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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Publication date
2016

Document Version
Final published version

CHAPTER 12

Synthesis and conclusions:

Legal challenges to MIO in modern conflict

States may use their navies to demonstrate and enforce their perception of the proper law of the sea. If such naval operations are consistent, effective and accepted, customary international law of the sea may develop. But if such naval operations are inconsistent, ineffective, or resisted, chaos may result.

Mark W. Janis – Sea Power and the Law of the Sea[806]

12. Introduction

I used Mark Janis' quote already in the introduction to underline the quest I was embarking on to discover the legal aspects of maritime interception operations. My aim was, through the study of practice and available literature, to provide some structure and identify challenges in MIO as regards the application of international law applicable to maritime interception in the context of international peace and security. Furthermore, it was also to add to the academic debate and to contribute to effectiveness of military operations by providing warship commanders and other practitioners through a structural analysis of law and practice a better understanding of at times a complex legal environment in which maritime interception operations take place. The central focus of this study has been the examination of the international legal frameworks applicable to naval operations conducting a maritime interception role outside the sovereign jurisdiction of States and in the context of international peace and security. This has been studied by analysing the generally accepted legal bases for MIO, and

[806] Janis (1976), 75.

by analysing in the context of legal regimes, three topics central to MIO, namely the right of visit, the use of force and detention.

12.1. Overall reflections: gains and challenges

Before summing-up the conclusions from the preceding chapters, as a syntheses I will start with some overall reflections. These reflections may, in broad terms, be summed up in the following three separate but not separable points. The first is the evolution of maritime interception operations from a legal notion to a term of naval-operational art. Second are the challenges that non-international armed conflict bring to maritime interception operations. And third is a focus on human beings in contemporary maritime interceptions and the legal effect that this focus brings with it.

12.1.1. The evolution of MIO

It can be concluded that over the past twenty-five years, through operational experience and academic thought, a relatively clear structure has emerged with regard to the legal bases for MIO that are also generally accepted and used by States and academics, and which are also familiar to military operators. The view that the term MIO is only strictly limited to UN-mandated maritime embargo operations is clearly behind us. Using the term, however, to include interceptions based on the law of armed conflict is not entirely an accepted way forward. Today, maritime interception operations are a well-known, much exercised and used tasking in the naval community. Although on an operational level maritime interception may be exercised much in a similar manner, its legal parameters will differ based on the applicable legal bases and regimes. Although the international legal framework for legal bases applicable to MIO is now relatively clear, points of contention related to these bases have also emerged, which raises discussions on the exact scope and authority of these different applicable legal bases. Examples that were discussed are the issue of master or flag state consent and the question of when the UNSC has authorized maritime enforcement measures. While these issues have emerged and indeed new issues have been added, such as the issue of how self-defence might serve as a legal basis for conducting a maritime interception operation against WMD, interestingly, the evolution of maritime strategy has also put new light the acceptability of some issues. A chang-

ing maritime strategy in the last ten years to enhancing maritime security, for instance, has put the ability to board under master's consent authority in a much more acceptable daylight as this a concept that makes operating at sea to enhance maritime awareness and security more workable. The focus on piracy, to name another example, has put the issues of the relationship between human rights law and the law of the sea more to the foreground.

12.1.2. Non-international armed conflict at sea

The fact that current conflict today can often be characterized as non-international armed conflict conducted by non-state actors has not left the maritime dimension untouched. One challenge in this respect is that the authorities of the law of naval warfare derived from economic warfare and maritime neutrality, such as the belligerent right of visit and search, do not apply in non-international armed conflict. Dealing with modern conflict at sea, therefore, appears to have a legal gap. As a result, maritime interception operations that are conducted during non-international armed conflict and against non-state actors do not stand out with much legal clarity and have also given rise to *modus operandi* or theoretical argumentation that may be legally debatable. Three of such examples are the practice friendly approaches, the arguments raised to board foreign vessels on the high seas suspected of carrying WMD based on self-defence and the use of statelessness to intervene on vessels. This thesis has argued that in the context of modern conflict at sea, it would make sense to also look into concepts that may considered to be too far-reaching today, such as a NIAC-right of visit. Arguably, however, such concept may in the end be more legal than trying to push existing rules over the edge into abuse of the rule.

1.2.1.3. Human beings

One other point that clearly stands out from twenty-five years of evolution of maritime interception operations, is the expanding focus on individuals, besides vessels and goods. One reason is the focus on enhancing maritime security which puts the human being into a central spot during maritime interceptions. Another important reason is the greater acceptance of extra-territorial applicability of human rights law, and its subsequent practice in,

for instance, counter-piracy operations. The focus on human beings and the broader scope of application of human rights law has firmly introduced human rights law within the realm of maritime interception operations. A focus on human beings and also more regular deployments in situations that do not amount to an armed conflict, has put more attention to analyse *modus operandi* of warships from a law enforcement perspective where it turns to the use of force and detention. If one would accept the extraterritorial application of human rights law to situations at sea, it may also mean that one could accept that the use of force standards that have crystallized over the years and through law of the sea jurisprudence and international agreements related to the sea are in fact the application of human rights law standards at sea. One particular area where academic thought and practice is extremely meagre is the question how co-existing legal regimes would relate in situations where both the law of naval warfare and human rights law exist. Be that as it may, today it is clear that human rights law also has a role to play in maritime interception operations.

In sum, maritime interception operations cannot be approached solely from the law of the sea perspective or from the vantage point of the UN-collective security system. It is generally accepted that the legal bases and regimes applicable to MIO now encompass the whole spectrum of international legal frameworks -bases and regimes- applicable to military operations. In other words, the international law that relates to maritime interception operations has over the last twenty-five years matured by firstly embracing the whole spectrum of general international law as applicable to military operations in the maritime dimension, and where it necessitates more in-depth legal specificities have emerged to better apply the law into the maritime dimension.

12.2. Legal bases for MIO

Part II has analysed the legal bases that are generally accepted to serve as a legal ground for maritime interception operations. With regard to legal bases for MIO, it may be concluded that an evolution has taken place in which in the start of the use of the term the legal basis was very much connected with the UN-collective security system. Gradually, MIO has evolved into an operational term to define an activity at sea which can be

based on different legal bases. Practice and theory have generally accepted that MIO can be based on the UN collective security system, self-defence and consent, either *ad hoc* or through international agreements. Basically, these legal bases follow the general international law of accepted legal bases for the use of military force. While these legal bases for MIO are not contested, the scopes in which the legal bases are applied do have several points of discussion.

With regard to the legal basis of the UN-collective security system it can be said that the practice of UN-mandated maritime interception operations has evolved into a fully accepted notion that the UNSC can authorize military enforcement measures at sea to enforce sanctions. Over the last twenty-five years, the UNSC has made use of this authority which on the one hand has crystallized into typical wording that signals the authority to enforce sanctions at sea, but on the other hand also created embargo operations through other kind of language, more specifically tailored for the conflict and situation at hand, such as in the cases of Lebanon and Libya. Whereas the heart of the UNSC decision to authorize naval assets to implement economic sanctions at sea lies with Article 41 of the UN-Charter, the justification and authority to act with military means to enforce implemented sanctions is more closely related to Article 42 of the Charter.

Self-defence can also be a ground for MIO. Firstly, invoking self-defence can be the start of a situation of an international armed conflict during which boarding operations may take place based on the legal regime of the law of armed conflict, the law of naval warfare in particular. Secondly, self-defence is also argued against single actions threats, such as seaborne WMD, and non-state actors. With regard to WMD self-defence is argued in an anticipatory manner, in which the requirement of immediacy is interpreted in such a way that it primarily focuses on the gravity of the possible act. The key-difference is that in the traditional approach self-defence is a condition that allows for to application of the law of armed conflict. LOAC -*ius in bello*- then provides the right to board vessels, albeit limited to international armed conflicts. In the other approach, related to NSA and WMD, the right to board a foreign flagged vessel is derived from the *ius ad bellum* itself, which brings unique argumentation into play, such as the argument that the use of self-defence is not dependent on other States, which, connected to the debate on the con-

ditions to cross borders in a NIAC, leads to the view that NSA can, under certain conditions, can be attacked beyond the attacked state's borders in other States, and thus on foreign flagged vessels in the maritime dimension. With regard to non-state actors, self-defence is argued to circumvent the legal challenge that no belligerent right of visit is currently generally accepted in non-international armed conflict. In this view, the right of self-defence and the view that it is not dependent of the will of other States, is balanced against the situation in which States are unable or unwilling to act against non-state actors.

The central point of discussion related to the basis of *ad hoc* consent is the master or flag state consent issue. This thesis submits that the answer to the issue very much depends on two key considerations. The first is the position the flag State takes with regard to boarding its flagged vessels. The second is the actual activities that a boarding team will conduct once they are aboard the vessel. The second consideration, therefore, does not completely discharge the possibility that there are situations that foreign vessels can be visited by a warship based on master's consent. At this point a very thin line exists between activities that may be regarded as enforcing State authority through its military, which lies primarily with the flag State, or whether it does not pass this threshold. In this perspective, a boarding at the invitation of the master would be allowable, but once the boarding team conducts any activity that may be deemed as a law enforcement activity it has surpassed its authority. In this context, the practice of the 'friendly approach' or AAV-visits to communicate with and help the fellow mariner's at sea adds to view that master's consent has been gaining more support in the operational arena.

As a last, the instrument of international agreements as a legal basis for MIO has since 9/11 also been more often used as a tool to enhance the possibility to use maritime interception. In particular, the 2005 SUA-Protocol and the bilateral agreements between the US and other States or of note. Although debates are raised, mainly to underline that the traditional freedom of navigation is eroded by these agreements, it is generally accepted that international agreements can serve as a basis for MIO. When one considers the content of the agreements, exclusive jurisdiction of a flag State over its flagged vessel still stands, however, as the legal point of departure. The authorities of the boarding State are strict and limited and mainly focused on procedural authorities that ensure timely reaction to a

threat on board another vessel. In other words, the flag State has not lost jurisdictional grip on its vessels and persons on board once it explicitly, or implicitly by the passing of time, approves a boarding.

An overall conclusion that be noted with regard to legal bases for MIO, is that it is also possible that a MIO is based on more than one legal basis. Counter-piracy operations off the coast of Somalia are framed both in UN-resolutions to the extent that it concerns operating in the territorial waters of Somalia, in consent from the (Somali) authorities to operate within the territorial sea of Somalia and also in the law of piracy that is codified in UNCLOS.[807] Another example is the maritime embargo operations off the coast of Lebanon conducted by MTF UNIFIL, which is set-up through a combination of a UN-resolution and consent by the Lebanon authorities.

12.3. Legal regimes in MIO

Part III has studied three specific activities central to maritime interception operations, namely the right of visit, the use of force during MIO and detention at sea, in the context of applicable legal regimes. A general conclusion that can be drawn is that through both the current focus on enhancing maritime security and the acceptance of extraterritorial applicability, human rights law has firmly introduced itself within the realm of maritime interception operations. This conclusion might be an open door at this stage of the debate on legal aspects of MIO, but it certainly was not the case when MIO surfaced as a means to deal with international peace and security. The obvious consequence is that the relationship between IHRL, LOAC and the international law of the sea becomes an important issue in establishing what authority the military may have during maritime interception operations. Especially on the subjects of the use of force and detention at sea the legal parameters during MIO are very much affected by human rights law. Whereas the international law of the sea and the law of naval warfare mainly focus on vessels and goods, the attention of human rights now urges to look beyond the hull of the ship and get more concerned with the persons on board. Guilfoyle commented with regard to legal grounds for detention in the *Medvedyev*-case that, 'One might wonder how it is possible that the note granted authority to detain a vessel on

[807] Treves (2009), 406-408.

the high seas, but not those aboard it'.[808] This is exactly the thinking-gap that lies between the vessel-focused law of the sea and the person focused-human rights law. The applicability of human rights law effects both the issue of the use of force and detention.

A second general conclusion that can be drawn from Part III is that the challenge that is brought upon the maritime dimension with the extension of non-international armed conflicts to sea has particular impact on the right of visit. Chapter 9 has underlined firstly that there are more rights of visit then the traditional peacetime and belligerent rights of visit, when one approaches this subject from general international law. The scope, purpose and content differ per rights of visit. It is therefore that commanders must keep them apart, especially in situations where they are tasked with more roles that involve the use of several rights of visit. Some of the rights are detailed as they are part of either international agreements or its details have been widely accepted in customary international law, such as the belligerent right of visit and search. Others are less clear and must either be detailed in the State's consent that waivers the flag State authority, or must be interpreted through actual texts of UN-resolutions. Also with regard to visits, a challenge lies in the fact that contemporary conflicts are more often characterized as non-international armed conflicts. Whereas international armed conflict provide a detailed right of visit, it is still viewed that this does not apply in NIAC-situations. It is quite imaginable that it is operationally unsatisfying that existing naval rules to conflict do not fit current conflict in the sense that the means is not available to effectively act against non-state actors at sea. Legal solutions to what seems to be a gap have been suggested, through the argument of a self-defence or a NIAC right of visit. In this approach the legal basis for the actual boarding of the vessel is regulated by the *ius ad bellum* and the scope of the boarding authorities by NIAC-regulations or self-defence itself.

From these two general conclusions -Applicability of human rights law to maritime interception operations and the existence of a legal gap with regard to MIO that are performed in NIAC operations - a number of subsequent conclusions can be drawn.

[808] D. Guilfoyle, 'Current legal developments European Court of Human Rights', in *The international Journal of Marine and Coastal Law*, vol. 25 (2010), 437-442, 440.

The first subsequent conclusion regards the rights of visit. Chapter 9 has analysed the different existing rights of visit. The challenge that non-international armed conflicts or non-state actors pose to MIO has developed into creative thoughts to fill the gap made by the fact that that traditional rights of visit do not suffice in NIAC-situations at sea. There may a view which can be called 'self-defence right of visit ' or a 'NIAC-right of visit'. In this view the right to board and undertake subsequent actions on board are brought within the context of the *ius ad bellum* in competition with sovereignty, rather than that it is derived from the *ius in bello*, the law of naval warfare in particular. This development of thought, however, does not do any justice to the basic framework of international law that starts with keeping basis and regime apart.

The second subsequent conclusion concerns the use of force. The manner in which force can be applied depends on the applicable legal regime, IHRL or LOAC. Both legal regimes have their own conditions for application, which also means that the question of whether IHRL or LOAC applies is a separate consideration. IHRL in the context of using force, however, only comes to the foreground were individual's lives are in fact at stake. During the phase were force is used against the vessel IHRL is not of particular importance. Rather this phase is regulated by the views on the use of force that have emerged from either international law of the sea or from the law of naval warfare.

The third and last subsequent conclusion deals with detention, dealt with in Chapter 11. Detention has become much more important in maritime interception operations than in the "old days" when MIO where only considered to be UN-mandated maritime embargo operations to enforce UN-sanctions at sea. Academic literature of how operational detention is applied in the maritime dimension has only started since the last few years, mainly as a result of counter-piracy operations. In terms of legal grounds for detention at sea, it appears that there are lesser explicit grounds to detain on the high seas, as GCIV does not directly apply to the maritime environment. Applying the rules of occupation law to vessels on the high seas may partly close this gap, but only for vessels that fly the flag of the occupied territory. Furthermore, the same challenge of (a lack of) an existing legal ground for security detention in an extraterritorial NIAC applies at sea. An all necessary means-mandate may provide a legal basis for detention during MIO, but needs to meet the principle of legal

certainty. Qualitative and procedural requirements of a sufficient legal basis must however be fulfilled. Some authors have argued that an all necessary means-mandate, therefore, may not be sufficient to provide such legal basis for detention. As a last, the Freedom Flotilla incident is a good example of the complexity of operational detention on the high seas. The incident, underlines that that although the law of naval warfare does not concern itself with individuals on board, it may be necessary to look beyond the hull of the vessel and deal separately with individuals on board. It furthermore, underlines that discussion on co-existing legal regimes can arise also in the maritime dimension. And lastly, it underlines that the need for security detention exists also on the high seas, during maritime interception operations.

12.4. Final remarks

The laws applicable to naval operations have always been regarded as a sort of a special thing in international law, with specialized lawyers speaking the secret language of the international law of the sea, and sometimes even its highly incomprehensible dialect of the law of naval warfare. There is nothing, however, that suggests that the law applicable to the maritime dimension can close its eyes to the developments and discussions that are raging on the mainland with regard to the application of more fields of international law to conflict, their interrelationships and the character of conflict. The maritime dimension of military operations must, in a similar fashion, be eager to embrace these debates on how the developments in the laws applicable to military operations in general, apply at sea. The question of what non-international armed conflict does to naval operations in the legal context and the more and more accepted application of human rights law at sea will remain a legal focus point in the development of the law of naval operations.

Glancing at the matrix that I mentioned in the first sentence of the introduction, on board *Hr. Ms. De Zeven Proviciën*, and looking both back and forward, undoubtedly, the various rules applicable to military operations at sea will certainly not make operating for military operators much easier. After a study of the scope and content of the international law applicable to maritime interception operations, one can at least argue that these frameworks have grown and their interaction has become more

complex. As a legal advisor of the Royal Netherlands Navy, I would like to end here with a quote from the Netherlands Commander in Chief of the Naval Forces during the Second World War, Admiral J. Th. Furstner[809], who at the outbreak of the war commented on the distinction that must be made with regard to the law of naval warfare at sea and in the courtroom. He stated:

> 'De prijsrechter zelf blijft uiteraard steeds de instantie, die eventueel noodzakelijke correcties op de maatregelen der Commandanten aanbrengt. Het is echter van het grootste belang de procedure in open zee zoo eenvoudig mogelijk te maken'.[810]

This quote can be translated as: "Obviously, the prize judge will remain the one that, if need be, will correct the measures taken by commanders. It is, however, of the greatest importance that procedures at sea stay as simple as they can possibly be." In a general sense, I take from his opinion that the law applicable to naval operations must be *workable* for naval operators at sea. Now, 75 years later, the challenge put to naval officers to adhere, understand, and work with the law applicable to naval operations have not become easier. Quite on the contrary, rather. I sincerely hope that some of what I have written here on the one hand provides something of a feeling to the academic arena on how challenging the task for at sea can be, but also will help practitioners in their, at times, daunting task to find their way through the legal challenges which may come upon their path, whilst being confronted with the many, many other challenges the members of the Armed Forces need to endure in military operations.

[809] 1887-1970. In the Netherlands the highest military naval rank an officer can achieve is lieutenant-admiral, which is a 4-star admiral. The rank of 'admiral', which comes after lieutenant-admiral, is privileged for the King of the Netherlands.
[810] Letter of the Netherlands Commander of the Naval Forces, J. Th. Furstner to the Minister of Defence, London 17 September 1940, no. S. 200/27/3. *National Archives, Londense Archief*, GA/JUZA, no. 1328.