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 III

The legal regimes of the law of armed conflict (LOAC) and international human rights law (IHRL) will be central in Part III. As mentioned in Chapter 1, a legal regime refers to the bodies of international law that regulate actions, in this case during interception operations. Part III will, therefore, move into the realm of actual military activities at sea. From an operational point of view, once the question is answered on which legal basis a maritime interception operation may take place, the next question will be which authorities exist during the interception of a foreign flagged vessel under which a warship's crew can conduct maritime interception operations. Part III will analyse the applicability of legal regimes through three specific activities that are of importance to maritime interception operations: the right of visit (Chapter 9), the use of force (Chapter 10) and detention at sea (Chapter 11).

Before embarking on the issue of legal regimes during maritime interception operations two preliminary and general remarks will be made. First, in recent years, the debate on the applicability of human rights to extraterritorial military operations has been on the centre stage in the theatre of international law and military operations. Although the debate has been very lively in the realm of land-operations, it has been less present in the maritime dimension. For one reason, because until recently naval operations have focused on stopping vessels and goods, rather than putting the individual on board as the central issue. To illustrate, when a vessel breaches a belligerent blockade the owner will run the risk of losing vessel, but it is not a punishable action for an individual. Also, to give another example, most the maritime embargo operations have focused on enforcing sanctions which dealt with prohibited items, such as military material or oil. Recent counter-piracy operations, and even more recently the current challenge of refugee flows at sea in the Mediterranean Sea, through practice and case law, has given rise to academic debate on the

scope of human rights law at sea.[502] As the ECHR aptly notes in the *Medvedyev* case:

> The special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.[503]

Activities during maritime interception operations must now not only be considered through the applicability of the law of armed conflict or the law of the sea, but also within the context of human rights law. As such, among other issues, it will attract similar discussion of the relationship between the applicability of legal regimes during maritime interception operations. With regard to the applicability of human rights law during MIO, Part III will primarily focus on human rights law from a European perspective and thus deal with human rights law through the *European Convention on Human Rights* (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR). The main reason for this is that this thesis is not be an in-depth study into the possible differences that may apply between the different human rights instruments, such as the ECHR and the *International Convention on Civil and Political Rights* (ICCPR). Second, as the Netherlands is bound by the ECHR and frequently operates with other European navies, the primary focus will, therefore, be on the ECHR.

The second general remark is on distinction. As in the land dimension, the maritime dimension during armed conflict obviously also distinguishes between combatants and civilians. The maritime dimension, however, than further divides civilian (or: merchant) vessels in enemy and neutral merchant vessels. The first are merchant vessels that fly the flag of the enemy State. The second are merchant vessels that fly the flag of a neutral State. Although both must be regarded as civilian, both categories of vessels are subject to a specialized subset of the law of armed conflict; the law of naval warfare. This subset of the laws of armed conflict, and the regulations regarding economic warfare and maritime neutrality in

[502] See e.g. E. Papastavridis 'European Convention on human rights and the law of the sea: the Strasbourg Court in unchartered waters', in M. Fitzmaurice, P. Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights : Legal and Practical Implications* (Leiden, Martinus Nijhoff publishers 2013), 117-146. (2013); Treves (2010).
[503] *Medvedyev*, paragraph 81.

particular, will have an effect on the manner in which way belligerent may ‘target’ their operations against merchant vessels.