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 10

The use of force in maritime interception operations

10. Introduction

This chapter addresses the use of force during maritime interception operations. To start with, the term 'use of force' can have different connotations. First, from a *ius ad bellum* perspective, it can have the meaning of the use of interstate *military* force which may or may not be in breach of Article 2(4) of the UN-Charter. Part of the *ius ad bellum* use of force issues, is the question what kind of force amounts to a breach of 2(4) UN-Charter and whether the force must be seen in the context of 2(4), or that it is in fact State's a legitimate use of force in pursuit of law enforcement activities at sea. The direction the answer has to take in this, as Nevill concludes; 'turns on an objective assessment of the State's intentions and the surrounding circumstances, not the gun or ammunition used, the number of shots fired, or the identity of the State authority…'[616] Another connotation of the use of force -which is the focus of this chapter- *is* in fact related to 'the ammunition used or the number of shots fired', namely the actual use of force itself: *How* must force be applied during maritime interception operations? This latter question relates to the relationship between using force during a MIO and applicable legal regimes that regulates such force. That is the question which is central to this chapter.

With regard to the legal regime on the use of force in maritime interception operations both the legal of human rights law and the law of armed

[616] P. Nevill,'Military sanctions enforcement in the absence of express authorization', in M. Weller (ed.), *The Oxford Handbook on the international law on the use of force* (2015), 272-292, at 282.

conflict play a role. Next to that also other legal frameworks, such as the international law of the sea play a role. These legal frameworks have their own particular perspectives and focus. As this chapter will underline, the law of the sea has in fact no specific use of force regulations, but has, through applying standards within human rights law to situations at sea, developed some guidance on the subject through case law, mainly along the lines of a focus on the use of force against vessels. Human rights law relates to the exercise of public power and use of force against individuals against the background of the right to life. The law of armed conflict comes into play when a situation of armed conflict arises in which force against both vessel and person is allowed, albeit limited by LOAC-regulations. As will also be discussed in this chapter, LOAC thereby significantly differs in concept on the use of force in relation to human rights. How these three legal frameworks interact with each other is a matter of debate. This debate relates both to the extraterritorial applicability of human rights law and the scope of its applicability in military operations. It also relates to the relationship between human rights and the law of armed conflict, which is a debate that has primarily emerged in land based military operations. Human rights law has, however, received increased attention in the maritime context, for example in relation to counter-piracy operations off the coast of Somalia and with regard to maritime border patrol operations in the context of dealing with refugees at sea.[617] UNCLOS does not deal with the application of human rights in the maritime dimension, although the rendering of assistance (Art. 98 UNCLOS) expresses a duty for a State aiming to protect the seafarer against the perils of the sea, and may arguably be seen as a human right obligation for States that stems directly from the international law of the sea.[618] The ECtHR in the *Hirsii Jamaa v. Italy* case has dealt with the relation between the duty to render assistance and the human rights principle of *non-refoulement*.[619] The relationship, however, between human rights and the law of the sea is an issue that has yet to further crystallize.[620] On this, Klein underlines the need to

[617] Such as the EU-operation FRONTEX, but also the individual actions of states, such as Italy in the Mediterranean Sea, that are confronted with the issue of refugees at sea.
[618] S. Cacciaguidi-fahy, 'The law of the sea and human rights', in *Panoptica Vitoria*, vol. 1, no. 9 (2007), 1-21.
[619] See also N. Klein, 'A case for harmonizing laws on maritime interception of irregular migrants', in *ICLQ*, vol. 63 (October 2014), 787-814.
[620] T. Treves, 'Human Rights and the Law of the Sea', in *Berkeley Journal of International Law*, vol. 28 no. 1 (2010), 1-13.

further harmonize the, as she calls it, 'fragmented legal frameworks applicable to maritime interception'.[621] This not only holds true for the interrelationship between the law of the sea and human rights, but also with regard to the relationship between human rights and the law of naval warfare. Whereas the discussion in the relationship between the law naval warfare and the international law of the sea since the adoption of UNCLOS III has now slowly moved to the background, there has been extensive debate covering the relationship between human rights law and the law of armed conflict in a general sense, little attention has been devoted to how this relationship would apply to the maritime context.

Various types of situations exist in which a necessity to use force in the maritime dimension can arise. These include the performance of law enforcement at sea, personal self-defence in response to unlawful assault, the execution of a UNSC-mandate and in the context of the right of national self-defence under Article 51 of the Charter.[622] In these situations, the actual application of force is regulated by applicable human rights law, by the international law of the sea and where relevant, the law of armed conflict.

With regard to term use of force in this chapter, as stated previously, it focuses on the question how and against whom or what force may be utilized. In the broadest sense, every form of coercion may be considered as a use of force. Also a boarding and visit of a foreign flagged vessel or detention of a person[623] may arguably be considered as a form of coercion as it impacts on the free will of the master of the vessel or the individual. This chapter will, however, define the use of force as the use of armed and potentially lethal force during an interception operation. In other words, when lethal weapons are used in the course of a maritime interception, what then are the conditions under which force can be applied?

[621] Klein (2014).
[622] See e.g. Rothwell & Stephens, 310; C.H. Allen, *International law for seagoing officers* (6th ed. Naval Institute Press, Annapolis Maryland, 2014), Chapter 13.
[623] See also Petrig (2014), 113-114 who states: Since arrest and detention of persons suspected of piracy or armed robbery at sea is a form of use of force going beyond self-defence and defence of others,…'.

10.1. Naval forces and the use of force

Before the legal aspects of the application of force in maritime interception operations are analysed, three preliminary comments will be made here on the use of force by naval forces in general.

Firstly, naval forces can be assigned several tasks within one military campaign, which, in terms of the use of force, can lead them to operate in both the lower and higher spectrum of using force within one and the same campaign. In the same campaign naval forces can, for instance, be assigned to conduct embargo operations against neutral shipping, while also providing naval gunfire support (NGS) to land operations. One such example is *Operation Desert Storm* in which naval forces were used to fire Tomahawk missiles at land targets in Iraq, while simultaneously enforcing the embargo, which is at the lower end of the use of force scale and directed against civilian vessels, and which were also potentially of a neutral status.[624] Another example is *Operation Unified Protector*, where some of the naval forces were both used to enforce the UN-mandated embargo and apply naval gunfire support to support the on-going air-campaign, the latter which was clearly a war-fighting activity as opposed to the maritime embargo operation, which was being conducted at the same time. A third example is OEF, in which naval forces supported land operations in Afghanistan from the sea and also sought for possible terrorists at sea. At the operational level, an organizational separation is usually made in which ships are assigned to a certain specific task. It is, however, not excluded that warships may quickly change from one tasking to another. Many factors will have a bearing on this decision, such as the capabilities of the available forces and geographical positioning, but also the limitations that States put on the conduct of their participating warships. Be that as it may, changes to the situation require the commander to change his mindset quickly from say the administration of force against suspect merchant vessel on one day, to attacking military targets on the next day.

Secondly, on a more tactical level the use of force can be directed against both the *vessel*, for instance to make the vessel stop, and the *persons* on board the vessel, for instance to take over control of the vessel or

[624] T. Benbow, 'Maritime power in the 1990-1991 Gulf war and the conflict in the Former-Yugoslavia', in A. Dorman, M. Lawrence Smith and M.R.H.Uttley, *The changing face of maritime power* (1999), 107-125.

arrest persons on board. The military actions against the persons on board the *Ibn Khaldoon*[625] and the *Mavi Marmara* are examples of the latter. The actions of the *Niels Ebbessen*[626] are an example of the former. While the international law of the sea and the law of naval warfare have primarily developed through focussing on force against vessels, human rights law focuses on persons.

Thirdly, the use of force can obviously be directed against military opponents, such as enemy warships or combatants, but also in the context of embargo enforcement or blockade, against civilian merchant vessels and persons on board those vessels. In fact, many of the naval operations which deal with economic warfare or the enforcement of economic sanctions are directed against civilian vessels and their crews and passengers, who may not have anything to do with the conflict.

10.2. International law of the sea

The international law of the sea is primarily meant to be peace time law and does not concern itself directly with military operations at sea. Also, no provisions of UNCLOS explicitly mentions any rule or guideline on how to use force during interception operations on the high seas, in either circumstances of peacetime or conflict.[627] Some provisions are seen as implicitly referencing to the use of force, such as Article 225 UNCLOS.[628] And others find implicit grounds for arguing that force at least can be used in the conduct of certain UNCLOS actions for the simple reason that for instance during an arrest of pirate-suspects under Article 105, one can as-

[625] The *Ibn Khaldoon* was a merchant vessel, dubbed the "peace-ship", which sailed in 1990 from Algeria to the port of Basra in Iraq during the MIF-period. The *Ibn Kaldoon*, similar as the *Mavi Marmara*, had protestors, congressmen and women on board and purposely attracted a lot of media attention. After helicopter insertion of the US boarding team passive resistance occurred by the passengers to try to stop the boarding team to take control of the vessel. After the boardingteam discovered prohibited items on board a port needed to be found to offload the prohibited cargo. Ultimately the cargo was offloaded in Oman. See http://articles.latimes.com/1990-12-26/news/mn-6714_1_peace-ship; Pokrant, 193-194.

[626] See on this incident later in this chapter.

[627] D.G. Stephens, 'The impact of the 1982 law of the sea convention on the conduct of peacetime naval/military operations', in *California western international Law Journal*, vol. 29, no. 2 (Spring 1999) , 283-311, at 292. Rothwell and Stephens (2010), 419.

[628] Art. 225 UNCLOS reads:

> In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.

sume that there is a chance they will resist.[629] The argument runs that without the possibility of force, such authorities would become in fact useless. Bono and Boelaert see this same implied use of force powers in Articles 110 and 111 UNCLOS.[630] Tullio Treves also argues that '[g]eneral international law, in authorising stopping and boarding for the purpose of exercising the right of visit under Article 110 of UNCLOS or the seizure of a pirate ship under Article 105, presupposes that force may be used to reach these objectives.'[631] By that as it may, there are no explicit powers for the use of force in UNCLOS itself.

Case law on the use of force within the context of the international law of the sea does, however, provide some guidelines. Such case law on the use of force in relation to the international law of the sea and maritime interception can be found in the *I'm Alone* (1929),[632] *Red Crusader* (1961),[633] *M/V Saiga, no. 2* (1999)[634] and the *Guyana v. Suriname* (2007)[635] cases. Notably, in the *MV Saiga*-case the Court held that in the

[629] See e.g. McLaughlin (2009), 80; R. Gosalbo-Bono, S. Boelaert, 'The European Union's comprehensive approach to combating piracy at sea: Legal aspects', in P. Koutrakos, A. Skordas, *The law and practice of piracy at sea: European and international perspectives* (2014), 81-167,103.
[630] Gosalbo-Bono and Boelaert (2014), 106-107.
[631] Treves (2009), 413.
[632] The Canadian flagged vessel *I'm Alone* was sunk in March 1929 in hot pursuit on the high seas in the Gulf of Mexico, by the US coast guard cutter *Dexter*, whilst it was engaged in prohibited liquor trafficking. On the question whether the sinking of the vessel was justified it was considered that:

> On the assumptions stated in the question, the United States might, consistently with the Convention, use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless. But the Commissioners think that, in the circumstances stated in paragraph eight of the Answer, the admittedly intentional sinking of the suspected vessel was not justified by anything in the Convention.

[633] Permanent Court of Arbitration (PCA), 23 March 1962. In 1961 the Danish fisheries inspection vessel *Niels Ebbessen* boarded the British flagged vessel *Red Crusader* and arrested the crew on suspicion of fishing within a prohibited area. After initially agreeing to follow the *Niels Ebbessen* to the Faroe Islands, it stopped cooperating to follow the *Ebbesen* and secluded the Danish officers that were still on board. The *Ebbessen* than first fired warning shots upon the Red Crusader, hailed it to stop and then proceeded to fire for effect at the *Red Crusader*. The commission concluded that firing upon the *Red Crusader* was not justified and that other means should have been sought to pursue arrest.
[634] *MV Saiga no. 2, Saint Vincent and the Grenadines vs. Guinea*, ITLOS judgment 1 July 1999. The oil tanker *MV Saiga* was attacked and boarded by Guinean officials in 1997. The vessel and persons were brought to Conakry and placed under arrest. The ITOs found that Guinea under the specific circumstances of the case used excessive force against the *MV Saiga*, which was fully loaded with fuel, was unarmed and travelling at a speed of 10 knots. See para's 158-159.
[635] *Guyana vs. Suriname*, Award of the Arbitral tribunal constituted pursuant to article 287, and in accordance with annex vii, of the United Nations Convention on the Law of the Sea, 17 September 2007. The underlying issue in this case was a border dispute between the two neighboring States. The case emerged from an incident in 2000 in which Suriname threatened to use force by means of two gunboats of the Suriname Navy to expel the vessel *C.E. Thornton* from the disputed area which was in service of Guyana.

course of stopping a vessel first visual internationally recognized signals must be given to stop the vessel, and when this does not succeed, a variety of other measures can be taken, including the firing of warning shots across the bow. When all this fails, the pursuing vessel may, as a last resort, use force. But even then, appropriate warnings must be given and efforts should be made to ensure that life is not endangered.[636] International law of the sea case law provides that once there is a legal basis to stop and board a vessel, reasonable, necessary and last resort force that ensures that life is not endangered on board the vessel is thus authorized.

The use of force in these cases is force used in the context of constabulary purposes, in the pursuit of legitimate law enforcement actions which is considered to be outside the prohibition of the use of force under Article 2 (4) of the UN-Charter. The legality of the use of force in law enforcement action by a State on the high seas against foreign flagged vessels is, therefore, not considered through the *ius ad bellum*.[637] Guifloyle supports this view by stating that use of force against a foreign (merchant) vessel is not force against the political or territorial integrity of a State.[638] Obviously, other factors matter in this debate, such as to what the degree the State itself is involved in for instance protecting the vessel (e.g. convoys with warships) or in its relationship with the vessel (e.g. contractual governmental task), or that a State to State dispute comes is fought over through merchant vessels (e.g. protecting territorial integrity). How thin the line between enforcing rights based on law enforcement activities and the use of force in contravention with the use of force prohibition of Article 2 (4) UN-Charter is, is shown by the Tribunal in the *Guyana-Suriname* case. In this case:

> The Tribunal accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary. However in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity. This Tribunal has based this finding primarily on the testimony of witnesses to the incident, in particular the testimony of Messrs Netterville and Barber. Suri-

[636] *MV Saiga* no. 2, para. 155.
[637] See also Papastavridis, 69-70.
[638] Guilfoyle (2009), 273.

> name's action therefore constituted a threat of the use of force in contravention of the Convention, the UN Charter and general international law.[639]

10.2.1. International agreements on the law of the sea

The principle that force may be used in law enforcement activities at sea provided that such force is unavoidable, reasonable and necessary, is also codified in different agreements that are related to the law of the sea. For instance, the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, states in Article 22 paragraph 1(f) that:

> 1. The inspecting State shall ensure that its duly authorized inspectors: ... (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

Also, the SUA-Protocol has a provision on the use of force which, interestingly, also focuses on the use of force on board the vessel. Article 8*bis* sub 9 of the SUA-Protocol states that, apart from the general notice that any force shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances, force shall be avoided except when necessary *to ensure the safety of its officials and persons on board, or when the officials are obstructed in the execution of the authorized actions*. The latter condition might apply when a vessel is not compliant with orders to stop and no other means are available to stop the vessel. Once on board, the officials need to avoid any use force during their activities unless to ensure their safety and those of the persons on board. The bilateral shipboarding agreements between the US and other States also contain a provision on the use of force. The agreement between Belize and the US, for instance, states that:

> 2. Each Party shall avoid the use of force except when and to the degree necessary to ensure the safety of Security Force Officials and ships, and of persons on board the suspect ship, and where Security Force Officials are obstructed in the execution of their duties.

[639] *Guyana-Suriname*, paragraph 445.

3. Only that force reasonably necessary under the circumstances may be used.
4. Boarding and search teams and Security Force ships have the inherent right to use all available means to apply that force reasonably necessary to defend themselves or others from physical harm.[640]

Although outside the scope of this thesis, it is worth mentioning here that the *Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area* **(***San Jose Treaty)*,[641] also has codified the use of force against both vessel and persons that detail the same conditions.[642] The point to underline here, however, is that when an international agreement on a specific subject exists, it may have a specific provision on the use of force. Those provisions can deal with the use of force, both against the vessel and the persons on board. The scope of these international agreements are usually aiming at law enforcement activities, during the course

[640] See Article 9 of the *Agreement Between the Government of the United States of America and the Government of Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea*, October 2005. The US-Croatia agreement (2005), for example, mentions words alike. Article 9 states:

1. Rules. When carrying out the authorized actions under this Agreement, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this Agreement shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

2. Self-defense. Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by Security Force or other officials of either Party.

[641] *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.

[642] See Article 22 of the *San Jose Treaty*, which reads:

1. Force may only be used if no other feasible means of resolving the situation can be applied.
2. Any force used shall be proportional to the objective for which it is employed.
3. All use of force pursuant to this Agreement shall in all cases be the minimum reasonably necessary under the circumstances.
4. A warning shall be issued prior to any use of force except when force is being used in self-defence.
5. In the event that the use of force is authorised and necessary in the waters of a Party, law enforcement officials shall respect the laws of that Party.
6. In the event that the use of force is authorised and necessary during a boarding and search seaward of the territorial sea of any Party, the law enforcement officials shall comply with their domestic laws and procedures and the directions of the flag State.
7. The discharge of firearms against or on a suspect vessel shall be reported as soon as practicable to the flag State Party.
8. Parties shall not use force against civil aircraft in flight.
9. The use of force in reprisal or as punishment is prohibited.
10. Nothing in this Agreement shall impair the exercise of the inherent right of self-defence by law enforcement or other officials of any Party.

of which persons may be arrested, and which go beyond the use of force in personal self-defence.

In sum, three points can be noted on the use of force from a law of the sea perspective. First, the UNCLOS-treaty does not contain explicit rules on the use of force. Through case law it is, however, accepted that the use of force under strict conditions is allowed in the pursuit of lawful law enforcement activities at sea by a State. Furthermore, and secondly, in specific agreements related to law enforcement at sea provisions exist that regulate the use of force. Case law seems to have been developed via the route in which the rules on the use of force has emerged in the context of the use of force during law enforcement activities against vessels, and not against persons directly. Persons, however, are part of the proportionality consideration to use force against the vessel. The regulations in agreements related to the law of the sea have added a person-focused part to using force. And third, which may be most important note to underline, is that, essentially, what happens in the case law and agreements is in fact the application of human rights law standards on the use of force in the maritime context. As human rights law has, however, always been regarded to apply within the territory of a State, the use of force in these circumstances at sea were never set within realm of human rights law. As extra-territorial applicability of human rights law is today a generally accepted legal concept, it may now, arguably, be more correct to State that the legal regime for the use of force at sea is not derived from the international law of the sea itself, but from human rights law that is applied in the maritime context. Equally, international agreements that contain provisions on the use of force during a boarding operation, ultimately apply human rights law standards, rather than standards that are derived from the international law of the sea itself.

10.3. Applicability of human rights to high seas interceptions

During the early stages of maritime interception operations human rights law was not as developed or relevant to such operations as it is today. One reason for this may be because of the fact the maritime embargo operations after the Cold War were focused on goods rather on persons. The ‘early writers’ on MIO, such as Fielding and Politakis, did not consider

human rights as a possibly applicable legal regime in the context of maritime interception operations. Nowadays, MIO are more and more conducted within the context of extraterritorial law enforcement operations on the high seas, in which persons have come more to the foreground of attention. And when individuals become involved, human rights become important. To illustrate, SC-Res. 1973 uniquely embargoed both goods and certain persons (mercenaries)[643] and counter-piracy operations have firmly stressed the fact that IHRL is an important legal regime to consider. Another reason for the rise of the importance of human right in military operations is obviously the above mentioned continuously growing acceptance that human right apply also extraterritorially. The naval dimension is certainly not excluded from this trend. In 1992, Captain Lyon (Royal Navy), for instance, still considered the possibility of the use of force during the MIF MIO against persons and the jurisdictional issues that may rise from that action mainly from an international law of the sea perspective and did not consider that the UK might have had jurisdiction based on human rights law.[644] Today, this question would immediately be analysed primarily from a human rights perspective.

With regard to applicability of human right in interceptions outside the sovereign waters of a State, we jump immediately to the issue of extraterritorial application of human rights. The applicability of IHRL centralizes around the question whether a State has jurisdiction over persons. From a European perspective, Article 1 ECHR states that:

> *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [Section I of] this Convention*.

Equally, the *International Convention on Civil and Political Rights* (ICCPR) centralises around the threshold of 'jurisdiction' for the application of human rights.[645] Against the background of the growing acceptance that -still in an exceptional fashion- jurisdiction exists extraterritorially on the high seas, the applicability of IHRL can thus be established in two ways. First, because flag States have exclusive jurisdiction over their flagged

[643] SC-Res. 1973 (2011), paragraph 13.
[644] Lyons, 163-164.
[645] See Article 2 (1) ICCPR. The relevant part states:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,…

vessels, it follows that IHRL applies on board their flagged vessel, including an intercepting warship. Second, a State has extraterritorial jurisdiction based on factual situation of the circumstances at the time. The case law on extraterritorial application of IHRL is extensive and developing and centers around the notion of *effective control*. If in case a State has effective control over a person (also known as state agent authority - SAA) or an area (known as effective control over an area – ECA), there may be grounds to conclude that a jurisdictional link is established between the person and that State, which allows human rights law to be applicable in the relation between the acting State and the individual. ECA exists when, as a consequence of military action a State exercises effective control of an area outside its national territory.[646] 'The obligation to secure, in such an area, the rights and freedoms set out in the convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration'. SAA refers to the situation where a State can be held accountable for violations of human rights when persons are outside the territory of a State, but under the authority and control of its agents.[647] It does not matter whether there is a legitimate legal basis which underpins the action. Human rights law may, for example, apply also where a State did not have the consent of a flag State where it should have and has acted against the persons on board that vessel.

The State's actions through the use of their warships and crews make it possible that human rights apply in the area of the high seas. Because international[648] and national[649] case law has dealt with the matter of application of IHRL on the high seas, this is rather undisputed. As Papastavridis mentions after the *Medvedyev*-judgment; 'Hence, the Medvedyev case comes to complement the above decisions and provide cogency to the ar-

[646] ECtHR, *Loizidou v. Turkey*, application no. 40/1993/435/514, (Preliminary objections), 23 March 1995. Paragraph 62 reads as follows:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

[647] See on these two notions of establishing extra-territorial jurisdiction in M. Milanovic,'Al Skeini and Al-Jedda in Strasbourg', in *EJIL*, vol. 23, no. 1 (2012), 121-139.

[648] E.g. *Medvedyev v. France, Hirsi Jamaa v Italy, Rigopoulos v. Spain, Xhavara v. Albania*.

[649] E.g. counter-piracy cases.

gument that the Convention applies on the high seas, in so far as control, and therefore, jurisdiction is exerted by organs of the States parties.'[650] Also, apart from the threshold question, the UNSC has underlined in its resolutions in the case of counter-piracy[651] and with respect to the Libya MIO in SC-Res. 2146 (2014) that measures shall be undertaken in accordance with human rights law.[652] The Council does not state that every action taken during counter-piracy operations will meet the conditions for extra-territorial application of human rights law, but the Council requires actions to be in accordance with human rights law by stating that measures shall be undertaken in such a manner. With regard to the latter, more generally, the question of which legal regime is applied during the use of force by the boarding team is a question of within which legal paradigm -IHRL or LOAC- the action will fall. With regard to the threshold question of applicability of human rights law on the high seas, if one would divide a maritime interception into phases, broadly speaking a distinction can be made between 1) the phase that leads up to boarding the vessel, 2) the phase of being on board the vessel, and 3) a possible phase of bringing persons on board the warship.[653] These three phases will be discussed below.

10.3.1.Human rights and the use of force whilst approaching target vessel

Do human rights already apply at the stage in which the warship commander is using force against a vessel to persuade it to stop the vessel? In the *Xhavara v. Italy and Albania* case,[654] in which during the boarding procedure of the Albanian flagged *Kater I rader* carrying Albanian refu-

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[650] E. Papastavridis, 'European court of human rights Medvedyev et al v France (Grand Chamber, application no 3394/03) judgment of 29 March 2010', in *ICLQ*, vol. 59, Issue 03 (2010), 867-882, 871.

[651] See e.g. SC-Res. 2077, para. 17.

[652] Paragraph 5 of SC-Res. 2146 (2014) reads:

> 5. Authorizes Member States to inspect on the high seas vessels designated by the Committee pursuant to paragraph 11, and authorizes Member States to use all measures commensurate to the specific circumstances, in full compliance with international humanitarian law and international human rights law, as may be applicable, to carry out such inspections and direct the vessel to take appropriate actions to return the crude oil, with the consent of and in coordination with the Government of Libya, to Libya;

[653] Petrig identifies two phases :The question of application of human rights on board the warship and application 'beyond its railing'. A. Petrig, 'Human rights in counter-piracy operations: No legal vacuum but legal uncertainty', in M.Q Mejia, jr., et al (eds.), *Piracy at sea, WMU Studies in Maritime Affairs*, no. 2 (Heidelberg, 2013), 31-45, at 36.

[654] ECtHR, *Xhavara and others v. Italy and Albania appl. no 39473/98,* 11 Janvier 2011

gees by the Italian warship *Sibilia* the ships collided and caused the Albanian vessel to sink, a plea of Article 2 ECHR was brought before the court. However, the Court held that the grief was held inadmissible because at that stage not all local remedies were exhausted.[655] This case unfortunately for the academic question involved provided, therefore, no answer. In the *Women on Waves v. Portugal* case, however, the Court applied human rights -in this case Articles 10 and 11 ECHR- to be applicable even when the (Netherlands flagged) vessel *Borndiep* was not boarded.[656] In 2004, the *Borndiep* was not allowed into Portuguese territorial waters. Warships were sent to obstruct the passage into the territorial waters of Portugal. Arguably, here Portuguese warships exercised public authority over the vessel, by prohibiting it to sail its intended course and denying access to Portuguese territorial waters.

Papastavridis stated with reference to the *Al Skeini*-judgment which held that effective control requires exercise of physical powers and control over the person, "it seems difficult to sustain that anything less than actual physical interference or by boarding, would trigger the extra-territorial application of the ECHR".[657] A broader approach than actual physical control, but rather already through military presence, would be to accept that human right would apply when a State exercises public authority over persons and objects. Consequently, this threshold would widen the application of human rights in the context of maritime interception operations to include a situation in which there is not yet physical control of persons and objects, but the State has started to exercise its public authority. In other words, before the boarding and physical control of the vessel and persons on board has occurred, human rights law would start to apply.

Another way to approach the applicability of human rights in the context of approaching vessels by warships, or vessels in the vicinity of individuals not being on board of the warship itself, is via the concept of effective control over an area (ECA). The ECA concept in this maritime context aims, rather than effective control over the individuals themselves, to see whether there may be a jurisdictional link on the basis of the idea that a warship (or a fleet) has effective control over a maritime area. This ap-

[655] *Xhavara and others v. Italy*, p. 8.
[656] *Women on Waves and others v. Portugal*, (appl. no. 31276/05), 3 February 2009. In 2004, the *Borndiep* was not allowed into Portuguese territorial waters. Warships were send to obstruct the passage into the territorial waters of Portugal.
[657] Papastavridis (2013), 126.

proach is advocated by Petrig who seems to have taken on board the idea that a group of warships may have control over an operational area. She mentions that; *it could be argued that effective territorial control cannot only be established within the (geographically changing) operational radius of an individual military ship, but even over a joint operational area by the entirety of ships and aircraft deployed*.[658] She then proceeds to take the Internationally Recommended Transit Corridor (IRTC) to be an example of such control. Assuming that at sea a certain degree of control of sea areas may indeed be established, the level of control in that area varies with the type, purpose and conditions within the area. Arguably, when area the is smaller, such as an area of amphibious operations (AOA) off the coast of another State, control may be assumed faster than within an general (and larger) area of operations (AOO).[659] If one would follow this reasoning to establish applicability of human rights law, it should be recalled that from an operational perspective, the operational areas may be enormous and the military assets may be few. In which case it would take days arrive at any incident. From this perspective, it would seem very difficult to readily accept that effective control exists within such an operational area at sea. Put differently, establishing an operational area does not automatically indicate that naval forces will have control over it. And consequently, one should not automatically conclude that effective control necessarily exists simply on such a basis.

10.3.2. Human rights and the use of force on board foreign flagged target vessel

With regard to the second phase, both Papastavridis and Guilfoyle take the view that the mere presence of an armed boarding party on board a foreign flagged vessel would satisfy the condition of effective control.[660] With regard to captured pirate-suspects on board a small pirate *dinghy*[661] that could very much be the case. But in the context of a huge container vessel, it may, however, be less easy to readily accept this view. In the *Al Skeini*-case the ECtHR stated:

[658] Petrig (2013), 39-41.
[659] The theatre of operations (TOO) is the widest operations area, then the AOO, and then smaller specific area can be assigned, such as an AOA.
[660] Papastavridis (2013),76; Guilfoyle (2009), 268.
[661] A small motor boot.

> 'The Court does not consider that jurisdiction [in the above cases] arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.[662]

Effective control should not automatically be assumed solely on the basis that a boarding party is inserted on a foreign flagged vessel. In the case of an opposed boarding with substantial armed resistance, outside the situation of an armed conflict, the human rights law paradigm applies. In terms of the question whether extraterritorial jurisdiction exists, one has to question whether effective control of the vessel or persons on board in fact exists during the phase of the boarding where there is armed resistance. In any case, in line with from the Court's view as stated above, the mere fact that a boarding party is on board a vessel does not automatically mean that it has effective control over the vessel or persons. In cases of friendly approaches, for instance, where the boarding party is invited on board and engages solely in general and friendly communication with crew of the vessel, there may be no actual exercise of public authority. That it is very possible that jurisdiction can exist whilst being on board a foreign flagged vessel, is underlined by the *Medvedyev*-case, in which the ECtHR considered that jurisdiction ex Article 1 ECHR existed because the French boarding team was obliged to use their weapons to defend themselves, kept the crew under guard in their cabins and rerouted and towed the *Winner* into the Port of Brest, all under orders of the French authorities. The Court therefore concluded that France had jurisdiction, at least *de facto*, from the moment of interception until the persons were tried.[663]

10.3.3. Human rights law application on board warships

With regard to the latter phase, case law is quite clear on the matter. Most recently, the ECtHR in the *Hirsi*-case underlined in the latter phase that persons brought on board the warship are under *de jure* and *de facto* control of the authorities of that State.[664] Earlier, in the *Bankovic*-case, the Court held that jurisdiction of a State exists on board crafts and vessels

[662] ECtHR, *Al-Skeini and others v. The United Kingdom* (application no. 55721/07,) judgment, 7 July 2011, paragraph 136.
[663] Medvedyev, para 66-67.
[664] *Hirsi Jamaa*, para. 81-82.

registered in, or flying the flag of, that State.[665] National court cases, in particular with the procedural rights, with regard to piracy also do not dismiss that IHRL apply when the suspects are brought on board the warship.[666] Once persons have been brought on board a warship, there is no doubt that IHRL applies to these individuals.

10.4. Normative requirements of applying force under human rights law

If international human rights law applies during maritime interception, the next step is to consider the substantive law on the use of force within the context of human rights law. Requirements for the use of force under international human rights are dealt with through the human right of the right to life. In the *European Convention on Human Rights* (ECHR), Article 2 ECHR has codified the right to life.[667] In the ICCPR the right to life is codified in Article 6.[668]

Which conditions apply to the military when using force in relation to the right to life under human rights law, has been extensively discussed, inter alia by Nils Melzer,[669] Louise Doswald-Beck[670] and Eric Pouw.[671] In essence, the general conditions for the use of force in the context of the right to life may be summarized by five requirements: The requirement of an adequate legislative framework, necessity, proportionality, precaution and investigation. The first requirement in essence obliges a State to have a legal framework for the use of force, train personnel and adequately plan

[665] ECtHR, *Bankovic vs Belgium et all*., appl. No. 52207/09, Decision Grand Chamber, 21 December 2001, para 73.
[666] For instance, in the Netherlands court case on the pirated vessel *MS Samanyolu*, it was never disputed that human rights applied on board the Danish warship *Absalon*. The District Court of Rotterdam held that the prolonged detention on board the *Absalon* was a breach of Article 5(1) ECHR, but did not see it as a breach by the State of the Netherlands.
[667] Article 2 (1) ECHR states:
> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

[668] Article 6(1) ICCPR states:
> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

[669] N. Melzer, *Targeted killings in international law* (2006).
[670] L. Doswald-Beck, *Human rights in times of conflict and terrorism* (Oxford University Press, 2011)
[671] E. Pouw, *International human rights law and the law of armed conflict in the context of counterinsurgency* (2013).

for operations.[672] The second requirement (necessity) obliges States to only use force only in circumstances when it is absolutely required to achieve the legitimate objective. The threat must be such that the use of lethal force must be unavoidable under the circumstances of the case and the use of force is strictly limited to achieve the legitimate objective. Within the context of this requirement the use of force is also limited to the *actual* moment when the threat is manifestly concrete and specific. With regard to the third requirement (proportionality) Pouw states that when the nature and scale of the threat does not outweigh the harm or injury to life resulting from the use of force applied in support of a legitimate aim, the deprivation of life violates the right to life.[673] The fourth requirement (precaution) obliges a State to take precaution throughout the whole process of the planning, execution and aftermath of the action. The requirement of precaution obliges the State to plan, organize and control the operation with a view towards restricting the use of lethal force, to the greatest extent possible.[674] The fifth requirement (investigation) means that a State has a duty to conduct an independent and impartial investigation in every instance of potential deprivation of life that can be attributed to a State.

10.4.1. The right to life in a naval operations dimension

At this stage, there is no case law from the European Court of Human Rights that has dealt with the right to life at sea.[675] The only case that came close was the *Xhavara*-case, but, as mention earlier, which was not admissible to the Court. No substantive views on the application of the right to life in the maritime environment have therefore emerged from its decisions to date. Nevertheless, the above mentioned five requirements exist in every situation where government officials (military) are required to use force to achieve their legitimate objectives. The requirements mentioned above clearly do not limit themselves to the actual moment of the use of the force, but cover a wide range of obligations and conditions related to the use of force before and after using the lethal means itself. The question within the context of MIO is whether the use of force under hu-

[672] Doswald-Beck (2014), 165-167.
[673] Pouw (2013), 245.
[674] Pouw (2013), 247.
[675] Papastavridis (2013), 126-130.

man rights law may be any different in the maritime context than the application of force outside the maritime dimension. As a point of departure it is safe to say that the maritime environment does not change anything in relation to the requirements. If differences exist, they must be sought in the practical application of these requirements. Operating in the maritime environment may involve practical issues that could lead to a different interpretation of the requirements at sea.

One of the challenges in terms of adequate legal framework may be that, although international agreements may give warship commanders the authority to act, naval personnel need to be given law enforcement authority to act through domestic law in such a way that naval personnel can lawfully perform law enforcement activities. The maritime environment may also have an impact on the feasible precautions requirement. What is feasible at sea may be quite different than in a normal law enforcement scenario on land. For example, an interception at sea involving the use of force can occur hours or even days away from supporting elements, such as sufficient medical facilities, and will depend on the location of the target vessel. Hence, the fact is that the maritime environment will often signify that fewer supporting resources are immediately available than in the land environment. With regard to proportionality, the circumstances of the case may lead to the decision not to board at sea when the vessel will ultimately sail into port and where the port authorities can be requested to inspect the vessel and take relevant actions. This must also be seen in the context of the fact that fewer means are available at sea for the application of precautionary measures. Furthermore, practical challenges may arise relating to investigations after the use of force on a foreign flagged vessel with regard to the ability to investigate. When an intervention on a foreign flagged vessel occurs and there would be reason to conduct an investigation, more States would be involved which could lead to more coordination efforts during such investigation.

10.4.2. Counter-piracy operations off the coast of Somalia

Piracy is a crime subject to universal jurisdiction under UNCLOS and customary law. By its nature, therefore, it is subject to the law enforcement standards of human rights law. In the particular case of piracy off the coast of Somalia, the UNSC has adopted *all necessary means* in relation

to act against piracy in the Somali territorial sea. The general understanding of the phrase is that it authorizes the use of military force.[676] It does not, however, also provide a separate legal regime to use force. As mentioned in previous chapters, although the counter-piracy resolutions use the phrase *all necessary means*, the given authorities are limited by the fact that action has to be in accordance with relevant international law, which in this case are UNCLOS and human rights law. Guilfoyle, Blank and others have sufficiently argued that counter-piracy operations are not military operations that are conducted under the regime of the law of armed conflict.[677] The phrase *all necessary means* by itself also does not, as Guilfoyle mentions, 'necessarily implicate IHL, which is applicable only in an international or non-international armed conflict'.[678] The use of force by naval forces in counter-piracy operations is, therefore, firstly force used in the legitimate pursuit of a law enforcement action. Naval personnel can be assigned a law enforcement task to take actions against piracy.[679] The limits on the use of force are the limits posed on law enforcement actions.[680] These law enforcement actions go beyond the situation of personal self-defence and have the purpose to affect police action of an arrest of a criminal suspect. The function of counter-piracy operations, to quote Guilfoyle again, 'is clearly a constabulary one: it is the

[676] See SC-Res. 1816 (2008). The resolution, in operative paragraph 7, states:

> 7. Decides that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General, may:
>
> (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
>
> (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;

See also, EU Council joint action 2008/851/CFSP, 10 November 2008 in which the EU underlined this authority in its mandate. Article 2d states:

> (d) take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present;

[677] Guilfoyle (2010(c)); L.R. Blank, 'Rules of engagement and legal frameworks for multinational counter-piracy operations', in *Case Western Reserve Journal of International Law*, vol. 46 (2013), 397-409.

[678] Guilfoyle (2015), 1062.

[679] It is apt to quote a phrase coined by Craig Allen in this context, who stated: 'It is the mission, not the uniform worn by the actor, that determines how force should be classified and which doctrine controls that use of force'. See Allen (2006), 82.

[680] Treves (2009),412-414.

power to arrest suspects and bring them to trial, one which necessarily carries with it an authorisation to use force'.[681] During these actions fire can is sometimes directed against military personnel, which can trigger the right of personal self-defence, of which its legal parameters are defined by domestic laws. In November 2008, British Royal Marine Commando's from *HMS Cumberland* approaching a Yemen-flagged dhow, believed to be attacking the Danish merchant vessel *MV Powerful*, in rhibs shot two pirate-suspects when they were fired upon from a dhow.[682] In another instance in 2009, Netherlands Royal Marines from *Hr. Ms. Tromp* in a rhib got fired upon when approaching a dhow that also held Iranian hostages. Their reaction led to the death of two hostage takers.[683] Secondly, Bono and Boelaert pose the view that the phrase *all necessary means* important in light of the different activities with regard to defending against piracy which may go beyond the strict action of arresting pirates during a law enforcement actions.[684] Examples they mention are escorting or convoying vessels with warships or armed personnel on board the vessel. Although how force must be applied is still within the realm of human rights, the legal ground for the use force would arguably be based on the authority of the resolution. The difference with using force in personal self-defence would be that in such case there is no duty to try to escape from the danger. Zwanenburg, discussing the use of force for Dutch VPD's on board escorted vessels which are not part of the UN-resolution based operations, has therefore argued that vessels being attacked by pirates must first try to escape from the attack before any necessity for the VPD exists to act in self-defence.[685] Obviously, the factual circumstances of the case, however, will influence whether this may be the manner in which way the element of necessity in self-defence must be operationally translated.

[681] Guilfoyle (2010c), 10.
[682] http://www.theguardian.com/world/2008/nov/13/pirates-killed-gulf-aden.
[683] *Al Feddah*-case. District Court of Rotterdam, 12 October 2012.
[684] Gosalbo-Bono and Boelaert (2014), 109-110.
[685] M.C. Zwanenburg, Enkele juridische aspecten van militaire beveiligingsteams aan boord van koopvaardijschepen (Vessel protection Detachments)', in *MRT* , vol. 107, no. 6 (2014), 205-218, 210-212.

10.5. The law of armed conflict

Maritime interception operations may also be conducted in the context of an international armed conflict. In the context of the use of force, a number of essential conceptual differences exist between the LOAC and IHRL legal regime. In essence, whereas LOAC is a legal regime that centralizes around the rules to use force, the rules on the use of force in IHRL are implied or derived from different substantial rules, such as the right to life, for which States have an obligation to ensure and secure. IHRL is meant to protect the individual against government actions, whereas LOAC concentrates on the balance between the principles military necessity and humanity. The general concept therefore of the use of force within LOAC can be described as that force is generally allowed but bound by the rules of LOAC. Within the context of LOAC not every individual is protected against the use of force. The general concept of IHRL, however, is that force cannot be used as a legal principle and must be considered as an *ultimum remedium.* This point results in the general view that under IHRL actions of a State should be focused on arrest, rather than killing the person.[686] Another conceptual difference is that the purpose of LOAC is that it is meant to operate within the complex circumstances of conflict. This leads to provisions that have open norms and puts the efforts at what a commander knows or should have known at the time he was about to use force. IHRL is meant to operate under peacetime circumstances and is judged also by its effects after the use of force rather than by the circumstances at the time the commander made the decision. The use of force in LOAC and IHRL are, therefore, conceptually based on opposite ideas. Clearly, whether force is used under the legal regime of LOAC or IHRL, therefore, does make much difference. Both legal regimes have their own conditions of application, which means that the question needs to be considered separately for both regimes. Moreover, it could also result in the conclusion that both apply. Indeed, the more generally accepted view is that IHRL continues to apply during armed conflict.[687]

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[686] C. Droege, 'Elective Affinities? Human rights and humanitarian law', in *IRRC*, vol. 90, issue 871 (2008), 501-548, p. 525.

[687] Contrary views also exist, namely, the separatist-approach. This approach contains the view that LOAC applies during armed conflict and IHRL applies during peacetime circumstances. See on these approaches T.D. Gill, 'Some thoughts on the relationship between international humanitarian law and international human rights law: a plea for mutual respect and a common sense approach', in Y. Haek, B. McGonigle Leyh, C. Burbano-Herrera & D. Contreras-Garduño (eds.), *The realisation of human rights: when theory meets practice: studies in honour of Leo Zwaak* (Cambridge, 2014), 335-350.

Whether the law of armed conflict applies depends on either the situation in which a State has declared war or when armed conflict exists.[688] The applicability of the LOAC today, therefore, centralizes primarily around the term 'armed conflict'. This is a factual term which is not further defined in LOAC-treaties. Jurisprudence has given some tools to define whether or not an armed conflict exists.[689] The well-known *Tadic*-formula provides that an armed conflict exists when there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed ground, or between such groups with the States[690]. With regard to the existence of non-international armed conflicts, jurisprudence has developed some more indicative factors to be considered, such as the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used and the number and calibre of munitions fired, against which the intensity of the violence and the ability to resort to protracted armed violence must be considered.[691] The essence, however, is that the factual existence of an armed conflict is the threshold for application of the law of armed conflict.

Obviously, the law of armed conflict is of importance in relation to the use of force and maritime interception. That part of the LOAC which deals with hostilities will apply in military operations against the enemy opponent during conflicts at sea and is essentially guided by the fundamental principles of humanity, necessity, distinction, proportionality and chivalry. But apart from the law that regulates the conduct of hostilities, of par-

[688] See Common Article 2 of the Geneva Conventions.
[689] R. Bartels, 'Gewapend conflict is geen eenduidig begrip', in *Internationaal recht in de kijker* (2008), 69-81.
[690] E.g. *Prosecutor v. Dusko Tadic*, IT-94-1, 2 October 1995, para 70.
[691] The Trial Chamber of the ICTY in its judgment of 3 April 2008 in the Haradinaj-case noted (para. 49):

> 49. The criterion of protracted armed violence has therefore been interpreted in practice, including by the Tadić Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration. Trial Chambers have relied on indicative factors relevant for assessing the "intensity" criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.

ticular importance to maritime interception is a specialized part of LOAC applicable to international conflict at sea: the law of naval warfare. This legal regime, while based on the same fundamental principles underlying LOAC, it is a specialized legal regime, which is already touched upon in Chapter 9, not only regulates hostilities between belligerent naval and aerial forces at sea during an international armed conflict, but also contains rules relating to economic warfare, maritime neutrality, particular means and methods of naval warfare (such as blockade and the use of naval mines), prize law as well as issues, such as the protection of the sick and shipwrecked at sea and the use of hospital ships.

For the purpose the analysing the use of force within the legal regime of LOAC, conceptually, it is important to underline that many of the provisions of the law of naval warfare deal with operations that involve dealing with civilians rather than operations that are solely directed against the military forces of the opponent. The use of force in the naval dimension and within the context of the legal regime of LOAC thus has two main prongs: One is the use of force against enemy warships, the other is the use of force in relation to action directed against civilian merchant shipping. Whereas the land-dimension of the law on targeting basically has distinction and the rule of direct participation to hostilities as its essential guiding principles, the law of naval warfare, although guided by the same principles, contain an extra legal framework that details under which circumstances force can be used against civilian merchant shipping. Important also, is that these regulations focus mainly on *shipping*, and not on persons.

Because the law of naval warfare is a part of LOAC, the applicability of it follows the same conditions. One major difference, however, is that the law of naval warfare is viewed not to be applicable in non-international armed conflicts.[692] As Chapter 9 has already commented on this point, I will only mention here that whereas the protective part of the LOAC has not ceased to develop and is under constant discussion to ensure apt application in modern conflict, often characterized as NIAC's, in the maritime dimension this has not been given much serious attention. Yet, naval forces are certainly not unused in current NIAC-conflicts. Whereas the overall LOAC framework of obligations and principles with

[692] Von Heinegg (2010), Chapter 19.

regard to the use of force apply in maritime operations during a NIAC, the specific rules of the law of naval warfare, in particular the rules relating to economic warfare and maritime neutrality which are confined to IAC's, do not apply in a NIAC.

10.5.1. Use of force against neutral and enemy merchant vessels

As underlined above, it must firstly be underlined that force can be used against military *and*, under certain conditions, against civilian shipping. In that sense, a separation can be made between the use of force against vessels that are considered to be military objectives or are subject to attack. The obvious example of a military objective is an enemy warship. The use of force against an enemy warship is regulated by the targeting-rules. Although nowadays extremely unlikely, situations may exist where enemy warships are boarded and ultimately taken as booty. If the maximum authority of directly attacking the vessel on sight is lawful, the lesser means of boarding and capturing the vessel would also fall within the lawful scope of actions.

More complex, however, within the context of military objective are the rules that apply when force may be used against neutral or enemy civilian merchant vessels. Enemy or neutral merchant shipping can under certain conditions also be subject to attack. As mentioned, the fundamental principle with regard to the use of force in LOAC starts with that distinction must be made between persons that take part in hostilities and persons that don't. The latter are protected against the use of force. Interestingly, many of the instruments available to a State under the law of naval warfare involve not just the opponent, but rather focus on other users of the sea against which, under specific circumstances, force can be used. These other users are civilian merchant shipping ('civilian' and 'merchant' may be considered as in fact the same thing, but for the purpose of underlining its character both terms are used). The law of naval warfare specifies under what conditions force may be used against civilian merchant shipping. These can be either neutral or enemy, but the essence is that they are civilian in nature.

10.5.1.1. The merchant vessel as a legitimate military target

In 1991, William Fenrick wrote that the question of when a merchant vessel can be considered a military target as one of the most unsettled questions of modern naval warfare.[693] His arguments as to why it is difficult lie mainly in the way naval warfare has developed through history. Although there is general agreement on the legal point of departure that merchant vessels cannot be attacked, one of the difficulties is that distinction between naval forces and civilian shipping has in history been blurred by incorporating the merchant fleet into the war effort. Further back in history, the use of privateers caused a very close tie between merchant and naval fleets, and also later, during the World Wars of 1914-1918 and 1939-1945 naval and merchant vessels were closely related during conflict, for instance by the confiscation of the whole merchant fleet by the State and in using them in the war efforts, for transport, evacuation and supply. Also the ruses used in naval warfare, such as Q-ships and the use of false flags, have done much to continue to blur the distinction between combatants and civilians at sea. States themselves have also used the tool of arming their merchant vessels to defend but also attack enemy warships. *The first British counter-move, made on my responsibility in 1915, was to arm British merchantmen to the greatest possible extent with guns of sufficient power to deter the U-boat from surface attack",* wrote Winston Churchill in his history of the First World War.[694] Historical practice shows that distinction at sea has, therefore, not been without any challenges, and certainly not as easy as identifying a grey hull as the enemy and all other vessels as civilian. Although everyone will have a ready picture in his or her mind of what a warship looks like, UNCLOS which gives a definition of warships, states that a warship should bear the external markings to distinguish such ships of its nationality, which is left to the flag State itself.[695] The Hague Convention 1907 no. VII on transformation of merchant ves-

[693] W.J. Fenrick, 'The merchant vessel as legitimate target in the law of naval warfare', in A.J.M. Delissen, G. Tanja (eds.), *Humanitarian law of armed conflict challenges ahead. Essays in honour of Frits Kalshoven* (Martinus Nijhoff publishers, 1991), 425-443, at 425.

[694] W.S. Churchill, *The World Crisis, 1916-1918, part II* (1927), 353. The second countermove was the use of Q-ships, ultimately followed by the convoy system.

[695] Article 29 UNCLOS reads:

> For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

sels to warships follows the same requirement in terms of external markings.[696] The external difference between merchant vessels and enemy warships can thus be as little as the marking of the war-flag. Legally, the use of force against such vessel may shift as fast as the flag is raised. History, therefore, has given rise to ideas that enemy merchant vessels could or should be attacked. H.A. Smith, in 1950, and after going over a number of hybrid examples during the Second World War even came to the conclusion that: *Unless a firm and clear line can be drawn between the warship and the merchantman it is inevitable that the latter must be exposed to the same risks as the former*.[697] There should be no other legal point of departure than the presumption that all merchant vessels -enemy or neutral- are exempted from attack, unless they can be deemed military objectives.[698] In that sense, there is no difference in the law then and now regarding the attack of merchant vessels. This general point of departure is also underlined in the basic targeting guidelines of the *San Remo Manual*.[699] Today, however, conflicts have generally not risen to the level of the Great Wars in which merchant vessels fulfilled the conditions to be attacked as military objectives, and where merchant vessels were transformed to participate as warships, or where States made them participate in the war effort.

The law of naval warfare considers certain activities by enemy or neutral merchant vessels to render the vessel a military objective or subject to attack. The SRM, in section 60[700] and 67,[701] has prelisted with regard to

[696] Art. 2 HC VII. The only external marking to distinguish a warship from a civilian vessel in Netherlands domestic law is the war flag (*oorlogswimpel*) and nothing else.
[697] H.A. Smith, *The law and custom of the sea* (Stevens & sons limited, London, 1950), 2nd ed. 83.
[698] See e.g. Dinstein (2005), 102; Klein (2010), 289. Von Heinegg (2014), 152; Von Heinegg (2010), 359.
[699] See part III SRM, specifically para's 40, 41 and 59.
[700] Section 60 SRM reads:

> 60. The following activities may render enemy merchant vessels military objectives:
> (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
> (b) acting as an auxiliary to an enemy s armed forces, e.g., carrying troops or replenishing warships;
> (c) being incorporated into or assisting the enemy s intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
> (d) sailing under convoy of enemy warships or military aircraft;
> (e) refusing an order to stop or actively resisting visit, search or capture;
> (f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely deflective systems such as chaff ; or
> (g) otherwise making an effective contribution to military action, e.g., carrying military materials.

enemy merchant vessels and neutral merchant vessel a number of activities and that may render an enemy merchant vessel as a *military objective* and a neutral military vessel *subject to attack*. Both these lists are interesting, first in the sense that the enemy merchant vessel and the neutral merchant vessel are apparently considered to be different in character with regard to when they can be considered as military objective. It begs the question whether there is any difference in terms of the use of force between 'military objective' and 'subject to attack'. The SRM-Commentary answers this question by stating that the definition of military objective does not apply in the legal relationship between a belligerent and a neutral.[702] In other words, it seems that the term military objective cannot be used when a belligerent targets a neutral vessel. In terms of ultimate result with regard to the use of force it is, however, the same: force can both be used against a military objective and a vessel that is subject to attack.

Secondly, and more important, the list in section 60 (enemy merchant vessels) is interesting because on the one hand it lists actions that under the current API targeting rules may indeed turn the vessels into military objectives.[703] One such example is "engagement in acts of war on behalf

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[701] Section 67 SRM reads:

> 67. Merchant vessels flying the flag of neutral States may not be attacked unless they:
> (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
> (b) engage in belligerent acts on behalf of the enemy;
> (c) act as auxiliaries to the enemy s armed forces;
> (d) are incorporated into or assist the enemy s intelligence system;
> (e) sail under convoy of enemy warships or military aircraft; or
> (f) otherwise make an effective contribution to the enemy s military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

[702] SRM-Commentary, paragraph 67.7. In a discussion with a Professor Heintschel von Heinegg who was intensely involved in the drafting of the San Remo Manual, he mentioned that the difference and the commentary made here was made in order for some to accept the current draft of the sections, but not to underline a legal distinction between 'subject to attack' and 'military objective'.

[703] The key-article is Article 52 API, which reads:

> 1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
> 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
> 3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

of the enemy".[704] But on the other hand, it also includes an action that arguably does not pass the threshold of military objective under the API-targeting rules. Of particular importance is the use of force during maritime interception after "refusing an order to stop or active resistance to visit, search or capture".[705] The SRM-commentary mentions that the vessel becomes a military objective by *behaviour*, which is not a standard in API.[706] Article 52 API only renders a civilian object military by nature, location, purpose or use, and not by behaviour. Section 60 SRM, therefore, has listed on the one hand the historical grown ideas that at least the enemy merchantman could be related to the enemy war efforts, which gives rise to the customary law notion that civilian merchant vessels can be targeted if they show a number of activities. On the other hand, there are the contemporary LOAC-targeting rules that aim to make a strict distinction between military targets and civilian objectives. Of note, however, in this context is that Article 49(3) API mentions that the API-provisions on targeting do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.[707] The provision suggests that customary rules of warfare at sea are not automatically set aside by Article 52 API. This has also led to early comments on these API-provisions in the sense that they did not apply to naval operations.[708] While the general rules of API on targeting apply to naval warfare (as set out in Part III of the *San Remo Manual*), API does not apply as treaty law to naval warfare. Nor does it set aside accepted customary rules on the loss of protection from attack or becoming a military objective during naval warfare. What follows from this, is the view that the customary rule of becoming subject to attack or a military objective when a merchant vessel is resisting submitting itself to belligerent visit and search, cannot be barred through the application of API. It may be arguable and depending on the circumstances whether an enemy merchant vessel without any further suspicion of contributing to the war effort, that refuses an order to stop or actively refusing to be boarded the vessel, is in fact making an ef-

[704] Paragraph 60 (a) SRM.
[705] Paragraph 60 (e) and 67 (a) SRM.
[706] SRM-Commentary, 60.6.
[707] Article 49(3) API reads:

> 3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

[708] Politakis (1997), who cites Michael Bothe's view on this on p. 639.

fective contributing to military action and the destruction of it will give definite military advantage. If that is the case, in Sections 61 and 68 SRM it is underlined that subsequent measures must be in accordance with the basis targeting rules that includes proportionality. The vessel becomes a military objective, the person on board may or may not be part of the balancing test of proportionality. To illustrate, an enemy passenger liner that sails under convoy of enemy warships may be deemed a military objective, but attacking it may be a disproportionate measure when the passenger liner has many civilians as passengers on board. Another example more closely connected to interception is that situation in which a vessel refuses to let itself be subjected to visit and search and is deemed to be subject to attack. Sinking the vessel may, however, not be a proportionate action depending on the risk that is posed to the persons on board and the question whether these persons can be seen as having lost their protection as civilians.

10.5.1.2. Use of force under the prize law rules

Next the situation where force is used against a vessel that may be considered as military objective, the other situation is the use of force against merchant vessels under the prize law rules, which apply to neutral merchant vessels. The unique thing, that has already been noted, is that the law of naval warfare accepts a limited number of circumstances in which the use of force against merchant vessels is not prohibited. As stated above, neutral merchant vessels can under circumstances be made subject to attack.

With regard to neutral merchant vessels, situations can occur in which the activities of a neutral merchant vessel do in fact conform to the definition of military objective, for instance when it is engaged in belligerent acts on behalf of the enemy.[709] There are also instances were a neutral merchant vessel does not become a military objective, but still can be subject to attack. In the context of maritime interception two situations are interesting to note, which are both listed in section 67(a) SRM. First, it is considered that carrying contraband to the enemy makes the vessel subject to at-

[709] Section 67(b) SRM.

tack.[710] Still, the decision to attack must fulfil the question if the vessel by carrying contraband actually effectively contributes to the military action and its destruction offers military advantage. It is may be easy for absolute contraband such as weapons and other military materiel, but less easy when it a cargo of flour meant for the civilian population but by the belligerent put on the contraband list. Contraband can consist of many different things ranging from actual war materiel to other material that may support the war effort in the most widest and remote sense, for instance luxury goods that alleviates the hardships of conflict on the population of the enemy State. It would not seem that there is a clear military advantage in these cases to render the vessel a military objective. Furthermore, questions can be posed whether a vessel that is suspected of carrying contraband and in which the commander of the warship decides to check its paperwork, immediately be considered a military objective because it intentionally and clearly resists the orders of the commander? Although reasonable suspicion of carrying contraband is enough to use the belligerent right of visit and search, is it also enough to consider it a military objective? Probably not, more likely is that based on the targeting-rules the vessel actually needs to be positively identified as carrying contraband. It, however, still allows for using force against the vessel according to the SRM.

Second, neutral merchant vessels are also subject to attack when they (attempt to) breach a blockade.[711] Apart from the overall notifications, the blockading power in stopping the vessel must first issue appropriate warnings when a merchant vessel is trying to breach a blockade after which he can use force to stop it.[712] The mere fact that the vessel breaches a blockade is enough to use force against it. It does not have to fulfil the conditions of a military objective. It might very well be a neutral merchant vessel that is simply taking its chances to escape or enter a blockade port without having anything to do with the conflict. The Netherlands government after the *Flotilla* incident underlined in its answers to parliament that

[710] Section 67 (a) SRM.
[711] Section 67 (a) SRM.
[712] Section 98 SRM.

under these circumstances the rule of using force to stop a blockade-runner still applies.[713]

Both enemy and neutral merchant vessels if captured must be brought before a prize court. If a vessel, however, can be targeted because it is deemed to be a lawful military objective but is captured as a lesser means, this would arguably not be the case. Somewhat outside the discussion is the issue of the use of force rules to sink a vessel *after* it has been captured. In the case of a capture of a military objective this would be possible. In other cases of capture, destruction, for instance because there is no practical opportunity to bring the captured vessel into port or another military necessity arises which necessitates destruction rather than prize court procedures, is debated. If destruction is authorized it is strictly limited to first putting the persons and the ships papers out of any danger.[714] 'If this is not feasible', opines Von Heinegg, 'destruction is illegal'.[715]

10.6. Relationship human rights law and the law of naval warfare

The preceding paragraphs have noted that during international armed conflict force can be used against vessels that are considered to be military objectives, which can for example either be vessels that are to military enemy opponent (enemy warships), but also enemy and neutral merchant vessels that have lost their protection due to hostile activities. A discussion may be raised at this point as to whether human rights law plays a role in this scenario. If one accepts that human rights law continuous to apply during armed conflict, obviously this point of view also applies to armed conflict in the maritime dimension.[716] Both the separate legal regimes of IHRL and the specialized law of naval warfare will co-exist during an international armed conflict. Imagine the following *casus*:

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[713] *Letters to Parliament*, 13 July 2010. Kamerbrief inzake beantwoording vragen van het lid Van Dam over de aanval van Israël op een internationaal hulpkonvooi. At: http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2010/07/13/kamerbrief-inzake-beantwoording-vragen-van-het-lid-van-dam-over-de-aanval-van-israel-op-een-internationaal-hulpkonvooi.html.

[714] See rule 2 of the *Submarine Protocol* 1936.

[715] Heinschel von Heinegg (2013), 522.

[716] Contrary views also exist, namely the separatist-approach. This approach contains the view that LOAC applies during armed conflict and IHRL applies during peacetime circumstances. See T.D. Gill, 'Some reflections on the relationship between international humanitarian law armed international human rights law: a plea for mutual respect and a common sense approach', in *YIHL* (2013), 335-351.

> A neutral merchant container vessel is asked to stop in order to be boarded by a belligerent warship. The commander has reasonable suspicion that the vessel is carrying contraband. After repeatedly hailing the vessel, it still does not comply with the order to stop for inspection. The commander of the belligerent warship decides to administer gradual steps of force; warningshots across the bow, non-disabling fires and ultimately disabling fire against the vessel if need be or the insertion of a boarding team to take control of the vessel.

The 'traditional' way to look at the use force according to the rules of naval warfare in this case, is that the vessel, by its refusal to cooperate, becomes a subject to attack. The fate of the persons on board is part of the proportionality considerations inherent to applying force.

If one would accept that also human rights law continuous to apply, another scenario becomes possible relating to targeting of merchant vessels. One could to argue that stopping a neutral merchant vessel is in fact something that must not be seen within the context of whether or not a vessel becomes subject to attack. The neutral merchant vessel is not a party to the conflict and the use of force to stop the vessel does, arguably, not directly weaken the enemy military forces. If one would follow this path, force is used against a civilian merchant vessel with civilians on board and with the ultimate aim to bring the vessel to a prize court. If using force in this case is considered as more of an activity that fits better into the law enforcement paradigm, which, as mentioned in Chapter 2, refers to the exercise by state agents (such as naval forces) of police powers to maintain public security, law and order, it would lead into the direction that the force applied is within the legal regime of human rights. In this perspective, visit and search is approached from the idea that the activity is *de facto* a policing action against civilians. The prevailing view, however, still is that taking measures against resistance to visit and search must be viewed within the context of an act of hostility and therefore under the rules of naval warfare.

Firstly, there exists a set of rules that especially deals with the particular situation. Secondly, the belligerent act of visiting and searching a vessel is not focused on policing, or maintaining public security and law and order at sea, but aims at depriving the enemy of continouing its war effort, for

which certain legal instruments exist. It aims, therefore and albeit indirectly, at weakening the enemy armed forces. Supporting such, will make vessel loose its protection. Let's now develop the *casus* a bit further.

> After several warning shots the vessel has stopped and the boarding team is put on board by helicopter to take control of the vessel. Once on board the target vessel, the crew and passengers appear to be hostile and act through armed resistance against the boardingteam. Some passengers appear to have nothing to do with the resistance against the boarding team and try to stay clear from any violence.

What force can be used against the persons on board? At this stage of the casus, one might again argue that both LOAC and IHRL coexist together. A first view is that by armed resistance the civilians have now lost their protection under LOAC and can be targeted because they are considered to take direct part in hostilities. A second view is that the resistance cannot be brought under the umbrella of taking direct part in hostilities, in which case the persons are still seen as civilians under LOAC protection. This still leaves room for personal self-defence to use force against the persons that may be an imminent threat to the boarding team. Coercive action to control the persons on board in order to ultimately search the vessel, should than be seen to better fit the law enforcement paradigm. In this latter view, force against the persons is regulated by human rights law. Although both views are arguable positions, when seen in the context of the preceded refusal to stop in order for the vessel to be visited and searched which made the vessel subject to attack, subsequent armed resistance by the crew might well be taken as taking up arms against a Party to a conflict aimed at directly causing harm to that Party.

What can be distilled from this small *casus* is that human rights in the context of enforcing belligerent rights against civilian merchant vessels does rise to the foreground and may coexist as a legal regime next to the law of naval warfare. Once on board and when directly dealing with individuals, there is more ground to argue that human rights law could play a role during the conduct of authorities that are based on the law of naval warfare. The *Mavi Marmara*-incident shows that opposed boardings are not theoretical and that there might indeed be a mixture of persons on board of persons taking part in hostilities and persons that are not, but un-

der the circumstances may still be threatening to the boarding team. Beyond solely the use of force, the possibility of operational (security) detention also belongs in this discussion. This, also in the context of the *Mavi Marmara*-incident, will be touched upon in Chapter 11.[717]

10.7. Use of force in UN-mandated interception operations

UN-mandated interception operations may range from peacekeeping to peace-enforcement operations in support of, or against a State. Chapter 5 has already commented on the debate on whether maritime embargo operation can be classified under either Article 41, 42 or somewhere in between.[718] It was submitted there that explicit maritime embargo operations may well be within the realm of Article 42 of the UN-Charter. In such cases, and in the cases where a resolution authorises *all necessary measures*, or words alike, it implies that military force can be used to fulfil the given mandate.[719] The phrase does not, however, clarify within which legal regime that force may be applied. The applicability of *how* force is administered in a UN-mandated maritime interception operation relates to the question whether the threshold of LOAC is met. Therefore, whether LOAC or IHRL applies to UN-mandated MIO will depend on the actual circumstances of the case.

10.7.1. UN-mandated MIO and LOAC

As mentioned above, for LOAC to apply the threshold of armed conflict must be met. The application of LOAC in UN-mandated MIO, however, does not occur often, especially not in the context of maritime embargo operations. A maritime embargo operation by itself does not trigger LOAC. There is also neither actual armed hostility against the State under sanctions, nor is there a situation in which the embargo enforcing States by enforcing the embargo have come in armed conflict with non-state ac-

[717] See Chapter 11, paragraph 11.8.
[718] See Chapter 5, paragraph 5.5.
[719] Interestingly, the first time that the all necessary measures-type wording was used, was in the context of the Iraqi maritime interception operations with UN-res. 665 (1990), which at that time caused considerable discussions on whether the phrase indicated to authorization for the use of military force. Its exact phrase, however, was not all necessary means, but to "use such measures commensurate to the specific circumstances as may be necessary". From then on, the precedent of using such wording and especially its meaning was set ever since. See *Security Council Report, 2008 no 1. Security Council actions under chapter VII; Myths and realities.*

tors. Measures taken are against maritime traffic not particularly of the targeted State. Practice also indicates that the law of naval warfare authorities were not used in any one of the specific UN-mandated *embargo* operations that aimed to enforce sanctions. Moreover, the application of the law of naval warfare is limited to international armed conflicts, which will further limit the scope of application of that part of LOAC in embargo operations.

International armed conflicts that existed while enforcing a UN-mandate and had also a MIO component were Korea (1950-1953), Iraq (1990) and Libya (2011). Belligerent rights during the MIO were only used in the first two, and not in the latter case of Libya. In the latter case, as McLaughlin notes (although referring to Iraq-operations of 2003, rather than 1990), "There was no LOAC based notice to mariners or special warning of a nature similar to that promulgated in relations to that of Iraq in 2003".[720] The difference between Libya and the large scale operations of Iraq and Korea were that the latter were not specifically implementing economic sanctions, but used the law of naval warfare to fulfil the mandate in a factual situation that amounted to an international armed conflict. The Libya case is unique in the sense that UNSC explicitly authorized a maritime embargo, which was conducted amidst an overall international armed conflict between the NATO-led States and Libya. What NATO, however, did not do was change the existing embargo authorities to authorities based on the law of naval warfare.

The Libya situation points in the direction that whereas embargo operations may not amount to an situation of armed conflict by itself, the law of naval warfare could more quickly apply when the maritime embargo operations are looked at from a broader campaign perspective in which the maritime embargo is an integrated part of the wider military campaign that based on the factual circumstances of the case could be considered as an international armed conflict against a targeted State, and in which warships participating in the embargo also have a war-fighting task in the wider campaign. A similar argument, although not in the context of enforcing an UN-embargo, was used by The Netherlands to apply the law of naval warfare to warships participating in OEF, which on land was con-

[720] McLaughlin (2015), 268.

sidered for a period an international armed conflict. The Netherlands did not divide between the land and maritime dimension, even though at sea there was no ongoing factual situation of armed conflict. Going back to the Libya-case, from the campaign perspective, it could have been argued that also the embargo was integral part of the international armed conflict, a situation derived from the air campaign. Arguably, however, the mandate itself in connection with the phrase *all necessary means* may play a role as a limiting factor as to whether it is actually needed to base the authorities of the embargo on the law of naval warfare. As these authorities are not obligations, they may apply, but at the same time may not sit very comfortably with the overall purpose of the mandate and the political background of why an embargo -as opposed to a belligerent blockade- against specific items was established by the Council in the first place. Therefore, the UN-mandate itself may have a limiting effect on the actual use of the law of naval warfare. As McLaughlin concludes; 'In most cases, the UNSC's clear preference is to employ MEZ[721] of varying scope via the mechanism of non-LOAC based sanctions-enforcement regimes.[722]

This practice shows that an embargo that is conducted in the context of an armed conflict could be governed by LOAC, if the States that are conducting the embargo were parties to the armed conflict. This was clearly the case in Korea. In the cases of Iraq (1990-1991) and Libya (2011) this is less straightforward. Some States were and others were not. France, for instance, was engaged in hostilities in both conflicts, whereas the Netherlands was not in either situation. Therefore, the operations involving the use of force by naval forces of the Netherlands conducting the embargo were not governed by LOAC, but by human rights law standards.

10.7.2. UN-mandated MIO and human rights

Today, there is no doubt that human rights continue to apply in military operations that are based on Chapter VII of the UN-Charter. In the *Al Jedda*-case the European Court of Human Rights opined that human rights law doesn't apply only in situations where the UNSC has explicitly stated

[721] Maritime Exclusion Zone.
[722] McLaughlin (2015), 269.

that it does not. [723] In practice, none of the UN-resolutions that have formed the basis for MIO have explicitly mentioned that IHRL does not apply. On the contrary, human rights are mentioned specially in certain resolutions that are connected to MIO in particular. The UN-resolutions with regard to piracy have consistently underlined that the fight against piracy must be in accordance with human rights.[724] SC-Res 2020 (2011) noted in several paragraphs that actions against possible pirates taken must be in accordance with relevant human rights law. The Netherlands district courts before which several piracy cases where brought, never doubted that human rights applies in cases of pirates captured within the context of the counter-piracy operations off the coast of Somalia and in the context of the UN-resolutions. As such, with regard to counter-piracy operations off the coast of Somalia no tension arises between Article 103 UN-Charter and the applicability of IHRL.[725] Another example is SC-Res. 2146 (2014) with regard to the Libya. In this resolution the UNSC explicitly stated that authority to board and inspect and to use all measures commensurate to the specific circumstances must be in compliance with international humanitarian law and human rights law, as may be applicable.[726]

Secondly, in terms of attribution, in principle human rights violations can be attributed to States even if the State conducts the operation under Chapter VII of the UN-Charter. This would not be the case where a maritime interception operation is UN-controlled and actions can be attributed to the UN rather than to the participating State. The only MIO that falls under this situation is MTF UNIFIL. Taking the view that maritime embargo operations do usually not amount to an armed conflict, force used is regulated by human rights law. Force against the vessel, for instance to

[723] *Al Jedda*, paragraph 102. The Court stated in this paragraph that :

> Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

[724] E.g. 1816, para 11; 1846, para 14; 1851, paragraph 6.

[725] See also Guilfoyle, 'Counter-piracy law enforcement and human rights', *ICLQ*, vol. 59 (2010), 141-169, at 152.

[726] SC-Res. 2146 (2014), para 5.

stop it, must be in line with the *Saiga*-criteria, where after appropriate warnings, reasonable and necessary force as a last resort[727] and where the lives of the persons are not endangered is possible. Once on the suspect vessel, force used against the persons on board is regulated by human rights law standards.

10.8. Use of force in self-defence interception operations

The use of force in self-defence naval operations in the traditional sense will usually trigger the conditions of an international armed conflict to which LOAC applies. In terms of the use of force against the opponent, in general, there is no difference between an IAC and a NIAC. In terms of the application of the law of naval warfare, however, there is a difference as this part of LOAC is considered not to be applicable in a NIAC. The non-applicability of the law of naval warfare in this situation has consequences. As noted above, the rules on prize give the authority to use force against merchant vessels. In a NIAC-situation these authorities cannot be applied. This results in a unfavourable situation that in a self-defence operation that has the character of a NIAC there are no legal instruments that can be used against non-state actors on board a foreign flagged vessel. Neither a belligerent right of visit and search exist, nor does another basis in international law give any authorities to use force against the vessel. As mentioned in Chapter 9, one possibiliby would however be to apply self-defence in the manner to provide a legal basis when it is 'harboring' non-state actors and the flag State is unable and or unwilling to act, or when the vessel is completely under the control of the non-state actor and has become a military objective. Although the individuals themselves on board may be directly targeted, from a practical perspective the boarding of the vessel will most probably be one of the prerequisites to get enough close to the individual. Instead of boarding the vessel, directly targeting persons through other, for instance more technical means such as armed UAV's, is possible but would still run against but would still runs against the issue of flag state jurisdiction.

[727] The ROE-practice is that the more force is applied, the higher the authority must be to apply force. Captain Lyons for instance mentions on the 1990 Iraq mission that in close consultation with the Ministry of Defence, the ROE permitted firing shells across the bow of the ship. Lyons, 163.

As Chapter 7 has outlined, self-defence is also viewed to be a direct legal ground in cases where the cargo of a vessel is so imminently threatening that it triggers the right of self-defence. In cases where the armed conflict threshold is not passed, it seems obvious that the use of force is regulated by human rights law. Chapter 9 has, however, also noted the existence of a view that is called the "third rail" by Geoffrey Corn,[728] in which the law of self-defence provides both a basis *and* a legal regime for and during military operations. The law of self-defence is not only used to determine whether force *can* be used, but also provides the legal regime in which force *is* used, based on the conditions for the application of military force under the law of self-defence (proportionality, necessity, immediacy). The third rail is argued in cases where the legal basis is self-defence, but where the situation may not be considered as an armed conflict. As Corn has correctly noted, this approach firstly completely blurs the distinction between the *ius ad bellum* and the *ius in bello* -self-defence is not meant to provide also a legal regime on the use of force- but also blurs the divide between the use of force in LOAC and human rights law.

10.9. Concluding remarks

In order to successfully conduct maritime interception operations it may be necessary that force is used. The legal regimes that regulate the use of force are human rights law and the law of armed conflict. Although the use of force in the maritime dimension has traditionally been approached through the international law of the sea, it has been submitted here that, basically, this meant applying law enforcement standards to the maritime dimension. The focus on persons and the evolution on extraterritorial applicability of human rights law allow accepting more readily that the use of force against vessels and persons at sea can be considered through human rights law standards.

Where maritime interception operations are conducted in the context of an international armed conflict, the law of armed conflict, and in particular the law of naval warfare, applies. The latter regime does not, however, apply in non-international armed conflicts. As human rights law standards can also apply to MIO during armed conflict in terms of the use of force

[728] Corn (2012).

human rights law and LOAC can co-exist. The question which framework would prevail in such circumstances primarily arises in situations where the boarding party is on board the target vessel.