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Counter-piracy operations: the legal regime in a nutshell

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Ever since they first arose, threats to maritime security have had a considerable impact on the stability of states, economies, regions, shipping and other industries, and on that of the financial world. But first and foremost maritime threats have had a direct effect on the security of all individuals affected. Without doubt, these threats require specific counter-measures, which are rooted in a legal framework whose political importance, despite its weaknesses, must not be underestimated. Although piracy, according to its legal definition, can only occur on the high seas and outside the jurisdiction of any state, and therefore must be distinguished from armed robbery at sea as well as other unlawful acts against the safety of maritime navigation, it commonly happens that policy discussions addressing maritime threats in general refer to the notion of piracy as though it were the paradigm. To be able to respond appropriately to threats and find solutions within an acceptable period of time, given that in most cases time will be essential, a basic understanding of this legal regime is indispensable.

This paper seeks to provide a brief overview and help create situational awareness of the legal concerns relevant to planning and conducting MSO. It will offer a set of basic guidelines for the engaged mind. Starting with an explanation of the key aspects of the law of the sea, followed by a presentation of regulations on maritime security and the use of force in particular, the paper then offers a legal checklist and finally discusses certain MSO scenarios.

1. Applicable Law

When addressing the issue of MSO from the legal point of view, one has to consider two main bodies, the basic elements of the law of the sea on the one hand, and the legal framework allowing enforcement measures, i.e. the use of force, on the other.

UN Convention on the Law of the Sea from 1982

Opened for signature on 10 December 1982, this UN convention² (UNCLOS) seeks “to settle, in a spirit of mutual understanding and cooperation, all issues

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² Note that many but not all states have signed UNCLOS. However, it is widely accepted even by those states which are not parties to it.

relating to the law of the sea”, and recognizes “the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world.”³ It has created, as a judicial body, the International Tribunal for the Law of the Sea in Hamburg, Germany (ITLOS).⁴ Although this Tribunal may only adjudicate disputes directly arising from the understanding and interpretation of UNCLOS, e.g. excessive territorial claims, the utilization of maritime resources or the legitimacy of exercising other sovereign rights, its decisions play an important role for MSO because there is a natural link between granted sovereign rights and the legitimate use of force to defend them. That said, UNCLOS distinguishes between different zones within the maritime environment. This regime has a significant impact on MSO, mainly because the actors involved may have different rights and obligations depending on the zone they operate in. It should be noted in this context that each zone, whatever its size, can be entered through the air, on the water, or from beneath the surface. One of the core issues throughout planning MSO is to locate where the operation will take place. This can be in national or international waters or in airspace, as will be explained in the following chapters.

Baselines

Every maritime zone mentioned in the UNCLOS goes back to the baseline. This line represents the starting point of all measurements and therefore marks 0 nautical miles (nm). There are two kinds of baselines: normal⁵ baselines and straight⁶ baselines. A normal baseline is the low-water line along the coast and in simple words it can be described as a horizontal line drawn where the water reaches land when the tide is low. Where the coastline is deeply indented or where there is a fringe of islands along the coast in its immediate vicinity, the coastal nation is permitted to use straight baselines. In this case, a straight, i.e. direct line is drawn along the outer edge of the coast, bay or island.

Internal waters

All waters lying landward of the baseline are internal waters⁷. Domestic law applies here, and is no different from that applied to land. Visiting nations usually have to ask permission to enter and nations can grant standing permission. However, warships and aircraft require specific entry permission, which can be regulated through a bilateral or multilateral arrangement. The coastal state

enjoys full enforcement jurisdiction with regard to the immunity⁸ of warships⁹ and aircraft.

Canals

Canals such as the Suez Canal, the Panama Canal or the Kiel Canal belong to internal waters. Since they are frequently used by different shipping nations, canals are to be expected to be free for every nation to transit. This is generally granted through the freedom of navigation. However, the precise exercise of this right depends on the status of local arrangements and conventions. The Suez Canal, for example, is generally free for merchant vessels and warships to cross. In times of war, the parties to the armed conflict may still pass through, but they have to comply with the principle of innocent passage¹⁰, usually an obligation to be found in TTW. This is binding up to 3nm around the Suez Canal. The Panama Canal is free for every merchant vessel or warship to cross; only nuclear powered vessels are prohibited, e.g. nuclear powered submarines. As for the Kiel Canal, every nation has to be granted permission before crossing, regardless of whether the vessel's purpose is civil or military. In all canals, the coastal state enjoys full enforcement jurisdiction with regard to the freedom of navigation and the immunity of warships.

Ports, bays, gulfs and river mouths

Ports, Bays, Gulfs and River Mouths¹¹ are naturally landward from the baseline and belong to the internal waters. The coastal state enjoys full domestic jurisdiction and can take measures of law enforcement through its local authorities. This does not mean, however, that the flag state's jurisdiction on board the warship is waived, but leads to a general overlapping of both jurisdictions. This can be solved through Status of Forces Agreements (SOFA) or various IMO¹² conventions such as MARPOL.¹³

Territorial waters and offshore islands

Full domestic jurisdiction may be exercised up to 12nm seaward from the baseline. These are the territorial waters (TTW)¹⁴. The belt has the same legal status as that recognized by the domestic law applicable on land and is therefore subject to sovereign rights with regard to the immunity of warships. In TTW, foreign vessels enjoy the right of innocent passage for the purpose of continuous and expeditious traversing of the territorial waters or for proceeding to or from internal waters.¹⁵ Any military activity

³ UNCLOS Preamble, see http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

⁴ “The International Tribunal for the Law of the Sea is an independent judicial body established by the Convention to adjudicate disputes arising out of the interpretation and application of the Convention. The Tribunal is composed of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.” For further information please visit <http://www.itlos.org>.

⁵ Article 5 UNCLOS.

⁶ Article 7 UNCLOS.

⁷ Article 8 UNCLOS.

⁸ See Article 32 UNCLOS.

⁹ Defined in Article 29 UNCLOS.

¹⁰ A term of international maritime law referring to a ship's right to enter and pass through a coastal state's territorial waters as long as it is not prejudicial to the peace, good order or security of the coastal state.

¹¹ See Article 9-12 UNCLOS.

¹² International Maritime Organization, explained further below.

¹³ International Convention for the Prevention of Pollution from Ships (1973), as modified by the Protocol of 1978 relating thereto.

¹⁴ Article 2 UNCLOS; both expressions are commonly used, Territorial Sea or Territorial Waters.

¹⁵ Article 45 UNCLOS.

undertaken without the permission of the coastal state can, in the worst case, be regarded as a provocative act. This, if highly aggressive in nature, may be judged to be an imminent threat or even an armed attack, which could then trigger the right of self-defense under Article 51 of the UN Charter¹⁶ as the most extreme consequence. Prohibited activities in the TTW can be any threat or use of force against the coastal state: weapons exercise; intelligence collection; acts of propaganda; launching or recovering aircraft and military devices. Further, the right of innocent passage may be restricted for the purpose of environmental protection, navigation safety or any other reason complying with international law. Offshore islands have their own baseline and TTW, which may lead to an expansion of the 12nm-belt. Single rocks do not count as islands. Artificial offshore platforms¹⁷ do not lead to an expansion of the 12nm belt, since they do not have their own baseline. Establishing a security zone of no more than 500 meters around these, however, is considered to be acceptable.

Contiguous zone

The contiguous zone (CZ) is a belt of 24nm maximum range extending seaward from the baseline and can be claimed by the coastal state. The coastal state may exercise the control necessary to prevent or punish infringement of fiscal, immigration, sanitation and customs laws and regulations occurring in its territory or TTW.¹⁸ A warship flying a foreign flag is free to conduct any naval activities within the CZ.

Exclusive Economic Zone

The exclusive economic zone (EEZ)¹⁹ is a sea zone that aims to safeguard the economic interests of a nation, permitting the enforcement of laws for the use and protection of marine resources. This means that the coastal state's jurisdiction in the EEZ only applies to economic resource activities. The EEZ may not be extended over 200nm from the baseline and overlaps the CZ. In the EEZ all nations enjoy the right to exercise the right of freedom of navigation and overflight. Like the CZ, the EEZ can be claimed by the coastal state. Again, a warship flying a foreign flag is free to conduct any naval activities.

High seas

High seas²⁰ are all parts of the ocean seaward from the EEZ. If a nation does not claim an EEZ, the high seas begin at the seaward edge of the TTW. Beyond, all nations enjoy

full freedom of navigation and overflight, as well as other rights laid down in the UNCLOS.

Apart from its rights in the TTW, CZ or EEZ, on the high seas no state enjoys a so-called granted right of enforcement jurisdiction. Since no sovereign rights whatsoever apply on the high seas, the justification of an act is always the responsibility of the flag state. In order to respond to a criminal act committed by another ship's crew, the operating state has to establish that act as criminal under its domestic law or as a breach of international law.

However, naval activities may be conducted on the high seas, even at times of armed conflict, although "the high seas shall [primarily] be reserved for peaceful purposes."²¹

Continental shelves

A continental shelf is the extended perimeter of each continent and associated coastal plain. It extends beyond the TTW to the outer edge of the continental margin or up to a distance of 200nm from the baseline. Artificial platforms attached to the continental shelf fall under the jurisdiction of the coastal state.²²

Archipelagos

Archipelagic states²³ are states which consist of a number of islands. In this case, the baseline is drawn around their outer edge. In simple words, the waters landward from the baseline between the islands count as internal waters. However, some islands leave enough space to allow international shipping to go through. Archipelagic states may therefore "designate sea lanes and air routes there above, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea."²⁴ The right to transit such archipelagic waters in normal mode is therefore called the right of archipelagic sea lanes passage.

International straits

The basic problem with international straits²⁵, e.g. the straits of Hormuz, Malacca, Gibraltar, is that two or more coastal states naturally have overlapping TTW or EEZ. This must not hinder international shipping from transiting through these waters, since often they are a vital sea lane and as such respected by international law. Basically the legal regime of transit passage²⁶ applies, meaning that the vessel or aircraft must comply with international law and first and foremost must not violate the coastal states in any way.

¹⁶ To this day, there is still great controversy about what the exact definition of an imminent threat or an armed attack. There are some precedents, however, which are regularly cited, such as the famous Caroline Case, dating back to 1837. The related discussion on the legality of pre-emptive measures established that such acts are in fact legal and justified if the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation".

¹⁷ Article 60 UNCLOS.

¹⁸ Article 33, para 1. UNCLOS.

¹⁹ Article 55 UNCLOS.

²⁰ See Part VII UNCLOS.

²¹ Article 88 UNCLOS.

²² Article 76-78 UNCLOS.

²³ Part IV UNCLOS.

²⁴ Article 53, para 1 UNCLOS.

²⁵ Part III UNCLOS.

²⁶ See Part III, Section 2 UNCLOS: "Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."

Transit passage can be conducted in normal mode, e.g. submarines may submerge in waters other than TTW, where innocent passage applies.

Proliferation Security Initiative (PSI)

Following UNSCRES 1540 (2004) urging the implementation of international cooperation against illicit trafficking of Weapons of Mass Destruction, the PSI is a multinational initiative initiated by the United States of America, i.e. an informal agreement, involving interdiction operations on sea, in the air and on land, on the grounds that suspect vehicles are carrying nuclear or other dangerous materials related to the use or building of Weapons of Mass Destruction. The primary role of PSI parties is to abide by a Statement of Interdiction Principles with the primary purpose of interdicting suspect weapons and materials. Additionally, parties are to enact legal statutes to facilitate effective interdiction and seizure of such items. Finally, the parties are to take measures to ensure that their national facilities are not utilized for the transfer of illicit weapon cargoes. Nonetheless, the PSI remains controversial. Among countries opposed to it, for example, are China, Indonesia, Malaysia and Iran, who dispute its legality.

International Maritime Organization regulations

Located in London, the International Maritime Organization (IMO)²⁷ is a body of the UN that addresses problems of maritime safety and security. It has initiated numerous regulations and conventions which are to be taken into account when dealing with MSO.

Convention for the Suppression of Unlawful Acts against the safety of maritime navigation (SUA Convention)

The SUA Convention is a multinational treaty, specifying rights and obligations when dealing with maritime crime, such as the seizure of ships by force, acts of violence against persons on board ships and the placing of devices on board a ship which are likely to destroy or damage it. The parties to this convention are required to take all necessary steps possible under their domestic laws to fight such crime, and indeed they are obliged to establish jurisdiction over the offences listed. This includes the collection of evidence and prosecution. The SUA Convention may solve some of the legal difficulties which the PSI is in fact facing. However, it aims to establish the cooperation of all parties against maritime crime, whether they are coastal states or flag states, depending of course on the situation.

Protocol for the Suppression of Unlawful Acts against the safety of fixed platforms located on the continental shelf (SUA Protocol)

This SUA Protocol extends the above rules and obligations to offshore platforms, which will become relevant when dealing with terrorist threats against oil rigs or other platforms.

The International Ship and Port Facility Security Code (SOLAS Convention)

Primarily designed to establish greater safety and security for ships and their crew, the SOLAS Convention does not deal directly with maritime crime but obliges the party states to take safety and security measures, such as the installation of a ship-to-shore security alert system to identify, locate and indicate that the security of the ship is under threat or has been compromised. In particular, identifying and locating a vessel which has been threatened, attacked or hijacked can be a very useful contribution to the MSO early planning stage, although not related to the legal regime in the first place.

Domestic law

The domestic law of each participating state plays an important role for several reasons. As mentioned above, the relationship between the coastal state and the flag state is the first and foremost issue. Moreover, the domestic law of third states to which persons on board belong has to be taken into account. Often they will have an interest in being part of the MSO round table. For NATO-led operations, there is the additional requirement to take the caveats of contributing states into account, since they are likely to lead to the decision on which nation is to carry out a specific operation, and how it is to be conducted.

The Law of Armed Conflict (LOAC)

Wherever the use of military force is considered, LOAC can become part of the legal regime. In accordance with the Paris Declaration (1856), the Hague Regulations (1907), the London Protocol (1936), the Geneva Conventions (1949), including their Additional Protocols (1977), and several other regulations, as well as trends in customary law, which for the purposes of this paper need not be discussed in detail, the LOAC seeks to regulate the methods and means of the use of military force and related issues such as the treatment of detainees in times of armed conflict. It has to be taken into account, however, that the precise point where the LOAC becomes applicable is highly controversial. Hence, the utmost care should be taken when discussing the applicability of the so-called Law of Naval Warfare to MSO. Its applicability to the full is in fact very unlikely, given modern threats and operations. Nevertheless, basic LOAC principles can be "transferred" to MSO in peacetime and therefore can become applicable, along with the governing rules of maritime law enforcement.

Mandate for NATO-led operations

Like any other military operation, NATO-led operations need a clear legal basis. Either in response to an official state request²⁸ or solely on the basis of the UN Charter, the United Nations Security Council can issue resolutions which will be

²⁷ <http://www.imo.org>.

²⁸ Such was the Somali request regarding the UN World Food Programme (WFP), leading to Operation Allied Provider. In view of maritime threats in Somali TTW and EEZ, which are frequented by vessels belonging to the WFP to this day, the Somali government called for help and requested NATO warships to escort the UN vessels and protect them against any threats, because Somalia as the coastal state was not able to do so.

the basis for a North Atlantic Council (NAC) decision on the possible subsequent deployment of troops. Moreover, the NAC can respond to a request in its own right in the same way.²⁹ NATO-led operations in response to an armed attack can also be based on Article 5 of the Washington Treaty and Article 51 of the UN Charter. However, although Article 5 of the Washington Treaty can be a legal basis, it should be mentioned with reluctance in this context, because in most cases it will not be relevant to MSO.

2. Piracy and armed robbery at sea

A distinction must be made between piracy and armed robbery at sea. According to Article 100 of UNCLOS, all states have the duty to cooperate in the repression of piracy "to the fullest possible extent." But what exactly is piracy? According to the UNCLOS view, piracy as an illegal act can only occur on the high seas or in places outside the TTW. It must be committed for private ends by the crew and/or the passengers from one private³⁰ ship (the so-called mother ship) or aircraft against another. On the high seas or in any other place outside the jurisdiction of a state, every state is entitled to seize a pirate ship or aircraft and arrest the pirates. The pirates may be prosecuted under the jurisdiction of that state.³¹ That said, UNCLOS codifies but does not develop customary law; in fact it provides cover for universal jurisdiction but does not require the adoption of criminal law. In this way UNCLOS builds upon illegality defined elsewhere. According to UNCLOS, fighting pirates is not an obligation, but all states are strongly advised to cooperate and do their utmost to fight these "enemies of mankind".

However, UNCLOS does have obvious limits in the context of piracy. For example, the right of hot pursuit of a pirate vessel outside the TTW ends as soon as the fleeing vessel enters its own TTW or those belonging to a third state. This is likely to provide relatively quick cover for the fleeing vessel, simply leaving the pursuing ship outside. Moreover, UNCLOS talks of piracy for private ends, which does not cover politically motivated acts at all. For this reason, acts of so-called maritime terrorism, e.g. the hijacking of yachts, cruisers or oil tankers in order to hold them for ransom and/or arouse public attention, do not fall under the UNCLOS definition, or at least remain controversial. The ship-to-ship condition, finally, does not cover the hijacking of a vessel by part of its own passengers or crew. Assuming that the hijackers have been on board the vessel for some time before they in fact hijack it and arouse attention, this would hardly be an act of piracy under UNCLOS.

That said, and with regard to known incidents, illegal acts which do not fall under the UNCLOS definition of piracy must be described as armed robbery at sea.

3. MSO methods and means

In practice, there are different ways to establish or conduct MSO. To foster a common understanding, this paper will discuss the most important methods and means applied in MSO.

Maritime Interdiction/Interception Operations (MIO)

In addition to the rights granted by UNCLOS, coalition forces can visit or board a suspect ship in order to check its crew, cargo and destination in accordance with a given mandate. As for the modes of boarding, the consent of the ship's master to, or his denial of, the presence of coalition troops on board will set the benchmark for compliant³², non-compliant³³ or opposed³⁴ boarding. These categories of boarding can be described as different escalation steps. In accordance with the principle of proportionality, some consider it appropriate to try to contact the flag state if the ship's master does not give his consent. National views on this differ: not all states require their naval commanders to contact the flag state.

Escort and convoy operations

Again, depending on the mandate, actions can range from acts of mere deterrence to the sinking of a suspect vessel considered to be a threat to the escorted vessels. Particularly if it is stated that "all necessary means" may be used to secure merchant or other vessels, the national understanding and interpretation of the operating states will play an important role at the MOS round table. National caveats and interests will have to be discussed. However, international law grants the right of self-defense at any time, which may include defending the convoy by using deadly force, if necessary. It becomes clear that, in this case, the legal regimes might overlap.

Law Enforcement Detachments (LEDET)/Shipriders

Some states embark foreign police or coast guard troops in order to establish a link to a state willing to prosecute captured criminals. In the case of LEDET, a law enforcement unit, preferably belonging to a regional state, is embarked, which will carry out the operation, leaving the warship acting only as a supporting platform. This procedure avoids the transfer of suspects from one jurisdiction to another. The second method is to embark a foreign official belonging to a regional state, who can decide and give his consent for the warship to operate in that state's TTW. This solves the problem of hot pursuit into foreign TTW, mentioned in the UNCLOS context.

²⁹ E.g. Operation Amber Fox in 2002, see <http://www.nato.int/fyrom/tff/home.htm>.

³⁰ Piracy by warships or government ships or aircraft whose crew has mutinied are assimilated to acts committed by a private ship or aircraft, see Article 102 UNCLOS.

³¹ Article 105 UNCLOS.

³² Ship's master giving his consent.

³³ Consent denied either by the master or by the flag state. Boarding operation is carried out against passive resistance.

³⁴ Consent denied either by the master or by the flag state. Boarding operation is carried out against heavy, i.e. armed resistance.

For operations off the coast of Somalia under Chapter VII of the UN Charter, the United Nations Security Council suggested the following model in its UNSCRES 1851 (2008): "(...) Invites all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ("ship riders") from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG³⁵ is obtained for the exercise of third state jurisdiction by ship riders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention (...)." As stated, the signing of an MOU³⁶ or SOFA or any other form of agreement between the states involved is highly advisable in order to define rights and obligations for all sides.

Securing Sea Lanes of Communication (SLOC)

SLOC is a term describing the primary maritime routes between ports, used for trade, logistics and naval forces around the world. It is primarily used by the UNCLOS and should not be confused with the military term "Sea Lines of Communication" (SLOC), although the meaning is quite similar and refers to supply routes in the maritime environment. MSO can be an appropriate means to secure SLOC against terrorist threats or other criminal acts, as long as the operation complies with the law. Again, it is vital that all coastal states are involved and give their consent. The only way a denial can be overruled is through a United Nations Security Council Resolution.

Establishing maritime zones

Generally speaking, there are two kinds of zones: safety and security zones. For MSO, only the latter is of interest. Security zones are areas comprised of water, air or land, or a combination of all, to which access is limited for the purposes of the mission, i.e. the mandate. Zones can help establish an embargo and the control of SLOC or any other desired areas. Note that zones are not a means to create a legal vacuum. There is no difference between rights and obligations inside and outside such zone. However, a security or warning zone can be used to create a situational awareness for all participants and make clear that the area is being monitored.

Non-Combatant³⁷ Evacuation Operations (NEO) and hostage rescue

Although NEO, an evacuation method for disaster relief, and the rescue of hostages differ in practice, the basic legal considerations are quite similar, and therefore their

legal assessment can be made in one chapter. Both can be carried out as an MSO, i.e. can take place in a maritime environment.

The rescue of non-combatants or hostages, using military force up to deadly force, has always been a very controversial issue. The question whether a state is to rescue nationals seems not to be the primary problem. In fact it is seen as an absolute obligation, though the legal grounds lack consensus. As mentioned above, the state in whose jurisdiction the criminal act occurs is obliged to fight it in the first place. If that state is unwilling or unable to curb such a crime, then the state to which the victims belong may become involved. This has to be stated very carefully, because the question of who may become involved, and when, is highly controversial.

For the purposes of this paper, however, there is no need to find a clear-cut answer to this question, since states will always justify their rescue operations by whatever arguments they choose. Most of them rely on their inherent right of self-defense acknowledged by Article 51 of the UN Charter, although its applicability is controversial and is more of an academic question. In this case, however, an imminent threat against or an armed attack on the individual is assimilated to an imminent threat against or an armed attack on the state.

In the case of Article 51 of the UN Charter as a legal basis for the right to use military force in order to end the threat or attack, the question of criminality under domestic law becomes irrelevant, because the assessment of an armed attack or imminent threat is solely left to the affected, i.e. the operating state. Article 51 of the UN Charter, in its nature, belongs to the so-called *ius ad bellum*, the right to use military force once an attack or threat has been established.

Apart from Article 51 of the UN Charter, there can be another legal basis, and that is the mandate given. If the mandate demands that security be established by "all necessary means", it can be said that this clearly includes the rescue of individuals in any situation whatever, as long as the situation occurs within the mandated area.

Detainees

The question of how to handle detainees is an ongoing and very difficult process. Again, the coastal state is held primarily responsible for their treatment and prosecution. Practice shows, however, that this aspect of the legal framework may be considered unsatisfactory – especially when the coastal state happens to be a failed state or close to this, and therefore other ways must be found to handle detainees, be they pirates, hostage-takers, both, or criminals belonging to another category.

According to international legal standards, most of which have been transferred from the catalogues of human rights law, the issues of appropriate, i.e. humane

³⁵ Transitional National Government (of Somalia).

³⁶ Memorandum of Understanding.

³⁷ Non-combatants are civilians such as tourists, embassy personnel, NGO workers etc.

treatment and guaranteed procedural rights become relevant, especially when handing detainees over to third parties. If these internationally recognized standards cannot be guaranteed, the detainees may not be handed over. The detainees can be held either for a criminal act under the law of the coastal state (operating state assisting) or for a criminal act under the law of the operating state, or for having committed an act of piracy according to UNCLOS. Moreover, detainees may be handed over to third states in order to prosecute them there, given that the standards mentioned can be upheld.

Another way of detaining individuals responsible for having committed such a crime, while at the same time upholding international legal standards, could be through the establishment of an international tribunal, primarily under the auspices of the United Nations, or else through prosecution before an existing international court. That said, from the legal point of view the tools for a prosecution following well-known standards are already available.

4. Legal checklist

It can be a useful step to break all information down to a list of concise questions so that, depending on the concrete circumstances, a rapid legal assessment of the situation can be made:

- What is the threat?
- Where is it?
- Is it moving or stable?
- Which nations, including passengers and crew, are involved?
- What kind of operation is being taken into consideration?
- Where exactly will the operation take place (vessel, oil rig, port, TTW, EEZ, high seas etc.)?
- Whose territorial integrity will be affected (coastal state, flag state)?
- Can that state carry out the operation?
- If so, do we need an agreement in order to assist?
- Is the coastal state party to any applicable conventions, e.g. SUA etc.?
- If the responsible state is unwilling or unable, can we carry out the operation?
- On what legal basis can we do that?
- Do we need the ship's master's consent for boarding operations?
- When the ship's master's consent is denied, do we need the flag state's consent for boarding operations?
- When both are denied, what does the mandate say (enforcement rights)? -
- What happens in the case of detainees?

5. Scenarios

In order to provide a basic survey of the issues that arise when dealing with MSO, this chapter offers short scenarios aimed at creating a situational awareness. Again, the

intention is to ensure a very basic understanding. Note, in this context, that sometimes there can be more than one clear-cut legal answer to a question.

Scenario A:

You are the government of state A. A merchant vessel, belonging to the United Nations World Food Programme (WFP) and flying your flag, is transiting the EEZ of state B in the southern hemisphere. Suddenly, two speedboats approach and armed individuals try to board your ship. On what legal grounds can your navy intervene?

Answer: The legal basis is Art. 51 of the UN Charter, granting the right of self-defense by taking proportionate measures in order to end the attack.

Scenario B:

You are the government of state A. One of your warships is transiting the EEZ of state B. There is an oil rig 20nm away, attached to the continental shelf, which has been hijacked by a terrorist group and the oil workers are being held hostage. A considerable number of them are citizens of A. Since the Ministry of Defense has informed you that your warship has a team of experts embarked, with special forces among them, you consider freeing all hostages. Which legal issues do you have to take into account?

Answer: The legal basis for your actions is Article 51 of the UN Charter. Note that, since hijacking is a maritime crime, State B can be held responsible for taking counter-measures in the first place, but Article 51 of the UN Charter makes no reference to domestic law. In practice, however, it would be most advisable to contact the local authorities in order to discuss such an operation, including any third states to which other oil workers belong.

Scenario C:

You are the government of state A. State B requests UN help to embark armed forces on B's merchant vessels while sailing the dangerous waters of state C. A United Nations Security Council Resolution is issued, authorizing the operation for your troops. How can you make sure that your troops, once embarked, will not be held responsible for the use of force up to deadly force against criminals, either under the law of B or under the law of C?

Answer: Through bi- or multilateral agreements on the operation, including a non-warranty clause.

Scenario D:

You are state A. Two of your warships are transiting through the Seychelles when they notice three suspect vessels anchoring near the coast. A satellite picture assures the commanding officers that these vessels belong to a known criminal group which has committed maritime crime in the past. Before taking further steps, the warships contact the local authorities in Victoria, who refuse to give their consent to MIO. What, then, would be the appropriate reaction for your ships?

Answer: Not to intervene at all: without the permission of the local authorities, intervention would violate domestic and international law.

Scenario E:

The same as D, except that you are acting under a United Nations Security Council Resolution, which explicitly states that allied naval forces may fight maritime crime in the area of maritime operations (AMO) “with all necessary means”. The AMO covers Somali and Kenyan TTW and EEZ, and the Seychelles. Nevertheless, the authorities in Victoria refuse to authorize any operation by your troops. What, then, would be the appropriate reaction for your ships?

Answer: The operation can take place, because it is authorized by the United Nations Security Council Resolution, which overrules the local instructions. In practice, such a scenario is very unlikely, but it should be noted that from the legal point of view it is not impossible.

6. Conclusion

It becomes clear that a number of legal issues have to be taken into account when dealing with MSO. First and foremost, in a maritime environment the core question is: where exactly does the operation take place?³⁸ Securing SLOCs, TTW or the EEZ will be a relatively stable operation, requiring the naval forces to monitor a specific area. The same applies to platforms attached to the continental shelf. On the other hand, when dealing with a single moving vehicle, e.g. a hijacked vessel or a vessel carrying dangerous goods related to illicit trafficking, the circumstances are likely to change. Third states can become responsible even if they have not been affected before at all. Whenever a coastal state or a flag state is involved, which is naturally the case in most MSO, it is vital to raise the question as to which position that state chooses and whether it is willing or able to support the operating forces.

The legal world and its catalogues remain complex and controversial. This is not surprising. Nevertheless, it is an

open secret that at the end of the day it is the political will that sets the course for what lawyers call customary law, which is none other than regular MSO state practice, based on an interpretation and understanding of the applicable law. If we play the devil’s advocate, however, it is possible to say that the legal gaps identified, often criticized by the academic world, are in fact vital for practitioners, because MSO are simply too dynamic to be restricted to a single set of rules. Instead, their legal regime happens to be a conglomerate of national and international law, which has mainly arisen from basic law of the sea and international law enforcement catalogues.

7. List of Abbreviations

- AMO: Area of Maritime Operations
- EEZ: Exclusive Economic Zone
- IMO: International Maritime Organization
- ITLOS: International Tribunal for the Law of the Sea
- LEDET: Law Enforcement Detachment
- LOAC: Law of Armed Conflict
- MIO: Maritime Interdiction/Interception Operation
- MSO: Maritime Security Operations
- NAC: North Atlantic Council
- NEO: Noncombatant Evacuation Operation
- PSI: Proliferation Security Initiative
- SLOC: Sea Lanes of Communication
- SOLAS: International Ship and Port Facility Security Code
- SUA: Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation/of Fixed Platforms Located on the Continental Shelf
- TTW: Territorial Waters
- UNCLOS: United Nations Convention on the Law of the Sea
- UNSCRES: United Nations Security Council Resolution
- WFP: United Nations World Food Programme

³⁸ Different views on precisely this issue led to the seizure of Royal Navy soldiers belonging to HMS Cornwall by Iranian authorities in 2007 in the Arabian Gulf. Iran claimed that the Royal Navy was operating in its TTW, whilst the RN stated that this was not the case.