Maritime interception and the law of naval operations

A study of legal bases and legal regimes in maritime interception operations, in particular conducted outside the sovereign waters of a State and in the context of international peace and security

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CHAPTER 6

Self-defence and maritime interception

As a practical guideline naval planning staffs should take it for granted that the employment of force…will be regarded as overstepping the boundaries of the legitimate, except when resorted to in self-defence. The real problem is what is meant by self-defence against an armed attack?

-D.P. O'Connell, The Influence of Law on Seapower[359]

6. Introduction

Self-defence as a legal basis for military operations has since the 9/11 attack been under much scrutiny with regard to how self-defence should be applied against contemporary threats. In the maritime dimension self-defence is often argued in two different contexts. It is firstly argued as the legal basis for the deployment of large scale military campaigns with a naval component. Recent examples of this context are maritime interception operations conducted in *Enduring Freedom*, *Active Endeavour*, *Cast Lead* and *Change Direction.* It is secondly argued as a basis to stop weapons of mass destruction and terrorists or a combination thereof at sea, outside the context of large scale naval operations.[360] The latter approach applies the right of self-defence against single threats in individual cases.

[359] O'Connell, 54.

[360] D. Guilfoyle, 'The proliferation Security initiative: interdicting vessels in international waters to prevent the spread of weapons of mass destruction? ' in *Melbourne University Law Review*, vol. 29 (2005), 734-764, at 750; M.A. Fitzgerald, 'Seizing weapons of mass destruction from foreign flagged ships on the high seas under article 51 of the UN-Charter', in *VJIL*, vol. 49, issue 2 (2008), 473-506; M.R. Shulman, The proliferation security initiative and the evolution of the law on the use of force', in *Houston Journal of International law*, vol. 28, no. 3 (2006), 771-828; J.M. van Dyke,'The Disappearing right to navigational freedom in the exclusive economic zone', in *Marine Policy*, vol. 29 (2005), 107-121; W. 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', *in IYIL*, vol. 34 (2004), 151-178;. Klein also sort of points in this direction of this as an emerging trend, Klein (2011), 297-300 and Klein (2005), at 307-308.

This approach to the use of self-defence as a legal basis has particularly emerged since the fight against terrorists was broadened against persons and cargo beyond Al Qaida, the Taliban and its affiliates. It was primarily initiated by the US National Security Strategy (2002), in which the former US president George W. Bush coined the much debated idea of pre-emptively countering threats to US national security, in particular terrorists who obtain and use weapons of mass destruction. Interestingly, back in 1956, the International Law Commission noted on the issue of whether the right of self-defence could be another exception to the exclusive jurisdiction of the flag State that it was not 'deemed to be advisable', because of the vagueness of terms as 'imminent danger' and 'hostile acts', which leaves them open to abuse.[361] To some, the issue implied the recognition of the idea itself.[362] To others, the ILC-commentary closed the subject as not being possible.[363] Today, however, the discussion of self-defence in relation to the exclusive jurisdiction over a vessel has received new attention in the legal arena. This Chapter will analyse the right of self-defence in relation to MIO. It will firstly start with a brief introduction to self-defence and then study the application of self-defence through both large scale naval operations that include maritime forces with an interception role, and self-defence MIO in response to single threats of WMD and terrorists.

6.1. The right of self-defence

Similar to the UN-collective security system the legal basis of self-defence takes as the starting point the prohibition on the use of force laid down in Article 2(4) of the UN-Charter. The sources of the right of self-defence are usually considered to be based on both the UN-Charter and international customary law. As such, there are specifically written condi-

[361] UN Doc A/3159, Comment 4 to article 46. *YILC* 1956 II, 284. Comment 4 is worthwhile quoting here because it remains of relevance to this day. It reads:

> The question arose whether the right to board a vessel should be recognized also in the event of a ship being suspected of committing acts hostile to the state to which the warship belongs, at a time of imminent danger to the security of that state. The commission did not deem it advisable to include such a provision mainly because of the vagueness of terms like 'imminent danger' and 'hostile acts', which leaves them open to abuse.

[362] A.M. Syrigos, 'Development on the interdiction of vessels on the high seas', in A. Strati, M. Gavouneli, N. Skourtos (eds.), *Unresolved issues and new challenges to the law of the sea. Time before and time after. Publication on Ocean Development*, vol. 54 (2006), 149-202, at 163.

[363] E. Somers, *Inleiding tot het internationaal zeerecht* (5th ed. Kluwer, 2010), 291.

tion for self-defence in Article 51 of the UN-Charter[364] and additional conditions that are derived from customary international law. In short, the conditions to be fulfilled in order to invoke the right of self-defence are firstly the existence of an armed attack. Secondly, the reaction to the armed attack must fulfill the substantive[365] customary conditions of necessity, proportionality, and immediacy. Necessity relates to the existence of an armed attack or an immediate threat of attack and focuses on the question whether the use of force under self-defence is a measure of last resort to which there are no other means or alternative available than the use of force. Proportionality focuses on the issue of a balanced response to the armed attack, against the background of the aim of self-defence, which is first to halt and repel the attack, and, to some authors, also includes ensuring that the attacker cannot mount future attacks.[366] Immediacy considers the temporal link between the attack and the start of the reaction to the attack, once the attack has occurred.

The answer to the question whether an armed attack has occurred, has been part of extensive legal debate since the 9/11 attacks, in particular from a material, temporal and *personae* approach. These three approaches deal with the questions of what amounts to an armed attack, at what moment in time can the right of self-defence be invoked and against whom it can be invoked. The debates have, therefore, concentrated on issues whether self-defence could exist in an anticipatory manner, whether it can be invoked against non-state actors and which scale and effect the attack must have be to be considered an armed attack. This is not the place to repeat these debates, but it generally appears that, although the jurisprudence of the ICJ is more reluctant,[367] scholars are moving into the direc-

[364] Article 51 of the UN-Charter reads as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[365] Next to these conditions, there are also procedural conditions that oblige to inform the UNSC that use of force is used in the context of self-defence. This procedural obligation is explicitly stated in article 51 UN-Charter.

[366] D. Kretzmer,'The inherent right to self-defence and proportionality in ius ad bellum', in *EJIL* vol. 24 (2013), 235-282, 264; Gill (2007), 124.

[367] E.g. Dinstein (2005); M.N. Schmitt,'"Change Direction" 2006: Israeli operations in Lebanon and the International law of self-defense', in *Michigan Journal of International Law*. Vol. 29, no. 2

tion that the general answer to the first two questions relating to the expanding scope of self-defence might well be a positive one.[368] Indeed an evolution has appeared to have taken place with regard to the scope of armed attack, which now also is considered to include both anticipatory attacks and attacks mounted by non-state actors. As Van Steenberghe has concluded based on a study of recent state practice; '...the interpretation of recent state practice amounts to considering that the latter evidences a clear tendency towards allowing States to act in self-defence in response to attacks, even if these attacks are committed only by non-state actors'.[369]

Within the context of maritime interception operations, the issue of *ratio personae* opens the possibility to act against non-state actors that are on board a vessel or use the vessels for the armed attack. The material aspect of self-defence emerges as an issue in the context of attacks against warships and what possibilities to react a State and the individual warship commander might have.[370] But more importantly, the broadened scope of self-defence in the temporal aspect is particularly of interest for proponents of the view that foreign flagged vessels that pose an imminent threat by virtue of their threatening cargo can be boarded based on self-defence. In this context anticipatory self-defence, which is seen through the now generally accepted *Caroline-criteria* -the armed attack must be instant, overwhelming, leaving no choice for other means, and no moment for de-

(2008), 127-164. He underlines that there is a difference in view between jurisprudence of the International Court of Justice and state practice in the case of operation Change Direction.

[368] See e.g. D. Kretzmer, 'The inherent right of self-defense and proportionality in Ius ad Bellum', in *EJIL*, vol. 24 no. 1 (2013), 235-282; M.C. Waxman,'Regulating resort to force: form and substance of the UN charter regime', in *EJIL*, vol. 24. No. 1 (2013), 151-189.

[369] R. van Steenberghe, 'Self-defence in response to attacks by non-state actors in the light of recent state practice: A step forward?', in *LJIL*, vol. 23 (2010), 183-208, 207.

[370] In the *Oil Platform* case, the ICJ noted that although in the specific circumstances of the incident with the *USS Samuel B. Roberts* being struck by a mine the it considered that attacking the platforms was not justifiable in response to an armed attack, the Court did state it does not exclude the possibility that; 'the mining of a single military vessel be sufficient to bring into play the "inherent right of self-defense". Judge Simma's separate opinion adds to this that although force may not be justifiable under Article 51 of the UN-Charter, where the threshold of gravity is not met, a state may still take proportionate defensive measures. ICJ, *Oil Platform* (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, 161 (Oil Platforms case). In the *Oil Platforms* case the ICJ dealt with the case of the US attacking a number of Iranian oil platforms. The attacks came as a reaction to a missile attack during the Iran-Iraq War that caused damage to the Kuwaiti owned but US reflagged oil-tanker vessel *Sea Isle City* in 1987, and the damage caused by mines, a year later, to the warship *USS Samuel B. Roberts.* The US chose to attack the oil platforms because it was believed that the platforms collected and reported intelligence concerning passing vessels, acted as military communication link for Iranian naval forces and as military staging bases.

liberation-[371] and the interpretation of immediacy is of importance. Anticipatory self-defence in essence questions whether a State can act when the use of grave and threatening force against the State is about to happen and whether a State needs to wait until an actual attack has taken place.[372] Because anticipatory self-defence is relevant to the issue of whether self-defence can be invoked in relation to vessels carrying WMD, I will return to this subject more elaborately in paragraph 6.3.1.

6.2. Large scale naval operations

In several recent military operations the right of self-defence has been a legal ground for States to deploy their warships in a maritime interception role. With regard to the military campaigns, from 1990 onwards most notably, the first days of the military operations against Iraq (1990), the operation with regard to Afghanistan from September 2001 onwards, and the Israeli operations against the Hezbollah (2006) and Hamas (2009) are generally considered to be based on self-defence. Although the latter three operations have their peculiarities with regard to the application of self-defence against non-state actors, there is not much controversy on whether self-defence could be used in these instances. Rather, this practice has been taken to support the broadened scope of self-defence. The four conflicts mentioned produced five different military operations in which maritime assets were also deployed in a maritime interception role: First, the immediate military response to the invasion of Iraq in Kuwait in 1990; second and third, the military response against the attacks on the United States on 11 September 2001, operation *Enduring Freedom* and *Active Endeavour*; fourth Israel's military operations against Hezbollah in Lebanon (Operation *Change Direction*) in the summer of 2006 and finally the fifth, the Israeli operations against Hamas in since the end of 2008 (Operation *Cast Lead*).

[371] T.D. Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-Emption, Prevention and Immediacy' in M.N. Schmitt, J. Pejic (eds.), *International law and armed: exploring the faultlines - Essays in honour of Yoram Dinstein* (2007), 113-157, 125.
[372] Kretzmer (2013), 248.

6.2.1. Iraq (1990 -1991)

The UNSC's affirmation that the Iraqi invasion of Kuwait on 2 August 1990 was considered a situation activating the right of self-defence in light of the UN-Charter followed four days later, on 6 August, when the Council adopted SC-Res. 661 (1990). In addition, the UNSC in SC-Res. 661 also imposed a trade embargo on the import into the territories of all member nations of all the commodities and products originating in Iraq or Kuwait. Debate existed in on the legal basis of the maritime interception operations that occurred between the adoption of SC-Res. 661 and 665, because SC-Res. 661 was considered to be based on Article 41 of the UN-Charter[373] and did not authorize any seaborne enforcement actions. The US, and later the UK,[374] stated that it intercepted vessels at the request of Kuwait who were in violation of the UN-resolution, but considered those actions to be based on a continued right of self-defence.[375] It, therefore, although acting consistent with the Council's resolution, based their actions on self-defence.[376]

6.2.2. Enduring Freedom, Change of Direction and Cast Lead

Whereas the invocation of collective self-defence against Iraq in support of Kuwait in 1990 was straightforward in the sense that it was a state-to-state situation, invoking self-defence against Al Qaida in 2001 as a non-state actor, however supported by the *de facto* Taliban government of Afghanistan, inititated the main legal debate. While this debate on applicability of the law self-defence to non-state actors raged on from 11 September onwards in the academic arena, on 7 October 2001 the US and its

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[373] Gill, *NJB*, 1476; N.J. Schrijver, The use of economic sanctions by the Security Council: An international law perspective'', in H.H.G. Post (ed.), *International economic law and armed conflict* (1994), p. 133.

[374] J.H. Westra, *International law and the use of armed force* (2007), 113-114.

[375] Fielding (1997), 46-47; L.E. Fielding,'Maritime interceptions; Centrepiece of economic sanctions in the new world order', in *Louisiana Law Review*, vol. 53 (1993), 1191-1241; J.H. McNeill, 'Neutral rights and maritime sanctions: The effects of two Gulf wars', in *VGIL*, vol. 31 (1991), 631-643, at 641. The announcement ran as follows (quoted from; H.B. Robertson,'jr.,'Interdiction of Iraqi Maritime Commerce in the 1990-1991 Persian Gulf Conflict ', in *ODIL*, vol. 22 (1991), 289-299, at 295):

> U.S. Forces participate in a multinational effort that will intercept ships carrying products and commodities that are bound to and from Iraq and Kuwait. This action is consistent with UN Security Council Resolution 661, which imposed mandatory sanctions on trade with Iraq and occupied Kuwait.

[376] See also a recent comment on this episode which underlines this view, W. Heintschel von Heinegg,'Blockade and interdictions', in M. Weller (ed.), *The Oxford handbook on the international law of on the use of force* (2015), at 942.

coalition allies started Operation *Enduring Freedom* (OEF). For them, the legal basis for the military response to the attacks was clear from the outset: Article 51 of the UN-Charter. Their view was backed up by the UNSC in SC-Res. 1368 (2001).[377]

In the issue of *ratio personae* that came up as a legal debate after the 9/11-attacks, the statist presumption, as Gill states, was eventually left to include the possibility of invoking the right of self-defence against non-state actors.[378] This view also paved the way to more practice in which the right of self-defence was used in practice against non-state actors, in particular in operation *Change Direction* and *Cast lead*.[379] In July 2006, Israel launched Operation *Change Direction* after the Hezbollah raided the Israeli border from Lebanese territory and ambushed Israeli soldiers. Eight Israeli soldiers died and two were captured. Israel's military operation as a reaction was considered to be based on the right of self-defence, which was presented so to the UNSC.[380] Part of the military campaign that Israel launched against Hezbollah consisted of a belligerent naval blockade off the coast of Lebanon. Israel argued that "[T]he ports and harbours of Lebanon are used to transfer terrorists and weapons by the terrorist organizations operating against the citizens of Israel from within Lebanon, mainly Hezbollah". The blockade was lifted again on 7 September 2006 after which the UN implemented a maritime embargo operation (MTF UNIFIL) in support of Lebanon against Hezbollah.

Israel's maritime operations against Hamas in the Gaza strip since January 2009 would in first instance appear to be based on the traditional approach, but has yet another particularity with regard to MIO based on the right of self-defence. In this case, Israel seems to have taken the traditional approach in which it has based its military operations on the right of self-defence and accepts that an armed conflict exists. The application of military force is governed, therefore, by the *ius in bello*. Israel position towards the imposed blockade established on 3 January 2009 is that: 'A maritime blockade is in effect off the coast of Gaza. Such blockade has

[377] But see the discussion on the variety of decisions by states on which right of visit was to be used during OEF in Chapter 9.
[378] T. D. Gill, *The 11th September and the international law of military operations* (2002), 9.
[379] Ruys, 419-462.
[380] S/2006/515, 12 July 2006. The latter states: Israel thus reserves the right to act in accordance with Article 51 of the Charter of the United Nations and exercise its right of self-defence when an armed attack is launched against a Member of the United Nations. The State of Israel will take the appropriate actions to secure the release of the kidnapped soldiers and bring an end to the shelling that terrorizes our citizens.

been imposed, as Israel is currently in a state of armed conflict with the Hamas regime that controls Gaza. Although the blockade has been established since January 2009, the so called *Freedom Flotilla* incident in May 2010, only really grasped the attention of the international community and commentators of the existence of this blockade.[381]

6.2.3. Operation Active Endeavour

To support the US-led coalition after 9/11, NATO took eight measures, one of which was to deploy the NATO standing maritime force to the Eastern Mediterranean Sea to demonstrate NATO's 'resolve to help deter, defend, disrupt and protect against terrorism'. A day after the 11 September attacks the NAC stated that if it could be proved that the attacks were directed from outside the United States NATO would consider it an armed attack under the terms of Article 5 of the NATO-Treaty, which includes reference to Article 51 UN Charter. To NATO, satisfactory evidence was given to the NAC by the US on 2 October, which triggered the start of operation Active Endeavour (OAE). In the years following, the NATO-operation underwent several geographical evolutions to ultimately cover the complete Mediterranean Sea.[382] OAE, however, does not operate in the seas around the Arabian Peninsula.[383] Whereas separate members of NATO did take part, NATO as an organization neither took part in the OEF-coalition, nor in the early stage offensive military operations in Afghanistan.

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[381] J. Farrant, The Gaza Blockade incident and the modern law of blockade', in *Naval War College Review*, vol. 66, no. 3 (summer 2013), 81-98; E. Sanger, 'The contemporary law of blockade and the Gaza freedom Flotilla', in M.N. Schmitt et all (ed.) *YIHL*, vol. 13 (2010), 397-444; W. Heintschel von Heinegg,'Methods and means of naval warfare in non-international armed conflicts', in *ILS*, vol. 88 (2011), 211-236; D. Guilfoyle, 'The Mavi Marmara incident and blockade in armed conflict', in *British Yearbook of International Law*, Vol.81 (2010), 171-213; J. Kraska,'Rule selection in the case of Israel's naval blockade of Gaza: law of naval warfare or the law of the sea?', in M.N. Schmitt (red.) *Yearbook of humanitarian International Law*, vol. 13 (2010), 367-395; G.M. Scott, Israel's seizure of the Gaza-bound flotilla: applicable laws and legality', in *Research paper no. 42/2010, Osgoode Hall Law School*. R.J. Buchan, 'The Palmer report and the legality of Israel's naval blockade of Gaza', in *ICLQ*, vol. 61 (2012), 264-273.

[382] See Chapter 3, para. 3.1.2.2.

[383] Becker mentions an action from July 2002 against Al Qaida terrorists, which was presumably done within the context of OAE. Although it could have been warships from NATO-members, considering that the area of operations did not go beyond the Suez Canal, I hesitate to believe that the action was taken under NATO command. M. Becker,'Shifting public order of the oceans', in *Harvard International law Journal*, vol. 46 no. 1 (Winter 2005), pp. 131-230, at 152.

6.3. Self-defence against vessel-borne WMD and non-state actors

Self-defence is also argued as a legal basis to legitimize military action to thwart a threat from a vessel that may be carrying WMD, terrorists, or both.[384] On an operational level *Enduring Freedom* quickly expanded into the global war on terror (GWOT), in which the maritime dimension was translated into conducting so called expanded maritime interception operations (EMIO). EMIO aimed primarily to deny and disrupt the movement of terrorists and weapons of mass destruction, and, importantly, went beyond only Al-Qaida and its affiliates[385]. The actions taken against these potential terrorists, therefore, are not covered by the same invocation of self-defence that covers the use of force against Al-Qaida and its affiliates. Rather, in this case, self-defence is argued to thwart individual threats.

One has to note that although this approach is argued as a possible means to stop terrorists and WMD it appears that virtually no state practice exists that would further confirm the use of self-defence as an accepted approach by States to thwart terrorist or WMD vessels at sea.[386]

The interception of the *Karin-A* by Israel is often used as a potential terrorist threat or carriage of WMD on board. This is, however, in technical terms not a very good example because the *Karin-A* carried conventional weapons rather than WMD. In January 2002, the *Karin-A* was carrying more than 50 tons of (conventional) weapons destined for the Palestinian Authority and was intercepted by the Israeli Defence Forces in international waters, on its way to the Gaza. Israel argued self-defence in its letter to the UN-Secretary General.[387] Later, in March 2014, the *Klos-C* was

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[384] E.g. M.R. Schulman, The Proliferation Security Initiative and the evolution of the law on the use of force', in *Houston Journal of international law*, vol. 28 no. 3 (2006), 771-828; D.J. Nincic,'the challenge of maritime terrorism: Threat identification, WMD and regime response', in *The Journal of Strategic Studies*, vol 28, no. 4 (2005), 619-644; J.A. Doolin, 'The proliferation security initiative. Cornerstone of a new international norm', in *Naval War college Review* vol. 59, no. 2 (spring 2006), 29-57; J.I. Garvey, 'The international institution imperative for countering the spread of weapons of mass destruction: Assessing the proliferation security initiative', in *Journal of Conflict and Security Law* , vol. 10, no. 2 (2005), 125-147.

[385] Hodgkinson (2007), 583-670.

[386] Papastavridis, 'The right of visit on the high seas in a theoretical perspective: Mare Liberum versus Mare Clausum revisited', in *LJIL*, vol. 24 (2011), 45-69. He doubts on the Karin-A incident.

[387] In a letter to the UN-Secretary General (4 January 2002, A/56/766) Israel told the UNSC the following:

> The attempt by the Palestinian Authority to smuggle this unprecedented number of weapons is a flagrant violation of agreements reached between the parties and is an ominous sign of Palestinian intentions to continue their terrorist campaign well into the future.

boarded by Israel. Although the Israeli political message maintained that Israel must be able to defend itself, the Israeli boarding of the *Klos-C* appeared to be with the consent of the Panamanian authorities.

6.3.1. WMD and armed attack

Self-defence is often argued also as a legal basis to stop emerging threats from or via the sea, or to use Allen's more popular words, to stop *cargoes of doom*.[388] Within this scenario, vessels can for example be used for transportation of WMD to ports of a State, brought close to governmental vessels or critical infrastructure and pose a grave threat to those objects. Whether self-defence can be invoked in such cases, has to be assessed like any other claim to self-defence. In order to being able to react in self-defence against these so called *cargoes of doom,* one must in the first place consider whether the situation of a WMD on board a vessel constitutes an imminent armed attack. This by itself is challenging because the question rises whether the existence of dangerous cargo on board a vessel (or the combination of vessel and cargo) can constitute an armed attack. The only manner in which way this could be considered as an armed attack, would be through an anticipatory manner. 'At most', as Klein mentions, 'the shipment of weapons to support a terrorist attack against another State is a threat of force'.[389] The conditions for using self-defence in an anticipatory manner are the generally accepted *Caroline-criteria*: The danger or threat must be instant, overwhelming, leaving no choice for other means, and no moment for deliberation. Apart from the act that there must be a meaningful threat against the State (Joyner mentions that non-state actors that merely possess or are developing WMD, without the existence of a meaningful threat, do not satisfy the Caroline-criteria[390]), the main point of contention with regard to the anticipatory self-defence crite-

These weapons were capable of striking deep into Israel and their seizure constitutes a vital act of self-defence and an important counter-terrorist measure, that has saved Israeli civilians from an untold number of terrorist attacks against Israeli population centres.

[388] G.H. Allen, 'Cargoes of doom: national and multilateral strategies to combat the illicit transport of weapons of mass destruction by sea', in D.D. Caron, H.N. Scheiber (eds.), *The Oceans in the Nuclear Age: Legacies and Risks* (2010), 295-336.

[389] Klein (2011), 270.

[390] D.H. Joyner, 'The implications of the proliferation of Weapons of mass destruction for the prohibition of the use of force, in M. Weller (ed.), *The Oxford Handbook on the use of force in international law* (2015), 1034-1056, at 1043.

ria and vesselborne WMD, is related to the temporal dimension of self-defence, in particular with the interpretation of imminence.

Whereas in 'traditional' armed attacks the condition of immediacy relates to the temporal link between the attack and the reaction to the attack, in which no undue time-lag can take place between the attack and the reaction to the attack.[391] In the anticipatory context immediacy does not relate to after the attack but is interpreted in a different temporal perspective. As Gill states: 'Immediacy in the context of the *Caroline*-criteria for anticipatory self-defence is synonymous with the existence of imminent or immediate threat of an armed attack.[392] The temporal dimension in this case is not related to the reaction to an actual attack, but has to be interpreted in the context of when the armed attack might -in future- occur. Obviously, knowing when an attack will occur is a challenge. Ruys has noted in this respect that some scholars view that the temporal aspect of immediacy in anticipatory self-defence should not be part of what imminence in this case should entail.[393] If this is taken out, imminence becomes primarily a consideration of gravity of danger and the likelihood that it will occur. Akande and Liefländer, who also seem to be supporters of this view, argue that when severe threat exists, but still temporally remote one can still react as long as the action is necessary and proportionate.[394] Proponents of this view support the *last window of opportunity*-standard, in which a State must act or otherwise loses the opportunity to defend itself.[395] If it is only the *gravity* of the threat that must be considered, the ICJ in the *Nicaragua*-case has indicated that the existence of an armed attack must also be measured against the scale and effects of the use of force, to rule out mere frontier incidents.[396] Apart from the fact that this viewpoint has been much criticized[397], it may easily be argued that the use of chemical, nuclear of biological weapons can in fact have enormous effects. As Guilfoyle notes; 'The critical justification for pre-empting WMD is that attack's potential scale, not its temporal imminence".[398] Giving less

[391] Dinstein, 184.
[392] Gill (2007), 151.
[393] Ruys (2010), 320-321.
[394] D. Akande, T. Liefländer,'Clarifying necessity, imminence, and proportionality in the law of self-defense', in *AJIL*, vol. 107 (2013), 364-570, at 565.
[395] G. Mordarai, et all, 'The seizure of Abu Anas Al-Libi: An international law assessment', in *ILS* vol. 89 (2013), 817-839, at 823.
[396] ICJ, *Nicaragua* (merits), para 191.
[397] Ruys (2010), 520-524.
[398] Guilfoyle, (2005), 758.

importance to the more traditional approach of the temporal aspect of imminence would ultimately lead to support the position that WMD in the wrong hands are an imminent danger against which action can be taken, when also necessary and proportionate. Still, the temporal aspect cannot be completely discarded, as other factors, such as the ability to connect the danger to the victim State, become harder to assess. In that sense, the identification of the threat becomes less, the farther away the threat may be. It is in such circumstances also rather difficult to show that there is any intention of attack against a particular State. As Klein states, drawing a conclusion from the *Oil Platorms* case; "…the armed attack must clearly be targeted against the State that acts in self-defense".[399] The challenging issue is of how imminence should be interpreted in the context of modern threats is still without consensus.[400] Something may be a threat, but it is hard to argue it is a specific threat against a certain State that is highly likely to occur.

6.3.2.Reaction to armed attack: flag state jurisdiction and self-defence

Apart from the question whether a boarding of the vessel can be considered as a necessary and proportional measure of self-defence, Papastavridis also mentions that the act must also be imputable to a State.[401] Whether this condition still holds ground, depends on the view that is taken with regard to the issue of imputablity. Firstly, as mentioned by Van Steenberghe, cited earlier, practice seems to suggest that it is accepted that self-defence can also be invoked against non-state actors and is less dependent on a 'statist link'. In this respect, Bethlehem states: It is by now reasonable clear that states have right of self-defence attacks by nonstate actors'.[402] Secondly, this still leaves open the question of the geographical aspect of self-defence, where the non-state actor launches its attacks on from another territory. In the traditional sense, when an action is considered to be an armed attack, the reaction of the State can be directed against the territory of the State that launched the armed attack. It gets more complex when the attack is launched by a non-state actor from the

[399] Klein (2011), 264.
[400] D. Bethlehem, Self-defense against an imminent or actual armed attack by non-state actors, in *AJIL*, vol. 106 (2012), 769-777.
[401] Papastavridis (2013), 151.
[402] Bethlehem (2012), 774. See also Dinstein (2011), who is a strong proponent of the view that attacks by non-state actors can be considered as armed attacks in the context of the right of self-defence.

territory of another State where the action of the non-state actor is not attributable to the State. Either a relationship between the non-state actor and the State where the actions of the first can be attributable to the latter will justify an attack on the territory of that State. Two other views are that, as crossing borders obviously clashes with State sovereignity in cases where the conflict is not against that State, it is viewed that either sovereignity is irrelevant in this case, or that the competing rights of self-defence and sovereignty need to be balanced. The latter view, supported by practice, has gained growing recognition. Where there is no sufficient relationship, defence against an armed attack by a non-state actor can still be undertaken on that territory when the State is unable and/or unwilling to take action and the military operations are directed only against the non-state actors which are located on that territory.[403] The conditions mentioned to be fulfilled in case defence against of un-atributable armed attacks try to reconcile the use of force in self-defence against non-state actors with the interstate prohibition of the use of force and the idea that self-defence it not dependent on the will of another State, which needs to belanced against the sovereignity of State over its territory.[404] This view is for instance supported by Schmitt, who mentions that the US, and he himself, take the position that;

> 'if the sanctuary State fails to remedy the situation because it is either unwilling to do so (perhaps out of sympathy for the attackers) or unable to do so (for instance, due to a lack of the necessary military equipment), the victim State, in realization of its right of self-defence, may cross into the sanctuary State's territory for the sole purpose of defending itself'.[405]

Getting back to the maritime dimension, on the high seas it is not the territory of a State, but the jurisdiction of a flag State that comes into question.

[403] See on this practice Kimberley Trapp, who mentions Al Qaida ((2001) and Hezbollah (2006) as examples in which self-defence was used to act against non-state actors who deeds where not attributable to the State they were in (Afghanistan and Lebanon). K.N. Trapp, "Can non-state actor amount an armed attack', in M. Weller, *The Oxford Handbook of the use of force in international law* (2015), 679-719.

[404] M.N. Schmitt, 'Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law', in *Columbia Journal of Transnational Law*, vol. 52 (2013), 79-114, 87. J.J. Paust,'Self-defense targeting of non-state actors and permissibility of U.S. use of drones in Pakistan', in *Journal of Transnational Law & Policy*, vol. 19. No. 2 (2010), 237-280.

[405] Schmitt, (2013), 89.

Applying the same view as mentioned above, such argumentation would lead to the view that States can also act against non-state actors on board a foreign flagged vessel, under the limiting circumstances that a flag State is unable or unwilling to act or remedy the situation. In the context of stopping WMD and non-state actors it is argued that self-defence can be another exception to flag state jurisdiction.[406] Hodgkinson *et al*, for example, discuss the right of self-defence under Article 51 of the UN-Charter in the context of acting against WMD and state that self-defence could be a legal basis to board a vessel suspecting of harboring terrorists. They then go on to opine that; "boarding such a vessel, mounting an inspection, and obtaining biometric data from its crews or passengers, even without the ship master's consent, could be viewed as proportional to a great enough threat". This is interesting, because in cases of international armed conflict LOAC (*ius in bello)* allows for boarding foreign flagged vessels through a distinct set of rules that are part of the law of naval warfare. Instead, in the above view in the context of WMD or non-state actors, the authority to board is argued from a perspective of the *ius ad bellum,* in particular from the perspective of the debate whether self-defence can be invoked against non-state actors and where (geographically) non-state actors can be attacked, and not through the subsequent application of LOAC. Arguing self-defence in this manner would provide a sufficient way of side stepping the exclusive jurisdiction of a flag State because it theoretically allows for the boarding of a foreign flagged vessel without any form of consent of the flag State. On this issue in the context of interception operations Von Heinegg is very articulate in a number of his articles and a strong proponent of the possibility that interception operations can be based on self-defence, which in his opinion prevails over the flag state principle.[407] He opines that consent of the flag State or the master in the context of self-defence is irrelevant; "as the right of self-defence has never been made dependent upon the will of Third States or of individuals".[408] To the author, self-defence does not by definition prevail over consent of the flag State, but only prevails when the conditions of an unwilling and/or unable flag State are also satisfied. Consent of the flag State, there-

[406] E.g. Walker, Fitzgerald.
[407] Heintschel von Heinegg, (2010), 389-390.
[408] W. 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', *in IYIL*, vol. 34 (2004), 151-178, at 154.

fore, stays relevant in the sense that a extra hurdle must be taken to argue why consent is not required in the particular circumstance.

6.3.3. Advantages of the ius ad bellum approach to boarding

The interesting point of the above argumentation is that where in the traditional view of boarding a vessel in situations of self-defence is based to the applicable legal regime (LOAC), in this view boarding of a vessel is now directly connected to self-defence. Taken against the reality of modern conflict, this view has its operational advantages. In the first place, it circumvents the operationally challenging issue of flag state consent to board a foreign flagged vessel. Within the context of high seas shipboarding, it would mean that where a flag State is unable or unwilling to act against the WMD, the ship can be boarded in self-defence. Such argumentation also opens the door to be able to board vessels that within the political scheme of things would never have consented to let board its vessels. For example, a North-Korean flagged vessel that is subject to a boarding by an American warship. Obviously, still the stringent conditions of self-defence need to be met.

Apart from the flag state consent issue, a second advantage of connecting to right to board to the *ius ad bellum* instead of the *ius in bello* is that it bypasses the question of whether the law of naval warfare applies in non-international armed conflict or against non-state actors. To take to Afghanistan example, it is widely viewed that the situation in Afghanistan changed after the Taliban had been brought to a fall and the *Loya Jirga* was convened in June 2002. First, many commentators view that the status of the armed conflict changed from that point onwards from an international armed conflict to a non-international armed conflict.[409] A common view with respect to the applicability of prize law, which the belligerent right of visit is part of, is that prize law is only applicable in international armed conflicts.[410] The application of the belligerent right of visit and search, therefore, poses extra challenges in applying it in new threats.

[409] See e.g. J. Pejic,'Unlawful/enemy combatants: Interpretations and consequences', in M.N. Schmitt and J. Pejic (ed.), *International law and armed conflict: exploring the faultlines* (2007), pp. 335-355, at 345. .

[410] W. Heintschel von Heinegg,'The law of military operations at sea', in T.D. Gill, D. Fleck, *The handbook of the international law of military operations* (2010), 325-371; J. Kraska,'Rule selection in the case of Israel's naval blockade of Gaza: Law of naval warfare or law of the sea?' in, *YIHL*, vol. 13 (2010), 367-395.

This subject in particular, with regard to the right of visit during NIAC's will be discussed in Chapter 9.[411] As the law of self-defence is gradually moving into the direction of accepting the use of force against non-state actors without State attribution, the essence of the issue relates to the question whether prize law can also be applicable in non-international armed conflicts or transnational armed conflicts. With regard to the latter type of conflict, which has no distinct legal regime, there is a tendency to view that in transnational armed conflicts the regime applies of non-international armed conflict applies.[412] Taking the above mentioned views as the point of departure, for States that apply the authorities of the law of naval warfare, the status of the conflict has impact on the authorities. But when the right to board another vessel is based on self-defence rather than the belligerent visit and search, the change of status of the conflict is in fact irrelevant. It stops, in other words, the need to articulate the status of the conflict.

Interestingly, one author has noted a debate on the so called "third-tier", in which the conditions of self-defence are used as a third legal regime, next to IHRL and LOAC.[413] In this approach the law of self-defence provides both a basis *and* a legal regime for and during military operations. The law of self-defence is not only used to determine whether force *can* be used, but also provides the scope of authorities -in a MIO-context- during the boarding, based on the conditions for the application of military force under the law of self-defence (proportionality, necessity, immediacy). Geoffrey Corn (a fervent opponent of this view) has noted that proponents of the third tier can avoid assessing the nature of hostilities and how they implicate *ius in bello* applicability.[414] This is obviously a convenient argument in current day conflict and fits neatly in the view that WMD can be stopped and seized on board a foreign flagged vessel, solely based on self-defence. This argument of using self-defence as a right to visit in the context of maritime interception operations is also found in a document from the US-Defence Department organization *Defense Institute of Legal Studies* (DILS), who notes that:

[411] See paragraph 9.4.3.
[412] C. KreB,'Some reflections on the international legal framework governing transnational armed conflicts', in *Journal of conflict and Security*, vol. 15. No 2 (2010), 245-274.
[413] G. Corn, 'Self-defense targeting: blurring the line between the ius ad bellum and the ius in bello', in *ILS*, vol. 88 (Naval War College, 2012), 57-92.
[414] Corn (2012), 73.

> The maritime interception operation has, through accepted practice and custom, developed a new legal regime under which, with the proper legal antecedents (i.e., UN authorization or national or collective self-defense under Article 51 of the UN Charter) warships may intercept foreign flag commercial vessels on the high seas, without resorting to any classical belligerent right. In fact, this expansion is now well seasoned through over ten years of continuous, unchallenged operations. Indeed, a substantial number of maritime nations have actively participated in the Arabian Gulf MIO.[415]

Apart from the *Karina-A* incident, it is hard to tell whether practice actually exists where self-defence was used as a direct legal basis to stop WMD or terrorists. Although the above blurb from DILS concludes as such and the US has always taken the standpoint that OEF was conducted under self-defence, it has always left it unspecified whether it used LOAC to regulate its boardings. More back into history, the Algerian Independence War (1955-1962) is interesting to note in this respect. Firstly, the visits and searches conducted by the French naval forces during the Algerian Independence War are mentioned by some[416] as MIO conducted based on self-defence rather than the law of armed conflict.[417] France's challenge in this situation was that it did not recognize the Algerians insurgents as belligerents, thereby depriving itself from the possibility to use the law of armed conflict.

6.4. Conclusion

Current day conflict, characterized by non-state actors, NIAC's and WMD poses challenges for maritime interception operations. In the quest to counter these modern challenges different views on how self-defence can be a legal basis for are embraced. The right of self-defence is now argued

[415] *DILS*, Maritime interception operations, 13 June 2005.
[416] Churchill and Lowe, 216-217; W. Heintschel Von Heinneg; Visit, search, diversion and capture – condition of applicability', in *Reports and commentaries of the round table of experts on international humanitarian law applicable to armed conflict at sea* (Bochum 1995), 1-93, at 56-57. Everyone quotes each other however
[417] O'Connell notes that: "The competence of the French Navy to carry out such visits and searches, although challenged apparently at the diplomatic level, did not form the subject of action in French courts. This is because in French law it is possible to test in the courts the validity of a seizure of cargo but not the preliminary issue of the validity of visit and search, which is an act of government". He mentions a French note that contended that the visits were justified by the French based on self-defense. D.P. O'Connell, International Law and Contemporary Naval Operations', in *BYIL*, vol. 44 (1970), 19-68, at 36.

as a basis for maritime interception operations in two different approaches. Firstly in a traditional way, where self-defence serves as a legal basis upon which large scale naval operations are conducted that may include maritime interception operations. Secondly, in the fight against non-state actors in NIAC's and WMD, self-defence serves as a direct legal basis to conduct a MIO. The key-difference is that in the traditional approach, self-defence is a condition that allows for to application of the law of armed conflict. LOAC -*ius in bello*- then provides the right to board vessels, albeit limited to international armed conflicts. In the other approach, related to NSA and WMD, the right to board a foreign flagged vessel is derived from the *ius ad bellum* itself, which brings unique characters into play, such as the argument that the use of self-defence is not dependent on other States. Connecting to the debate on crossing borders, it is viewed that NSA can, under certain conditions, can be attacked beyond the attacked State's borders in other States. A translation to the maritime dimension would lead to the conclusion in this argumentation that foreign flagged vessels could be boarded based on self-defence when the flag State is unable and/or unwilling to act themselves. Advantages to use self-defence in such a way are primarily that it circumvents the issue of flag state consent. It is advantageous both in the fact that there is no need in to gaining timely consent, and in situations where the State will politically not give consent. A further advantage is that it allows disregarding the position that the right to board a vessel in the law of naval warfare only applies in international armed conflicts, which makes it not very useful in current conflicts which are often characterized as non-international. The attractiveness to such argument, therefore, is rather high when one needs to deal with current threats and conflicts. Regardless of the attractiveness, however, the conditions of the law of self-defence have to be met, and as such is not a *carte blanche* to circumvent flag state consent or LOAC.