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Maritime interception and the law of naval operations

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

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Introduction to Part II

Part I aimed at setting the stage for further examination of the law applicable to maritime interception operations. After the introduction, general remarks were made in Chapter 2 on naval operations in connection positioning the navies' role in maritime interception. Furthermore, it mentioned some basic elements that are specific to operating in the maritime environment. The evolution of the term MIO was then elaborated upon by means of a short contemporary history of MIO in Chapter 3. Chapter 4 briefly underlined the fundamental principles central to maritime interception operations which serve as the starting point of any discussion on this subject. It has underlined that the legal point of departure is that States cannot interfere by means of their warships with foreign flagged vessels in maritime areas outside the territorial jurisdiction of a State, unless there exist a legal ground to do so. The chapters of Part I have shown that over the last 25 years the role of naval forces has expanded beyond the national defence role into an active role in the maintenance of international peace and security, which has further developed into a strategic concept of operations in which an active form of policing the high seas is sought after and where interference with foreign shipping in the commons and the maritime community is not seen as exceptional, but rather as the key to enhance maritime security. Consequently, the term MIO has undergone an evolution which has resulted in the now generally accepted view that the term MIO is an operational term of art, rather than a legal term. Alongside this evolution, from a legal perspective to an operationally orientated one, more legal bases have come to be accepted upon which to base maritime interception operation on general international law, than solely the limited exceptions in the realm of the international law of the sea. This subject will be the main subject of study in Part II. In terms of legal regimes, the evolution from stopping goods to include also persons puts a focus on the

applicability of human rights law. This will be more elaborated upon in Part III.

Part II will venture into the study of legal bases for maritime interception operations. As MIO are considered in the context of conducting military naval operations, two different approaches can be taken to analyse the subject. The first approach is along the lines of the exceptions to the prohibition on the use of force in international relations as stated in Article 2(4) of the UN-charter.²⁴⁴ Two generally accepted exceptions to the use of force exist: the use of force based on the UN-collective security system and the right of self-defence. The second approach is along the lines of state sovereignty, in which a State can make exceptions to its own exclusive jurisdiction over its vessels and its territory, by way of State consent; either *ad hoc* or through treaties. As such these can be considered as legal bases for interception operations. Part II, therefore, considers four legal bases for MIO in four separate chapters: the use of collective measures within the context of the UN-collective security system, self-defence, *ad hoc* consent and international agreements.

Chapter 5 will analyse maritime interception operations within the context of the UN-collective security system. It will first categorize the different types of interception operations that can be undertaken within the UN-collective security system and then focus on the so-called Article 41/42 debate. Chapter 6 will consider self-defence as legal basis for MIO. This chapter will focus on two different contexts in which the law of self-defence is argued to be a legal basis for maritime interception: large scale naval operations after having invoked Article 51 of the UN-Charter, and single actions to stop WMD and non-state actors. Chapter 7 considers *ad hoc* consent as a legal basis for MIO, in particular with regard to the master's and State consent debate and touch upon the issue of statelessness of vessel within the context of MIO. Finally, Chapter 8 will consider international agreements as a legal basis for MIO. It will consider UNCLOS, the SUA and its 2005 Protocol and the bilateral treaties between the US and other States made within the context of PSI.

²⁴⁴ Article 2 (4) UN-Charter reads:

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