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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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CHAPTER 7

(ad hoc) Consent

7. Introduction

Consent of a State to allow another State the use of its armed forces on its territory or aboard its flagged vessels may serve as a legal basis for maritime interception operations. Within the maritime context this could firstly mean that a coastal State will consent to allow maritime interception operations by foreign warships within its territorial sea or internal waters. Secondly, this could mean that a flag State allows the boarding of its vessels by foreign warships on the high seas. The legal basis of consent for military operations⁴¹⁸, and for maritime interception operations in particular, is in fact often used. Guilfoyle mentions that consent-based interceptions are much used in law enforcement operations, for instance in relation to drug-smuggling, fisheries management and transnational crime.⁴¹⁹ A well-known situation that addressed consent in the maritime context and has reached the ECHR is the *Medvedyev*-case.⁴²⁰ In early June 2002 the French authorities requested permission from Cambodia to intercept the Cambodian flagged vessel *Winner* that was suspected of carrying large quantities of drugs. France requested and got the authority via a diplomatic note exchange between France and Cambodia.⁴²¹ The French warship *Lieutenant de vaisseau Le Henaff* was instructed to intercept the *Winner* and did so near the Cape Verde Islands. France based its action on three legal bases.⁴²² Article 108 UNCLOS, the diplomatic note, and the argu-

⁴¹⁸ To illustrate with a recent military operation, in 2013 the French operation *Serval* was based on the consent of Mali authorities to rid the state of terrorist that had taken control of parts of Mali. On this operation see, K. Bannelier, T., Christakis, 'Under the UN Security council's watchful eyes: Military intervention by invitation in the Malian Conflict', in *LJIL*, vol. 26 (2013), 855-874.

⁴¹⁹ Guilfoyle, (2009), 342.

⁴²⁰ ECtHR, *Medvedyev and others v. France*, application no. 3394/03. Judgment 29 March 2010.

⁴²¹ *Medvedyev*, para 10.

⁴²² *Medvedyev*, para 82-101.

ment that the vessel was not flying a flag and refused to identify itself. The ECtHR dismissed the first argument because Cambodia is not a party to UNCLOS and also because Article 108 does not cover situations of requests to board third State vessels. The ECtHR also dismissed the second legal basis because the nationality was in fact already known before the *Le Henaff* physically encountered the *Winner* and as such considered the argument contradictory to the claim it was without nationality. The third legal basis, the diplomatic note, however was considered by the court as an *ad hoc* agreement between France and Cambodia and thus a source in international law. Although the ECtHR considered the note verbale not sufficiently clear on the fate of the crew, it did not reject the view that the note could be a legal basis to board the vessel.

There are a few other incidents also in which the boarding of a vessel were carried out on the basis of consent. In March 2014, Israel boarded the Panama-flagged *Klos-C* on suspicion of carrying a large bulk of weapons (surface-to-surface rockets) in the Red Sea on its way to Sudan, ultimately destined for the Gaza in an operation codenamed operation *Full Disclosure*. According to the Foreign Affairs minister of Israel, it had obtained permission from Panama to board the vessel.⁴²³ The vessel was diverted to Eilat and the crew members, who according to an Israeli spokesman were not aware of the content of the cargo, were released. In addition to individual cases, the NATO-led operation *Active Endeavour* (OEA) is a MIO whereby the boarding operations are entirely based on consent. In 2003 NATO decided to undertake interception operations in the context of OAE.⁴²⁴ With regard to the authorities to perform boardings by participating warships, NATO decided that such boardings can only be undertaken when they were of a *compliant manner*.⁴²⁵ NATO understood compliant boardings in the case of OAE as requiring prior authorization from both the State *and* the master to board a foreign vessel. UNSC-practice also exists in relation to consent based maritime interception op-

⁴²³ D. Williams, 'Israel seizes arms shipment', Reuters, 5 March 2014. Williams reports that: Foreign Minister Avigdor Lieberman said Israel had obtained Panama's permission to board the ship. "We followed international law to the letter. The ship travelled under a Panamanian flag, the company was listed in Marshall Islands, the captain was Turkish and the crew was from various different countries," he told a conference in Tel Aviv.

At: <http://www.reuters.com/article/2014/03/05/us-israel-gaza-ship-idUSBREA240X720140305>.

⁴²⁴ http://www.manp.nato.int/news_releases/mcnaples/pressreleases11/NR_52_11.html.

⁴²⁵ The term "compliant boarding" is not often used anymore. It's more common to speak of *consensual boardings*. See Chapter 2 on the terminology of boarding operations.

erations. In SC-Res. 1929 (2010) relating to Iran, the UNSC has underlined the possibility of boarding foreign flagged vessels under the condition that the flag State consents to the boarding. Also SC-Res. 2146 (2014) with regard to the Libyan crude oil export prohibition, the UNSC notes that States should first make efforts to ask the flag State for authorization before boarding the vessel.⁴²⁶ In sum, therefore, it is accepted in both practice and jurisprudence that consent is an internationally accepted legal basis for maritime interception operations. The application in the maritime dimension of the conditions under which consent can be a legal basis are, however, not crystal clear. The main point of contention is whether alongside the authorities of the flag State, the master of the vessel is authorized to validly consent to a boarding.

In his commentary to the ILC- Draft Articles on State Responsibility, James Crawford has given two meanings to the notion of consent in international law.⁴²⁷ In the first meaning consent is seen in the context of state responsibility and viewed as a circumstance that precludes wrongfulness of State actions when the other State has consented to this action. In the second meaning consent must be seen within the context of the law of treaties and as a basis for the existence of international agreements and the suspension of international obligations that flow from such agreements. The legal basis to the use of force on the territory of another State or on board a foreign flagged vessel is viewed as part of the first meaning, and will be dealt with in this chapter. Consent as used in the second meaning will be dealt with in the chapter on international agreements. Consent, in any case, is a attribute of sovereignty in which a State may always (not) consent to a foreign State conducting activities that would otherwise violate its sovereignty. This chapter aims to consider some points of contention with regard to consent-based maritime interception operations. Consent can manifest itself as a legal basis for maritime interception operations from three vantage points. The first is consent from a State to board its vessel on the high seas. This type of consent concentrates on the vessel itself. Second is the notion of the statelessness of vessels. This type of

⁴²⁶ SC Res. 2146 (2014), paragraph 6 reads:

Requests that Member States, before taking the measures authorized in paragraph 5, first seek the consent of the vessel's flag State;

⁴²⁷ Commentary no. 2 on article 20 of the draft articles of state responsibility. See also C. Farhang, 'The notion of consent in part of the draft articles on state responsibility', in, *LJIL*, vol. 27 (2014), 55-73.

consent is realized by the lack of a responsible flag State. And third is the consent of a State to conduct MIO in the maritime zones over which a coastal State has jurisdiction. This type of consent focuses on the geographical area over which a State has jurisdiction. As this last subject falls outside the scope of the thesis, it will not be discussed here.⁴²⁸

This chapter will address the above mentioned contexts in two parts. It will first consider the conditions for consent in general international law, and will apply these conditions in the context of consent in maritime interception operations on the high seas. The second will discuss MIO in relation to stateless vessels. Obviously, the issue of statelessness is not a matter of consent *strictu sensu*, but it relates in so far that challenges exist when there is no State that can give consent.

7.1. Legal framework consent

Consent is not generally considered from the perspective of the prohibitions of the use of armed force within the framework of the UN-Charter, but as a circumstance that precludes the wrongfulness of actions by a State.⁴²⁹ Article 20 of the ILC-Articles on State Responsibility (DARS) states that valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent. Sovereignty implies that within the limitations of international law a State may allow another State to use its military within the area over which the consenting State has sovereign powers. Consequently, consent of a State can allow another State to engage in operations in relation to areas, objects, or persons subject to its jurisdiction. Or, in the words of Wendel in the context of MIO: The fact that the flag State authorizes another State to board a vessel flying the flag of the former State, precludes the wrongfulness of the boarding in relation to the flag State.⁴³⁰

⁴²⁸ See on this subject R. McLaughlin, *United Nations naval peace operations in the Territorial Sea* (Martinus Nijhoff publishers, Leiden, Boston, 2009).

⁴²⁹ UNGA resolution 56/83 (12 December 2001): Responsibility of states for internationally wrongful acts, article 20. Crawford mentions under commentary no. 4 that: A consent must be valid, which includes issues of whether the agent or person who gave the consent is authorized to do so on behalf of the state, or whether the consent was vitiated by coercion or some other factor.

⁴³⁰ Wendel (2007), 165.

The point to note regarding consent, as also underlined in the ICJ-case *DRC v. Uganda*⁴³¹ and mentioned by Crawford under commentary no. 4 of Article 20 DARS, is that that a consent must be *valid*. This includes issues of whether the agent or person who gave the consent is authorized to do so on behalf of the State, or whether a consent was achieved through coercion or some other factor.⁴³² Based on Crawford's commentary, Gill considers within the context of military operations in general that the primary three conditions for consent to be a true legal ground are: a consent, which must be 1) granted freely, and 2) issued by the lawful authority of the 3) consenting State.⁴³³ The first condition underlines that there should not be any form of threat or compulsory action aimed at the State to give consent. It is also always subject to any condition that the State may pose and may always be terminated. As such, military operations based on consent must be conducted within the limits of the given consent. This condition interrelates with both legal basis and regime: if on the one hand action is taken based on consent which goes beyond the substantial scope of the consent (legal regime) that is given, the consent may lose its validity to serve as a legal basis. The third condition underlines that consent must ultimately be attributed to the State as the authority that can decide on whether or not to allow military operations within its jurisdiction. What also flows from this, is that the consenting State may not grant more authority than it possesses. In particular, condition two and three raise debate within the context of maritime interception.

7.1.1. The consenting authority

Conditions two and three essentially deal with the question of the consenting authority to allow a boarding to take place on a foreign flagged vessel. In the first place, consent to board a foreign flagged vessel cannot be implied to exist. This may for instance be the case in instances where a State requests to board another vessel, but no answer to the request is given. In the prompt release case between The Netherlands and the Russian Federation before the ITLOS, concerning the Netherlands flagged Greenpeace vessel *Arctic Sunrise*, this point was also argued by the Netherlands, who

⁴³¹ ICJ, Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda) judgment of 19 December 2005.

⁴³² J. Crawford, *ILC articles on state responsibility: Articles and commentaries* (2002), 163-165.

⁴³³ Gill (2010c), 230.

opined that: ‘Any exceptions to the general prohibitive rule to exercise enforcement jurisdiction over foreign vessels are explicit and cannot be implied’.⁴³⁴

With regard to the consenting authority within the context of maritime interception operations there are two main questions that are part of the current debate. The first question is the issue of who the consenting authority can be. The second is the question of the actual scope of the consent. The latter question is a question of applicable legal regime, but has significant impact on whether or not a consensual boarding is legal and is therefore difficult to separate. The first question refers to the core debate whether or not consent of the flag State is needed (flag State consent) before a boarding party boards a merchant vessel that flies a different flag than the warship, or whether the consent of the master of the vessel provides an adequate authority to do so (master’s consent). The existence of these two views could raise confusion when a warships’ crew that is allowed to visit based on master’s consent according to its national view, boards a vessel of a nation that views flag state consent as the only legally correct ground of visit. Although it is in fact immaterial what the view of the boarding State is, the commander of the visiting warship may - incorrectly- view that he has handled the situation correctly based on the national legal view. One can imagine that this is a recipe for potential legal and diplomatic problems.

7.1.1.1. Flag state consent

The principal argument for flag state consent is the view that sovereignty, on which the principle of non-interference of vessels is based, is a State instrument and cannot be waived by individuals like the captain of a ship. The view is taken that the captain of the vessel is in most instances not an official representative of a State and therefore cannot waive the State’s jurisdiction,⁴³⁵ particularly when the captain of the vessel does not have the same nationality as the flag State. Proponents of flag state consent furthermore argue that because of its nature and purpose it is difficult for a

⁴³⁴ ITLOS, case no. 22. *Arctic Sunrise*, order of 22 November 2013, para. 63.

⁴³⁵ See P.J.J. Van der Kruit (ed.) *Handboek voor de Maritieme Rechtshandhaving (draft version, 2010)*, p. 84.

visiting warship to be conducting activities that could not be considered as being the prerogative of the flag State. When flag state consent is given by the State concerned, the master should then comply with the visit of a foreign warship.

7.1.1.2. *Master's consent*

Both master's and flag state consent take the same principle of sovereignty of the flag State over vessels as the legal point of departure. The proponents of master's consent however argue that the consent of the flag State in certain cases is not needed and that the consent of the master proved sufficient authority. The *Commander's Handbook on the Law of Naval Operations* of the United States views master's consent as follows:

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

The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority (such as arrest or seizure). A consensual boarding is not an exercise of law enforcement jurisdiction per se. Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue to the boarded vessel.⁴³⁶

In other words, the master of the ship has the authority to allow persons on board as long as the boarding party does not perform any law enforcement activities. Therefore, proponents of the concept of master's consent argue that visits by foreign flagged warships can be authorized by the master of the vessel as long as the visiting warship's crew does not perform any law enforcement activities.

Several arguments are put forward to support this view, such as the existence of *flags of convenience* that cause a certain level of legal disconnect

⁴³⁶ A.R. Thomas & J.C. Duncan, 'Annotated Supplement to the Commander's Handbook on the Law of Naval Operations', Vol. 73 *ILS* 1999, p. 240, Section 3.11.2.5.2.

between the flag State and the vessel that flies its flag⁴³⁷ and the view that visiting a vessel does not mean that the boarding team is actually stepping on the territory in the legal sense of the flag State.⁴³⁸ The main argument for master's consent is however a practical one. As Becker states, it is viewed that: "Where procedure for requesting and authorizing flag state consent are not predetermined by agreement, the process can be slow or, in the worst case, a failure if the target is allowed to escape before operations can begin".⁴³⁹ The reasons for the delay could be many. For instance, a nation does not have a single point of contact or an internal procedure to find a fast answer. Often many actors need to be consulted before consent can or cannot be granted. The second PSI principle therefore also underlines that States undertake to streamline procedures "for rapid exchange of relevant information concerning suspected proliferation activity (...)".⁴⁴⁰ Also more political reasons could explain why a nation does not want to answer or consent to boarding. One could imagine that, for example, Iran will not consent to the United States boarding a vessel flying its flag. Also revealing information to support the request for boarding may give difficulties as the intelligence may be classified. As Brown writes: "However, for States with strained diplomatic relations with the United States, particularly if the evidence of terrorism activity is withheld as classified intelligence, consent may be more difficult to obtain".⁴⁴¹ Also Wilson's argument with regard to flags of convenience to support master's consent seems to come from a practical point of view.⁴⁴² He asserts that States with open registries, next to the fact that there is no genuine link between the vessel and the flag State, are often also vulnerable to political upheaval and do not take jurisdictional responsibility over the vessel. As such: "The recognition and continued existence of master's consent is crucial as

⁴³⁷ Wilson, 170-185.

⁴³⁸ T.M. Brown, 'For the "Round and Top of Sovereignty": Boarding Foreign Vessels at Sea on Terror-related Intelligence Tips', Vol. 59 *NLR* 2010, p. 81.

⁴³⁹ Becker, 178.

⁴⁴⁰ Shulman, 827.

⁴⁴¹ Brown, 83.

⁴⁴² Another more practical point is that a warship can have a potentially threatening posture. By analogy, as Greenwood remarked, in the context of confiscation of goods in enemy territory, 'the request by a heavily armed soldier that is requesting to search the house may in fact not be an actual request'. It cannot be ruled out that law abiding merchant vessel captains will be overwhelmed by an approaching warship and will readily invite the boarding party at the warships request aboard, without also knowing where the limits of the authorities of the crew are. In this sense, flag state consent at least supposes that the requestor and the requested remain on a more equal level.

a valid alternative where the flag state consent is not possible or practical”.⁴⁴³

7.2. Analysis

There is a common understanding that a captain of a vessel is free to invite persons on board as his guests, which could include military personnel.⁴⁴⁴ No one will disagree that also military personnel can be invited for instance to a cocktail party aboard a merchant vessel without the captain having to show the guest list to the flag State for approval. The purpose of such a visit is, however, significantly different than from a visiting warship’s crew in pursuit of their official duties. There is also a deep rooted understanding in maritime law that the master of a vessel has responsibility for the safety of his vessel, from which certain legal authorities are derived. Some domestic legislation may under certain circumstances even allow the master of the vessel to perform specific law enforcement activities over the crew of the vessel. These activities are, however, limited to the purpose of safeguarding the safety of the vessel and cargo and do not extend to authorities for the master according to which the exclusive jurisdiction of a flag State can be waived. Some argue that for the safety of his vessel a master can invite third States to support the master. This view is also underlined by Article 27 UNCLOS,⁴⁴⁵ which mentions that whilst sailing through the territorial sea of a coastal State the master can ask for the assistance of the coastal State authorities. This is, however, a different situation than a situation when the vessel’s safety is not at stake and it is not the master that is asking for assistance, but is being asked to be boarded on the suspicion, for instance, that the vessel is used to transport prohibited cargo or possible criminals.⁴⁴⁶

That the principle of master’s consent exists is, therefore, not contested. Be that as it may, an invitation of the master does, in the first place, not provide any sort of law enforcement authority to the boarding party aboard the vessel. Second, persons in their official capacity in the pursuit of their task must take into account the limits of their authority. The crux of the matter essentially lies in the nature of the activities of the boarding

⁴⁴³ Wilson, 185.

⁴⁴⁴ See also Kraska, ‘Broken Taillight’, (2010), 16.

⁴⁴⁵ Art. 27 sub 1 (c) UNCLOS.

⁴⁴⁶ Hodgkinson, 583.

party and whether or not the boarding party does something that would fall under the authority of the flag State. In other words, the purpose of the visit is essential to the question whether a master's or flag State consent is needed. What is in fact contested is which authority master's consent will create to a boarding party of a foreign warship.

The difficulty lies in drawing the line between action by naval personnel that does or does not imply some form of law enforcement, or does not involve any activities that may threaten the sovereignty of the flag State. The example of the cocktail party is easy, but gathering intelligence that may end up supporting military or law enforcement action becomes more blurry. When one accepts that a master can invite persons on board, the dividing line between an authorized and an unauthorized visit may even be as thin as a difference in the manner of querying the crew of the vessel. The US *Commander's Handbook on the Law of Naval Operations* mentions that checking paperwork during a boarding granted by the master's consent is a permitted activity. Roach supports this view to argue that checking the vessels documents, cargo and records, are "non-jurisdictional actions".⁴⁴⁷ Another view would be that checking the validity of paperwork and cargo manifests are actions that are usually performed by government officials and in that sense could fall within the realm of law enforcement activities. Von Heinegg appears to draw the line at verification of the vessel's true nature. This for him includes verifying cargo, documents and destination, but does not go as far as enforcement measures if in case irregularities of some sort would come from the verification.⁴⁴⁸ In the authors' view, if consent is given by a master the come on board, they are basically nothing more than his guests and no law enforcement authority can flow from this. The master is not required to hand over any documentation of vessel or cargo, unless this is permitted through domestic legislation. In this sense, one can relate to the view of Matteo Tondini, who mentions that: 'the legal basis for boarding a vessel with the master's

⁴⁴⁷ A. Roach, 'Developments in the Law of Naval Operations', in R. Lefeber (ed.), *Contemporary International Law Issues: Opportunities at a Time of Momentous Change* (Dordrecht, Martinus Nijhoff, 1993), p. 337.

⁴⁴⁸ W. Heintschel von Heinegg, Blockades and interdictions, in M. Weller (ed.), *The Oxford Handbook on the use of force international law* (2015), 925-946, at 942.

consent only [...] remains questionable when exercised other than for maritime safety reasons.⁴⁴⁹

7.2.1. Practice: the “broken taillight-approach”

Interestingly, in practice a *modus operandi* has evolved which at times is characterized as the so called “broken-taillight-approach”.⁴⁵⁰ The approach refers to the police officer that stops a car because of a broken taillight, but then discovers (or already knew beforehand) the drugs on the backseat of that same car, which will subsequently be taken by the police officer. The scenario has been used in the context of trying to find ways to board vessels in order to stop WMD at sea.⁴⁵¹ The broken taillight-approach, in other words, is used as an argument to find whatever ways to be able to board a vessel.⁴⁵² Whereas the broken-taillight approach signals ‘pushing the envelope’ on the legal limits of existing legal possibilities, the search for lawful boarding options on a practical level and within the context of MSO has also resulted into a practice in which master’s consent plays a significant role. In the naval operators’ dimension, these actions are familiar under the term ‘friendly approaches’ or ‘approach and assist visits’ (AAV).⁴⁵³ Lieutenant Marsden explains:

“Over the course of an average day we will conduct between 5 and 20 Approach and Assist visits to fishing and trading dhows of various sizes”, said Deputy Logistics Officer and Boarding Officer Lt Chris Marsden RN [Royal Navy, MDF]. “The boats’ crews are generally pleased to see us and we are often able to help out by providing them with supplies and information ranging from deteriorating weather conditions to the latest cricket scores! In return the crews are able to provide us with details of any suspicious activity in the area, which we can then act upon”.⁴⁵⁴

⁴⁴⁹ M. Tondini, ‘The legality of intercepting boat people under search and rescue and border control operations’, in *The Journal of International Maritime Law*, vol. 12 (2012), 59-74.

⁴⁵⁰ J.M. Kraska, ‘Broken taillight at sea: the peacetime international law of visit, board, search and seizure’, in *Ocean and Coastal Law Journal*, vol. 16 no. 1 (2010), 1-46.

⁴⁵¹ J. Su, ‘The Proliferation Security Initiative (PSI) and Interdiction at Sea: A Chinese Perspective’, in *ODIL* no. 43 (2012), 96-118, 103.

⁴⁵² Kraska, ‘The broken taillight at sea’, 14.

⁴⁵³ See e.g. *CMF press release*, 24 March 2013, ‘HMS Monmouth conducts Maritime Approach and Assist operations’. At <http://combinedmaritimeforces.com/2013/03/24/hms-monmouth-conducts-maritime-approach-and-assist-operations/>. US Navy press release, Ramage VBSS team conducts 100th Approach and assist visit’, at http://www.navy.mil/submit/display.asp?story_id=42177.

⁴⁵⁴ *CMF press release*, 24 March 2013, ‘HMS Monmouth conducts Maritime Approach and Assist operations’. At <http://combinedmaritimeforces.com/2013/03/24/hms-monmouth-conducts-maritime-approach-and-assist-operations/>.

The information gathered through engaging the maritime community in a certain area adds to the maritime awareness and may ultimately be a piece of the puzzle which results in actionable intelligence. Allen mentions that this practice during maritime security operations in which crew of warships board at the invitation of the master to approach the maritime community point into the direction that master consent is in practice in fact tacitly accepted even by States such as the United Kingdom, who are proponents of flag state consent.⁴⁵⁵ An AAV may also include coming on board the vessel in which the warship is engaged with. This *modus operandi* is supported also by the definition of approach used by the EU-Operational Order (OPORD) for operation *Atalanta*, which is quoted by Papastavridis:

An approach is defined by a de-escalatory low key interaction. This may include visits on board if invited, but does not include ‘boarding exploitation’ of the vessel (crew checks, searching cargo/crew)...the approach is an informal means of engaging with the maritime population to continue the conversation on board his vessel...this is not considered as a boarding in a legal sense.⁴⁵⁶

In performing ‘friendly approaches’ or AAV’s, therefore, naval operators seem to take care of staying away from any activity that may be seen as a law enforcement activity. Interestingly, the EU, possibly in order to try to create some clarity, seems to have divided in boardings in the legal sense and boardings in the non-legal sense. The latter is a boarding in which the boarding party is physically on board another vessel at the invitation of the master and does not perform any activities that may possible be seen as law enforcement actions. Although this is essentially a form of master’s consent, this EU-approach with regard to the purpose, therefore, goes less far as the view of the United States, underlined by Kraska, who mentions: *‘Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel’s voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue delay to the boarded vessel.’*⁴⁵⁷ With this practice, we see a certain level of acceptance of

⁴⁵⁵ Allen (2014), 259. Examples from UK-practice can be found at: <http://eunavfor.eu/eu-naval-force-ship-rfa-lyme-bay-conducts-friendly-approach-with-local-seafarers/>.

⁴⁵⁶ Papastavridis (2013), 59 footnote 107.

⁴⁵⁷ Kraska, ‘Broken taillight’ (2010), 17.

master consent, but still a difference in opinion with regard to the scope of authority that a boarding party has under the invitation of a master.⁴⁵⁸

In summary, the above paragraphs have shown that with regard to *ad hoc* consent in the context of MIO, basically two -closely related- points of contention exist. The first is a difference in view whether a State allows either master or flag state consent boardings with regard to their vessels. The second is a difference in view, or rather debate, on what the scope of authorities would be when a master consent boarding is carried out. These two points are, as said, closely related because whether a State would allow a master consent boarding may also depend on the scope the activities of a boarding party. A State may find itself in agreement with a *de facto* boarding in order to acquire information about the area or to support its vessels with any safety issues, but may not agree with a boarding that is set up to actively search for any criminal activity. Ultimately, whether flag state or master consent applies in a particular situation depends on the position of the flag State of the vessel and on what level or detail the flag State has authorized to the master in domestic law to act on behalf of the flag State.⁴⁵⁹ Current practice in maritime security operations seems also to be moving into the direction that master consent boardings of the kind that merely allows to engage with the maritime community is a more and more an accepted *modus operandi*.

7.3. Stateless vessels

One particular issue to note with regard to flag state jurisdiction over vessels in the context of consent is statelessness. In general, consent presupposes the existence of a State that can exercise its jurisdiction over a vessel and can give its consent to board a vessel. If a vessel is considered to be stateless, there will be no State that can be requested for permission. Statelessness as a legal basis to board a vessel does not flow from the inability to obtain consent from a State. Rather, the fact that a vessel is stateless by itself provides a legal basis for warships to visit the vessel.⁴⁶⁰ A

⁴⁵⁸ Arguably, when a boarding team that encounters something illegal during an AAV, they would have to obtain consent from the flag State, if it decides that it wants to take action.

⁴⁵⁹ Papastavridis (2013), 65.

⁴⁶⁰ See Article 92 sub 2 and Article 110 sub 1 under (d) UNCLOS.

stateless vessel is considered to be without nationality. This is codified in UNCLOS,⁴⁶¹ and arguably also a rule of customary law.

Boarding stateless vessels by means of warships is in fact not a rare activity. It is a much discussed topic in drug interdiction operations, for instance in the Caribbean region. France also used statelessness as an argument in the *Medvedyev*-case. But also in the realm of international peace and security, since 9/11, the use of statelessness as a legal basis has spread in the effort of enhancing maritime security. Spanish forces operating within the context of operation *Enduring Freedom* in the search for Al Qaida and the Taliban members at sea, boarded the *So San* after concluding that the vessel could be considered as stateless. In March 2014, US Navy Seals boarded and stopped the *Morning Glory* from trying to sell crude oil coming from a Libyan port, as the vessel was a Libyan rebel held vessel that was said to be stateless after it was stolen by Libyan individuals upon which North Korea deregistered the vessel.⁴⁶²

7.3.1. Conditions for statelessness as legal basis

In order for statelessness to be a proper legal basis, the commander of the visiting warship must have *reasonable suspicion* that the vessel is stateless. A vessel is determined to be stateless under three different circumstances: if the vessel shows a flag but is suspected of flying a false flag, or shows more than one flag⁴⁶³, when the vessel does not fly a flag at all, and thirdly, if it cannot be allocated to a State. Article 110 UNCLOS provides that under these circumstances a warship can board a stateless vessel. In terms of process, Meyer states that the visiting State first has a duty to try to verify the nationality of the vessel without boarding the vessel. Basically Meyer sums up three conditions that justify boarding the vessel: 1) The determination of reasonable suspicion that the vessel is indeed without nationality, 2) there are no other means available to verify its registration and, 3) that there is no 'reasonable excuse', why the vessel is trying to conceal its nationality.⁴⁶⁴ Meyer's view therefore underlines that

⁴⁶¹ See Article 110 UNCLOS.

⁴⁶² 'U.S. Navy hands over North Korean-flagged oil tanker Morning Glory to Libya after seizing it from rebels in dramatic raid', in *Daily Mail*, 22 March 2014. At: <http://www.dailymail.co.uk/news/article-2586995/U-S-Navy-hands-North-Korean-flagged-oil-tanker-Morning-Glory-Libya-seizing-rebels-dramatic-raid.html>.

⁴⁶³ See also Article 92(2) UNCLOS.

⁴⁶⁴ Oppenheim writes on the manner in which flag verification is demonstrated:

even though a legal basis may exist, some reticence must still be observed to board the vessel.

With regard to Meyer's second condition, one can argue whether the duty must not solely be on the commander of the warship, but also on the State of the warship. In other words, must a State do all which is feasible under the circumstances at the time to find out what the nationality of a vessel is, or is the local situation *at sea* and the communication between commander and the vessel enough for determining that there is a reasonable suspicion that the vessel is stateless? The ECtHR in the *Medvedyev* case seems to point in the direction that it is not only a commander's duty, but when possible also a State's duty. The ECtHR judged the fact that the *Winner* at sea did not show the flag and kept resisting the boarding not sufficient to consider the vessel as stateless against the background that the French authorities at that stage already knew it was a Cambodian flagged vessel.⁴⁶⁵ As such, the ECtHR seems to look upon the issue that it is not solely the information that is physically verifiable at sea but also includes other information within the government that may be available to the commander. In the case of the *So San* that occurred in December 2002, according to Doolin, the decision to board the vessel came about based on three suspicions.⁴⁶⁶ First, the vessel zigzagged, that vessels ordinarily would not do; the crew of *So San* raised and lowered the North Korean flag; third and most importantly the name *So San* was freshly painted on the stern while no name was registered under that name in North Korea. According to Roach after being queried, the master of the vessel replied that it was registered in Cambodia. The Cambodian authorities appeared to have confirmed that a vessel meeting the description was registered in Cambodia, but under the name of "*Pan Hope*" instead of *So San*. On the basis of the inconsistencies the vessel was boarded on the grounds of statelessness.⁴⁶⁷ What the authority of the boarding team is once the vessel is boarded, is the real subject of debate. Unclearly exists on the ju-

A man-of-war which meets a suspicious merchantman not showing her colours and wishes to verify the same, hoists its own flag and fires a blank cartridge. This is the signal for the other to hoist her flag in reply....if the suspicious vessel, in spite of this warning [warning shot across the bow] still declines to hoist her flag, the suspicion becomes so grave that the man-of-war may compel her to bring to for the purpose of visiting her and thereby verifying her nationality.

⁴⁶⁵ *Medvedyev*, para's 87-89.

⁴⁶⁶ Doolin, 29-30.

⁴⁶⁷ Roach, (2004).

risdiction that can be exercised over a stateless vessel. This subject will be touched upon in Chapter 9.⁴⁶⁸

7.4. Final remarks

Consent is generally accepted as a legal basis for MIO. The conditions for consent are clear, but the question when these conditions are met in the context of MIO raise certain issues, in particular with regard to the consenting authority. This debate centers on the question whether a State itself or the master of a foreign flagged vessel provides sufficient authority to board the vessel. Whereas the principle of master consent exists and the notion by itself is not debated, the scope of the master consent is. To what type of boarding can a master consent and what can the boardingteam do during a master consent boarding? These are questions that are basically the two sides of the same coin. Factors to be considered in these two questions are the position of the flag State of the vessel and to what purpose the boarding is taking place.

With regard to the latter, it is generally clear that no jurisdictional activities can take place during such boarding. As a result of these different views on how consent is applied in the maritime dimension States can take a both strict and more liberal approach. Either one takes the strictest position that only the flag State is authorized to board a vessel, whatever the purpose of the boarding is, or it allows certain activities. The contention is that there is a thin line between non-jurisdictional and jurisdictional actions. As a result of different views on this matter NATO in operation *Active Endeavour* has taken a cautious approach in which both master's and flag state consent is needed.⁴⁶⁹ The matter is, however, unsettled in a more general sense, at least for the present until such time as an authoritative ruling is issued or international agreement on this issue is reached.

⁴⁶⁸ See Chapter 9, para 9.3.1.1.

⁴⁶⁹ 'De strijd tegen het terrorisme in het Middellandse Zeegebied', in *NATO Review*, (Autumn 2005) www.nato.int/docu/review/2005/issue3/dutch/art4.html.