg seizing, detaining) is to be found. This has been illustrated in the *So San* incident. Shortly after the Spanish Navy had turned over the *So San* to the US Navy, the vessel was allowed to continue on to Yemen with its cargo. The reason was that the shipment of missiles to that country was not prohibited under international law, or, said otherwise, because its seizure was not authorised under any legal authority.⁸⁵ As the White House spokesperson explained: ‘While there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen.’⁸⁶

⁷⁹ See also Murdoch, above n 43, 310.

⁸⁰ *UNCLOS* art 92(2).

⁸¹ *Ibid* art 110(1)(d); Nandan, Rosenne and Grandy, above n 26, 245.

⁸² Angelos Syrigos, ‘Developments on the Interdiction of Vessels on the High Seas’ in Anastasia Strati, Maria Gavouneli and Nikos Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea* (Martinus Nijhoff, 2006) 149, 184-5; Joel A Doolin, ‘The Proliferation Security Initiative: Cornerstone of a New International Norm’ (2006) 59(2) *Naval War College Review* 29, 29-31; Thom Shanker, ‘Threats and Responses: Arms Smuggling; Scud Missiles Found on Ship of North Korea’, *The New York Times* (New York), 11 December 2002, 1.

⁸³ David E Sanger and Thom Shanker, ‘Reluctant US Gives Assent for Missiles to Go to Yemen’, *The New York Times* (New York), 12 December 2002, 1.

⁸⁴ Barry, above n 67, 299-300.

⁸⁵ The journey of the missiles could have been definitely stopped if there was a resolution of the Security Council establishing sanctions on the supply of WMD to Yemen. See Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 195.

⁸⁶ Ari Fleischer, White House Press Secretary (Press Briefing, 11 December 2002)

<<http://www.presidency.ucsb.edu/ws/?pid=47463>>. It is often said that this incident lead to the establishment by the United States of the Proliferation Security Initiative (PSI) in 2003. The PSI is well explained in the 2007 US *Commander's Handbook on the Law of Naval Operations*: ‘PSI is a global effort that aims to stop shipments of WMD, their delivery systems, and related materials worldwide. The goal of PSI is to establish a more dynamic, creative, and proactive approach to preventing proliferation to or from nation States and non-State actors of proliferation concern. This approach includes at-sea interdiction by committed nations acting in support of PSI. As such, the PSI is a set of activities, not a formal treaty-based organization. It is best understood as a set of partnerships that establishes the basis for cooperation on specific activities, when the need arises. It does not create formal “obligations” for participating states, but does represent a political commitment to establish “best practices” to stop proliferation-related shipments. PSI seeks to use existing national and

3.2 Consent conferred by other Treaties

Article 110(1) of the *LOS Convention* provides that ‘acts of interference’ may also ‘derive from powers conferred by treaty’.⁸⁷ This means that some international treaties, other than the *LOS Convention*, permit interference against foreign flagged vessels in circumstances other than those specified in sub-paragraphs (a) to (e) of Article 110. In the last twenty years, international, regional and bilateral treaties have been signed in response to concerns regarding terrorism and/or the proliferation of WMD and related materials in the maritime domain. 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’.⁸⁸ Indeed, all these treaties establish express and/or implied consent regimes designed to authorize a treaty member to interdict another treaty member’s ship on the high seas when an offence set forth in the said treaty has been, is being or is about to be committed. At the same time, however, it should not be ignored that these treaties also provide some provisions that might significantly slow down maritime interdiction operations and therefore weaken counter-terrorism efforts.

At the multilateral level, it is worth mentioning the existence of the *2005 SUA Protocol*. This treaty imports and expands the offences specified in the 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*.⁸⁹ In general, Articles 3, 3bis, 3ter and 3quarter of the *2005 SUA Protocol* 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 materials or terrorist fugitives to the targeting of a ship in a terrorist attack.⁹⁰ In particular, Article 3bis(1)(b) contains counter-proliferation offenses (eg transport on a ship of any explosive or other WMD, such as biological, chemical or nuclear weapons, or related materials, equipment, or software). Article 3bis(1)(b) is of particular interest because it opens the door to maritime interdiction operations against vessels suspected of ‘unlawfully and intentionally’ trafficking WMD materials, be it for terrorist purposes or not, whilst *a contrario* no provision in the *Non-Proliferation Treaty*,⁹¹ the *Biological Weapons Convention*,⁹² or the *Chemical Weapons Convention*⁹³ provides clear legal basis in that regard.⁹⁴

Concerning the conduct of maritime interdiction operations, when a State Party suspects a ship of being involved in the commission of an offence set forth in the *2005 SUA Protocol*, it shall first request that the flag State confirm the claim of nationality.⁹⁵ As per paragraph 2 of Article 8bis, each request shall respect certain constraints, like for example to contain the name of the suspect ship, the IMO ship identification number, and port of registry. 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 offense set forth in article 3, 3bis, 3ter or 3quarter has been, is being or is about to be committed.⁹⁶

international legal authorities for such interdictions. In many cases, such legal authority will be found in a bilateral agreement. In the event that no bilateral agreement exists, the PSI statement of interdiction principles urges PSI participants and “all States concerned with this threat (PSI activity) to international peace and security” to “seriously consider providing consent under appropriate circumstances 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 that may be identified by such States.” US Navy, US Marine Corps and US Coast Guard, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M (July 2007) 4-8 s 4.4.5 (‘US Commander’s Handbook’).

⁸⁷ UNCLOS art 110(1).

⁸⁸ Klein, above n 85, 190.

⁸⁹ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992).

⁹⁰ *2005 SUA Protocol* arts 3, 3bis, 3ter, 3quarter. For an overview of the *mens rea* elements contained in art 3, see James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff, 2013) 828-30.

⁹¹ *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

⁹² *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) Weapons (Biological) and Toxin Weapons and on Their Destruction*, concluded 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975).

⁹³ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, concluded 3 September 1992, 1974 UNTS 45 (entered into force 29 April 1997).

⁹⁴ See Kwast, *Maritime Interdiction*, above n 35, 23.

⁹⁵ *2005 SUA Protocol* art 8bis(5)(a).

⁹⁶ *Ibid* art 8bis(5)(b).

It is important to mention that in such 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.⁹⁷ If the flag State grants the request, it may place conditions on its approval, thus controlling how the boarding is conducted.⁹⁸

The *2005 SUA Protocol* also provides an implied consent regime. The flag State can indeed notify the IMO Secretary-General in advance that it allows authorization to board and search a suspected ship flying its flag. 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.⁹⁹

Article 8bis(5)(d) is very similar. The only difference lies in the fact that the notification made to the IMO Secretary-General limits the authorization to board and search to the case where ‘there is no response from the first Party [the flag State] within four hours of acknowledgment of receipt of a request to confirm nationality’.¹⁰⁰ It has to be noted that the notification made to the IMO Secretary-General can be withdrawn at any time.¹⁰¹

Beside board and search measures, the requesting Party is also allowed to conduct detention under specific conditions. Indeed, Article 8bis(6) provides:

When evidence of conduct described in articles 3, 3bis, 3ter or 3quater is found as the result of any boarding conducted pursuant to this article, the flag State may authorize the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag State.¹⁰²

Pursuant to Article 8bis(8), the flag State may also, ‘subject to its constitution and laws, consent to the exercise of jurisdiction by another State’.¹⁰³ Such an exercise of jurisdiction includes ‘seizure, forfeiture, arrest and prosecution’ over ‘a detained ship, cargo or other items and persons on board’.¹⁰⁴ As explained before, however, not all of these measures are included in the concept of maritime interdiction.¹⁰⁵

At the regional level, Member States of the Caribbean Community signed in 2008 the *CARICOM Maritime and Airspace Security Cooperation Agreement* (‘*CARICOM Agreement*’).¹⁰⁶ The objective of the *CARICOM Agreement* is mainly to ‘promote cooperation among States Parties to enable them to conduct ... law enforcement operations’ that relate to, *inter alia*, combating terrorism.¹⁰⁷ Like the *2005 SUA Protocol*, the *CARICOM Agreement* sets forth an express and an implied consent regime. Article IX(1)(b)(i) and (ii) provides respectively that, when the claim of nationality is verified, the requesting State Party may request the flag State to ‘authorise the boarding and search of the suspected vessel, cargo and the persons found on board’¹⁰⁸, and

if evidence of any activity likely to compromise the security of the Region or of any State Party is found, authorize ... the requesting State Party to detain the vessel, cargo and persons on board pending instructions from the competent authority of the requested State Party...¹⁰⁹

With regard to the implied consent regime, Article IX(4)(b) provides that ‘[w]here there is no response from the requested State Party within two (2) hours of its receipt of the request [to verify the claim of nationality]’,

⁹⁷ See *ibid* art 8bis(5)(c).

⁹⁸ See *ibid* art 8bis(7).

⁹⁹ *Ibid* art 8bis(5)(e).

¹⁰⁰ *Ibid* art 8bis(5)(d).

¹⁰¹ Kraska and Pedrozo, above n 90, 840.

¹⁰² *2005 SUA Protocol* art 8bis(6).

¹⁰³ *Ibid* art 8bis(8).

¹⁰⁴ *Ibid*.

¹⁰⁵ See above nn 32-7 and accompanying text.

¹⁰⁶ See above n 33.

¹⁰⁷ See *CARICOM Agreement* arts II(1)(a) and II(2)(b).

¹⁰⁸ *Ibid* art IX(1)(b)(i).

¹⁰⁹ *Ibid* art IX(1)(b)(ii).

the requesting State Party shall be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching the vessel to determine if it is engaged in any activity likely to compromise the security of the Region or of any State Party.¹¹⁰

In this case also, the requesting State Party 'may detain the vessel, cargo, and persons on board pending expeditious disposition instructions from the other State Party' when 'evidence of any activity likely to compromise the security of the Region or of any State Party is found'.¹¹¹

Some provisions of the *CARICOM Agreement*, however, negatively affect the effectiveness of counter-terrorism efforts. Similarly to the *2005 SUA Protocol*, some provisions impose time-consuming constraints. This is the case, for example, of the requests for verification of nationality of a suspected vessel, before the actual boarding and search. Article V(3) provides that if the requests are conveyed orally, they shall later be confirmed by written communication which contains specific indications.¹¹² Another dangerous obstacle to effective counter-terrorism relates to the power of the flag State. Article IX(2) provides that 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.¹¹³

Finally, at the bilateral level 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).¹¹⁴ The agreements establish authority to board foreign vessels suspected of carrying illicit shipments of WMD and related materials. In general, their rules governing the carrying out of maritime interdiction operations are similar to those existing in the *2005 SUA Protocol* and the *CARICOM Agreement*. Some of these ship boarding agreements establish only an express consent regime,¹¹⁵ while others set forth an express and an implied consent one.¹¹⁶ As well, some provisions authorize the requesting Party to detain or control vessels where evidence of proliferation is found, pending instructions from the requested Party.¹¹⁷ Finally, some provisions – notably those related to Contents of Requests¹¹⁸ and Responding to Requests¹¹⁹ – also negatively affect counter-terrorism efforts by limiting how quickly an intervention onboard the foreign ship may occur.

3.3 Ad hoc Consent from the Flag State

Another legal ground used to justify maritime interdiction operations is the *ad hoc* consent given by the flag State to the interfering State. Consent is a secondary rule of State responsibility,¹²⁰ ie a circumstance precluding the

¹¹⁰ Ibid art IX(4)(b). Here also, pending instructions from the flag State, the Requesting Party 'may detain the vessel, cargo, and persons on board': at art IX(5).

¹¹¹ Ibid art IX(5). See also art XI(2) with regard to seizure, forfeiture, arrest, and prosecution.

¹¹² See ibid art V(3).

¹¹³ See ibid art IX(2).

¹¹⁴ Most of 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 on the website of the US Department of State <<https://2009-2017.state.gov/t/isn/trty/index.htm>>.

¹¹⁵ See, eg, *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 (United States – Cyprus)*, signed 25 July 2005 (entered into force 12 January 2006) art 4 <<https://2009-2017.state.gov/t/isn/trty/50274.htm>>.

¹¹⁶ See, eg, *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 Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (United States – Antigua and Barbuda)*, signed 26 April 2010 (entered into force 27 September 2010) art 4 <<https://www.state.gov/documents/organization/154075.pdf>>.

¹¹⁷ See, eg, *Agreement between the Government of the United States of America and the Government of Malta concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (United States – Malta)*, signed 15 March 2007 (entered into force 19 December 2007) art 5(b)(ii) <<https://www.state.gov/t/isn/trty/81883.htm>>; *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 (United States – Belize)*, signed 4 August 2005 (entered into force 19 October 2005) 4(b)(ii) ('US-Belize Agreement') <<https://www.state.gov/t/isn/trty/50809.htm>>. Note that the US-Malta agreement uses the term 'detain' and the US-Belize agreement uses the term 'control'.

¹¹⁸ See, eg, *US-Belize Agreement* art 4(2).

¹¹⁹ See, eg, ibid art 4(3)(a).

¹²⁰ Some authors hold the view that consent should not be seen as an exception to the primary rule, but as a constituent part of the primary rule. See, eg, 'Second report on State responsibility, by Mr James Crawford, Special Rapporteur' [1999] II(1) *Yearbook of the International Law Commission* 3, 63[242]; Natalino Ronzitti, *Rescuing Nationals Abroad through Military*

wrongfulness of an act. Indeed, Article 20 of the *Articles on Responsibility of States for Internationally Wrongful Acts* ('*Articles on State Responsibility*') provides:

[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.¹²¹

As reflected in Article 20, consent is justified only if it is valid. The International Law Commission has identified several criteria that consent must fulfil to be valid. Firstly, consent must be internationally attributable to a State, ie 'it must emanate from an organ whose will is deemed, at the international level, to be the will of the State'.¹²² Secondly, consent must be given prior to the commission of the act.¹²³ Thirdly, consent must be given freely, ie 'consent must not be vitiated by 'defects' such as error, fraud, corruption or coercion'.¹²⁴ Fourthly, consent must be clearly established and not presumed.¹²⁵ In addition, it should be noted that a particular act, which otherwise would have been considered as a breach of an international obligation, is lawful only if conducted 'within the limits which the State expressing the consent intends with respect to its scope and duration'.¹²⁶

Some of the aforementioned criteria deserve further consideration. Firstly, from a theoretical or doctrinal point of view, the present writer would contend that the purpose of an *ad hoc* consent is to prevent *ex ante facto* an act from becoming unlawful rather than to annihilate or erase *ex post facto* the unlawful character of a wrongful act. The rationale why consent by the flag State should be seen as a circumstance excluding wrongfulness *ex ante facto* – and not *ex post facto* – could be explained as follows: it has been said *supra* that a valid consent has to be given *ex ante facto*; this implies that the maritime interdiction operation consented to does not constitute a violation of the principle of exclusivity of flag State jurisdiction when it is carried out; therefore, as that operation does not constitute any breach of an international obligation, no international wrongful act is perpetrated, and consequently no wrongfulness that consent can preclude *ex post facto* exists.¹²⁷

Another point to clarify concerns the question of who has sufficient authority to provide a valid consent to the implementation of a maritime interdiction operation: must consent emanate from the flag State, the ship's master, or from both of them? As identified by the International Law Commission, consent must emanate from a State.¹²⁸ In the context of maritime interdiction operations, it means that prior consent must be given by the flag State. This implies that even when consent to exercise law enforcement operations is granted by the master of the vessel, they still must be pre-authorised by the flag State too prior to their actual implementation. The reason why it is necessary to seek consent of the flag State can be explained by the fact that this is the flag State – and not, for instance, the ship's master – that has exclusive jurisdiction over its vessels.¹²⁹

In addition, it is sufficient that consent to interdict comes from the flag State only, rather than coming cumulatively from the flag State and another entity like the ship's master. This opinion is shared by the publicists. Murdoch, for instance, clearly stresses that '[f]lag State consent undoubtedly provides sufficient authority for another State to interdict one of the flag State's ships. There is no support for the proposition that international law requires the additional consent of a ship's master'.¹³⁰ Sufficient flag State-consent requirement is confirmed by UN Security Council's practice. For example, with regard to the purpose of preventing the proliferation of nuclear material to or from North Korea, the Security Council, in Resolution 1874 (2009), '[c]alls upon all Member States to inspect vessels, *with the consent of the flag State*, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer, or export of which is

Coercion and Intervention on Grounds of Humanity (Martinus Nijhoff, 1985) 88; Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (Martinus Nijhoff, 1993) 47; Corten, above n 46, 254; Théodore Christakis, Karine Mollard-Bannelier, '*Volenti non fit injuria*? Les effets du consentement à l'intervention militaire' (2004) 50 *Annuaire Français de Droit International* 111, 113.

¹²¹ *Responsibility of States for internationally wrongful acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex art 20 ('*State Responsibility*'). In this resolution, the General Assembly took note of the articles: at para 3.

¹²² 'Report of the International Law Commission on the work of its 31st session (14 May – 3 August 1979)' [1979] II(2) *Yearbook of the International Law Commission* 1, 113 [15].

¹²³ *Ibid* [16].

¹²⁴ *Ibid* 112 [12].

¹²⁵ *Ibid* [14].

¹²⁶ *Ibid* 113 [17].

¹²⁷ See 'Eighth report on State responsibility, by Mr Roberto Ago, Special Rapporteur. The internationally wrongful act of the State, source of international responsibility' [1979] II(1) *Yearbook of the International Law Commission* 3, 30 [55].

¹²⁸ See above n 122 and accompanying text.

¹²⁹ See Murdoch, above n 43, 309; Kwast, *Maritime Interdiction*, above n 35, 12.

¹³⁰ Murdoch, above n 43, 308. See also Kwast, *Maritime Interdiction*, above n 35, 12.

prohibited by' the present and previous Security Council resolutions (emphasis added).¹³¹ *In casu*, the Security Council does not call upon States to inspect vessels 'with the consent of the ship's master', or 'with the cumulative consent of the flag State and the ship's master'.

NATO members seem *a priori* to have adopted a more restrictive approach. Between 2001 and 2016, NATO forces of Operation *Active Endeavour* (OAE) – operation launched in response to the 9/11 terrorist attacks to help deter, defend, disrupt and protect against terrorist activity in the Mediterranean Sea – boarded nearly two hundreds vessels.¹³² In April 2003, OAE's rules of engagement were strengthened to include *compliant boarding* of suspicious vessels.¹³³ For NATO, compliant boarding means that '[b]oarding takes place only with the compliance of the captain of the ship and the flag state, in accordance with international law'.¹³⁴ NATO also stresses that '[i]f the captain of the suspicious ship does not wish to be boarded, NATO forces will follow the vessel and alert the port in which it is coming to rest, whose authorities will have the legal right to examine it'.¹³⁵ However, apart from the circumstances where the flag State imposes that the maritime interdiction operation must also be authorised by the master of the vessel, it seems that compliant boarding finds no justification in law. The rationale behind compliant boarding is explained by practical and operational reasons rather than legal ones. With respect to Operation *Active Endeavour*, Murdoch explains:

If a ship's master is not compliant it is almost inevitable that force will be required to conduct the interdiction. As international law does not impose the additional need for the master's consent, it can be safely concluded that the NATO Council's unanimous decision to require it for OAE operations was not for legal reasons but as a corollary of the decision that force is not used to conduct OAE interdictions.¹³⁶

Finally, it can be observed that some warships conduct so-called 'consensual boardings'. This is notably the case of US warships engaged in Operation *Enduring Freedom*.¹³⁷ The 2007 US *Commander's Handbook on the Law of Naval Operations* ('US *Commander's Handbook*') describes consensual boarding as follows:

A consensual boarding is conducted at the invitation of the master (or person in charge) of a vessel that is not otherwise subject to the jurisdiction of the boarding officer. The plenary authority of the master over all activities related to the operation of his vessel while in international waters is well established in international law and includes the authority to allow anyone to come aboard his vessel as his guest, including foreign law enforcement officials.¹³⁸

Although such boardings may have some utility similar to the ones of maritime interdiction operations – eg obtaining and verifying vessel documents and cargo –, it is important to underline that a consensual boarding is different from a maritime interdiction operation. The former one is 'a routine interaction of mariners at sea'¹³⁹ and is not sufficient in itself to permit another State to conduct a maritime interdiction operation intended to exercise enforcement authority. In that regard, the US *Commander's Handbook* clearly states:

The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority. A consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction *per se*. The scope and duration of a consensual boarding may be subject to conditions imposed by the master and may be terminated by the master at his discretion.¹⁴⁰

¹³¹ SC Res 1874, UN SCOR, 6141st mtg, UN Doc S/RES/1874 (12 June 2009) para 12. Similar wording is used with regard to the enforcement of sanctions against Iran, see SC Res 1929, UN SCOR, 6335th mtg, UN Doc S/RES/1929 (9 June 2010) para 15. See also SC Res 2240, UN SCOR, 7531st mtg, UN Doc S/RES/2240 (9 October 2015) para 6, and SC Res 2312, UN SCOR, 7783rd mtg, UN Doc S/RES/2312 (6 October 2016) para 6 relating to the inspection of vessels suspected of being used by organized criminal enterprises for migrant smuggling or human trafficking from Libya.

¹³² Operation *Active Endeavour* (27 October 2016) North Atlantic Treaty Organization <http://www.nato.int/cps/eu/natohq/topics_7932.htm>.

¹³³ Lord Jopling (General Rapporteur), 'Maritime Security: NATO and EU Roles and Co-ordination' (Committee Report No 207 DCS 10 E BIS, NATO Parliamentary Assembly, 2010) [30] <<http://www.nato-pa.int/Default.asp?SHORTCUT=2087>>.

¹³⁴ Frank Cook (General Rapporteur), 'NATO Operations: Current Priorities and Lessons Learned' (Committee Report No 158 DSC 08 E BIS, NATO Parliamentary Assembly, 2008) [105] <<http://www.nato-pa.int/Default.asp?SHORTCUT=1476>>.

¹³⁵ Ibid.

¹³⁶ Murdoch, above n 43, 308.

¹³⁷ See *ibid*. This is also the case of the Royal Canadian Navy. With respect to the cooperative boarding of the *MV Byblos* by a Royal Canadian Navy frigate in 2016, see *Canadian frigate boards merchant vessel in the Mediterranean* (13 September 2016) Navy Today <<http://navaltoday.com/2016/09/13/canadian-frigate-boards-merchant-vessel-in-the-mediterranean/>>.

¹³⁸ US *Commander's Handbook*, above n 86, 3-12 – 3-13 s 3.11.2.5.2.

¹³⁹ Murdoch, above n 43, 308.

¹⁴⁰ US *Commander's Handbook*, above n 86, 3-12 – 3-13 s 3.11.2.5.2.

3.4 State of Necessity

State of necessity is another ground that might be invoked to justify maritime interdiction operations on the high seas against terrorists. In the 2001 Commentary on the *Articles on State Responsibility*, the International Law Commission's Special Rapporteur, James Crawford, explains that

[t]he term 'necessity' (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency.¹⁴¹

Like consent, state of necessity is here comprehended as a circumstance precluding the wrongfulness of an otherwise internationally wrongful act. This circumstance, recognized by customary international law,¹⁴² has been codified by Article 25 of the *Articles on State Responsibility* which provides:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) the international obligation in question excludes the possibility of invoking necessity; or
 - (b) the State has contributed to the situation of necessity.¹⁴³

Article 25(1) lays down 'strictly defined conditions which must be cumulatively satisfied'.¹⁴⁴ In order to understand how, in the context of the fight against terrorism, maritime interdiction operations might be justified by the plea of necessity, it is important to clarify the meaning of these conditions. Firstly, the excuse of necessity can only be invoked to safeguard an 'essential interest'. As stated by Ago in 1980, the extent to which a given interest is essential 'depends on the totality of the conditions in which a State finds itself in a variety of specific situations; it should therefore be appraised in relation to the particular case in which such an interest is involved, and not predetermined in the abstract'.¹⁴⁵ That being said, based on the analysis of State practice, judicial decisions and the work of publicists, the International Law Commission has nevertheless proposed some broad categories of essential interests, such as the preservation of the very existence of the State, its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of its population, and the safeguard of the environment.¹⁴⁶ With regard to economic and public interests, in the *M/V Saiga (No. 2)* case the Tribunal for the Law of the Sea has not excluded the possibility that maximizing tax revenue – *in casu* from the sale by Guinea of gas oil to fishing vessels – could be deemed to be an essential interest for a developing country.¹⁴⁷ Concerning the protection of the environment in general, it is also interesting to note that in the *Gabčíkovo-Nagymaros* case the Court stressed 'the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind', and *in casu* the Court expressed 'no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment ... related to an "essential interest" of that State'.¹⁴⁸ As it can be seen in the non-exhaustive list mentioned above, the essential interest protected by the excuse of necessity is not limited to the existence of the State or to its national interest narrowly defined.¹⁴⁹ Indeed, necessity is a cause that can also be invoked to justify the violation of a rule in order to safeguard essential interests of the international community as a whole as well.¹⁵⁰

¹⁴¹ James Crawford, 'Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 2 July – 10 August 2001)' [2001] II(2) *Yearbook of the International Law Commission* 1,80 [1] ('Crawford, Commentary').

¹⁴² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7, 40 [51].

¹⁴³ *State Responsibility* art 25.

¹⁴⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7, 40 [51].

¹⁴⁵ Ago, *Addendum*, above n 69, 19 [12]. See also Crawford, *Commentary*, above n 141, 83 [15].

¹⁴⁶ Ago, *Addendum*, above n 69, 14 [2]; Crawford, *Commentary*, above n 141, 83 [14].

¹⁴⁷ *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea) (Judgment)* ITLOS Case No 2 (1999) 38 ILM 1323, 1352 [135].

¹⁴⁸ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7, 41 [53].

¹⁴⁹ Ago, *Addendum*, above 69, 19 [12]. Ian Johnstone, 'The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism' (2005) 43(2) *Columbia Journal of Transnational Law*, 337, 343 n 11.

¹⁵⁰ Crawford, *Commentary*, above n 141, 83 [15]. See also Andreas Laursen, 'The Use of Force and (the State of) Necessity' (2004) 37(2) *Vanderbilt Journal of Transnational Law* 485, at 503-4. On the concept of 'international community as a

Secondly, the essential interest to be safeguarded has to be threatened by ‘a grave and imminent peril’, ie by a risk objectively established, grave for the essential interest at stake, and imminent in the sense of either immediate or certain and inevitable. In a now famous paragraph of the *Gabčíkovo-Nagymaros* judgment, the International Court of Justice has explained the concept of ‘grave and imminent peril’ as follows:

The word ‘peril’ certainly evokes the idea of ‘risk’: that is precisely what distinguishes ‘peril’ from material damage. But a state of necessity could not exist without a ‘peril’ duly established at the relevant point in time: the mere apprehension of a possible ‘peril’ could not suffice in that respect. It could moreover hardly be otherwise when the ‘peril’ constituting the state of necessity has at the same time to be ‘grave’ and ‘imminent’. ‘Imminence’ is synonymous with ‘immediacy’ or ‘proximity’ and goes far beyond the concept of ‘possibility’. As the International Law Commission emphasized in its commentary, the ‘extremely grave and imminent’ peril must ‘have been a threat to the interest at the actual time’ (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.¹⁵¹

Thirdly, the course of action not in conformity with an international obligation must be ‘the only way’ available for averting the grave and imminent peril.¹⁵² Crawford indicates that the excuse of necessity is excluded ‘if there are other (otherwise lawful) means available, even if they may be more costly or less convenient’.¹⁵³ He also stresses that ‘[t]he word “way” in paragraph 1 (a) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations’, and that ‘any conduct going beyond what is strictly necessary for the purpose will not be covered’.¹⁵⁴

Fourthly and finally, the act taken by the entity invoking a state of necessity must ‘not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole’.¹⁵⁵ In other words, the threatened essential interest protected by an act justified by a state of necessity must be superior to the interest protected by the international obligation breached by the acting State or States.¹⁵⁶ Crawford explains that ‘the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective’.¹⁵⁷

International law also establishes limits to the invocation of a state of necessity. As provided in paragraph (2) of Article 25 of the *Articles on State Responsibility*, even if the above-mentioned cumulative conditions are fulfilled the plea of necessity is unavailable where the rule from which derogation is sought precludes its invocation, or where the State invoking necessity has contributed to the situation of necessity. In addition, Article 26 of the *Articles on State Responsibility* excludes the possibility of safeguarding an essential interest threatened by a grave and imminent peril by an act contrary to a peremptory norm. On this last point, Crawford states that ‘[t]hose peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination’.¹⁵⁸ None of these prohibitions are infringed by maritime interdiction operations as defined earlier.

In the maritime context, state of necessity has sometimes been invoked.¹⁵⁹ Suffice to recall the arrest on 9 March 1995 on the high seas of the Spanish fishing ship, the *Estai*, by Canadian officials. Canada asserted that ‘the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen’.¹⁶⁰ Spain protested and brought the case before the Court. The merits of the case, however, were not discussed in detail as the Court held that it had no jurisdiction over the case.¹⁶¹

With respect to the fight against terrorism, State practice does not seem to offer actual examples of maritime interdiction operations expressly justified by a state of necessity. Failing that, in a world where the horror of reality

whole’, see James Crawford, ‘Responsibility to the International Community as a Whole’ (2001) 8(2) *Indiana Journal of Global Legal Studies* 303.

¹⁵¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7, 42 [54].

¹⁵² Ago, *Addendum*, above n 69, 20 [14]; Crawford, *Commentary*, above n 141, 83 [15].

¹⁵³ Crawford, *Commentary*, above n 141, 83 [15].

¹⁵⁴ *Ibid.*

¹⁵⁵ *State Responsibility* art 25(1)(b).

¹⁵⁶ Laursen, above n 150, 505.

¹⁵⁷ Crawford, *Commentary*, above n 141, 83-4 [17].

¹⁵⁸ *Ibid* 85 [5] (commentary on art 26).

¹⁵⁹ See, eg, Ago, *Addendum*, 22 [21] et seq.

¹⁶⁰ *Fisheries Jurisdiction (Spain v Canada) (Jurisdiction of the Court, Judgment)* [1998] ICJ Rep 432, 443 [20].

¹⁶¹ *Ibid*, 468 [89].

sometimes surpasses fiction, plausible scenarios can still be contemplated. In the opinion of the present writer, state of necessity could be invoked by a State that carries out maritime interdiction operations on the high seas against, for example, a vessel controlled by terrorists who are determined to ram it into an oil tanker or an offshore platform in order to cause major pollution on the coasts of the interfering State; or against a vessel seized by terrorists with the purpose of bringing it into the busy canal of the interfering State – like the Suez Canal – where the vessel will be sunk to disrupt maritime traffic and severely devastate the economy of the interfering State which collects significant revenues from ships passing through its canal; or against a vessel carrying WMD materials destined for diehard terrorists who have carefully planned an unconventional attack in the capital city of the intervening State. For a state of necessity to be rightly invoked by the interfering State, the conditions described previously must be fulfilled. So, the above described circumstances – ie where terrorists are poised to cause major pollution, severely disrupt the economy of the country, or use WMDs – must constitute a grave and imminent peril that threatens an essential interest of the interfering State: this condition is fulfilled as the preservation of its environment, or the survival of its economy and population, are essential interests imminently threatened by terrorists. Then, the danger must be objectively established: this is the case when intelligence services provide accurate and timely information. In addition, the maritime interdiction operation must be the only way available: this happens when, for example, the flag State is unwilling or unable to stop its vessel, or the Security Council is not able to swiftly adopt a resolution authorizing immediate action against the said-vessel before the peril becomes a material damage. Last but not least, the essential interest of the flag State must be inferior to the essential interest of the interfering State: this condition is also fulfilled in the sense that ensuring respect for the flag State's right to freedom of navigation and to exclusive jurisdiction over ships sailing its flag is an interest inferior to the one of protecting the interfering State's territory and population from massive pollution or lethal attack.

3.5 UN Security Council Authorization to Interdict

Another legal ground that might be invoked to justify maritime interdiction operations on the high seas lies in the powers that the UN Security Council has to authorize such operations through the adoption of resolutions. The following paragraphs analyze the constitutional basis of these operations.

Members of the United Nations have conferred on the Security Council 'primary responsibility for the maintenance of international peace and security'.¹⁶² Such a responsibility entails the carrying out of duties. The specific powers granted to the Security Council for the discharge of its duties are laid down in, *inter alia*, Chapter VII of the *UN Charter*.¹⁶³

Chapter VII starts with Article 39 that provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.¹⁶⁴

This article is the cornerstone of the system of collective security established in 1945. To some extent it contains a summary of the powers granted to the Security Council and necessary for the implementation of the mechanism of collective security: first, to determine the existence of a specific situation, and then, to decide through the adoption of resolutions what measures to take in order to maintain or restore international peace and security. According to Article 25 of the *UN Charter*, UN Member States have the obligation to carry out the decisions of the Security Council, and pursuant to Article 103 such an obligation to respect the decisions of the Council prevails over 'any other international agreement'¹⁶⁵, which one obviously includes the *LOS Convention*.

With regard to the power of determination, an in-depth analysis of the Security Council's practice reveals that since the beginning of the 1990s the Council has been qualifying terrorism as a threat to the peace. More exactly, since 1992 the Security Council qualifies the acts of 'international terrorism' as threats to the international peace and security.¹⁶⁶ Then, from 2003 onwards, the Council continuously stresses that 'terrorism', in all its forms and

¹⁶² *UN Charter* art 24(1).

¹⁶³ *Ibid* art 24(2).

¹⁶⁴ *Ibid* art 39.

¹⁶⁵ *Ibid* art 103.

¹⁶⁶ See SC Res 731, UN SCOR, 3033rd mtg, UN Doc S/RES/731 (21 January 1992) related to the Lockerbie bombing; SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001); SC Res 1377, UN SCOR, 4413th mtg, UN Doc S/RES/1377 (12 November 2001); SC Res 1438, UN SCOR, 4624th mtg, UN Doc S/RES/1438 (14 October 2002) related to Bali bombings; SC Res 1440, UN SCOR, 4632nd mtg, UN Doc S/RES/1440 (24 October 2002) related to the

manifestation, – and no longer merely ‘international’ terrorism – constitutes one of the most serious threats to international peace and security.¹⁶⁷

Then, according to Article 39, the second step in the implementation of the mechanism of collective security is for the Security Council to ‘decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’.¹⁶⁸ Article 41 refers to ‘measures not involving the use of armed force’.¹⁶⁹ The Security Council may call upon UN State Members to apply such measures which ‘may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations’.¹⁷⁰ This list is not exhaustive and can include other measures not involving the use of armed force. Should ‘measures provided for in Article 41 ... be inadequate or have proved to be inadequate’,¹⁷¹ Article 42 provides that the Security Council ‘may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security’.¹⁷² Article 42 also provides a non-exhaustive list of measures that ‘include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations’.¹⁷³

The wording of Article 42 – ‘may take such action’ – deserves some explanations which help understand the development, at the end of the Cold War, of a new Security Council’s practice consisting of authorizing States to use all necessary measures to restore or maintain international peace and security. The letter of Chapter VII does not envisage the establishment of a UN international army. Instead, as stressed in Articles 43 *et seq.*, ‘[a]ll Members of the United Nations ... undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities ... necessary for the purpose of maintaining international peace and security’.¹⁷⁴ These agreements shall be concluded between the Security Council and UN Members. Their aim is to govern the numbers and types of forces, their degree of readiness and general location and the nature of the facilities and assistance to be provided.¹⁷⁵ According to the original collective security scheme, the Security Council shall exercise strong command and control over the national troops made available to it. Indeed, assisted and advised by a Military Staff Committee, the Council shall determine the strength and degree of readiness of the contingents, their employment, plans for their combined action, the regulation of armaments and possible disarmament.¹⁷⁶

This original collective security scheme, however, has never been implemented as such. Due to political and ideological divergences, the special agreements mentioned under Article 43 have never been concluded, and without these agreements and multinational contingents under its command and control the Security Council has obviously not been able to, *strico sensu*, ‘take’ military action as may be necessary. Therefore, in order to be able to discharge its duties, the Security Council has progressively developed and implemented a new practice, in conformity with the spirit – and not with the letter – of the Chapter VII, a practice today accepted by the international community.¹⁷⁷ Indeed, especially since the end of the Cold War the Council started to authorize Member States or regional arrangements to use force in order to maintain or restore international peace and security. In doing so, the Security Council transferred or delegated to States some of its discretionary enforcement

hostage-taking terrorist attack in Moscow; SC Res 1450, UN SCOR, 4667th mtg, UN Doc S/RES/1450 (13 December 2002) related to the bombing at the *Paradise Hotel* in Kenya and the attempted missile attack on Arkia Israeli Airlines flight 582.

¹⁶⁷ See, eg, SC Res 1530, UN SCOR, 4923rd mtg, UN Doc S/RES/1530 (11 March 2004); SC Res 1611, UN SCOR, 5223rd mtg, UN Doc S/RES/1611 (7 July 2005); SC Res 1735, UN SCOR, 5609th mtg, UN Doc S/RES/1735 (22 December 2006); SC Res 1787, UN SCOR, 5795th mtg, UN Doc, S/RES/1787 (10 December 2007); SC Res 1805, UN SCOR, 5856th mtg, UN Doc, S/RES/1805 (20 March 2008); SC Res 1904, UN SCOR, 6247th mtg, UN Doc, S/RES/1904 (17 December 2009); SC Res 1963, UN SCOR, 6459th mtg, UN Doc, S/RES/1963 (20 December 2010); SC Res 1989, UN SCOR, 6557th mtg, UN Doc, S/RES/1989 (17 June 2011); SC Res 2083, UN SCOR, 6890th mtg, UN Doc, S/RES/2083 (17 December 2012); SC Res 2129, UN SCOR, 7086th mtg, UN Doc, S/RES/2129 (17 December 2013); SC Res 2133, UN SCOR, 7101st mtg, UN Doc, S/RES/2133 (27 January 2014); SC Res 2199, UN SCOR, 7379th mtg, UN Doc, S/RES/2199 (12 February 2015); SC Res 2309, UN SCOR, 7775th mtg, UN Doc, S/RES/2309 (22 September 2016); SC Res 2341, UN SCOR, 7882nd mtg, UN Doc, S/RES/2341 (13 February 2017).

¹⁶⁸ *UN Charter* art 39.

¹⁶⁹ *Ibid* art 41.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid* art 42.

¹⁷² *Ibid*.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid* art 43(1).

¹⁷⁵ *Ibid* arts 43(2) and 43(3).

¹⁷⁶ *Ibid* art 45 to 47.

¹⁷⁷ Robert Kolb, *Ius contra bellum*, Le droit international relatif au maintien de la paix (Helbing Lichtenhahn, 2003) 93. In the opinion of the present writer, the authority of the Security Council to authorize States use armed force is not founded on Article 42 but rather on the theory of implied powers, see Corthay, above n 52, 381-5.

powers under Chapter VII.¹⁷⁸ This process of delegation introduces an element of decentralization in the system of collective security: now States decide on a voluntary basis whether, to which degree and for how long, they will take the necessary measures called for by the Council.¹⁷⁹

The study of the Security Council's practice indicates that this political organ has several times adopted resolutions that authorize UN Member States to carry out naval interdiction operations. It is important to note, however, that these resolutions have a limited scope of application: the authorized operations have been generally deployed in a context of armed conflict, and they have been mainly authorized in order to enforce economic sanctions (eg arms, oil or charcoal embargoes) already imposed through previous resolutions.¹⁸⁰ Even though it has been abundantly stressed that terrorism constitutes one of the most serious threats to international peace and security, to the knowledge of the present writer the Security Council has never adopted a resolution that authorizes Member States to interdict, *anywhere on the high seas* in time of peace, vessels engaged directly or indirectly in terrorist activities. It has been suggested, for example, that Resolution 1373 (2001) – resolution adopted after the 9/11 terrorist attacks – authorizes States to forcibly interdict vessels transporting terrorists and goods designed to further acts of terrorism when their flag States are unwilling or unable to take the necessary measures according to the said resolution.¹⁸¹ Nevertheless, this statement has to be rejected on the basis that Resolution 1373 (2001) does not explicitly authorize such interdictions.¹⁸² The requirement of an explicit authorization – by opposition to a presumed one – granted by the Security Council *ex ante facto* is recognized by the publicists as a fundamental condition for making an authorization valid.¹⁸³ The reason is that the absence of such a requirement could lead to a multiplication of contested maritime interdictions, an aggravation of international tensions, and eventually the undermining of the system of collective security.

A rare, if not (yet) unique, example of UN Security Council resolutions, adopted to authorize the deployment of naval interdiction operations on the high seas to enforce economic sanctions and to combat terrorism as well, is Resolution 2292 (2016) related to the chaotic situation in Libya. Reaffirming that 'terrorism, in all forms and manifestations, constitutes one of the most serious threats to peace and security',¹⁸⁴ and 'expressing concern that the flow of foreign terrorist fighters to Libya can increase the intensity, duration and complexity of the conflict and pose a serious threat to their States of origin, transit, and travel',¹⁸⁵ as well as

*[e]xpressing concern that the situation in Libya is exacerbated by the smuggling of illegal arms and related materiel in violation of the arms embargo, underlining its concern at the allegations of violations of the arms embargo by sea, land, or air, and expressing further concern that such arms and related materiel are being used by terrorist groups operating in Libya, including by ISIL [Islamic State in Iraq and the Levant],*¹⁸⁶

the Security Council, acting under Chapter VII of the *UN Charter*,

[d]ecides, with a view to addressing the threat posed by unsecured arms and ammunitions in Libya and their proliferation, to authorize, in these exceptional and specific circumstances for a period of 12 months from the date of this resolution Member States, acting nationally or through regional organizations, with appropriate consultations with the GNA [Government of National Accord], in order to ensure strict implementation of the arms embargo on

¹⁷⁸ Danesh Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press, 2000) 13.

¹⁷⁹ Jochen A Frowein and Nico Krisch, 'Article 42' in Simma Bruno (ed), *The Charter of the United Nations, A Commentary* (Oxford University Press, 2nd ed, 2002), vol I, 749, 756.

¹⁸⁰ See, eg, SC Res 221, UN SCOR, 1277th mtg, UN Doc S/RES/221 (9 April 1966) on Southern Rhodesia; SC Res 665, UN SCOR, 2938th mtg, UN Doc S/RES/665 (25 August 1990) on Iraq; SC Res 787, UN SCOR, 3137th mtg, UN Doc S/RES/787 (16 November 1992) on the Former-Yugoslavia; SC Res 794, UN SCOR, 3145th mtg, UN Doc S/RES/794 (3 December 1992) and SC Res 2182, UN SCOR, 7286th mtg, UN Doc S/RES/2182 (24 October 2014) on Somalia; SC Res 875, UN SCOR, 3293rd mtg, UN Doc S/RES/875 (16 October 1993) on Haiti ; SC Res 1132, UN SCOR, 3822nd mtg, UN Doc S/RES/1132 (8 October 1997) on Sierra Leone ; SC Res 1973, UN SCOR, 6498th mtg, UN Doc S/RES/1973 (17 March 2011); SC Res 2146, 7142nd mtg, UN Doc S/RES/1973 (19 March 2014) and SC Res 2292, 7715th mtg, UN Doc S/RES/2292 (14 June 2016) on Libya.

¹⁸¹ Wolff Heintschel von Heinegg, 'The Legality of Maritime Interdiction Operations within the Framework of Operation Enduring Freedom' in Wybo P Heere (ed), *Terrorism and the Military, International Legal Implications* (TMC Asser Press, 2003) 43, 47-8.

¹⁸² See, eg, Murdoch, above n 43, 313; Klein, above n 85, 283.

¹⁸³ See Corthay, *La lutte contre le terrorisme international*, above n 52, 386-7, Linos-Alexandre Sicilianos, 'L'autorisation par la Conseil de Sécurité de recourir à la force : une tentative d'évaluation' (2002) 106(1) *Revue Générale de Droit International Public* 5, 47.

¹⁸⁴ SC Res 2292, UN SCOR, 7715th mtg, UN Doc S/RES/2292 (14 June 2016) Preamble para 16.

¹⁸⁵ Ibid Preamble para 5.

¹⁸⁶ Ibid Preamble para 7.

Libya, to inspect, without undue delay, on the high seas off the coast of Libya, vessels bound to or from Libya which they have reasonable grounds to believe are carrying arms or related materiel to or from Libya, directly or indirectly, in violation of [previous resolutions], provided that those Member States make good-faith efforts to first obtain the consent of the vessel's flag State prior to any inspections pursuant to this paragraph, and calls upon all flag States of above-mentioned vessels to cooperate with such inspections.¹⁸⁷

The convoluted text of the resolution needs careful attention. The statement 'provided that those Member States make good-faith efforts to first obtain the consent of the vessel's flag State prior to any inspections pursuant to this paragraph'¹⁸⁸ raises the question of whether authorized inspections can be carried out in case the consent of the flag State is not obtained. During their meeting at the Security Council, certain Member States – Russian Federation,¹⁸⁹ China,¹⁹⁰ Bolivarian Republic of Venezuela¹⁹¹ – stressed that inspections would not be allowed without the flag State's consent, whilst the majority of the other States present at the meeting did not comment this issue.¹⁹² The representative of Venezuela, for instance, stated:

In authorizing the interdiction of ships on the high seas suspected of transporting arms to be used by the Islamic State in Iraq and the Levant or Da'esh or other terrorist organizations in Libya, respect for international law must be upheld, which includes obtaining the consent of the vessel's flag State prior to any inspections.¹⁹³

A textual interpretation of the resolution leads, however, to a different conclusion. Paragraph 3 mentioned above does not impose on the interfering States an obligation to 'obtain' the consent of the vessel's flag State, but rather an obligation to 'make good-faith efforts' in order to obtain consent.¹⁹⁴ This paragraph imposes therefore an obligation of conduct and not an obligation of result with respect to the obtention of a consent. In other words, to be legal it is sufficient for the inspection referred to in paragraph 3 to be explicitly authorized by the Security Council. The reason is notably that flag State's consent and Security Council authorization are two distinct and independent derogations to the principle of exclusivity of flag State jurisdiction. To make the authorization for a naval operation conditional on the consent of the flag State would have very little meaning.

Yet, the requirement of a flag State's consent is not totally excluded from Resolution 2292 (2016). Indeed, it should be noted that the scope *ratione loci* and *ratione materiae* of the Security Council authorization to inspect vessels is very narrow. As affirmed by the Security Council in Paragraph 9 of the Resolution:

... the authorizations provided in this resolution apply only with respect to the smuggling of illegal arms and related materiel on the high seas off the coast of Libya and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, including the general principle of exclusive jurisdiction of a Flag State over its vessels on the high seas, with respect to any other situation, underscores in particular that this resolution shall not be considered as establishing customary international law.¹⁹⁵

So, maritime interdiction operations carried out in 'any other situation'¹⁹⁶ on the high seas, where explicit authorizations by the Security Council are not provided, must still find a solid legal ground in order to be lawful. Here, the consent of the flag State – a guiding principle of the law of the sea¹⁹⁷ – is of particular importance.

¹⁸⁷ Ibid para 3. On 12 June 2017, Resolution 2357 (2017) extended the authorizations set out in Resolution 2292 (2016) for a further 12 months. See SC Res 2357, UN SCOR, 7964th mtg, UN Doc S/RES/2357 (12 June 2017). In practice, on 1 May 2017, the German ship *Rhein*, engaged in European Union military operation *Sophia*, carried out an inspection on the vessel *El Mukthar*, flying a Libyan flag. The Lithuanian boarding team 'found several types of weapons, including Machine Guns, AK47 rifles, RPG bullets, RPG launchers, mortar grenades and ammunitions. All weapons were seized and then transferred on board the German ship to be checked, counted and then disposed of by military personnel...'. See European External Action Service, 'EUNAVFORMED operation SOPHIA seizes weapons on board a vessel in international waters' (Press releases, 2 May 2017) <https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/25373/eunavformed-operation-sophia-seizes-weapons-board-vessel-international-waters_en>.

¹⁸⁸ Ibid.

¹⁸⁹ UN SCOR, 7715th mtg, UN Doc S/PV.7715 (14 June 2016) 3.

¹⁹⁰ Ibid 4.

¹⁹¹ Ibid 5.

¹⁹² See, however the position of France: '... the document is well balanced. The Chapter VII authorization under the resolution is carefully set out. It would apply in very specific contexts and does not call into question the law of the sea, whose guiding principle remains the consent of the flag State.' At: ibid 7.

¹⁹³ Ibid 5.

¹⁹⁴ SC Res 2292, UN SCOR, 7715th mtg, UN Doc S/RES/2292 (14 June 2016) para 3.

¹⁹⁵ Ibid para 9.

¹⁹⁶ Ibid.

¹⁹⁷ See above n 192.

Finally, the question to know upon which articles of the Chapter VII – Article 41 or (the spirit of) Article 42 of the *UN Charter* – maritime interdictions are based deserved to be addressed. In Resolution 2292 (2016), the Security Council authorizes Member States conducting inspections pursuant to paragraph 3 ‘to use all measures commensurate to the specific circumstances to carry out such inspections’.¹⁹⁸ It is difficult to know whether the term ‘all measures’ refers to non-military enforcement measures (Article 41), military enforcement ones (Article 42), or to both of them. This difficulty is due to at least three reasons. Firstly, in the present resolution, like in many others,¹⁹⁹ the Council does not invoke either Article 41 or Article 42. Secondly, as already mentioned, both articles ‘are themselves open-ended, containing non-exhaustive lists of enforcement measures, and thus, leaving open the possibility to classify the maritime interdiction campaign among the unenumerated measures of either Article’.²⁰⁰ Thirdly, debates at the Security Council meetings offer no clear answers, and opinion of publicists is divided on the issue.²⁰¹

In the opinion of the present writer, however, a range of indicia would make a stronger case for Article 41 of the *UN Charter*.²⁰² Firstly, Article 42 refers to measures enforced through military action. These measures are in principle contrary to the principle prohibiting the use of armed force enshrined in Article 2(4) of the *UN Charter*.²⁰³ The force allowed to be used in this context may be likened to ‘extensive use of military hardware in order to engage and disable enemy forces’.²⁰⁴ In contrast, maritime interdiction operations, as they have been defined earlier – ie operations consisting in stopping, boarding, searching, and possibly seizing and temporarily detaining vessels, crews and cargoes – should rather be seen as law enforcement operations and not military enforcement ones.²⁰⁵ The forcible measures sometimes deployed during the carrying out of these maritime operations – eg firing across vessel’s bow, neutralizing hostile forces aboard – amount to maritime police measures intrinsically distinct from military measures governed by the *ius contra bellum*. *Per se*, police measures fit more comfortably within the measures of Article 41. That being said, nothing prevents robust naval operations, other than maritime interdiction operations, from being based upon (the spirit of) Article 42. Secondly, it is interesting to note the wording used by the Security Council in Resolution 1874 (2009) – resolution related to the enforcement of economic sanctions and arms embargo against the Democratic People’s Republic of Korea –, and in Resolution 1929 (2010) – resolution related to the enforcement of arms embargo and sanctions against Iran and certain Iranians. These two resolutions are not directly related to counter-terrorism and do not give explicit authorizations to inspect vessels. However, and this is the key point, when the Security Council in these two resolutions respectively ‘calls upon all Member States to inspect vessels’²⁰⁶ and ‘notes that States ... may request inspection of vessels’²⁰⁷ suspected of carrying prohibited items on the high seas, with the consent of the flag State, the Council expressly bases these measures of inspection upon Article 41 of the *UN Charter*.²⁰⁸

4 Conclusion

Maritime terrorism, like any form of terrorism, is a threat to international peace and security and as such it must be dealt with. The international legal framework provides a limited number of legal bases for maritime interdiction operations. This is only under strict and specific circumstances that the principle of exclusivity of flag State jurisdiction can be bent. The existence of such legal bases is already a good achievement, given the difficulty of

¹⁹⁸ SC Res 2292, UN SCOR, 7715th mtg, UN Doc S/RES/2292 (14 June 2016) paras 4 and 8.

¹⁹⁹ See, eg, above n 180.

²⁰⁰ George P Politakis, ‘UN-Mandated Naval Operations and the Notion of Pacific Blockade: Comments on some Recent Developments’ (1994) 6(2) *African Journal of International and Comparative Law* 173, 191.

²⁰¹ See, eg, *ibid* 191-8; Sarooshi, above n 178, 194-210 (see also authors cited by them).

²⁰² This is also the opinion of the US maritime doctrine. The US *Commander’s Handbook*, above n 86, 4-7 s 4.4.4.1.1, states: ‘One legal justification for maritime interception operations is authorization by the UN Security Council. Under Article 41 of the Charter of the United Nations the Security Council may authorize the “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication...” As such, the UN Security Council may authorize member nations to use naval forces to intercept vessels and possibly board, inspect, search, and seize them or their cargoes as necessary to maintain or restore international peace and security. On three separate occasions since 1990 the UN Security Council authorized States to halt shipping into and out of Iraq, Haiti, and the Federal Republic of Yugoslavia, respectively, to ensure strict implementation of other Security Council resolutions.’

²⁰³ See Joe Verhoeven, ‘Etats alliés ou Nations Unies? L’ONU face au conflit entre l’Irak et le Koweït’ (1990) 36 *Annuaire Français de Droit International*, 167, cited in Politakis, above n 200, 197.

²⁰⁴ Politakis, above n 200, 192.

²⁰⁵ See above nn 43-55 and accompanying text.

²⁰⁶ SC Res 1874, UN SCOR, 6141st mtg, UN Doc S/RES/1874 (12 June 2009) para 12.

²⁰⁷ SC Res 1929, UN SCOR, 6335th mtg, UN Doc S/RES/1929 (9 June 2010) para 15.

²⁰⁸ See SC Res 1874, UN SCOR, 6141st mtg, UN Doc S/RES/1874 (12 June 2009) Preamble para 10; SC Res 1929, UN SCOR, 6335th mtg, UN Doc S/RES/1929 (9 June 2010) Preamble para 24.

finding an appropriate balance between, on the one hand, the freedom of the high seas, including the freedom of navigation, and, on the other hand, the maintenance of order and security on the high seas.

Of course, the legal bases analyzed in this paper are not perfect and room for improvement exists. For instance, more ship boarding agreements, with fewer constraints for the requesting party, could be signed. To encourage States to do so, one way is to convince them that preventing and deterring maritime terrorism definitely serve all States and that, therefore, precedence must be given to common interests – eg maritime security and safety – over individual interests – eg free flow of goods by sea without stoppage.

Interdiction operations are not the only way to combat maritime terrorism. On the maritime domain, effective control mechanisms in ports can also be implemented. More generally, terrorism in the world can be fought against in very various manners: by adopting, implementing and applying international treaties, interdicting hateful ideologies, and promoting peace and justice through education, etc. All these measures could contribute to reduce maritime terrorist threat and consequently the number of maritime operations on the high seas.

Finally, it is worth recalling that maritime security and safety is not only threatened by terrorism, but also by other activities that are shameful for the international community, such as slavery, human trafficking, people smuggling, drug and weapons trafficking, and illegal fishing. To different extent, all of them threaten global stability, security and prosperity, and all of them, like maritime terrorism, should be combatted by putting common interests before individual ones.