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Legal Issues on Self-Defense and Maritime Zones in Naval Operations

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Summary

During the 20th century the use of the maritime operational zone device has been more and more frequent. At the same time the rights of free navigation on the high seas has been acknowledged as a customary right. Moreover the rights of self-defense and the technological development have changed not only the way wars are justified, but also the way they are conducted. There have been a number of incidents and military operations were these conflicting principles have been put against each other. This essay will try to further shed light on the way maritime operational zones are used and warranted by international law. Furthermore a short description on how naval assets are used in modern warfare and the legal framework governing the naval *jus in bello* are included. A number of cases of state practice have been examined and are accounted for in the third chapter.

Sammanfattning

Under det föregående århundradet kom nyttjandet av zoner som i olika former begränsar sjöfartens rörlighet att bli alltmer vanligt vid militära operationer till havs. Samtidigt kom rätten till fri rörlighet på världshaven att erkännas som sedvanerätt. Tillkomsten av FN-stadgan och det teknologiska framskridandet under nittonhundratalet har medfört att inte bara krigets rättfärdigande utan även dess utformning radikalt förändrats. Ett antal incidenter har förekommit där principen om det fria havet kommit i konflikt med rätten till självförsvar grundat på FN-stadgans artikel 51. Detta arbete syftar till att belysa dessa konflikter i samband med tillämpningen och rättfärdigandet av maritima exklusionszoner. Som bakgrund ges en kort genomgång av sjökrigets grunder och marina stridskrafters roll inom den moderna krigföringen. Även det juridiska regelverk som styr sjökriget kommer att behandlas tillsammans med exempel på dess tillämpning i modern historia.

Preface

During the days I spent in the Navy I seldom reflected over the legal framework my actions were indirectly a result of. When the word 'navy' suddenly appeared during a lecture in international law it marked the completion of a circle. Today the field of naval *jus in bello* seems so grand that it is remarkable that I did not find interest in it earlier. In spite of my fascination for the subject, the road to a finished thesis has not been without its bumps. I would like to thank Professor Lars Göran Malmberg for the time and support given to me during the course of this work.

The finalization of this thesis seems like the closest I will ever come to giving birth, and like being pregnant I have too experienced sudden mood changes and unexpected cravings for chocolate. I would like to take this opportunity to express my apologies for the effects such behavior might have induced to my closest surroundings. A, your support and love have been crucial to me. I would also like to thank Robert and Bella who have listened patiently to my ramblings on maritime zones and the u-boat war. Still, you might be the most knowledgeable cats in international law at the time being.

Abbreviations

AGL	Above Ground Level
AJIL	American Journal of International law
ATS	Air Traffic Service
CCC	Center for Contemporary Conflicts, National Security Affairs Department at the US Naval Postgraduate School in Monterey, California
CJIL	The Canadian Journal of International Law
DoD	(US) Department of Defense
EEZ	Exclusive Economic Zone
HMS	Her Majesty's Ship (UK)
HSC	The 1958 Geneva Convention on the high Seas
UN	The United Nations
UNCLOS	The 1982 United Nations Convention on the Law of the Sea
ICAO	International Civil Aviation Organization
ICJ	The International Court of Justice
ICLQ	The International and Comparative Law Quarterly
IW	Information Warfare
JCSL	The Journal of Conflict & Security Law
LOAC	Law of Armed Conflict
LOS	Law of the Sea
MEZ	Maritime Exclusion Zone
MPZ	Maritime Protection Zone
MZ	Maritime Zone
NATO	The North Atlantic Treaty Organization
NM	Nautical Mile
NWP	Newport Papers, a series of publications published by the US Naval War College in Newport, Rhode Island
MHZ	Megahertz
MIO	Maritime Interception/Interdiction Operations
MoD	(UK) Ministry of Defence
NCW	Network-Centric Warfare
NOTAM	Notice to Air Mariners
NOTMAR	Notice to Mariners
PCIJ	Permanent Court of International Justice
PfP	Partnership for Peace
PS	Police Statement
PSI	Proliferation Security Initiative
RDZ	Remote Defensive Zone
RMA	Revolution in Military Affairs
RN	(UK) Royal Navy
ROE	Rules of Engagement
SAWZ	South Atlantic War Zone
SUA	UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
SMZ	Strengthen Maritime Zone

SROE	Standing Rules of Engagement
TEZ	Total Exclusion Zone
UPLR	University of Pennsylvania Law Review
UK	The United Kingdom of Great Britain and Northern Ireland
US(A)	The United States (of America)
USD	United States Dollar
USS	United States Ship
USSR	The Union of Soviet Socialist Republics
USN	United States Navy
VHF	Very High Frequency
WMD	Weapons of Mass Destruction
YLJ	The Yale Law Journal

1 Introduction

1.1 Purpose

In 1982, after much discussion the United Nations adopted the Law of the Sea Convention (UNCLOS). There was hope that all legal disputes between the freedoms of international navigation and the territorial rights of the coastal states were settled. There is little reference in the UNCLOS to military activities and it was generally regarded, at the time, that the framework of the Laws of Armed Conflicts (LOAC) provided legal basis for military maritime operations and naval warfare. By the events of September 11, 2001, international legal concepts have been revised, in particular relating to the right of self-defense. The grey area between the classical nation-state war and peacetime operations in the oceans has become more immense as terrorist threats and low-intensity conflicts have increased. Furthermore there seem to be new threats, apart from terrorism, that needs to be addressed such as piracy and environmental harm. By custom law-enforcement at sea has by many nations been exercised by military forces. The international community has showed great concern for the situation in the area off the Somali coastline where piracy has become an everyday predicament. This in turn raises the question of the legal basis of such operations. While the UNCLOS provides a right to intervene it does not handle a situation where there is no enforcement of jurisdiction by the coastal state and maybe not even a government. The LOAC, in principal, only addresses situations where nation states are in conflict. Whereas the UN Charter and the right of self-defense have been stretched to also include terrorist activities and maybe even responses to criminal activities it is unclear if this can be applied as collective measures in order to protect other vessels than those belonging to the flag-state.

The main subjects that will be explored are the right to self-defense on the high seas and in the territory of another state and the establishment of zones in international territory. There is a legal grey area between the right of self-defense and the rights to free navigation, in other words; how far can the state stretch the right of self-defense until it is to be regarded as a hindrance of the customary right to passage on the high seas. Does the right of self-defense prevail against the customary law rights in terms of use of the high seas at any cost and in all circumstances? While the technical development results in improved ranges of weapons and missiles the room for error is decreasing, which can be illustrated by the circumstances amounting to the tragic accidental downing of a Iranian Air Airbus (IR655) by *USS Vincennes* in the Persian Gulf (for further reading on that specific event please see below, 4.2.3.1). Furthermore the rights of the belligerent vis-à-vis a neutral state and vice versa will in some extent be dealt with. Exclusion zones are also instruments of justification for attacks on merchant vessels, as such their legality and the strategies that the state proclaiming them are pursuing will be looked into. Closely tied to this is the issue on self-defense

and non-governmental property, which also will be investigated to some extent.

A post World War invention is the concept of the “defensive bubble”[1], a floating bubble in which naval units enjoy (or at least claim to enjoy) the right to take measures in order to defend themselves. The right for military units to defend themselves from attack is not of much controversy, albeit the measures they may take in precaution are. If a military authority decides to divert shipping and in other way interfere with the freedom of navigation does it not imply that it is also, to some extent, exercising jurisdiction?

1.2 Delimitation

The law of naval warfare and the law of the sea are complex and there are still many areas left with obsolete or unsatisfying legislation. The modern naval war has evolved and is today more problematical than yesterdays question of peace and war as a simple black and white question. The legal matter of self-defense has also undergone rapid development since the events following September 11 of 2001. Therefore this essay will confine itself to the issues of self-defense by naval units and the establishment of maritime zones outside of the territorial waters of the flag-state. The institute of maritime blockade and the pre World Wars codifications of naval warfare will only be explored in limited extent.

1.3 Methodology and Material

The most powerful naval power today is the United States; consequently the US has a substantial interest to be a key participant in the international discussion concerning the Law of the Sea, the freedom of navigation and the law of armed conflicts. Self-defense is also a vital legal instrument on which US naval power relies. As a consequence the US is a major contributor to the academic field of legal studies in naval warfare and operation. The material used in this essay is to large extent collected from US publications in general and the US Naval War College in particular, although considerations have been done to the extent of political and cultural influence exercised on the publishing institutes.

Much consideration has been given to the practice laid down by the US and UK manuals on the law of naval warfare as well as the recently developed *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, which serves as a compilation of customary law.

[1] Also known as the Remote Defensive Zone (RDZ) or *Cordon Sanitaire*.

1.4 Outline

In order to give light to the above raised questions three elements of naval warfare have been given precedence. In the second chapter the uses of military force at sea are being explored as well as the overall doctrines and strategies. The recent developments and the implications of technical development are also addressed. The use of military forces in the struggle to counter terrorism is given particular attention. In the third chapter the legal framework of naval peace- and wartime operations is investigated. A individual subchapter is dedicated to the legal implications of the post 9/11 events. The fourth chapter is devoted to the uses of maritime zones and their legality. Much attention is given to state practice. The fourth chapter addresses the concept of self-defense and the UN Charter, here, again, much notice given to the practice of states.

2 Background

2.1 The use of military force at sea

The fundamental role of navies and maritime military power has remained the same since ancient times - to gain access to maritime territory and denying it for the adversary. The renowned 19th century military thinker Sir Julian Corbett describes two objects on which all maritime operations relate to; obtaining or disputing the command of the sea and exercising control of communication.[2] In today's naval warfare there are fundamentally six ways in which to use naval forces; *coastal defence*, *maritime power projection*, *commerce raiding*, the *fleet-in-being*, *fleet battle*, and *blockade*.[3] In peace the main uses for naval forces are *power projection* and *law enforcement* (although many coastal states have separate civilian branches for maritime law enforcement, i.e. coastguard or police). Arguable, three other methods could be added; *deterrence from nuclear attack*, *protection of air-lines of communications* and *forward missile defence*. The increasing global trade has made the world economy even more dependent on maritime transport and consequently creating a need for a naval presence by the flag states in order to protect it. It is estimated that, annually, more than fifty thousand large commercial vessels carry almost 80 percent of worldwide commerce, 60 percent of all petroleum produced, and more than eleven million passengers.[4] Today's major naval powers include the US, Russia, China, UK and France. In the Pacific India has arisen as a competitor to Chinese dominance.[5]

The use of naval power in *coastal defence* is obvious and not only includes sea-going units but also land based units in order to fend off an attack directed towards land from the sea. On the other hand *maritime power projection* is the opposite and includes the use of force from the sea directed towards land. This can be in the form of air raids by aircrafts launched by carriers, by heavy artillery or amphibious assaults.[6] This strategy can also be applied in peacetime, also known as gunboat diplomacy, as an enfacement to the diplomatic process. In recent the concept has been used by the US in the Russian – Georgian conflict by positioning the *USS Mount Whitney* of the USN 6th fleet off the Georgian coast.[7] The use of naval forces as maritime power projection is being defined in the US Naval War College's *Commander's Handbook on the Law of Naval Operations*; "[d]epending upon the magnitude and immediacy of the problem, naval forces may be positioned near areas of potential discord as a show of force or as a symbolic expression of support and concern. Unlike land-based

[2] Corbett, 161 – 166.
[3] Uhlig, *Fighting at and from the Sea: A Second Opinion*, p. 123.
[4] Alamocarrillo, Juan Carlos Del, et. al., p 16.
[5] *Into the wide blue yonder; Asia's navies*, the Economist, Jun 7, 2008, p. 66.
[6] Uhlig, pp. 124-7.
[7] See article in the Washington Post, www.washingtonpost.com, *US unloads aid to Georgia, Russians eye every move*, September 6, 2008.

forces, naval forces may be so employed without political entanglement and without the necessity of seeking littoral nation consent."[8]

The concept of a *fleet-in-being* can be explained as deterrence to enemy activity in a certain area, the mere fact that a naval force is in the area and the knowledge thereof deters the enemy from naval operations and thereby constricting him. Another naval tactic frequently used is *commerce raiding*, not so much to actually damage the enemy's supply lines but rather to annoy and subject the enemy to inconvenience. The concept of *fleet battle* is very simple; engage the enemy's major naval force in battle and win – thereby gaining free access to a certain area of the sea. In turn this will give safe transportation and the possibility for *maritime power projection* against the enemy's land territory.[9] The use of *blockade* in maritime operations originally meant to block the enemy's naval assets from leaving port but has evolved to also include the sinking of merchant and naval vessels by submarines and the laying of mines. During the cold war naval vessels armed with intercontinental ballistic missiles capable of launching nuclear warheads was frequently navigating the world's oceans; these units were used in the strategic level as a nuclear deterrence towards the adversary. As technical development proceeded in the 20th century naval vessels gained the ability to effectively defend not only themselves but also friendly aircrafts from threats making them effective in the *protection of air-lines of communications*. This technical development also resulted in radar systems capable of detecting launches of ballistic missiles at sea or from land and thereby making naval forces useful as a part of a *forward missile defence* warning and intercept system.

2.2 Modern Naval Warfare

2.2.1 General

From the early days of maritime history to the 19th century tactical and strategically uses for naval forces basically remained the same. In the 17th century ship-borne artillery was developed, making it possible to implement the strategy of *maritime power projection* (as explored above, see 2.1). During the US civil war technical development amounted to a transformation of tactics as the commanders were given more diverse tools to use in order for them to achieve success in their operations. The invention of the Ironclad, the mine, the torpedo and the submarine all added new dimensions to naval operations. The submarine became a much-used asset in the First World War and dominated the maritime strategy used by both sides during the Second World War. During the 20th century technical development has spiraled, the aircraft carrier, the nuclear-propelled submarine and the AEGIS-destroyer and not the least the capability of naval units to carry nuclear weapons have drastically changed the tactics of naval

[8] The *Commander's Handbook on the Law of Naval Operations*, NWP 1.14, at 4.4.1.
[9] Uhlig, p. 126.

warfare on almost every decision level. More recent developments include the use of advanced *Information Warfare* (IW) systems, also often referred to as *network-centric warfare* (NCW).[10] The recent developments in the specter of information warfare are often referred to as a *Revolution in Military Affairs* (RMA), even though any major paradigm shift in the history of military development could also be fitted within the concept of RMA.

2.2.2 Revolution in Military Affairs (RMA)

In the early 1990s the concept of RMA was launched and gained recognition as a new model to explain the impact of computerization and information warfare on military operations. Today the concept is included in the doctrine of most military institutions in the world. The objective of RMA is to gain dominance over the flow of information, securing the distribution of accurate information to friendly forces and denying it to hostile forces. This is done with advanced communications systems supplying information to all levels of decision-making, from the political leadership down to the individual soldier or sailor. This will in turn result in affective and precise military actions and avoiding collateral damage. IW can also be used for political purposes, supplying the adversary's military and civilian population with false information and propaganda in order to destabilize the military establishment, the economy or the political system. Examples of military conflicts in which the RMA concept was deployed include the first Gulf War in 1991, the Kosovo operations in 1999 and the Iraq War in 2003.[11]

2.2.3 Asymmetrical Warfare

The attack on the Twin Towers in September 2001 marked the beginning of a new era in military doctrine. Asymmetrical warfare had been encountered previously in modern history, less than six months previously with the bombing of *USS Cole*[12] and in various manifestations of political violence during the late 19th century such as the Lockerbie incident[13]. Even though, the attack on the World Trade Center and the Pentagon was so massive in its form that it altered the military and political agenda significantly.

Steven Metz and Douglas V. Johnson of the U.S. Army War College neatly defines the concept of Asymmetrical Warfare as; "acting, organizing, and

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[10] The Economist, *Transformed?*, published Jul 20, 2002.
[11] Kamienski, Lukasz, *The RMA and War Powers*.
[12] See below 4.2.3.3 on the bombing of *USS Cole*.
[13] On the 21 of December 1988 a Pan Am Boeing 747-121 en route John F. Kennedy International Airport from London Heatrow was destroyed by a bomb in the vicinity of the Scottish town Lockerbie. A total of 270 people were killed in the incident (including 11 town residents killed on ground). The bombing was believed to have been carried out by Libya and two Libyan nationals were subject to criminal investigation, although only one was convicted. See the New York Times, www.nytimes.com, *Pan Am Flight 103*, published in June 28, 2007.

thinking differently than opponents in order to maximize one's own advantages, exploit an opponent's weaknesses, attain the initiative, or gain greater freedom of action. It can be political-strategic, military strategic, or a combination of these. It can entail different methods, technologies, values, organizations, time perspectives, or some combination of these. It can be short-term or long-term. It can be deliberate or by default. It can be discrete or pursued in combination with symmetric approaches. It can have both psychological and physical dimensions".[14] In terms of the 9/11 attacks asymmetry could be expressed as being the opponent's willingness to sacrifice his own life. Technical advantage can also be regarded as an asymmetry; the U.S. Armed Forces today have a superior advantage in terms of technically advanced weapons and IW-systems.[15] This applies equally to land-, air- and naval warfare. In naval operations this is, thus, very evident as many such ventures occur between modern western task forces and units versus a technically less advanced adversary.

Asymmetry equally applies in all tactical and strategic levels; the ground troops with most advanced training and the most sophisticated equipment enjoy an advantage against their opponent. The military leadership with the best information and the ability to communicate and give out orders to their subordinates enjoy the same advantage. On the political level asymmetry is manifested as the greater tactics and the ability to present that to the public as well as establishing international recognition for the politics pursued.[16]

In naval operations the issue of asymmetrical threats is very relevant as technical performance is a main tactical factor for seagoing units. On the other hand, in spite of her technological superiority, the *USS Cole* was unable to respond accurately to the threat posed by small crafts manned with suicide crews. This manifests how naval warfare has transformed from naval forces being a rather blunt tool in large-scale conflicts into a more multifaceted instrument. A tactical and strategic concept within the asymmetrical model is the maritime zone, a natural response to threats posed by such attacks as the one on *USS Cole*.

The right for belligerents to stop and search merchant vessels flying the flag of the enemy is well established in international law as well as state practice. However, there has been much controversy on the rights of belligerents to stop and search neutral vessels. In a very restrictive interpretation of the rules such a right would only exist either if mandated by the Security Council or if the criterions for self-defense are met.[17]

An increasing use for naval forces is the use of them in maritime operations intending to control areas of the sea in order to intercept and interdict

[14] Metz and Johnson, *Asymmetry And U.S. Military Strategy: Definition, Background, and Strategic Concepts*, p. 5.
[15]Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, p. 14.
[16]*Ibid*., p. 14.
[17] Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law*, p. 235

vessels in violation of international, regional or national law, referred to as maritime Interception/Interdiction Operations (MIO). Elements of such missions include sea-traffic control, asserting freedom and safety of navigation, protection of vessels in general or of those belonging to a certain flag-state and the suppression of terrorism and other illegal activities within the area.[18] MIO has been conducted on a number of occasions during the last decade, most notably during the operation *Enduring Freedom* as a mean to fight terrorism. The very nature of a MIO is to interfere with international shipping in the meaning that vessels involved in illegal activities are normally not belonging to the same flag-state as the one conducting the operation. Recent attacks on merchant vessels in the waters surrounding the Horn of Africa has attained much attention as the pirates operate from bases in Somalia and pose a serious threat to international shipping. The most recent example being the attack on an Ukrainian vessel carrying Russian military materials, including tanks and RPG's, which has resulted in the ordering of Russian warships to the area.[19]

2.3 Conclusions

The rapid development in technology and tactics in the military field in general and the maritime or naval field in specific has altered the arena of naval warfare considerably. New challenges for the world's navies include the 'war on terrorism' and the increasing threat posed by criminal elements such as pirates against international shipping. As weapons are getting increasingly easy to obtain, cheaper, and easier to use, the effectiveness of such organizations as *Al Qaeda* is improving. The same development applies to the field of communication; satellite telephones and the use of the Internet allow for a much more simple way to effectively coordinate and control terrorist and criminal operations by their leaders. At the same time the global merchant navy is expanding with more tonnage than ever before deployed in the world's oceans following the ever increasing globalized economic system. In order to be successful in their operations naval commanders must use all of their tactical and technical advantages, still, in the asymmetrical threat environment the technological advantage in certain situations account for very little. In the case of the bombing of *USS Cole* a small craft, equipped with almost ancient weapons and propulsion, succeeded in an attack against one of the worlds most advanced warships.

A different question that arises is if military units are the most effective tool in conflicts between states and the international community against non-state parties. A view that some has taken is that the use of military force is inefficient and blunt in such an operational environment and rather like the allegory of "shooting flies with cannons". Although law-enforcing institutions have customarily been confined to the territories of their home states and seldom enjoys the same technical and logistical resources as their

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[18] Von Heinegg, *The Legality of Maritime Interception/Interdiction Operation within the Framework of Operation ENDURING FREEDOM*, NWP 79, p. 256.
[19] *Russia call to halt Somali piracy*, article published on news.bbc.co.uk, October 3, 2008.

military equivalents. On the maritime arena law-enforcement has traditionally been enforced by military forces or by a semi-military coast guard organization.

3 The law of naval warfare

3.1 General

There is in public international law a general divide between rules applicable in peacetime and those used in war. This also applies to maritime law; the UNCLOS does not in any part try to regulate armed conflict, thus there are still some provisions stating that the ocean is to be reserved for peaceful purposes.[20] However this is not considered to be an attempt to illegalize all maritime violence but rather as a general opinion that states should refrain from such violence. [21] Consequently, two different branches within public international maritime law can be identified; the law of the peacetime uses of the sea and the law of naval warfare (also known as the naval *jus in bello*). The laws of naval warfare are not regulated to the same extent as the laws of land warfare, and there are no codifications subjecting naval warfare to the general principles applied to the latter. Even though, with reference to the UK and US manuals on conduct in naval operations[22] as well as the *San Remo Manual*, those principles seems to have been applied to the customary law of naval warfare regardless of the lack of treaty-law.[23]

With the beginning in the 1856 declaration of Paris, there have been different attempts to codify naval warfare such as the 1907 Hague Convention and the 1909 London declaration, although the legal status of these codifications is unclear due to state practice during the two world wars and the adoption of the UN Charter.[24] There is today a difference of opinions between those who believe that these events nullified the previous codifications and those who believe that the codifications are still valid, although altered. The former group of international jurists argues that the general ban on violence in the UN Charter only gives room for action that could be related to Security Council decisions or the right of self-defense.[25] Even though the general opinion is that the naval *jus in bello*, which has not been altered to any significant extent during the last 100 years[26], is still valid when armed conflicts *de facto* occurs (i.e. in accordance with the UN Charter). This is also the opinion of the authors to the USN *Commander's Handbook* as it repeats the prohibition of war in the UN Charter but still recognizes the existence of a framework of laws governing the conduct of warfare.[27] This expresses the view that the *jus in bello* must be viewed in

[20] UNCLOS, art, 88.
[21] Churchill & Lowe, p. 421.
[22] See *The Manual of the Law of Armed Conflict* and *The Commander's Handbook on the Law Of Naval Operations,* NWP 1-14M.
[23] Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, AJIL, Vol. 94, No. 1, p. 69.
[24] Wendel, p. 233.
[25] *Ibid*, p. 234.
[26] Stephens, *Law of Naval Warfare and Zones*, *Maritime Operational Zones*, at 4-2.
[27] *The Commander's Handbook On The Law Of Naval Operations*, NWP 1-14M, at 5.1 – 3.

the light of the UN Charter and thus any violence must meet the requirements of self-defense or otherwise be sanctioned by the Security Council.[28] The UK, on the other hand, has since the 1980s Tanker War and both during the 1982 Falklands/Malvinas conflict and the later 1990s Gulf War refrained from the use of terminology referring to the LOAC or naval *jus in bello*. Instead the UK has sought to pin all questions on legality of the use of force to article 51 of the UN Charter and the right of self-defense.[29] It remains clear that the treaty-laws governing naval operations are approaching the end of their life cycle as technical and tactical uses of maritime forces have altered considerably since their creation (see above, 2.1).[30]

A very important area of legislation concerning the naval *jus in bello* is belligerents' rights and obligations in regard to neutral coastal and flag states. By tradition the *jus in bello* obligates the parties engaged in military conflict to exercise 'respect' in regard to the rights of neutral states while the standard phrase in LOS is 'due regard'. The authors of the *San Remo Manual* choose to use the wording 'due regard' on the grounds that the former was restricting the conduct of the naval warfare too excessively and thus would not be respected.[31]

In addition to the technological and tactical development the peacetime laws governing the territory of coastal states have evolved during the last century. In the late 19th century there was only two jurisdictional zones at sea; the three-mile territorial sea belonging to the coastal state and the high seas. The latter was consequently open for belligerent's military operations without any limitation. In the post UNCLOS environment the sea is subject to a multitude of geographical limitations such as the EEZ and the continental shelf. The territorial sea has also been expanded to 12 NM[32], in turn encapsulating many international straits. The creeping coastal state jurisdiction on the expense of the high seas have direct effect on belligerents military operations as it increases the maritime area excluded from military activity for the reason that it is controlled by neutral powers.[33]

3.2 The Law of Armed Conflict

Historically the matter on determining the legality of military conflict consists of two branches the first one deals with the legality of a nation's decision to engage in military conflict, the *jus ad bellum*. The second one deals with the actual conduct of such operations, referred to as *jus in bellum* or the law of armed conflict (LOAC). The *jus ad bellum* is primarily the

[28] Lowe, NWP 64, pp. 130 – 131.
[29] *Ibid*, p. 133.
[30] Doswald-Beck, AJIL, Vol. 89, No. 1, p. 194.
[31] Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, AJIL, Vol. 94, No. 1, p. 68.
[32] UNCLOS, art 3.
[33] Roach, p. 67-68.

responsibility of the political leadership and is resolved on a grand strategic level while the latter is a responsibility primarily of the military establishment and to be considered on every level of decision-making.[34]

The idea of the 'just war' developed as Christianity became the state-religion of the Roman Empire, aggression was considered to be unjust and the general idea was that military operation and the use of force should follow the 'divine will'. With the founding of the European nations and empires a notion of the requirement to attempt a peaceful resolution of the conflict, prior to military engagement, appeared. The Peace of Westphalia in 1648 marked a shift in international law as states were for the first time recognized as having rights and obligations vis-à-vis each other, which included the obligation of honoring agreements and respecting the territorial integrity of other states. During the 19th century, as secularism was increasing, the concept of the 'just war' began to deteriorate and was replaced by a strictly legalistic point of view. War was being considered as the expression of politics rather than an instrument to punish wrong doers. In the years following the Peace of Versailles in 1919 and with the creation of the League of Nations the idea of the 'just war' re-emerged. In 1928 the *Kellog-Briand Pact* was signed, prohibiting war between the signatory states.[35]

The Laws of War were first codified during the Hague conferences, in 1899 and 1907, and originally covered such areas as the treatment of wounded prisoners and the use of certain ammunitions. The law of naval warfare was also codified to a certain extent. In 1949 the four Geneva conventions succeeded previous agreements on the amelioration of the condition of the wounded and the sick in the armed forces in the field, the amelioration of the condition of the wounded, sick and shipwrecked at sea, the treatment of prisoners of war and protection of civilians in armed conflicts. In 1977 two additional protocols were added to the previous four, further expanding the protection. It has been noted by the ICJ that the all of the codifications included in the Hague and Geneva conventions today function as single legal framework which can be referred to as the 'international humanitarian law'.[36] It must be taken in account that the development of the modern LOAC is in essence a design by the West and has a clear link to the wars that the colonial powers and later the US and other industrialized nations has been entangled in during the 19th and 20th centuries. These conflicts include the American Civil War, the Crimean War, the Boer War, the Franco-German wars and the two World Wars.[37]

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[34] *The Commander's Handbook On The Law Of Naval Operations*, NWP 1-14M, at 5.1.
[35] Shaw, p. 1013 - 1017.
[36] *Ibid*, p. 1056.
[37] Ehrenreich Brooks, War Everywhere: *Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, UPLR, vol. 153. p. 706.

3.3 LOAC in the post 9/11 world

The grey area between 'war' and 'peace' has always existed in terms of determining the legal status of a specific situation. Semantic questions such as the meaning of the words 'war', 'civil war', 'unruliness' and 'crisis' are frequently debated. This in turn amounts to a quite unstable ground for determining whether or not the laws of armed conflict is applicable. Ever since the fall of the Twin Towers in September 2001 this already unstable ground has been further destabilized, furthermore the events have led to a more complicated relationship between domestic and international affairs of states. The 'War on Terror' declared by the Bush administration, and supported by a majority of the allied states[38], raises many legal questions. One of the major issues is whether or not the conflict between the US and Al Qaeda is an 'internal' or 'international' conflict. On one hand Al Qaeda is not a state and certainly not a 'High Contracting Party' to the Geneva Convention[39] making it hard to argue that an 'international' armed conflict exists between the US and the organization. On the other hand it would be even harder to argue that an 'internal' conflict exists. Nevertheless the 'War on Terror' can be characterized as an armed conflict as military force is *de facto* being used. A position from a legal point of view would be to regard the 'war' as a police operation rather than a military conflict, the objective being to stop criminal acts (such as terrorism) from being conducted. This would imply that the LOAC is not applicable as it only apply to 'war', yet such a view would be contrary to the terminology and level of force used.[40] Furthermore there is the matter of geographical boundaries; in LOAC there can be found a rather distinct division between 'zones of war' and 'zones of peace'. During the major wars of the early 20th century some states, such as Switzerland and the Nordic countries, announced their neutrality, thus making them 'zones of peace', while the territory of the belligerents could be characterized as a 'zone of war'. This served the purpose of limiting the hostilities spatially. Following the September 11 events such a clear division can not be made as Al Qaeda operate globally and often from neutral or allied countries and even within the US. This was demonstrated by the 2002 CIA attack on a high level Al Qaeda operative in Yemen, the attack succeeded, even though there were collateral casualties (including a US citizen). The action was justified as preemptive self-defense, but amounted to serious scrutiny by many international organizations such as Amnesty International.[41] Another aspect corresponding to spatial boundaries are the temporal dimension of a 'war'. Traditionally LOAC draws a sharp distinction between 'peacetime' and 'wartime'; an armed conflict commences when a party declares war or otherwise initiates the armed conflict and ends with the 'cessation of hostilities'. This, for instance, has immense importance to prisoners of war (POWs) and others detained or

[38] In this context the term 'allied states' includes the members of NATO, Partnership for Peace (PfP), and other states such as Japan and Saudi Arabia who have expressed support for the US actions following the 9/11 events.
[39] Geneva Convention, article 2. !!!
[40] Ehrenreich Brooks, pp. 712 – 715.
[41] *Ibid.*, pp. 721 – 725.

evacuated during the conflict, as peace would normally allow for them to return to their home country. As an example of these implications the fate of a large number of people being detained by the US at a military base in Guantanamo, during the 'War on Terror', continues to remain uncertain (regardless of their otherwise unclear legal status) as there seems to be no temporal end to the hostilities between the US and Al Qaeda.[42]

3.4 Criminal activities at sea

Under customary law there has long been considered to be an inherent right for flag-states to intervene against certain crimes committed on the High Seas, such as piracy and slave trade. The UNCLOS provides that "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State"[43] and that, correspondingly, states have the right to apprehend pirate vessels outside of the jurisdiction of other states.[44] Furthermore only "warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service" can invoke such a right.[45] Of course neither LOAC nor the *San Remo Manual* provides any regulations in terms of dealing with piracy as they are designed to regulate hostilities between nations and not law-enforcement. Even though there exists a link between the right of self-defense and measures taken against piracy, as the flag-state has the right to defend her vessels from any attack including criminality.

3.5 The 1982 Law of the Sea Convention

The origin and development of the 1982 UN Law of the Sea Convention, or UNCLOS III, will not be explored in this thesis. Even though, the effect of the convention extends to all areas and uses of the seas, including the use of force and the oceans as a theatre for military operations. UNCLOS can be considered to be a peacetime convention as it only covers peacetime uses of the sea; on the other hand it can be held that 'war' does not exist as it is unlawful under the UN Charter. If the concept of 'war', from a legal perspective, does still exist (and UNCLOS is to continue to be valid in both peace and war), that would imply that many parts the provisions of UNCLOS might be in conflict with LOAC and other sources such as the *Commander's Handbook,* or that there is a need to determine when the regulations of UNCLOS can be overruled by the *jus in bello*. This is very

[42] Ehrenreich Brooks, pp. 726 - 728.
[43] UNCLOS, art. 100.
[44] *Ibid*, art. 105, which reads as follows; *"On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."*
[45] *Ibid*, art. 107.

evident in the articles regulating the peaceful uses of the EEZ and the high seas, which makes naval warfare practically impossible.[46] Peacetime gunboat diplomacy or show of force is also unlawful under the UNCLOS, as article 301 requires nations to refrain from threat of force against the territorial sovereignty and political independence of coastal states. The wording of previously mentioned articles can be considered vague and too general to pose any practical significance, nevertheless they should be regarded as an extension of the UN Charter and their purpose can be considered to be to reassure that the LOS is in compliance with the constraints of force laid down in the Charter.[47]

3.6 The San Remo manual

In the 1980s, and especially after the 1982 UN Law of the Sea Convention and the completion of the US *Commander's Handbook On The Law Of Naval Operations* in 1987 and the UK *Manual of the Law of Armed Conflict*[48], it became evident that there was a discrepancy between the old frameworks of laws governing naval operations and state practice (as demonstrated by the US in the *Commander's Handbook […]*). As a result a group of international lawyers, scholars and naval officers began work on a compilation of the customary rules and treaty law relevant to the area of naval *jus in bello*. In June 1994 the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (hereinafter referred to as the *Manual*) was completed following a seven-year long effort. The *Manual* extends from just compiling customary law towards actually suggest a new regime in controversial areas, such as the use of maritime zones.[49] There are six chapters in the *Manual,* each dealing with separate aspects of the naval *jus in bello*. The first chapter contains the general provisions and gives reference to the UN Charter as well as defines the area of naval warfare and the terms used. The second chapter is entitled 'Regions of Operations" and deals with belligerents and neutrals rights and obligations in different areas of the sea from the high seas to the internal waters of a coastal state. Part III contains provisions for basic naval combat and target discrimination in much based on the International humanitarian law. In part IV the uses of certain weapons such as mines, missiles and torpedoes are codified. In addition part IV includes certain rules governing the uses of the maritime exclusion zone device. Part V contain rules governing measures 'short of attack' such as interception and search of neutral and belligerent vessels, while part VI attends to the rules of medical personnel and transport.[50] One of the unique features of the Manual is its reference to the UN Charter and its attempts to combine the laws of naval combat with the international legal

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[46] UNCLOS III, art. 88 and 58.
[47] Lowe, NWP 64, p. 131.
[48] *The Manual of The Law of Armed Conflict* – Amended text 01/04, Joint Doctrine and Concepts Centre, Legal Cell, Ministry of Defence.
[49] Doswald-Beck, AJIL, Vol. 89, No. 1, p. 193.
[50] The San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994

framework in general and in particular *vis-à-vis* the UNCLOS.[51] The traditional *jus in bello* indicates that the laws of war only come in effect when a state of war is declared and then continue to be valid until a formal peace treaty is signed. This is albeit very seldom the way military conflict is being conducted in the post UN Charter era as war is prohibited. Instead military conflicts are often conducted on the base of self-defense. The Manual reflects this and emphasizes the principles of necessity and proportionality, thereby attempting to avoid that the belligerents resort to unconditional naval warfare. This is reflected in paragraphs three and four of the Manual;

3. *The exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter of the United Nations is subject to the conditions and limitations laid down in the Charter, and arising from general international law, including in particular the principles of necessity and proportionality.*

4. *The principles of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security.*

These provisions are naturally more directed towards the political decision making level and is not directly applicable to the individual commander at sea.

The distinction in previous codifications between non-belligerents and neutrals has been abandoned and there is only reference to neutrals, thus including all states not involved in the conflict within the term. The concept of 'military objective' is a very significant feature in the *Manual* as it determines the level of force that belligerents can exercise towards vessels other than those belonging to the armed forces such as warships and auxiliaries. The rules governing attack on neutral and enemy merchant vessels were rather restrictive in the 1936 London Protocol relating to the rules of submarine warfare, although this was not affirmed by state practice during the Second World War – in contraire the submarine warfare was almost unrestricted.[52] In the Nuremberg trials the former German head of the navy, admiral Dönitz, was found innocent to the charges relating to submarine attacks on civilian shipping (although the Court condemned the practice of unrestricted submarine warfare).[53] The Manual incorporates the London Protocol list of actions that render an enemy merchant vessel subject to attack on the grounds that it is to be considered as a military

[51] Doswald-Beck, AJIL, Vol. 89, No. 1, p. 197.
[52] Both the German Navy and the US Navy practiced the concept of unconditional submarine warfare, the former in the Atlantic and the latter in the Pacific. There was a general view that the total war included all civilian contributions to the war effort – and as almost all shipping to some extent was involved in that effort civilian merchant vessels subsequently became a legitimate target. Furthermore merchant vessels had been ordered to report sights of any u-boats to the Naval Command and if possible ram them thus also making them combatants. See Fenrick, *The Exclusion Zone Device*, CYIL, 1986, pp. 101 – 102.
[53] See the Nuremberg Tribunals sentence of Karl Dönitz.

objective as well as state practice during the Second World War. Concerning neutral merchant vessels the Manual allows for attack or capture if the vessel is carrying contrabands or otherwise is actively supporting the war effort, although it does not stretch as far as attacks on neutral vessels on a sole economical ground (thereby diverting from the US opinion as expressed in the *Commander's Handbook*).[54]

3.7 Conclusions

The criminalization of war can be said to have had protracted the development of laws applicable to armed conflict, although there has been some development, for instance in terms of the 1970s additions to the Geneva Convention. The division between those who argue that the LOAC is still applicable when an armed conflict *de facto* occurs and those who argue that all combat actions can be determined in the light of the UN Charter is in practical terms not very wide. It seems that LOAC is considered regardless in practice, as was i.e. the case in the Falklands Conflict. The *San Remo Manual* can be said to combine these views as it is in basic an interpretation of state-practice in the light of the Charter, thereby merging the *jus in bello* with the *jus ad bellum*. It has been suggested that the *Manual* should be converted into a treaty; still many jurists are of the view that the best road to travel would be to let customary law evolve, instead of being reduced to an obsolete document. The latter opinion is supported by the tendency for codifications to attempt to correct the actions of the last war fought rather than addressing the future questions. On the other hand some scholars, such as Ehrenreich, argue that a new attempt to codify LOAC is of vital importance as terrorism and low-intensity conflicts increases in number, mainly due to humanitarian reasons.

Regardless of the illegality of war there is the question what impacts a 'state of war' would have on the UNCLOS. Since the codification has no provisions addressing such a situation it seems likely that it was designed as a peacetime convention. Still many conflicts have included references to the UNCLOS and the freedom of navigation. The mere fact that maritime zones are established by states in conflict indicates that the belligerents consider the zonal regime as an exemption to the main rules. The Manual contains some answers to the question as it incorporates and references to the UNCLOS.

[54] Roach, p. 70.

4 Self-defense

4.1 General

Ever since the creation of the *Kellog-Briand Pact* [55] violence between nations has been considered illegal, accordingly this is reflected in article 2 (4) of the UN charter, which prohibits the use of force. The UN Charter itself is today, at least in parts, by some regarded as *jus cogens*.[56] An exception to the main rule is found in article 51 of the charter, addressing the question of self-defense and stating that;

> *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense 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."*[57]

The article is a manifestation of the ancient customary rule that every state has the 'inherent' right of self-defense,[58] today the customary rule can be regarded as a parallel rule vis-à-vis article 51.[59] This raises the question wheter or not the customary rule is exactly corresponding to article 51 or if there are any differences and the question of (if so) the balance between self-defense and other *jus cogens* rules. A state may act in self-defense until the Security Council has taken necessary steps to maintain the international peace. The article allows for individual or collective self-defense, e.g. corresponding to article five of the Washington treaty.[60] The question wheter or not a Security Council resolution exhausts the rights of self-defense arose during the 1990s military conflict regarding Iraq and Kuwait (*Operation Desert Storm*). Strong support for the latter alternative was given by the US, holding the policy that there is a link between the decisions of the Security Council and customary law making such a decision accommodative to customary law rather than nullifying it. This, in turn, suggests that the right to self-defense can be invoked as long as the Security Council has not yet dealt with the situation successfully.[61]

The difference between the right to use force in self-defense according to article 51 and the decisions and mandates given by the Security Council

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[55] The *Kellogg-Briand Pact* (or the *Pact of Paris*) was signed on August 27, 1928, with the objective of 'providing for the renunciation of war as an instrument of national policy'. See Shaw, p. 422 – 423.
[56] Walker, p. 606.
[57] The Charter of the United Nations, as signed on 26 June 1945, in San Francisco.
[58] Gill, JCSL 11:3, p. 363.
[59] Walker, p. 606.
[60] The North Atlantic Treaty, as signed on 4 April 1949 in Washington D.C.
[61] Jaques, Maritime Operational Zones, 5, p. 10.

applies equally on lower levels of decision-making. On operational and tactical level the actual military decisions would normally not be regulated in detail by the Council and therefore must be taken on the grounds of article 51, the naval *jus in bello* and other relevant customary and treaty law.[62] Consequently, the right of self-defense is not solely based on article 51, but rather of a blend between customary law and the charter and the use of such force needs to be covered (at least partially) by article 51. If the action is taken on the legal basis of customary law there is a need to establish that the rule allowing it is neither obsolete or in conflict with the charter.[63] Self-defense was clearly established to be a part of customary law by the ICJ in the *Nicaragua Case*[64] stating that the terms 'inherent' or 'natural' are only valid if they are linked to a 'customary nature'.[65]

The existence of an anticipatory right to self-defense is not often disputed. The *Caroline incident* of 1837 establishes the right to take anticipatory measures if 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.[66] The general opinion is that the outcome of the *Caroline incident* suggests that there is three criteria's for the legality of anticipatory self-defense, namely *immediacy*, *necessity* and *proportionality*.[67] The right was invoked by the Netherlands (East Indies) relating to her declaration of war against the Japanese empire following immediately after the attack on Pearl Harbour as well as made to apply on the German invasion of Norway by the ruling by the International Military Tribunal in Nuremburg.[68] The concept of anticipatory self-defense in maritime operations is defined by the US Navy's commander's handbook as:

> *"…the inherent (…) right of a nation to protect itself from imminent attack. Imminent does not necessarily mean immediate or instantaneous. The determination of whether or not an attack is imminent will be based on an assessment of all facts and circumstances known at the time. International law recognizes that it would be contrary to the purposes of the Charter of the United Nations if a threatened nation were required to absorb an aggressor's initial and potentially crippling first strike before taking those military measures necessary to thwart an imminent attack. Anticipatory self-defense involves the use of armed force where attack is imminent and no reasonable choice of peaceful means is available."*[69]

As it seems the USN doctrine reinterprets the *Caroline* criteria's and add the neologism of 'imminent attack', and at the same time diverse the term from 'immediate attack'.

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[62] Jaques, Maritime Operational Zones, 5, p. 10.
[63] Gill, JCSL 11:3, p. 364.
[64] ICJ Reports 1986 para 195, 211, Case Concerning Military and Paramilitary Activities in and Against Nicaragua.
[65] Shaw, p. 1026.
[66] *Ibid.*, p. 1024 – 1025.
[67] Gill, p. 364.
[68] *Ibid.,* p. 361.
[69] The *Commander's Handbook On The Law Of Naval Operations*, NWP 1-14M, at 4.4.3.1.

4.2 Self-defense in the maritime context

4.2.1 General

The *San Remo Manual* emphasizes the connection between the naval *jus in bello*, the inherent right of self-defense and the UN Charter:[70]

3. *The exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter of the United Nations is subject to the conditions and limitations laid down in the Charter, and arising from general international law, including in particular the principles of necessity and proportionality.*

4. *The principles of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security.*

5. *How far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed.*

6. *The rules set out in this document and any other rules of international humanitarian law shall apply equally to all parties to the conflict. The equal application of these rules to all parties to the conflict shall not be affected by the international responsibility that may have been incurred by any of them for the outbreak of the conflict.*

The general opinion is that the Law of the Sea (LOS)[71] regulates peacetime use of the oceans, albeit the use of self-defense is not regulated in any of the sources. Still, self-defense can be invoked in peacetimes as well as in times of conflict and is considered to be *jus cogens* while the LOS, in general terms, is not. From this the conclusion can be drawn that self-defense is overruling the norms of the LOS, i.e. the right of free navigation. In terms of the right of anticipatory self-defense it has been suggested that this would only apply in the maritime context if a 'first casualty' is sustained. However Professor A.V. Lowe suggests that this is not realistic, as it would imply a very high threshold for a violent response. This can be exemplified by the situation in the Falklands where a 'first casualty' could have implied the sinking of any of the Royal Navy's key units, such as the only aircraft carrier in the operational area. Such a strike could have resulted in the total failure of the British expedition.[72]

4.2.2 ROE

There are a strong link between the orders given by the state and its commanders to the military units and the use of force by such units in self-defense. Usually such orders are issued in the form of Rules of Engagement (ROE) that designates the level of force that is allowed in specific situations.

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[70] *San Remo Manual, paras. 3-6.*

[71] The term 'Law of the Sea' or LOS here refers to the customary provisions of UNCLOS as well as the 1958 High Seas Convention and other customary rules.

[72] Lowe, NWP 64, pp. 128 – 129.

According to the US Department of Defense dictionary ROE is "[d]irectives issued to guide United States forces on the use of force during various operations [which may] take the form of executive orders, deployment orders, memoranda of agreement, or plans".[73] On a general level the creation of a standard ROE (or SROE) is much practiced, the SROE demonstrates the determination of the political and military establishment. Sections of the SROE concerning self-defense are often made public in order to inform possible aggressors of the actions that they could become subject to. The US SROE applies to all military operation outside of US territory, in peace as well as conflict.[74] US ROE normally instruct the commanders that their first duty is to protect the vessel or aircraft.[75] During the Tanker War France was explicitly declaring that all attacks and threats against French vessels were to be met by force, which was also demonstrated by an incident in which Iranian naval forces initially threatened the merchantman *Ville d'Angers,* but later broke off after receiving strong warnings from a nearby French naval vessel.[76]

The US view on ROE in regards to military personnel is that a breach of the issued ROE is a violation of the military code of justice and can i.e. result in criminal charges if the action results in injury or death. Practical difficulties arise when naval units of different nations and branches participate in combined efforts such as multinational task forces where ROE is normally constructed for the force as a whole, and from time to time not corresponding to the ROE:s issued on a national level. This is especially apparent in terms of self-defense where different nations can be subject to different levels of threat as a result of the political and military situation.[77] US ROE dictates that "[a]ll necessary means available and all appropriate actions may be used in self-defense" even though "the nature, duration, and scope of the engagement should not exceed that which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces or other protected personnel or property".[78] This is on the other hand subject to supplement and amplification when the situation so requires.[79]

4.2.3 State practice

4.2.3.1 The downing of Iran Air Flight IR655

At 6.54 in the morning of the 3rd of July 1988 Iran Air flight IR655 en route Bandar Abbas from Teheran was destroyed in the vicinity of Qeshm Island

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[73] Department of Defense Joint Publication 1-02, *Dictionary of Military and Associated Terms,* 12 April 2001, as amended through 4 March 2008.
[74] Allen, *Limits on the Use of Force*, U.S. Naval war college, International Law Studies, vol. 81, p. 83.
[75] Walker, p. 609.
[76] *Ibid.*, p. 57.
[77] Allen, p. 84.
[78] Instruction by the Chairman Of The Joint Chiefs Of Staff on 15 January 2000, *Standing Rules Of Engagement for US Forces* (J-3 CJCSI 3121.01A), para. A 8 (a), at. A-6.
[79] Allen, p. 84.

by two ER-SM2 surface-to-air missiles, fired from the US warship *USS Vincennes*, killing all 290 passengers and crew.[80] The event was the consequence of general confusion and faulty information following the tense situation in the Persian Gulf at the time. At the period previous to the incident international naval forces were operating in the area in order to protect civilian shipping from hostilities and safeguard freedom of navigation. Of particular importance to the understanding of the chain of events is the incident on 17 May 1987 in which the *USS Stark* was severely damaged by two Exocet missiles fired by Iraqi interceptors.[81] This demonstrated the level of threat that naval units in the area were exposed to and resulted in attempts to identify and evaluate all air contacts approaching US warships. In turn the attempts to identify air traffic resulted in a large number of challenges directed against unknown air contacts by US military authorities and consequently a great deal of radio traffic on the emergency and air traffic control frequencies. The US military authorities maintained little communication with Iranian and other civilian air traffic control authorities and there were frequent reports of US warships interfering with traffic control and in turn resulting in dangerous conflicts.

The United States issued a notice in early 1984 stating that her naval vessels operating in the area were taking defensive precautions and requesting that aircraft not cleared for approach or departure from an international airport stay clear from US warships by no less than 5 nautical miles.[82] Other aircraft operated within the 5 nautical mile limit were requested to maintain contact by 121,5 or 243 Mhz,[83] failure to communicate or actions that could be interpreted as a threat would result in defensive measures.[84] Following the *USS Stark* incident a NOTAM[85] were issued to advice that additional defensive precautions were taken by naval vessels in the area and that all aircraft (both fixed wing and helicopters) was to maintain watch on 121,5 and 223 Mhz. The measures were supposed to be implemented in a way that not unduly interfered with the “freedom of navigation and overflight”.[86] Even though, the measures taken by the United States was *de facto* posing a problem for international civil aviation in the area. On a number of occasions civilian aircrafts were challenged during critical maneuvers such as takeoff and landing as well as being ordered to change heading while in ATS fixed tracks. There were also reports of confusion arising from situations were wrong aircraft mistakenly answered challenges from US vessels. A solution to the aviation industry was to reroute, albeit this was

[80] Report of ICAO fact-finding investigation on the destruction of Iran Air Airbus A300 in the vicinity of Qwshm Island, Islamic Republic of Iran on 3 July 1988, at 1.1.5.
[81] *Ibid.*, at 2.1.1.
[82] *Ibid.*, at 2.2.1.
[83] Challenges to unknown air traffic is normally made on VHF frequency 121,5 MHZ, a frequency mainly intended for distress traffic, which is assumed to be guarded by all aircraft. VHF frequency 223 Mhz is intended for military air distress traffic and is normally not guarded by civilian aircrafts.
[84] ICAO report, at 2.2.1.
[85] Notices to Airmen (NOTAM) are issued to inform aviators on particular hazards or obstructions to air traffic.
[86] ICAO report, at 2.2.2.

also an economic and technical question considering fuel prices and the maximum range of aircrafts.[87]

The *Ticonderoga*-class AEGIS[88] cruiser *USS Vincennes* was at the time one of the most modern warships commissioned by the US. The vessel joined the US Joint Task Force Middle East in late May 1988 and was from the beginning involved in direct hostilities. The Aegis system is capable of monitoring and tracking multiple targets in a wide geographical area and displaying the information to tactical officers, at the time all civilian flight plans and scheduled take-offs were known. No communication was ever established between civil aviation authorities in Iran and the vessel.[89] At the same day as the downing of IR655 intelligence had issued a warning on Iranian F-14 interceptors operating in the area and possibly posing a threat to US forces. Earlier on the day on the 3rd a helicopter launched from the *Vincennes* was reported to be under fire from small Iranian gunboats and the vessel consequently changed course in order to respond to the hostilities eventually entering Iranian territorial waters and engaging the Iranian units.[90]

The ICAO was requested to investigate the matter and came to the conclusion that the incident was resulting from the initial and continuing assessment by the crew onboard *USS Vincennes* that the radar contact was hostile. This assessment was based on that the flight had taken off from a joint military and civilian airport, the reports on Iranian F-14s, the previous hostilities between US forces and Iranian naval forces, the failure to match IR655 to the schedule of departing aircrafts and later on by the lack of response to the hailing of the target and reports on changes in the aircrafts speed and altitude indicating it was preparing for attack.[91]

The issued Rules of Engagements (ROE)[92] that were valid during the period of the incident specifically stated the responsibility for commanders to defend their vessels from hostile attacks and to pursue a hostile entity until it no longer poses a threat. The ROE also allowed for US warships to enter the territory of Iran in order to counter threats that could be pertained to the right of self-defense; although pursuit was to be halted "when the hostile force no longer poses an immediate threat".[93] Furthermore the ROE requisite for the identification of all air contacts prior to designating them as hostile unless they were actually showing hostile intent, even though the instructions also stipulated that "If a potentially hostile contact persists in

[87] *Ibid.*, at 2.8.1 – 4.
[88] Aegis is a mythological word pertaining to the shielding or protection of something. The AEGIS system used in naval warfare is a computerized system for combat information and monitoring of air and sea movements.
[89] ICAO report, at 2.3.1 – 2.
[90] Kelley, *Better Lucky Than Good: Operation Earnest Will As Gunboat Diplomacy*, p. 80.
[91] ICAO report, at 3.1.23.
[92] The guidelines and orders for conducting a special mission and the level of force allowed by US and NATO forces is known as the Rules of Engagement (ROE).
[93] Fogarty, *Investigation Report: Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988*, p. 13 – 15.

closing after you warn him away and if, in your judgment, the threat of attack is imminent, it is an inherent right and responsibility to act in self-defense”.[94]

The US position has consistently been that the action taken by the *Vincennes* was in accordance with international law and the inherent right of self-defense. The incident was subjected to the ICJ and proceedings were initiated, although a settlement was agreed under which the United States compensated Iran by 132 billion USD. In the letter of agreement the US furthermore acknowledged the tragedy and expressed regret for the loss of lives.[95]

4.2.3.2 The Falklands/Malvinas Islands Conflict

The Falkland/Malvinas Islands (hereafter referred to as the *Falkland Islands* or the *Falklands*) were discovered in the 16th century, but remained unpopulated until the British first made an attempt to settle there in 1765.[96] The first settlement only lasted nine years as the islands were deserted in 1774. The possession was reestablished by a new British settlement in 1833, which lasted uninterruptedly until the Argentinean intervention in 1982. In 1946 the Falklands were registered as a non-self-governing territory under the British crown in the UN.[97] At the time of the Falklands conflict 1.700 inhabitants populated the islands, most involved in the sheep farming industry.[98] The first Argentinean claim dates back to 1927, although the matter was never pursued until the 1960s when Argentina brought the case to the UN with a request that the Islands be transferred to the sovereignty of Argentina. In 1975 the relations between the UK and Argentina deteriorated as the UK began scientific exploration of the continental shelf of the coast of the Falklands.[99] In April 1982 Argentina invaded the Falkland Islands, possibly with vague expectations of political support by the US. The UK set up an expeditionary battle group and quickly expelled the Argentinean forces from the islands. The conflict resulted in the death of approximately 960 combatants.[100]

From a legal perspective an interesting development arose by the frequent practice, by both parties, to use the exclusion zone device. In all there was seven zones declared over the course of hostilities; the April 12 UK Maritime Exclusion Zone (MEZ), the April 23 UK Remote Defensive Zone (RDZ), the April 30 UK Total Exclusion Zone (TEZ), the May 7 UK policy statement, the April 29 Argentinean Maritime Zone (MZ), the April 29 Argentinean Strengthen Maritime Zone (SMZ) and the Argentinean May 11

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[94] Kelley, p. 79 - 80.
[95] Settlement; *Agreement on the Case Concerning the Aerial Incident of 3 July 1988,* before the International Court Of Justice.
[96] Barston and Birnie, *The Falklands Islands/Islas Malvinas conflict – A question of zones*, Marine Policy, vol. 7, issue 1, Jan., 1983, p. 14.
[97] Reisman, *The Struggle for the Falklands*, YLJ, vol. 93, p. 311.
[98] *Ibid.*, p. 287.
[99] Barston and Birnie, p. 15 - 16.
[100] Reisman, p. 287.

South Atlantic War Zone (SAWZ).[101] The MEZ was announced unilaterally by the UK during the initial stages of the conflict and comprised 200 NM zone centered on the position South 51° 40’ and West 59° 39’. The zone was intended to constrain Argentinean aircraft, warships and auxiliaries from entering the area and to function as a warning to neutral shipping from navigating in proximity to the military operation. The MEZ was a new invention in terms of international law, which was probably intentional in order for the UK government not to become limited to, or even acknowledging the existence of the naval *jus in bello*. The use of the 200 NM limit was never explained, still there are many rationales such as that it coincides with the EEZ and that the distance of 200 NM would provide adequate range in order to identify vessels and aircraft approaching the islands. The use of an exact circle rather then an extension from the baselines could be considered to be of pure practical reasons, i.e. the patrolling and surveillance of the area. The MEZ was later replaced by a total exclusion zone (TEZ), which prohibited all neutral and enemy vessels from entering the vicinity. The declaration of the TEZ was accompanied by a statement that the establishment of the zone was ‘without prejudice to the right of the United Kingdom to take additional measures which may be needed in exercise of its rights of self-defence under Article 51 of the UN Charter’.[102] The TEZ was only followed by challenges from two nations; Argentina and the USSR. The USSR main objection was that the establishment of such a zone was in violation of the 1958 HSC.[103] The practical reasons behind the USSR objection may have been that this would intervene with Soviet attempts to monitor and collect signals intelligence from the UK strike force.[104] The TEZ was total in the way that it also applied to all neutral vessels, without a specific permit of the British government. In May 1982 the TEZ was vastly expanded as a notice was given[105] that all Argentinean forces were prohibited from operating beyond 12 NM from the Argentinean coastline. This could largely be considered to be a response of the sinking of *HMS Sheffield* four days prior to the announcement, *HMS Sheffield* was sunk by an Argentinean ‘sneak’ attack using stealth tactics and air refueling, which demonstrated a British vulnerability. The declaration also served as an clarification of the UK view on self-defense and the, six days earlier, sinking of the pre World War II Argentinean cruiser *General Belgramo* 36 NM outside of the TEZ. The RDZ has already been explored above in 4.2.5 and will not be further examined in this chapter.

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[101] Fenrick, *The Exclusion Zone Device*, CYIL, 1986, p. 109.
[102] Barston and Birnie, p. 20 - 21.
[103] Fenrick, p. 111.
[104] At the hight of the Cold War signals intelligence gathered from a ’real’ combat situation would probably be of strategic interest to the USSR as it would provide vital knowledge of NATO capabilities and operational procedures.
[105] ”Because of the proximity of Argentine bases and the distances that hostile forces can cover undetected, particularly at night and in bad weather, Her Majesty’s Government warns that any Argentine warship or military aircraft which is found more than 12 nautical miles from the Argentine coast will be regarded as hostile and is liable to be dealt with accordingly”. See Fenrick, *The Exclusion Zone Device*, CYIL, 1986, p. 111.

The Argentinean zones created during the conflict were more of a reaction to British declarations than the results of a deliberate strategy. The MZ in large coincided with the MEZ, both geographically and in terms of what types of vessels and aircraft that was excluded, and the SMZ was clearly a reflection of the TEZ. Following the UK policy statement, on May 7, Argentina declared the SAWZ, which turned the whole of the Atlantic Ocean into a war zone. The only attack that *de facto* occurred outside of the area of conflict was a bombing of the Liberian tanker *Hercules* by the Argentinean Air Force. The question of economic compensation was resolved in a US court, which held the view that if no reparation was made the matter constituted an act of piracy thereby invoking state-responsibility.[106]

4.2.3.3 USS Cole

On October 12, 2000, the US *Arleigh Burke* class destroyer *USS Cole* was attacked by a small raft laden with explosives while refueling in the port of Aden in Yemen. Casualties included 17 crewmembers while another 39 were injured. The vessel was severely damaged and was later unable to leave port on her own keel. The attack has been characterized as an adoption of the well used truck-bomb tactics to the maritime context, it also bears close reassembly to the bombings of the US Marine Corps barracks in Beirut in 1983 and the Khobar Towers U.S. military residence in 1996.[107] The attack is believed to have been carried out by militant Islamists with possible connections to Al Qaida. Investigations following the incident concluded that the crew onboard was not in compliance with the SROE in terms of force protection and alert, although the investigations also showed that even if the SROE had been followed the attack could not have been avoided. In spite of this finding the US DoD commission report recommended that no changes be made to the SROE.[108]

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[106] Ruling by and the United States Court of Appeals, AMERADA HESS SHIPPING CORP v. ARGENTINE REPUBLIC, 830 F2d 421, 2d Cir., September 11, 1987, and the Supreme Court of the United States, ARGENTINE REPUBLIC v. AMERADA HESS SHIPPING CORP. ET AL., 488 U.S. 428, January 23, 1989.

[107] CRS Report, *Terrorist Attack on the USS Cole: Background and Issues for Congress*, p. 2.

[108] *DoD USS Cole Commission Report*, 9 January, 2001, p. 5.

4.2.4 Self-defense and commercial shipping

4.2.4.1 Interference with shipping on the high seas

4.2.4.1.1 General

According to the present regime of customary law and the UNCLOS, a state may only interfere with international shipping in peacetime if the flag state consents or if there is reason to suspect piracy, slave trade, etc. [109] This principle applies with some modifications in war and armed hostilities on the high seas as well. Even though, in certain situations, there seems to be conflict between the right of self-defense and the principle of non-interference on the high seas. The right of interference with vessels on the high seas was invoked by France during the Algerian upsurge in the 1950s and 60s when a large number of ships were arrested and inspected. The French actions were the source of great international criticism and by many considered illegal in respect to article 51 as violence is limited to 'armed attack'.[110] This was further asserted during the Falklands conflict between the UK and Argentina as a French vessel bound for Buenos Aires and carrying weapons was considered not to be a legitimate target by the Royal Navy. Consequently there can be regarded to be a state-practice and an *opinio juris* opposed to the right of extended self-defense in regard to ships in international water.[111] Albeit the opposite view was taken by the US during the Cuban missile crisis as the US was arresting and searching vessels bound for Cuba in order to prevent the installment of missiles carrying a nuclear payload directed towards targets on the US mainland. The state of Israel has also made arrests in search of weapons destined for the Palestinian authority and other organizations in Palestine. Most notably is the arrest of the Iraqi vessel *Karin-A*, in 2002, carrying a cargo of some 50 tons of weapons, which was met by little response from the international community.[112]

Concerning merchant vessels belonging to the enemy, certain activities, according to the *San Remo Manual* and the 1936 London Protocol, can render them legitimate targets. The main rule is that attack on a merchant vessel is only allowed if the vessel can be considered as a military objective. This criteria can however be interpreted quite widely and both the *Manual* as well as the US Navy's policy delivers rather wide definitions. The US Navy designates a merchant vessels as hostile "[i]f an enemy vessel or aircraft assists the enemy's military effort in any manner, it may be captured or destroyed. Refusal to provide immediate identification upon demand is ordinarily sufficient legal justification for capture or destruction".[113] The essential fact in determining a target as hostile is thus the "effective contribution to military action" exemplified as "carrying military

[109] See UNCLOS art. 110.
[110] Churchill & Lowe, p 217.
[111] Byers, Michael, *Policing the High Seas: The Proliferation Security Initiative*, AJIL, Vol. 98, No. 3, p. 533.
[112] *Ibid.*, p. 533 - 534.
[113] *Commander's Handbook*, NWP 1-14M, para. 8.6.3. at 8-11.

materials".[114] A vessel is not solely characterized by the flag it is flying but rather on its ownership or the origin of the organization controlling it.[115]

According to US policy this not only extends to the flag-state but rather all vessels contributing to the enemy war effort, including neutrals.[116] Although this does not constitute a right to take action against neutral vessels involved in normal import and export trade only on the notion that it can be of importance to financing of the enemy efforts.[117]

4.2.4.1.2 Transport of weapons

The question of interference with vessels on the high seas and transportation of weapons of mass destruction (WMD) arose when the North Korean cargo vessel *So San* was boarded and inspected in December 2002 by the Spanish *Armada* on request by the US. The inspection concluded that the vessel was carrying SCUD-missiles originating from North Korea and bound for Yemen. Since neither Yemen or North Korea were at the time bound by any non-proliferation treaty the vessel was released, although the situation was far from satisfying for the Bush administration. This resulted in the initiation of the Proliferation Security Initiative (PSI) designed to create a broad framework for executive authorities to act in a multilateral environment, however the jurisdiction provided by the PSI only extends to the signatory parties.[118] It has been suggested that one way to come to terms with the problems of action against vessels of non-signatory flag states is to leave the matter to the UN Security Council and thus making it subject to chapter VII and a matter of "peace and security".[119] However making every action subject to the decision of the council is a cumbersome and time-consuming procedure. A different approach to the issue revolves around invoking the right of self-defense (with the US intervention in Afghanistan providing a new view on the concept) and the right to take counter-measures in order to fight international terror and the sponsors of such.[120] It is suggested that such a right can already be found within customary law (expressed in article 51 of the UN charter) as for example when a vessel poses an imminent threat.[121]

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[114] San Remo Manual, para. 60 (g).

[115] *Commander's Handbook*, NWP 1-14M, para. 7.5. at 7-7 states that "the fact that a merchant ship flies a neutral flag, or that an aircraft bears neutral markings, does not necessarily establish neutral character. Any merchant vessel or civilian aircraft owned or controlled by a belligerent possesses enemy character, regardless of whether it is operating under a neutral flag or bears neutral markings".

[116] *Ibid.*, para. 7.4. at 7-5 characterizes such vessels as vessels involved in "the carriage of contraband or otherwise contribut[ing] to the belligerent's war-fighting/war-sustaining capability"

[117] Roach, pp. 70-71.

[118] Byers, Michael, *Policing the High Seas: The Proliferation Security Initiative*, AJIL, Vol. 98, No. 3, Jul., 2004, pp. 526 – 528.

[119] *Ibid.*, p. 531.

[120] *Ibid.*, p. 532.

[121] See 5.1.4. for a discussion concerning the term 'imminent' and the temporal extension of self-defense and 5.1.0 for a discussion on article 51 and customary law.

4.2.4.2 Interference with shipping by bellingerents

4.2.4.2.1 The Tanker War 1980 – 1988

In September 1980 the Iran – Iraq war began following rising tensions between the two countries as manifested in the branding of the Iran Islamic Revolution as non-Islamic by Iraq in 1979 and the consequent termination of diplomatic relations. The conflict generated much attention from western and global powers concerned by the threat the conflict posed to strategic oil supply. Another aspect was the emerging political influence by the USSR on Iran that resulted, in an effort to maintain *status quo*, in a strong naval presence in the area by US and UK forces.[122] Another reason for the naval presence was the frequent attacks, by both belligerents, on neutral shipping in the area.

The Tanker War 1980 – 1988 (also referred to as the *Iran – Iraq War*) demonstrated the vulnerability of international oil dependency in relation to the gulf-area and the geography of the area. Historically the conflict has its origin in the old colonial days when France and Great Britain had strong interests in the area as well as the old Ottoman Empire. In 1971 the last British forces withdrew from the area only to be succeeded by US naval forces. At this time worldwide dependency on Persian Gulf produced oil was growing although the US was less dependant as her production was still sufficient until the peak in the beginning of the 80s.[123] Still the US (whose company's predicted the production peak and were already strongly active in the area) realized the importance of maintaining naval power in order to protect the vital oil shipping routes and oil production in general. However this was not a new policy in the Gulf as already in 1946 British naval vessels were involved in protecting UK private enterprises in Iran.[124] The US (being heavily stressed at the time by the involvement in the Vietnam War) was unwilling to commit herself fully as surety of the maritime security in the area. The solution was the so-called Twin Pillars policy, giving military support to both Saudi Arabia and Iran in order to maintain the status quo.[125]

By the end of the 70s the revolution in Iran permanently terminated the Twin Pillars policy. The power vacuum in the Gulf perceived by the USSR resulted in the invasion of Afghanistan which in turn resulted in a State of the Union address by President Jimmy Carter stating that the Persian Gulf was vital to US security interests. Consequently a US naval task force was sent to the area. On September 22, 1980, Iraq began military operations in order to invade Iran marking the beginning of the war. A NOTMAR delivered by Iran on the same day declared waterways in the vicinity of the operation area as a 'war zone' marking the beginning of the hostilities. In May 1981 a Danish vessel, the *Elsa Cat*, and a Kuwaiti research vessel,

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[122] Amin, S. H. *The Iran-Iraq Conflict: Legal Implications*, ICLQ, Vol. 31, No. 1, pp. 167 – 168.
[123] Walker, p. 36.
[124] In July 1946 HMS *Norfolk* and *Wild Goose* were involved in resolving a riot, taking place in a UK-controlled refinery in Iran. See Walker, pp. 33 – 34.
[125] Walker, p. 35.

were both arrested by Iran authorities on the allegations that they were carrying weapons bound for Iraq. Both vessels were however promptly released, as Iran was unwilling to challenge the international community in general and the western powers in particular.[126] At the same time Iraq was deliberately targeting neutral merchant vessels in the north of the Persian Gulf and gradually expanding the area of operations. In February 1984 Iraq declared a Gulf Maritime Exclusion Zone (GMEZ) of 50 NM centered on the Kharg Island in which all ships would be sunk without prior warning. In March the attacks escalated as a British merchant vessel was attacked by Iraq and, for the first time, a supertanker, *Yambu Pride*, was attacked by Iran in April.[127] This resulted in a January 1984 NOTMAR by the US declaring a protective "bubble" around US warships in the area and restricting other vessels movement in the vicinity of such.[128] In 1987 the *USS Stark* was hit by two Exocet missiles fired from an Iraqi aircraft, this heightened the US readiness in the area and resulted in new ROE: s for US commanders. In turn the new ROE and the threat of attack to US naval vessels contributed heavily to the IR655 and *USS Vincennes* incident. The UK was clear in her statements that all measures taken on behalf of the belligerents against neutral shipping was to be tied to their inherent right of self-defense under article 51.

On October 19, 1987, the US armed forces attacked a Iranian oil platform in the Gulf claiming that it was used in a three days earlier attack on the reflagged Kuwaiti tanker, *Sea Isle City*, which was struck by a Silkworm missile.[129] The US maintained the position that the action was justified under the rights of anticipatory attack and article 51 of the UN Charter. An aspect supporting this view was that the platform was equipped with both launching capability as well as radar, thereby posing a continuing threat to shipping in the area. However the attack also bears close reassembly to that of a reprisal.[130]

4.2.4.2.2 Merchant vessels and self-defense

As has been earlier concluded there is the existence of an inherent right to self-defense against attack by a nation towards the defending state. This naturally extends to attack on government owned property (such as naval vessels or military aircraft). It is also generally considered that the right of self-defense also applies to merchant vessels flying the flag of the state. Yet another view is that there is a (at least limited) right for the state to protect her other interests, i.e. property of company's originating in that country. This can come in conflict with the flag-principle considering the modern day practice of reflagging as an economic measure. During the Tanker War

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[126] Walker, p. 46.

[127] *Ibid.*, p. 51.

[128] The NOTMAR states that *"U.S. Naval forces operating in international waters [...] are taking additional precaution against terrorist threats. Aircraft at altitudes less than 2000 AGL [...] are requested to avoid approaching closer than five NM to U.S. naval forces"*, see Walker, p. 50.

[129] Gray, *The British Position in Regard to the Gulf Conflict*, ICLQ, vol. 37 (1988), p. 426.

[130] Lowe, NWP 64, pp. 128 – 129.

the opposite of the practice was taking place as many nations chose to reflag to US and other flags of the major naval powers, so-called flags of protection (as opposite of the flag of convenience). The US also declared that she would come to the aid of any neural vessel not carrying goods to any of the belligerents on the request by the neutral state. Extending the right of self-defense seems as in accordance with UN Charter and customary law, as long as it does not involve aiding one of the aggressors.[131] The duty to protect merchant vessels is normally expressed in the ROE i.e. in the US standing ROE and in the Swedish ordinance concerning the use of force. It can be noted that the Swedish ordinance regards Swedish flagged vessels as a part of Swedish territory and thereby subject to self-defense.[132]

4.3 Conclusions

Walker addresses the question of concerning state practice on neutrality and aiding the target of an aggression. During the Second World War, between 1939 and 1941, USA declared herself neutral but nevertheless was still aiding one party of the conflict. This was also the case during the Falklands conflict in which many states (including the US) chose to aid the UK. Walker characterizes this as an informal form of collective defense by neutral states sharing the same interest in the particular matter.[133]

Necessity and proportionality is by principle corresponding to the principles of LOAC, although the area and subject of the self-defense is limited to the attack in itself. There are, as an example, not a right to attack any military target anywhere but rather the specific aggressing unit and units aiding it. According to Walker the US did not violate any of those principles during the Tanker War, even in terms of anticipatory self-defense. Accordingly the IR655 accident was also within the legal principles of self-defense as the response was perceived as "necessary, proportional and admitting no other alternative" and thus meeting the *Caroline* criterions.[134]

The *Caroline* criterions have been expanded both by state-practice and technological development over the years. With the Second World War came the concept of a total war in which almost everything was connected to the total war effort. Targeting the civilian population would, according to that viewpoint, be legal as it is contributing to that same effort. The bombs over Hiroshima and Nagasaki were justified by military necessity and proportionality as the claim was that they allowed for a swift end to the Pacific war, thereby sparing many lives. The same can be argued for in the case of the UK sinking of *General Belgrano*; the individual threat she posed

[131] Walker, p. 607.
[132] Instruction by the Chairman Of The Joint Chiefs Of Staff on 15 January 2000, *Standing Rules Of Engagement For Us Forces* (J-3 CJCSI 3121.01A) & *Ordinance concerning the Intervention by Swedish Armed Forces in the event of Violations of Swedish territory in peacetime and in Neutrality*.
[133] Walker, p. 607.
[134] *Ibid.*, p. 608.

was limited, although the threat posed by the entire Argentinean navy was considerable.

Professor Gill has argued that self-defense can not solely be interpreted on the basis of article 51 of the UN Charter, even though it is an exception to the general ban on international violence provided by article 2 (4). Instead Gill believes that article 51 is substituting an independent rule, rather than being interdependent to article 2 (4). This in turn suggests that self-defense can be exercised even in a case in which there has been no armed aggression. During the last ten years many nations claim to have been exposed to attacks on their electronic information systems by hackers and possibly other states. Such attacks could be met by an armed response if the arguments laid down by Gills prevail. There seems to be a link to the case when a nation only perceives to be threatened while in reality it is not. While the US persisted in claiming that the *USS Vincennes* incident was justified, on the grounds of self-defense, the facts were indisputable; a civilian airliner had been shot down by a warship. Although reparation was made, the US never admitted guilt in turn suggesting that such a right exist under international law.

The USS Cole incident resulted in no changes to the US SROE, still the investigations found that if they had been followed it would not have made any significance to the outcome. No disciplinary charges were ever made to the commander. This would imply that even if the SROE were not amended the instruction on how to implement it might have been. The use of force in self-defense while within the jurisdiction of another state is a complex issue. On one hand the state exercising jurisdiction has the responsibility to protect the installations and objects belonging to other states legally within the territory. On the other hand it must be considered to be legal for a commander to defend himself and his crew against imminent danger.

It is assumed that the US is seeking to change customary law in order for it to permit interdiction of foreign-flagged vessels suspected of transporting WMD, not bound by any multilateral treaty. This would clearly be a transformation from the present regime, as has been proven by the US herself in the *So San* case. Still the possibility of WMD being transferred to rouge states would impose such a risk that the US would most likely be forced to intervene. A feasible outcome would in all probability be the invocation of the right to anticipatory self-defense.

5 Maritime Zones

5.1 General

5.1.1 Mare Liberum

The world's oceans can be divided into water-areas being within the jurisdiction of a state and thus belonging to that states territory (territorial water) and water-areas not belonging to any state (international water or the high seas). However this has not always been the case; during the 15th and 16th century the Spaniards and Portuguese, supported by the Papal Bulls of 1493, instituted a regime of territorial possession of the high seas.[135] Many scholars in the 17th century challenged this; most famous was Hugo Grotius and his work *Mare Liberum* (or *Freedom of the Seas*, published in 1609). Grotius expressed the view that the oceans were to be open for all nations and thus free of any territorial claims and jurisdiction as opposed to the regime of *Mare Clausum* – the view that states enjoy the same territorial rights on land as on sea.[136] The regime of *Mare Liberum* prevailed during the 18th century and is at present considered to be universal customary law. The freedom of the seas was codified during the 20th century in the 1958 High Seas Convention and the 1982 UNCLOS.[137] The definition of the high seas can be found in article 1 of the 1958 Convention while the UNCLOS regulates the activities that states are allowed to perform in the high seas (which include e.g. laying of submarine cables and pipelines, fishing, research, etc.). It is generally considered that the right to conduct naval exercises in the high seas can be based on article 2 of the 1958 Convention.[138] The concept of zones established in the High Seas can be considered as an exception (amongst many) to the regime of *Mare Liberum*. A fundamental principle on the high seas is that only the flag-state has the right to exercise jurisdiction over the vessels that fly her flag.[139] There are a few exceptions to this rule relating to piracy and crimes against humanity but in general the principle is regarded to fall within *jus cogens*.

5.1.2 Maritime Zones and the Laws of Naval Warfare

From the beginning of the 20th century and onwards the use of maritime zones in naval operations has become increasingly more frequent and is today often facilitated by naval forces in their normal conduct. The utilization of such zones is a way to limit enemy movement while maintaining maximum freedom of navigation for the own side. The concept of maritime zones has been variously termed over the years, including

[135] Shaw, p. 542 – 543.
[136] Oxman, Bernard H. *The Territorial Temptation: A Siren Song at Sea*, AJIL, Vol. 100, No. 4, pp. 830-831.
[137] Article 2 of the 1958 High Seas Convention and article 89 of the UNCLOS.
[138] Shaw, p. 544.
[139] This was affirmed by the PCIJ in the 1927 S.S. Lotus Case and is also expressed in UNCLOS, art. 92 (1).

descriptions such as “operational areas”, “military exclusion zones”, “total exclusion zones” or “war zones”. Interestingly there have been no attempts of treaty-based codification vis-à-vis the concept, albeit it has been explored in customary law and is presented in the *San Remo Manual*.[140] The more extreme practices are regarded as illegal in terms of *the Manual* and the responsibilities of the belligerents in regard to maritime zones are well defined:

> *105. A belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea.*
>
> *106. Should a belligerent, as an exceptional measure, establish such a zone:*
> *(a) the same body of law applies both inside and outside the zone;*
> *(b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality;*
> *(c) due regard shall be given to the rights of neutral States to legitimate uses of the seas;*
> *(d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided:*
> *(i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;*
> *(ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; and*
> *(e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.*
>
> *107. Compliance with the measures taken by one belligerent in the zone shall not be construed as an act harmful to the opposing belligerent.*
>
> *108. Nothing in this Section should be deemed to derogate from the customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations.*[141]

Articles 105 to 108 are generally agreed to reflect the International principles and customary law as it has evolved during the 19th century. As is stated in article 105 belligerents have an absolute duty to respect humanitarian law whether or not the actions geographically take place within a zone.

In tradition two different types of zones can be identified, the first one being a zone designed to limit hostilities to the territorial sea belonging to the belligerents. Such zones have been used during the Spanish Civil War during the 1930s, the Vietnam War and Middle East Wars of 1967 and 1973.[142] These types of zones bear close reassembly to the initial concept of blockade which was codified in the early 19th century. The second type of zone function as a limitation of the spatial area of a conflict and serve as a notice to neutral and enemy shipping to keep out of a certain area. A classic example of such a zone is the areas designated as ‘war zones’ during the

[140] Roach, p. 72.
[141] The *San Remo Manual*, paras. 105 – 108.
[142] Barston and Birnie, p. 19.

both World Wars. Such a zone can be vastly expanded in terms of geography; the zones established during WW2 were loosely limited to 'the Atlantics' and 'the Pacific' (thereby covering a very large portion of the world's oceans). A third type of zone is connected to a political will of hindering communications between certain nations or areas. The most significant example being the US quarantine of Cuba during the 1962 Cuban Missile Crisis – a zone designed to hinder the establishment of nuclear launching facilities on Cuba by denying USSR merchant vessels, carrying the necessary equipment, to call Cuban ports. The quarantine was amended by the Organization of American States (OAS) and was thereby justified with reference to the UN Charter and regional peace-keeping[143].[144]

5.2 Maritime operational zones

5.2.1 General

The late renowned jurist, and former judge of the ICJ, Sir Hersch Lauterpacht neatly defines a maritime 'war' or 'operational' zone as comprising "an area of water which a belligerent attempts to control, and within which it denies to foreign shipping generally the same measure of protection which the latter might elsewhere claim".[145] The exclusion zone device can be used both as a defensive and offensive instrument, however their tactical purpose remains the same in both cases. The mechanisms of the exclusion zone is closely tied with the maritime doctrine of blockade (as examined above), the overall objective being to obstruct the enemy's logistics. This can be in the form of denial of supplies, reinforcements and replacements. Such a strategy can be carried out by either 'persisting' and 'holding' the zone free from enemy forces, or by 'raiding' enemy assets within the zone.[146] The late Professor L.F.E. Goldie has constructed four criterions in order to determine the legality of an exclusion zone; *reasonableness*, *proportionality, clarity of definition* and *self-defense*.[147] It would not be exaggerated to assume that the same criterions were much considered by the authors of the *San Remo Manual* when developing articles 105-108.

5.2.2 Maritime exclusion zones

The maritime exclusion zone (MEZ) has its origin in the First World War even though the zones established both during the first and second war are considered to be illegal. A clear distinction can be drawn between the exclusion zone, the maritime warning zones and the immediate vicinity of a combat area. The maritime exclusion zone as defined during the world wars were more of a 'free fire' zone in which no vessel was safe regardless of the

[143] UN Charter, art. 52.
[144] Barston and Birnie, pp. 18 - 20.
[145] As cited in Goldie, NWP 64, note 1, p 194.
[146] *Ibid.*, p. 157.
[147] *Ibid.*, p. 174.

threat she posed or the flag she was flying (most probably due to military necessity while fighting the u-boat war). The MEZ as a ‘free fire’ zone is clearly not in consistency with modern international law[148] as regards to the obligation to distinguish targets from each other, the unconditional submarine warfare was also later condemned by the Nuremberg Tribunals (however no one was convicted see above 3.3).[149] Since the last world war the technical aspects of naval warfare have developed dramatically and thus changing the legal issues in terms of exclusion zones. One of the key tactical developments in terms of warfare is the means to identify a target as friendly or hostile. While this was more complicated in the 1940s submarine warfare in which the officer had to rely solely on optical information there has emerged new implications as technical solutions has improved, i.e. by means of weapons with a range over the horizon. Other developments include the escalating problem on international terrorism in conjunction with an ever-increasing global merchant navy.[150]

5.2.3 Immediate area of operations

The rights for a belligerent to control shipping in the immediate vicinity of military operations are well established in customary law. Such rights have been exercised in almost all military conflicts during the 20th century. There is a strong connection between controlling the immediate area and the law of targeting and the need for a positive identification of an enemy vessel in order for an attack to be legal.[151] The evolvement of over-the-horizon weapons and units operating with great speed has naturally increased the area needed to control such shipping activities. The US position is that, since the right to control the immediate area of operations derives from the naval *jus in bello,* it also overrides the peacetime right of freedom of navigation.[152]

5.2.4 Cordon Sanitaire

In the late 1960s the status quo between the two superpowers USA and USSR was beginning to turn in favor of the latter as the concept of the carrier battle group was invented, allowing for the US to project massive military force globally. The USSR answered by letting “tattletale” vessels follow in the track of the carrier groups and thereby providing intelligence and exact positions for targeting in the eventuality of a full-scale war. This reduced the tactical usefulness of the carrier groups and was countered by the development of the concept of a *cordon sanitaire*[153] surrounding the

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[148] The San Remo Manual paragraph 105, which reads “[a] belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea”.
[149] Jaques, p. 216.
[150] *Ibid.*, p. 215 – 216.
[151] Maritime Zones, at 4-1.
[152] *Ibid.*, at 4-4.
[153] Roughly translated from French as ”*sanitary zone*” or ”*bubble*”.

carrier groups and evocable during a crisis situation. When evoked the *cordon sanitaire* would deny access to foreign vessels in a certain designated zone centered on the position of the carrier group and thereby denying the adversary the correct position of the carrier group.[154] The concept was considered to be tactically problematical as their were issues on how the creation of such a zone would be notified and if such an notification in itself could be considered to be a provocation in a crisis situation. Another tactical dilemma was that if the one was to be notified it must be in some relation to the position of the vessels it was supposed to protect thereby revealing the position and thus being contra productive.[155] Although the *cordon sanitaire* is a product of the cold war it does still pose tactical importance, a future use could possibly be while fighting the war on terror and a to counter future threats from silent-propelled submarines.[156]

The US implementation of the concept can only be executed by a direct order from the highest political organ and as a consequence of deteriorating conditions between states. The zone in itself is selective in its nature and allows for the complete removal of hostile forces while neutrals and friends are unaffected.[157] This can be argued is in inconsistency with the inherent right of free navigation of the high seas as codified in both the HSC and the UNCLOS, the counterargument being that the freedom of navigation is not superior to the right of self defense against armed attack (regardless if this is on the grounds of *direct* or *anticipated* attack).[158] The right of self-defense is in itself the legal ground for the declaration of a *cordon sanitaire*, thus implicating that there must be a serious threat to the state's national security in order for her to take such action. The use of the *cordon sanitaire* could also be considered to be a first '*warning'* or '*declaration'* that the use of force is imminent and as such the actual declaration in it self would pose as a measure in between the use of force and political actions. The geographical extension of the area is a military concern as it involves the assessment of the adversary's tactical capabilities such as the technical ranges of weapons and the use of own units.[159]

In peacetime the US is exercising a 500-yard (approximately 457 meters) Naval Vessel Protection Zone (NVPZ) around large naval vessels on the grounds of necessity in order to insure such vessels safety and security. The NVPZ is only exercised in an area of three nautical miles seawards of the US baselines and should not be confused with the "defensive bubble" or *cordon sanitaire* as these are instruments used on the high seas.[160] In the

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[154] The US Navy's definition of the *cordon sanitaire* is *"[a]n area relative to U.S. Naval Forces, defined by [. . .] a circle centered on the [high value unit's] formation in which the presence of units of a potential enemy would be considered a hostile act, making such units subject to military action"*, Maritime Operational Zones, US Naval War College, Newport, at 3-3.

[155] Maritime Zones, 3-3.

[156] *Ibid.*, 3-6.

[157] *Ibid.*, 3-3.

[158] For a more ellaborate discussion on self-defense see chapter 4 above.

[159] Maritime Zones, 3-6.

[160] *Ibid.*, at 1-8.

aftermath of the 1983 bombing of U.S. installations in Beirut a new concept of the "defensive bubble" were created based on the notification of Warning Zones (WZ) on the high seas. This included making public announcements that US forces were operating on "a heightened level of alert" in certain areas of the world issued as NOTMARS. The areas covered by such WZ:s varied in time and geography and the legal implications were not clarified. Vessels and aircrafts approaching US forces were asked to indentify themselves and were advised that "protective measures" could otherwise be taken against them. The WZ was invoked on the basis of the inherent right to self-defense.[161] The WZ was implemented following the September 11, 2001, attacks on the Twin Towers and during *Operation Enduring Freedom* as well as in the initial stages of the 2003 *Operation Iraqi Freedom*.[162] The US has justified the WZ with the right to self defense and the right to conduct military exercises on the high seas.[163]

During the Falklands Conflict Great Britain invoked a Remote Defensive Zone (RDZ, also known as the "defensive bubble") surrounding all of her vessels operating in the South Atlantic. This zone was limited in geography to the South Atlantic and only applied to forces belonging to Argentina, however there was no specification of the actual range of the area in which the RDZ would apply. The RDZ was used to justify the sinking of the Argentinean cruiser *General Belgrano* by the British submarine *HMS Conqueror.* [164]

5.3 Conclusions

The close proximity and link between the right of self-defense and the establishment of maritime zones has been explored in the course of this chapter. A distinction of the thin line between legal and illegal zones can also be extinguished to some extent. It seems clear that the zones established by the UK during the Falklands conflict fall within the former while the Argentinean South Atlantic War Zone falls within the latter. This is well within the criterions laid up by Goldie; *reasonableness*, *proportionality, clarity of definition* and *self-defense.* While it seems the UK zones met all of those criterions it would be reasonable to agree that the SAWZ was basically only in compliance with the *self-defense* criterion (and even that is not without objection). However the use of force against vessels outside of the combat area could still be justified by self-defense if they were effectively supporting the enemy's war efforts.

The establishment of a maritime zone designed to exclude vessels of any flag state is an exception to the main rule of free navigation. According to

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[161] The US position is that the function of the WZ is "solely to advise that measures in self defense will be exercised by US forces. The measures will be implemented in a manner that does not impede the freedom of navigation of any vessel or state." As cited in Maritime Zones at 2-3.
[162] *Ibid.*, at 2-3 – 5.
[163] 1958 Convention on the High Seas, art. 2.
[164] Goldie, NWP 64, pp. 172 – 173.

general legal principles this would in itself imply that the use of such zones should be restrictive as is usually the case with exceptions. A well-established fact in the field of maritime law is the issue of "creeping jurisdiction" as coastal states expands their area of interest on the expense of the high seas. In a state of emergency the military necessity surely overrides the freedom of navigation; however an excessive utilization of exclusion zones, in temporal, geographical or other terms, can also be regarded as a form of "creeping jurisdiction". This would especially be the case when such zones do not discriminate amongst vessels.

Zones declared on the basis of self-defense, such as the US 'protective bubble', are dependant on that the potential aggressor is physically within the zone or that he shows hostile intent. The development of over-the-horizon ballistic missiles and the concept of RMA call for a substantial area to be covered in order for the zone to be efficient. However, if large portions of the oceans were closed due to the movement of passing warships, that would substitute a grave hindrance to the freedom of navigation. On the other hand using a rather small 'protective bubble' could still be useful to counter asymmetrical threats in the form of small vessels with suicide-crews. Closely tied to the range of the zone is the more complex question if, *ipso facto*, being within such a zone constitutes a hostile act in itself. The case of *USS Vincennes* illustrates just how catastrophic the outcome can get if the identity of the assumed aggressor is mistaken.

A subject only marginally explored in doctrine is what effect exclusion zones constitute in terms of jurisdiction. An exclusion zone typically excludes government-operated ships from all other flag states or, at least, those belonging to certain flag-states. That would in turn make it impossible for any other state to enforce jurisdiction than the one, or ones, that declared the zone, thus creating a 'vacuum'. Normally an exclusion zone would only affect the high seas or the territory of the adversary; still there might be future exceptions. In fact, the 'cordon sanitaire' could possibly be invoked inside neutral or even allied territory. The LOAC regulates the rights and duties of a state occupying the territory of another, including the duty to enforce jurisdiction, nevertheless an occupation is a strict legal state that has never been claimed in connection to the declaration of a maritime exclusion zone. Moreover many zones, such as the 'protective bubble', are used in peace. Internally, within a vessel or aircraft, jurisdiction can be invoked by the nation where it is registered according to the principle of flag-state jurisdiction, but if the vessel is engaged, for instance, in criminal activities there might be reasons to act immediately, which could be hindered by the declaration of a exclusion zone.

Another question that arises when studying the RDZ or 'protective bubble' is the notification of such zones to other mariners. In order to enforce such a zone it must be made public and known to other seafarers, otherwise it will be impossible to know the geographical extension of the zone. This raises a tactical dilemma, as doing so also discloses the actual position of the warship meant to be protected by the zone and leaving it vulnerable to

attack. This was in some extent the case when a UK submarine sank the Argentinean cruiser *General Belgrano*, however justification was claimed on other grounds.

The Nüremberg Tribunal, in their judgment on Dönitz, condemned the use of the exclusion zone as a ‘free fire’ area, meaning that the same rules on targeting and distinction apply both inside and outside of such a zone. This position is affirmed by the *San Remo Manual*. What is then the purpose of an exclusion zone if the same regulations apply both within and outside of it? It seems that the TEZ, as used by the UK during the Falklands conflict, served the purpose of limiting the area of hostilities and warn neutral vessels from entering the area. The TEZ did however not hinder the UK from the use of violence outside of its limits as illustrated by the sinking of *General Belgrano*. This, in turn, leads to the conclusion that the declaration of a exclusion zone does not constrain the declaring state to the declared zone and thus does not grant enemy units ‘immunity’ from attack. On the other hand the declaration may be seen as a due warning to neutral shipping leaving them subject to enforcement measures from the declaring state. Such measures are however does not extend beyond what is stated in the San Remo Manual on the rights of neutrals within declared zones.

6 Final remarks

During the course of this essay a key element has been the search for an answer to the question of what exactly constitutes a legal maritime exclusion zone. The, above mentioned, L.F.E. Goldie criterions of *reasonableness*, *proportionality, clarity of definition* and *self-defense* are a very solid ground for a discussion on the legality of maritime operational zones. It seems that the RDZ or 'protective bubble' fails, at least, on the third criteria. Still the US has in theory as well as in practice made use of the concept (as accounted for in the case of the downing of IR655). It would be premature to regard this as a change of customary law, although the connotation of clarity of definition can possibly be argued. Another approach would possibly be to regard *self-defense* as a core-criterion, which in itself consumes the other conditions of legality. This would obviously terminate in the answer that the legality of a maritime exclusion zone must be determined from case to case. For the military commander wishing to utilize the maritime exclusion zone device this answer is in all probability very unsatisfying. On the other hand a clear definition could possibly amount to an extended usage of the device, which in turn would restrict the freedom of navigation. Furthermore self-defense must be examined on its own as well; the *Caroline incident* suggests that there is three criteria's for the legality of anticipatory self-defense, namely *immediacy*, *necessity* and *proportionality*. In turn, this suggests that all of these criterions as well have to be met in order for the device to be legal.

A conclusion that can be drawn is that there is de facto an increasing practice to interfere with vessels on the high seas, there is i.e. a general opinion that a legal framework for suppressing the transportation of WMD must be created. The concept of anticipated self-defense also extends to such transports and could (and would most likely) be used when it comes to such acts as transporting WMD or with vessels engaged in supporting terrorism. The US position on the freedom of navigation is two folded, on one hand she needs to protect herself and her allies from harmful activities, on the other she does not like to be restricted while exercising her own rights to the freedom of navigation.

An element in this essay has been the exploration, and possible definition, of the grey area between the freedom of navigation and military necessity. Most literature on the subject reflects the belief that while in a military conflict the naval *jus in bello* takes precedence over the peacetime rights of navigation. All is well so far, however there is today no general opinion on what actually constitutes an armed conflict. The effects of the 'war on terror' remain unclear and it seems that low-intensity crisis and domestic unruliness is today more common than conflicts between nations. Surely there must be some sort of a limit in to which extent a state of war can be regarded to exist, however determining such a limit lies far beyond the scope of this essay. It can even be argued that a 'state of war' cannot occur

in the post charter era, as war is illegal and the concepts of 'war' and 'peace' are blurred and no longer lend themselves to clear definition.

In turn this leads to different opinions on whether or not the law of armed conflict is still in effect. Here the US and UK position differs considerably; the US holds the position that the rules of armed conflict will apply whenever there is a military conflict regardless if it is sanctioned by the Security Council or in conformity with the inherent right of self-defense. The UK on the other hand (based on the declarations that was made during the Falklands war and the tanker war) is reluctant to give any reference to do the laws of armed conflict, but rather relies on the right to self-defence and the United Nations charter. Globalization, technological development and the new asymmetrical threat environment all contribute to making the challenges to the laws of armed conflict complex. In basic the code was developed by the experiences achieved during the grand wars of the late 19th and 20th century. A view would be to call for an ongoing evolvement of the codes that would follow the same rate as the technological and tactical development. This would demand a more stable structure and institutions prepared to take the helm; it would be unreasonable to believe that states involved in a particular conflict or developing a new weapon would also take the lead within the legal process. To summarize; what is best, to let customary law evolve or to legislate? It would be fair to say that with the creation of the *San Remo Manual* and the frequent studies by nations, other than the US, of the US *Commander's Handbook*, the former alternative has prevailed.

Bibliography

Literature

Alamocarrillo, Juan Carlos Del et. al. *Changing Asymmetrical Threats Require New Responses*, Perspectives on Maritime Strategy, Essays from the Americas, ed. by Paul D. Taylor, Editor, Newport Paper thirty-one, US Naval war college, Newport, Rhode Island, August 2008.

Allen, Craig H. *Limits on the Use of Force*, International Law Challenges: Homeland Security and Combatting Terrorism, ed. by Sparks and Sulmasy, International Law Studies, vol. 81, US Naval war college, Newport, Rhode Island, 2006.

Amin, S. H. *The Iran-Iraq Conflict: Legal Implications*, The International and Comparative Law Quarterly, Vol. 31, No. 1, January, 1982, pp. 167 – 168.

Byers, Michael, *Policing the High Seas: The Proliferation Security Initiative*, the American Journal of International Law, Vol. 98, No. 3, July, 2004, p. 533.

Barston, R.P. and Birnie, P.W. *The Falklands Islands/Islas Malvinas conflict – A question of zones*, Marine Policy, vol. 7, issue 1, January, 1983.

Churchill & Lowe, *The Law of the Sea*, Manchester University Press, third ed., Manchester, 1999.

Corbett, Julian, *Some Principles of Maritime Strategy*, Naval Institute Press, Annapolis, 1988, (originally published by Longmans, Green and Co., London, 1911).

Doswald-Beck, Louise, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, The American Journal of International Law, Vol. 89, No. 1, January, 1995.

Fogarty, William M., *Investigation Report: Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988*, US Department of Defense, Washington, 1988.

Gill, T.D. *The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy*, Journal of Conflict & Security Law 11:3.

Gray, Christine, *The British Position in Regard to the Gulf Conflict*, The International and Comparative Law Quarterly, Vol. 37, No. 2, April, 1988, pp. 420 – 428.

Greig, D. W. *Self-Defense and the Security Council: What Does Article 51 Require?* The International and Comparative Law Quarterly, Vol. 40, No. 2, April, 1991, pp. 389 – 390.

Jaques, Richard (ed.), *Maritime Operational Zones*, US Naval war college, Newport, Rhode Island, 2006.

Kamienski, Lukasz, *The RMA and War Powers*, Strategic Insights, Published by the Center for Contemporary Conflict (CCC), National Security Affairs Department at the Naval Postgraduate School in Monterey, California. September 2, 2003.

Metz, Steven and Johnson, Douglas V., *Asymmetry And U.S. Military Strategy: Definition, Background, And Strategic Concepts*, The Strategic Studies Institute, US Army War College, January, 2001.

Oxman, Bernard H. *The Territorial Temptation: A Siren Song at Sea*, The American Journal of International Law, Vol. 100, No. 4, October, 2006, pp. 830-831.

Reisman, W. Michael, *The Struggle for the Falklands*, The Yale Law Journal, vol. 93, no. 2, December, 1983, pp. 287-317.

Roach, Ashley, J. The Law of Naval Warfare at the turn of two centuries, the American Journal of International Law, Vol. 94, no. 1, January, 2000.

Ronzitti, N. (ed.), *The Law of Naval Warfare – A Collection of Agreements and Documents with Commentaries*, Dordrecht, Martinus Nijhoff Publishers, 1988.

Schmitt, Michael N., *Asymmetrical Warfare and International Humanitarian Law*, International Humanitarian Law Facing New Challenges, Springer, Berlin, 2007, pp. 11-48.

Shaw, Malcolm N., *International Law*, 5th edition, University Press, UK, Cambridge, 2003.

Uhlig, Frank, Jr. *Fighting at and from the Sea: A Second Opinion*, Naval Power in the Twenty-first Century, Center for Naval Warfare Studies, ed. by the Dean of Naval Warfare Studies, and the President of the Naval War College, Newport Paper Twenty-four, US Naval war college, Newport, Rhode Island, July, 2005.

Von Heinegg, Wolff, *The Legality of Maritime Interception/Interdiction Operation within the Framework of Operation Enduring Freedom*, International Law and the War on Terror, International Law Studies, vol. 79 (NWP 79), ed. by Fred L. Borch & Paul S. Wilson, Newport Paper seventy-nine, US Naval war college, Newport, Rhode Island, 2003.

Wendel, Philipp, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law*, Hamburg Studies on Maritime Affairs, vol. 11, Springer Berlin Heidelberg, September, 2007.

Walker, George K. *The Tanker War, 1980 – 1988: Law and Policy*, US Naval War College, International Studies, vol. 74, US Naval war college, Newport, Rhode Island, 2000.

Official text

The Charter of the United Nations, as signed on 26 June 1945 in San Francisco.

The North Atlantic Treaty, as signed on 4 April 1949 in Washington D.C.

The Manual of The Law of Armed Conflict – Amended text 01/04, Joint Doctrine and Concepts Centre, Legal Cell, United Kingdom Ministry of Defence.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, which entered into force 7 December 1979.

San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994.

Report of ICAO fact-finding investigation on the destruction of Iran Air Airbus A300 in the vicinity of Qwshm Island, Islamic Republic of Iran on 3 July 1988, doc. C-WP/8708.

Förordning om försvarsmaktens ingripanden vid kränkningar av Sveriges territorium under fred och neutralitet, m.m., (Ordinance concerning Intervention by Swedish Armed Forces in the event of Violations of Swedish territory in peacetime and in Neutrality), (IKFN-förordning), SFS 1982:756.

Instruction by the Chairman Of The Joint Chiefs Of Staff on 15 January 2000, *Standing Rules Of Engagement for US Forces,* J-3 CJCSI 3121.01A.

US Department of Defense Joint Publication 1-02, *Dictionary of Military and Associated Terms,* 12 April 2001, as amended through 4 March 2008.

Congressional Report Service, *Terrorist Attack on the USS Cole: Background and Issues for Congress*, RS20721, Report for the US Congress, January 30, 2001.

US Department of Defence, *USS Cole Commission Report*, 9 January, 2001.

Articles

The Economist, *Into the wide blue yonder; Asia's navies*, vol. 387, issue 8583, 7 June, 2008, p. 66.

The Economist, *Transformed?*, vol. 364, issue 8282, 20 July, 2002.

BBC, *Russia call to halt Somali piracy*, article published on news.bbc.co.uk, 3 October, 2008.

E-resources

The office for the United Nations High Commissioner for Human Rights homepage; http://www.ohchr.org

The Washington Post homepage; www.washingtonpost.com

The New York Times homepage; www.nytimes.com

The British Broadcasting Service (BBC) homepage; www.news.bbc.co.uk.

Table of cases

Case Concerning The Military And Paramilitary Activities In And Against Nicaragua (Nicaragua v. United States Of America), Judgment of 27 June 1986.

Case Concerning Oil Platforms (Iran v. United States of America), ICJ Decision of 6 November 2003.

Permanent Court of International Justice Judgment No. 9, The Case of the S.S. "Lotus", September 7th, 1927.

Ruling by the Supreme Court of the United States, ARGENTINE REPUBLIC v. AMERADA HESS SHIPPING CORP. ET AL., 488 U.S. 428, January 23, 1989.

The verdict by the Nuremberg Military Tribunal on Karl Dönitz, 1946.