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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 8

International agreements

8. Introduction

States have the power to agree with other States to allow those States to intercept and board vessels under their jurisdiction on the high seas for certain specific activities. Obviously, international agreements are a form of consent, most commonly agreed between States. Treaties primarily aim to agree or set out the conditions between States in a more structural and permanent manner. The general advantage of international agreements over *ad hoc* consent, apart from the agreement being a more structural form, is that the provisions of the agreement itself upon which the interception takes place, provides more narrowly described authorities and also defines the scope of activities that may take place under the treaty-regime.

The contemporary focus on the use of international agreements as a legal basis for maritime interception operations is connected to the efforts to enhance maritime security. First, making use of international agreements fits the idea that maritime security is reached through cooperation on mutual security issues that States share.⁴⁷⁰ This is a different idea than the classic naval power view in which naval power is used for competing with other States over command of sea. Second, international agreements have become more interesting where on the global level security interests cannot be sufficiently dealt with due to challenges of the involvement of the many States and their interests, States may still pursue their security interests on a more bilateral or regional level. To illustrate, the UN efforts on proliferation of WMD have until now not reached as far as providing non-consensual boarding authority to stop vessels suspected of carrying

⁴⁷⁰ J. Kraska, 'Grasping the influence of law on sea power', in, *NWCR*, vol. 62, no. 3 (Summer 2009), 113-135.

WMD on the high seas. Instead, States try to achieve this through agreements on a bi- and multilateral level. As some States may find that the particular issue of WMD is not sufficiently addressed through either the UN-collective security system or the international law of the sea, international agreements are the tool that provides the legal basis in order to fill that gap. On the one hand, therefore, while global maritime security issues force States to cooperate with each other, on the other hand, because of the multitude of interests and factors involved these issues can develop slowly or in an unsatisfactory manner which can States to approach the issue from the bottom up with smaller bi-, regional- or multilateral level solutions.

International agreements with regard to maritime interception operations do not aim to take a step away from the basic ground rules of the law of the sea. Rather, one reason to enter into international agreements is that they make things work better or run more smoothly within the international system of States, which may be especially true for treaties that seek to enhance safety at sea. International agreements in this context try on a more operational level to overcome the hurdles that initially come with the fundamental principles of international law. They focus on mutual cooperation between States. Aspects like setting up procedures, intensifying coordination, points of contact, or obligations to criminalize acts under domestic laws all seek to strengthen maritime security, without in fact having to step away from fundamental principles derived from the sovereignty of States. It firstly operationalizes the issue of sovereignty versus mission accomplishment into workable details. And secondly it can subject any possible boardings to strict control measures.

Still, using the tool of the international agreement for maritime interception operations is not without criticism. The bilateral boarding agreements between the US and other States have brought some to argue against such treaties. For one reason because the procedural provisions set up in the agreements while not explicitly violating the basic principles of the law of the sea, do seem to nibble at those fundamental principles. As such, as the argument runs, an implied consent regime which is set up in these agreements is a procedure that may not seriously allow the requested State to exercise their sovereignty.⁴⁷¹ The fear may be that these proce-

⁴⁷¹ Klein, 313,

dures may be the start of something that ultimately can result in impairing the sovereignty and the equality of States.⁴⁷²

There are a number of international agreements on a wide range of topics that can form the basis for maritime interception operations. Examples of topics are drug-interdiction (1988 Vienna Convention),⁴⁷³ criminal acts at sea (SUA-Convention and its protocols), piracy (UNCLOS), hostages (Hostages Convention 1979) and WMD (bilateral boarding agreements between the US and others). These treaties all fall within the realm of minimizing criminal acts at sea. As such, most of these fall outside the scope of this thesis. But because certain topics are now also related brought within the realm of restoring international peace and security, such as piracy, terrorists and proliferation of WMD, these topics will be touched upon in this chapter. Apart from the international agreements that are meant to work in a more global manner on specific thematic topics, also regional mutual cooperation arrangement are made between States to counter a maritime threats in specific areas. For instance, the cooperation treaty between the ASEAN⁴⁷⁴ States laid down in the ASEAN Convention on counter-terrorism⁴⁷⁵ and the so called *San Jose Treaty* on drug trafficking between a number of States in Caribbean hemisphere.⁴⁷⁶

8.1. The increasing role of international agreements in MIO

Although this part of the thesis focuses on the legal basis for MIO at sea, international agreements can play a role in the whole maritime interception process in the broadest sense, which extends further than to activities at sea alone. First, international agreements can play a role in the preconditions for successful MIO. This could for instance be setting up an intelligence gathering and sharing network between States and relevant organizations.⁴⁷⁷ But this could also include authority to operate in certain geographical areas where naval operations are subject to authority of a State.

⁴⁷² Syrigos, 201.

⁴⁷³ See article 17 of the Vienna Convention against illicit traffic in narcotic drugs and psychotropic substances (1988) .

⁴⁷⁴ Association of Southeast Asian Nations, which includes 10 member states in South Asia.

⁴⁷⁵ *ASEAN Convention on Counter Terrorism*, Cebu, 13 January 2007.

⁴⁷⁶ Agreement concerning co-operation in suppressing illicit maritime and air trafficking in narcotic drugs and psychotropic substances in the Caribbean area, San Jose, 10 April 2003.

⁴⁷⁷ N. Klein, 'Intelligence gathering and information sharing for maritime security purposes under international law', in, N. Klein, J. Mossop, D.R. Rothwell, *Maritime security. International law and policy perspectives from Australia and New Zealand* (2010), 224-241.

A State can agree by international arrangement to allow foreign vessels to operate in its territorial sea. Another example of where international agreements can play a role in MIO is in international (shiprider) agreements to allow foreign shipriders⁴⁷⁸ or law enforcement agents (LE-DET's)⁴⁷⁹ on board a warship. The purpose of shiprider-agreements is to provide a jurisdictional link between a suspect person and the State officials. It is a frequently used agreement in maritime drug interdiction⁴⁸⁰ and has also been a subject of discussion in counter-piracy operations off the coast of Somalia. Whereas these examples focus on setting the conditions to ultimately enable a successful operation at sea, international agreements can also play a role in the aftermath of the interception. Some treaties set out provisions that codify the principle of *aut judicare aut dedere*, such as the SUA-Convention.⁴⁸¹ With regard to piracy, the UNCLOS provisions on piracy do not contain such a provision, but in recent counter-piracy operations off the coast of Somalia further agreements were made to transfer persons from one State to another. For instance, the EU concluded a transfer-agreement with Kenya on the conditions of transfer of suspected pirates.⁴⁸² Apart from the fact that such agreements lessen the logistical burden of out-of-area counter-piracy operations it also supports the political view that piracy should be prosecuted in the region rather than in the far off State of the intervening warship.

In terms of agreements that focus on the aftermath, also mention can be made of so called diversion port agreements that be concluded in order to agree with a State to have a port available where suspect vessels can be inspected, in a more thorough fashion as can be done at sea. Apart from the practical issues of inspecting at sea, the advantage of in port inspection is that it takes place within the jurisdiction of a State who can take more

⁴⁷⁸ J. Voetelink, *Militair operationeel recht* (2013), 150. Shipriders should not be mistaken with vessel protection detachments (VPD's). The first are law enforcement agents who 'ride' on board a warship of another state through which specific authorities are provided which enables an arrest of a person at sea. VPD's are protection teams that protect a vessel from being boarded. These are frequently used in the context of piracy. See for the Dutch experiences M.D. Fink, J.E.D. Voetelink, 'De status van militaire Vessel Protection Detachments', in *MRT*, vol. 106 (2013), 41-53.

⁴⁷⁹ Law Enforcement Detachment.

⁴⁸⁰ See Van der Kruit, 274-294.

⁴⁸¹ Article 10 SUA-Convention.

⁴⁸² *Exchange of Letter between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such capture*, 25 March 2009.

appropriate measures against possible breaches of an UN-embargo. Although a diversion port agreement would very much take away much of the un-clarity as to what to do what suspected goods and persons encountered at sea, States seem to be reluctant to agree on authorizing one of its ports to function as a diversion port during military operations.⁴⁸³

Narrowing MIO again to operations at sea, a number of international agreements have specific provisions that deal with the right of visit by warships on foreign vessels on the high seas. The most obvious three treaties, used within the context of international peace and security, are the UNCLOS, *Treaty on Suppression of Unlawful acts at Sea against the Safety of Maritime Navigation*, 1988 (SUA-convention) and its 2005 Protocol, and lastly, the bilateral boarding agreements between the United States and other nations that are agreed against the background of the PSI. These agreements will be discussed below in the following paragraphs.

8.2. International agreements and the international law of the sea

Article 92 UNCLOS mentions that the convention itself (itself a treaty) or an international treaty may deviate from the fundamental principle of exclusive jurisdiction over a vessel by the flag State. As such, UNCLOS clearly opens the door for States to agree on treaties that may give enforcement jurisdiction to other States over a foreign flagged vessel. As Chapter 4 has set out, on the high seas the State has exclusive jurisdiction on board its flagged vessels. As mentioned there, Article 92 UNCLOS provides for the exception to the ground-rule in “exceptional cases expressly provided for in international treaties or in this Convention...”. UNCLOS, therefore, opens the door specifically to consent through treaties. It does, however, not say anything on the use of consent within the meaning of precluding the wrongfulness of actions of a State. A strict reading of this article would lead to the conclusion that it does not consider consent through other forms of state consent, such as consent within the meaning an *ad hoc* agreement. As international agreements are ‘form free’ and may also exist in very rudimentary forms as long as it consists of the

⁴⁸³ According to Pokrant Oman appeared to be reluctant to allow its ports being used as diversion ports. In the author’s own experience during OUP, states that were asked to provide diversion were however also very reluctant to agree on a diversion port agreement.

will of an authorized body or person within both States, this still could fit the *ad hoc* agreement of consent. This seems also to be the line taken by the ECtHR in the *Medvedyev*-case.

There are only a few international agreements that have allowed third States to enforce jurisdiction over a flag State vessel without prior *ad hoc* permission in the context of international peace and security. The obvious one is UNCLOS itself, and next to UNCLOS one could mention the UN-Charter of which the collective security system provides for binding decisions for States and can take mandatory measures under Chapter VII to intercept third state vessels.⁴⁸⁴ Interestingly, although an international agreement may give options to overcome the issue of exclusive jurisdiction, treaty-making practice in the maritime dimension has not jumped immediately in that direction. There are in fact no treaties that specifically step away from prior permission. Instead, against the background of trying to promote more instruments to minimize the threats of terrorists and WMD, solutions in recent treaties are sought primarily in shorter timelines and more efficient procedures to be able to obtain consent to board a foreign flagged vessel. As Hodgkinson *et al* conclude: “Boarding agreements save time”.⁴⁸⁵ As was mentioned in Chapter 2, the SUA-Protocol 2005 endeavored to enhance the use-ability of the SUA-Convention in light of the increased threats against maritime security. The main principle is enshrined in Article 8bis of the 2005 SUA-Protocol is still that: “The requesting Party shall not board the ship or take measures set out in subparagraph 5(b) without the express authorization of the flag State”. Thus a prior request needs to be sent to the flag State. A minor procedural step away from this principle is however made in Article 8bis sub 5 under (d), which creates a “silent consent” procedure or a “presumption of consent”

⁴⁸⁴ R.R. Churchill, ‘UN Security Council resolutions and 1982 LOS convention’, in *International Law Studies*, vol. 84 (NWC), 143-157, at 147. The possibilities the UN-Charter provides as a legal basis for maritime interception have already been discussed in Chapter four and will stay outside the scope of this chapter.

⁴⁸⁵ Hodgkinson, 665.

when a State party does not react within four hours.⁴⁸⁶ As Ashley Roach mentions; ‘The boarding procedures do not change existing international maritime law or infringe upon the traditional principle of the freedom of navigation. Instead, the procedures eliminate the need to negotiate time consuming *ad hoc* boarding arrangements when facing the immediacy of ongoing criminal activity.’⁴⁸⁷

The PSI is not a treaty and the interdiction principles by themselves do not give a legal basis for boarding foreign flagged vessels. The PSI does contain a political basis for subsequent treaty making between PSI-participants.⁴⁸⁸ The bilateral ship-boarding agreements between the US and other States are based on this.

A construct of implicit authorization by the flag State is used in the ship-boarding agreements between the US and other States for the purpose of the PSI.⁴⁸⁹ For example, the agreement between the US and Liberia has a time lapse limit of two hours before an authority to board is assumed.⁴⁹⁰ The agreement between the US and Croatia appears to be an exception to this. Although there is a time limit of four hours, there are no consequenc-

⁴⁸⁶ Article 8 bis, sub 5 (d) 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, London, 14 October 2005, IMO Doc. LEG/CONF.15/21, reads as follows: “Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence set forth in article 3, 3*bis*, 3*ter* or 3*quater* has been, is being or is about to be committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality”.

⁴⁸⁷ J. Ashley Roach, ‘Global Conventions on piracy, ship hijacking, hostage taking and maritime terrorism’, in R.C. Beckmann, J. Ashley Roach (eds.), *Piracy and international maritime crimes in ASEAN. Prospects for cooperation* (NUS center for international law, 2012), 38-61, at 50.

⁴⁸⁸ The fourth principle states that:

Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks...

⁴⁸⁹ Klein, *supra* note 19, p. 312. Shipboarding agreements have been agreed between the US and Antigua & Barbuda (2010); Nassau (2008), Belize (2005); Croatia (2007); Cyprus (2006); Liberia (2004); Malta (2007); Marshall Islands (2004); Mongolia (2008); Panama (2004); Saint Vincent and the Grenadines (2010).

⁴⁹⁰ Article 3 (d) Agreement Between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea, Washington, 11 February 2004, <http://www.state.gov/t/isn/trty/32403.htm>, reads as follows: “If there is no response from the Competent Authority of the requested Party within two hours of its acknowledgment of receipt of the request, the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessels documents, questioning the persons on board, and searching the vessel to determine if it is engaged in proliferation by sea”.

es when time has run out. Express authorization of the flag State is still needed.⁴⁹¹

As such, both the 2005 SUA-Protocol and the ship-boarding agreements at least on paper appear to have effectively dealt with the fear that explicit flag state consent may take too long and this approach seems to be moving away from a hard-line view of the principle of flag State consent against the background of current security threats. Primarily because, as Garvey mentions: “Two hours is obviously a period of time grossly inadequate to assess the credibility of a request for interdiction and the interests involved. Under these bilaterals, if consent is not provided within two hours, interdiction can proceed by default”.⁴⁹² Whether it is possible to obtain consent within four hours will probably depend on how the national institutions are organized to deal with the question when it arises.

8.3. UNCLOS

UNCLOS contains provisions in which within the international law of the sea it is allowed to interfere with foreign flagged vessels on the high seas. These provisions are laid down in Article 98, 110 and 111 UNCLOS.⁴⁹³ Arguably, these provisions codify existing international customary law.

⁴⁹¹ See Articles 4 (b) and (d) Agreement between the Government of the United States of America and the Government of the Republic of Croatia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials, Washington, 1 June 2005 (at :<http://www.state.gov/t/isn/trty/47086.htm>). Article 4d of this agreements states:

d. Except as otherwise permitted by international law, the requesting Party shall not board the vessel without the express written authorization of the Competent Authority of the requested Party.

⁴⁹² J.I. Garvey, ‘The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative’, Vol. 10 No. 2 *Journal of Conflict and Security Law* 2005, p. 133.

⁴⁹³ Article 110 sub 1 UNCLOS reads:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

These provisions contain six subjects altogether: rendering assistance, piracy, slave trade, unauthorized broadcasting, statelessness and hot pursuit. Articles 100-107 and 110 UNCLOS relate to the law of piracy. A lot has been written on the law of piracy laid down in UNCLOS since the multinational efforts of navies started to patrol the seas around the Horn of Africa supported by UN-resolutions. In this context however Article 105 and 110 are UNCLOS are of particular importance. Article 105 UNCLOS allows States to establish universal jurisdiction over piracy on the high seas, or any other place outside the jurisdiction⁴⁹⁴ of any State. When properly authorized through national legislation, nations' warships can board a vessel suspected of piracy and arrest the persons and seize the property on board. Article 110 UNCLOS provides the authority to board a foreign flagged vessel, under the condition that there is a reasonable ground for suspecting that the vessel engaged in piracy.

Obviously, the piracy provisions in UNCLOS have been well used in recent years, but also, as mentioned in Chapter 5, the notion of statelessness is used as a reason to board a vessel within the context of enhancing maritime security.

Apart from the more traditional Articles of 110 and 111 UNCLOS, one could argue that in the interest of saving human lives in danger of the perils of the sea, Article 98 UNCLOS concerning the rendering of assistance implies also that under circumstances of distress, the boarding of a foreign flagged vessel is permissible. The situation of these distress circumstances allows (or rather: obliges) for immediate action taken by any mariner -man of war or merchantman- that can do so without serious danger to the (own) ship, crew or the passengers, rather than to wait for consent of a flag State of a vessel in distress. Rendering assistance in a maritime context has a specific and long developed context, is codified not only in UNCLOS but also in other maritime law treaties⁴⁹⁵, and focuses on the safety of the vessel and persons of the dangers that exists from the per-

⁴⁹⁴ Presumably this is Antarctica. Some have argued that maritime areas that belong to failed states would fall under this. Article 105 UNCLOS reads:

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.

⁴⁹⁵ Such as the SOLAS-Convention and the Salvage Convention.

ils *from* the sea, for instance the lack of seaworthiness of a vessel drifting at sea. But it is, however, not meant to permit boarding when life threatening danger arises between for instance persons on board. Rendering assistance has, in other words, a strictly limited meaning and cannot be used in all circumstances of general danger at sea.

8.4. The SUA-Convention and Protocol

Instead, States have sought to take appropriate measures against criminal acts that occur on board a vessel via the SUA-Convention (1988), which came about as a result of the *Achillo Lauro* incident.⁴⁹⁶ The Convention is supplemented by the SUA-Protocol (2005), which was ratified in 2010. The SUA-Protocol is not yet a generally ratified protocol.⁴⁹⁷ The importance of the 2005 SUA-Protocol is that it adds four new offences to the SUA-Convention and includes a right of visit regime.⁴⁹⁸ The offences are important for the proliferation of WMD because they make punishable an act of which its intention is to intimidate a population, or to compel a government or an international organization to do or to abstain from any act, by using NBC-material on or from the vessel. The provisions that allow for boarding a foreign flag vessel under SUA are Articles *8bis* under 5 (c) and (d). With Article *8bis* under 5 (c) (i) a flag State can authorize another State to board its vessel. With Article *8bis* under 5 (d) a flag State can also opt for the four-hour rule regime, in which a requesting boarding State can board the vessel if there is no response from the flag State within four hours of acknowledgment of receipt of a request to confirm nationality. The visit-provisions are further analysed Chapter 9. Although the Protocol is, as Kraska and Pedrozo mention,⁴⁹⁹ more robust than many other international agreements, it still takes the exclusive jurisdiction of the flag State over its vessels as the point of departure. Article *8bis* under 5 (c) states that no party shall board the ship or take measures without the express authorization of the flag State.

⁴⁹⁶ The Italian flagged *Achillo Lauro* was hijacked by Palestinians off the coast of Egypt, demanding the release of 50 Palestine prisoners. The hijackers were given safe passage in Egypt and were allowed to board an airplane to fly to Tunisia. US fighters then forced the plane to land in Italy. See D.L. Bryant, 'Historical and Legal Aspects of Maritime Security', in *University of San Francisco Maritime Law Journal*, vol. 1, no. 3-4 (2004), 1-27. A Cassese, *Terrorism, politics and law. The Achillo Lauro affair* (1989).

⁴⁹⁷ The IMO-website states that as of February 2016, 35 states ratified the Protocol.

⁴⁹⁸ Art. 4 under 5 SUA-Protocol.

⁴⁹⁹ Kraska, Pedrozo, 835.

8.5. PSI bilateral boarding agreements between the US and others

The United States has entered into a number of bilateral agreements that concern ship-boarding for the purpose of stopping WMD. Kraska and Pedrozo mention that within the different agreements that exist (11 in 2014) three models exist for a legal ship-boarding action.⁵⁰⁰ First is the situation where the US needs flag state consent under all circumstances. Second is the situation in which boarding is presumed to be authorized when a certain period of time has lapsed without response. And third is the situation where the boarding can take place if the registry of the vessel cannot be confirmed within a certain timeframe. There is not much available on the practical use of these BSA's. Only the *MV Light* incident can be connected to BSA's.⁵⁰¹ But apart from its actual use in practice, one can also see agreements as a mechanism to close the net on terrorists that try to use the maritime environment for their actions.

8.6. Conclusion

International agreements can form the legal basis for maritime interception operations. Where some treaties (UNCLOS and the UN-Charter) have provisions that ultimately allow States under certain circumstances to interfere with other vessels without prior permission of the flag State, another relevant treaties (SUA, bilateral ship-boarding agreements) have explicit regulations on boarding foreign flagged vessels, but do not reach as far as not needing prior permission. Rather, against the background of the need to act rapidly authority in treaties have move to implied authority, or silent procedures. The condition for the legal basis to come into play is the passage of time, after which consent is presumed to be given. Even so, this procedure is still based on the overall explicit authority given by a State through a treaty.

⁵⁰⁰ Kraska and Pedrozo, 788.

⁵⁰¹ The Belize flagged vessel *MV Light* from North-Korea on its way to Myanmar and suspected of carrying missile parts was forced to turn back by the US who dispatched the *USS McCampbell* to intercept the *MV Light*. Although authority to board was given by Belize, based on the US-Belize shipboarding agreement the master refused. Instead it finally turned back to North Korea.