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XIII

The Legality of Maritime Interception/ Interdiction Operations Within the Framework of Operation ENDURING FREEDOM

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Object and Purpose of Operation ENDURING FREEDOM

While Operation ENDURING FREEDOM covers a wide set of measures against international terrorism, the naval forces deployed to the Horn of Africa and in the sea areas around the Arab peninsula have a clear task to fulfil. Their assignment covers inter alia

- control of sea traffic in the area;
- guaranteeing the freedom and safety of navigation;
- protection of endangered vessels;
- disruption of supplies for terrorist groups, especially by preventing others from supporting and financing international terrorism;
- elimination of terrorist command and training facilities; and
- capture of international terrorists for the purpose of prosecuting them.

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The tasks presuppose a sound knowledge of the geography and of those present in the sea area concerned. The naval units, therefore, have to precisely and comprehensively monitor sea and air traffic. Intelligence collection and surveillance by means of the electronic and other equipment on board such warships does not create any significant legal problems, since it does not interfere with the rights of other states. If such equipment is used during passage in the territorial sea of another state, in principle, the prohibitions found in Article 19 of the UN Convention on the Law of the Sea (hereinafter LOS Convention) must be observed.[2] Activities "prejudicial to the peace, order or security of the coastal state" are, however, to some extent modified by the inherent right of self-defense found in both Article 51 of the UN Charter and customary international law. As soon as there is reasonable grounds to believe a concrete threat against the vessel or its personnel exists, the warships are entitled to take all measures necessary to neutralize or eliminate the threat.

2. Article 19 of the UN Convention on the Law of the Sea provides that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." Passage prejudicial to peace, good order or security of the coastal state includes a foreign ship engaging in any of the following activities:

> (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
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> (b) any exercise or practice with weapons of any kind;
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> (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
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> (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
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> (e) the launching, landing or taking on board of any aircraft;
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> (f) the launching, landing or taking on board of any military device;
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> (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
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> (h) any act of wilful and serious pollution contrary to this Convention;
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> (i) any fishing activities;
>
> (j) the carrying out of research or survey activities;
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> (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
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> (l) any other activity not having a direct bearing on passage.

See U.N. Convention on Law of the Sea, U.N. Doc. A/CONF.62/122 (1982), art. 19, *reprinted in* BARRY CARTER AND PHILLIP TRIMBLE, INTERNATIONAL LAW SELECTED DOCUMENTS (2001), at 553 [hereinafter INTERNATIONAL LAW SELECTED DOCUMENTS].

Within a foreign territorial sea, replenishment at sea would be contrary to Article 19(g) of the LOS Convention, unless the coastal state expressly authorized it. All other activities, not listed in Article 19 UNCLOS are permitted. Importantly, coastal states may not require warships to notify them of their passage in advance or to make that passage subject to prior consent.[3] This, *a fortiori*, holds true for transit passage through international straits, such as in the Strait of Bab el Mandeb.

The purpose of this article is not to analyze each of these issues, however. Instead, the emphasis of this article is on the basis for, and legality of, maritime interception/interdiction operations.

Legality of Maritime Interception/Interdiction Operations

Given that flag states exercise exclusive jurisdiction over "their" vessels in sea areas beyond the territorial sea of third states, the question arises as to whether coalition members in the Global War on Terror may interfere with such vessels if the flag state has not consented or has expressly objected. Moreover, even if the flag state is obliged to tolerate maritime interception/interdiction operations (MIO) against its shipping, the applicable legal regime must be understood for such operations. This is particularly true today as although MIO is currently being conducted by the United States and coalition members in Operation ENDURING FREEDOM, the UN Security Council has neither imposed such an obligation on flag states nor expressly authorized the United States and its coalition members to conduct such operations.

Legal Basis For MIO

What then is the legal basis for the United States and coalition members conduct of MIO in support of Operation ENDURING FREEDOM? It must first be emphasized that international law permits interference with foreign ships, their cargo and their crew/passengers only when:

3. In their joint statement agreed upon in Jackson Hole on 23 September 1989 the former Soviet Union and the United States emphasized that "the provisions of the 1982 United Nations Convention on the Law of the Sea, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interests of all States." *See* 89 DEPT. STATE BULL. 25f. (December 1989), *reprinted in* 14 LAW OF THE SEA BULLETIN, at 12 (December 1989).

- a treaty rule exists that expressly provides for interference such as in the case of piracy[4] or severe pollution of the marine environment,[5] or
- the interfering state finds itself in a special situation, i.e., in an international armed conflict. [6]

In the latter situation the parties of the conflict are not limited to visit, search, and capture of only enemy vessels. Rather, according to the law of maritime neutrality,[7] each state party may also take measures against vessels flying the flags of third/neutral states to include visit and search, capture, and in exceptional circumstances, even to the destruction of those vessels.[8] As long as these measures conform with the law of naval warfare and with the law of maritime neutrality, flag states must tolerate them. The reason for this requirement stems from the merging in certain aspects of the law of peace and the law of war. Given the existence of the UN Charter, the following considerations are now decisive:

In the absence of a Security Council resolution affirmatively identifying the aggressor state, it remains essential, in view of the continuing object and purpose of international law to secure international peace and security, to prevent the escalation of an ongoing international armed conflict. This purpose

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4. *See* LOS Convention, *supra* note 2, at art. 105, *reprinted in* INTERNATIONAL LAW SELECTED DOCUMENTS at 582. Note, however, that the customary definition of piracy is broader than that agreed upon in the LOS Convention. *See* A.P. Rubin, *The Law of Piracy*, 63 INT'L L. STUD 305, 337 (1988). For measures that may be taken against pirates, see S.P. Menefee, *Foreign Naval Intervention in Cases of Piracy: Problems and Strategies*, 14 INT'L J. MARINE AND COASTAL L. 353 (1999).

5. *See, e.g.*, LOS Convention, *supra* note 2, at art. 220, para. 6, *reprinted in* INTERNATIONAL LAW SELECTED DOCUMENTS at 621. *See also,* Myron H. Nordquist, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY, Vol. IV, at 301 (Dordrecht et al. eds., 1991); T. Treves, *Intervention en haute-mer et navires étrangers*, XLI ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 651 (1995).

6. For the measures that may be taken against (neutral) merchant vessels see SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, paras. 59, 67, 118, 146 (Cambridge Univ. Press, 1995) [hereinafter SAN REMO MANUAL]. *See also,* W. HEINTSCHEL v. HEINEGG, SEEKRIEGSRECHT UND NEUTRALITÄT IM SEEKRIEG, at 363, 483, 567, 582 (Berlin 1995) [hereinafter SEEKRIEGSRECHT UND NEUTRALITÄT IM SEEKRIEG].

7. The exact status of the traditional law of neutrality is far from clear. On the one hand, there are overlaps with political concepts of neutrality. On the other hand, the scope of applicability (only in a "war" *strictu sensu?*) is highly disputed. Still, with regard to the maritime aspects of the law of neutrality some rules and principles have developed that are met by wide agreement. *See, e.g.,* Helsinki Principles on the Law of Maritime Neutrality, *in* 68 INT'L L. ASSOC. REP. 497 (1998) [hereinafter Helsinki Principles].

8. *Cf.* SAN REMO MANUAL, *supra* note 6, at paras. 67, 118, 146. *See also,* SEEKRIEGSRECHT UND NEUTRALITÄT IM SEEKRIEG, *supra* note 6, at 567, 582.

includes limiting and preventing the involvement of third states and their nationals. This indeed is the main objective of the law of maritime neutrality. On the one hand, according to that law, the parties to the conflict are, in principle, obliged not to interfere with neutral vessels and aircraft. On the other hand, neutral vessels and aircraft are prohibited from contributing to the war-fighting efforts of one party to the disadvantage of the other party to the conflict.[9] If neutral vessels and aircraft violate these rules designed to serve their protection, they lose their protected status.[10]

According to the law of maritime neutrality, the parties to the conflict are entitled to monitor neutral shipping and neutral aircraft in order to verify if they are abiding by the prohibitions on non-neutral service. Flag states must tolerate these measures[11] and possess very limited means to prevent the parties to the conflict from interference.

Importantly, the foregoing principles only apply in international armed conflicts. In cases of inner disturbances and of internal armed conflicts the parties may not, beyond their own territorial sea, interfere with foreign shipping and aviation, unless the measures taken are in conformity with the law of the sea or with other rules of international law.[12]

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9. *See generally* Chap. 7, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (A. R. Thomas and James Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies) [hereinafter ANNOTATED SUPPLEMENT].

10. In this context, two situations must be distinguished: Neutral vessels actively participating in the hostilities or being integrated into the enemy's command, control and information system are legitimate military objectives in the sense of Article 52, para. 2 of Additional Protocol I and the corresponding customary law. *See* 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Articles 52(2), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 1 [hereinafter GP I], *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts and Richard Guelff eds., 3rd ed., 2000), at 419 [hereinafter DOCUMENTS ON THE LAWS OF WAR]. Thus, such vessels may be attacked and sunk without prior warning. If, however, neutral merchant vessels merely assist the enemy, by, e.g., transporting contraband, they may only be captured and, if further preconditions are fulfilled, seized according to the law of prize. If the latter vessels resist capture they may also be considered legitimate military objectives. *See* ANNOTATED SUPPLEMENT, *supra* note 9, at para. 7.10.

11. Such measures include the stopping, visit, search and diversion (for the purpose of search) of merchant vessels. *See* SAN REMO MANUAL, *supra* note 6, at para 118; Helsinki Principles, *supra* note 7 at 5.2.1.

12. Hence, the legality of measures taken by France during the Algerian crisis is at least doubtful. For an evaluation see L. Lucchini, *Actes de contrainte exercés par la France en Haute Mer au cours des opérations en Algérie*, XII ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL at 803–822 (1966).

The present situation of the war on terrorism can be characterized as neither an internal nor an international armed conflict *strictu sensu*. An international armed conflict presupposes that at least two states are involved and though the United States has been (and most probably is and will be) the victim of acts of international (transborder) terrorism that can be equated to an armed attack in the sense of Article 51 of the UN Charter, there (still) is no other state to whom these acts can be attributed. While it might have been possible to attribute certain terrorist activities to Afghanistan or the Taliban regime in the past, in view of the changed circumstances, this is no longer possible. Therefore, MIO directed against the shipping of third states seem to be prohibited if it is not based upon the consent of the flag state or if implemented against the express will of the flag state. Clearly, this is true as there is no treaty rule expressly providing for MIO.

Analogizing MIO to anti-piracy measures does not help either. If international terrorists could be considered pirates in the sense of the LOS Convention, every state would be entitled to take measures against them in sea areas beyond the sovereignty of their state. However, this would presuppose that terrorists have taken control over a respective ship, a rather rare scenario. More importantly, however, is the absence of such an established analogy in international law—insofar as there exist special rules explicitly dealing with international terrorism and it is impossible to detect an *opinio juris* of states that the rules on piracy are applicable to acts of international terrorism.[13]

However, such tortured constructions are not necessary in concluding that current MIO performed by the United States and its coalition partners in and around the Persian Gulf states is legal. Recall that by Resolution 1368 the Security Council:

> calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.[14]

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13. An example of how that could be achieved is the 1937 Nyon Agreement—by which certain attacks by unidentified submarines were considered acts of piracy. *See* Nyon Agreement, 181 L.N.T.S. 137-40, 151, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (Dietrich Schindler and Jiri Toman eds., 3rd ed. 1988) at 887, 889. For an analysis of the Nyon Agreements, *see* L.F.E. Goldie, *Commentary on the 1937 Nyon Agreements*, *in* THE LAW OF NAVAL WARFARE. A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES, 489 (N. Ronzitti ed., 1988).
14. S. C. Res. 1368, U.N. SCOR, 56th Sess., U.N. Doc. S/1368/(2001).

In Resolution 1373 the Security Council is more precise by deciding that all states shall, inter alia,

> [p]rohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons; . . .
>
> (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
>
> (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
>
> (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
>
> (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
>
> (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; . . .
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> (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents; . . .[15]

This implies, for example, that states may not (knowingly) allow their nationals or ships and aircraft to transport international terrorists and goods that are designed to further acts of international terrorism. If they obtain knowledge of such

15. S. C. Res. 1373, para. 1d, 2a, 2e, U.N. SCOR, 56th Sess., U.N. Doc. S/1373/(2001).

activities they must take the necessary preventive or suppressive measures. If they willingly abstain from such measures they are not only in breach of their obligations under the UN Charter but may also become legitimate targets of self-defense measures if abstention is equated to permitting the activities concerned.

But even if such private acts may not be attributed to another state or if the flag state is unable to take the necessary measures according to Resolution 1373, abstaining from action would still have to be considered a breach of international law. In such cases third states are entitled, in lieu of the state with primary responsibility for acting, to take the necessary measures to fulfill the requirements of Resolution 1373. It would be incompatible with Resolution 1373 to permit a flag state to object to MIO by claiming the right of the sovereignty or the lack of explicit consent. As the Security Council has made abundantly clear, international terrorism is a threat to international peace and security that must be eliminated.[16] Accordingly, if a vessel is on the high sea and is suspected of carrying international terrorists or weapons destined to international terrorists it is not necessary to inform the flag state in advance because requiring such notice would jeopardize the effectiveness of the international efforts against international terrorism in an intolerable way.

To this point, this article has dealt with situations in which all participants have knowledge of the presence of either terrorists or certain cargo on board a vessel or aircraft. The question remains whether measures seeking simply to verify whether there is some involvement in international terrorism can also be considered as in accordance with international law in cases where there is no state counterpart. Recall in this context that vessels and aircraft regularly operate at great distance from the territories of their respective flag states. National authorities are generally ignorant of the route, of the cargo and of the identity of passengers on these vessels and aircraft. Even if they are in possession of this information, the information may be inaccurate or false. Only in exceptional cases will the national authorities be in a position to control or otherwise verify the veracity of a described route or of a passenger or cargo manifest. If, however, a vessel with international terrorists on board reaches its point of destination, further attacks like those seen on September 11th could be expected. States other than the flag state are therefore entitled to prevent this as early as possible. This again is only feasible if the vehicles in question can be controlled. Hence, the flag state must tolerate such control measures because they merely serve the purpose of

16. *Id.* at preamble. *See also* S. C. Res. U.N. SCOR, 55th Sess., U.N. Doc. S/1269/(1999) in which the Security Council, inter alia, condemns "all acts of terrorism, irrespective of motive, wherever and by whomever committed."

countering international terrorism as effectively as necessary. If such control reveals that the vehicle in question is incorporated into the network of international terrorism or is otherwise assisting it, all further adequate measures, such as capture, may be taken.

As far as the transport of weapons to Somalia is concerned a special feature ensues from Resolution 1356.[17] In paragraph 1 of that resolution, the Security Council "reiterates to all States their obligation to comply with the measures imposed by Resolution 733 (1992), and urges each State to take the necessary steps to ensure full implementation and enforcement of the arms embargo." Although the second part of this paragraph speaks to measures states are obliged to take in the sphere of their national jurisdiction, it nonetheless follows from the first part that Resolution 733[18] continues to be fully in force and applicable. Paragraph 5 of this resolution states:

> that all States shall, for the purpose of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise.[19]

One means of implementing this weapons embargo is through the national measures provided for in paragraph 5 of Resolution 733. After all, without such national measures an arms embargo would not make much sense. Still, in order to fully comply with Resolution 733, states need not merely confine themselves to national measures. According to Resolution 733 they are to implement a "complete" and "general" embargo. Hence, embargo measures must not only cover all arms, weapons and the like (complete), but must also be directed against all actual and potential suppliers (general). If a state complies with this obligation by controlling the sea and air traffic to Somalia, it is allowed to stop and search any vessel or aircraft that is reasonably suspected of being engaged in the transport of arms because only by such control can a "general" embargo be effectively implemented. A feasible understanding of Resolution 733, given the wide meaning of "implement" then, authorizes states to conduct MIO for weapons destined for Somalia. Accordingly, the United States and its coalition partners are not restricted only to measures against vehicles flying their own flags or bearing their own markings.

17. S. C. Res. 1356, U.N. SCOR, 56th Sess., U.N. Doc. S/1356/(2001).
18. *See* S. C. Res. 733, U.N. SCOR, 47th Sess., U.N. Doc. S/733/(1992).
19. *Id.* at para. 5.

Some commentators may not be inclined to subscribe to such an interpretation of Resolutions 1356 (in connection with Resolution 733) and 1373 as the Security Council has neither authorized MIO explicitly nor obligated member states to tolerate such interference with their merchant shipping and civil aviation. However, even if this position is not shared by the rest of the world, MIO by the United States and its coalition partners would continue to be legal provided it was done as part of the exercise of these states' rights to individual and collective self-defense.

Clearly, the UN Security Council, by expressly reaffirming the right of self-defense in the context of the terrorist attacks on the United States in its Resolutions 1368 and 1373, has acknowledged the so-called Anglo-American concept of self-defense,[20] i.e., a broad interpretation of Article 51 of the UN Charter and of the customary inherent right of self-defense. In his press statement of 8 October 2001 the President of the Security Council, Richard Ryan, declared:

> [t]he members of the Security Council took note of the letters that the representatives of the United States and of the United Kingdom sent yesterday to the President of the Security Council, in accordance with Article 51 of the United Nations Charter, in which they state that the action was taken in accordance with the inherent right of individual and collective self-defense following the terrorist attacks in the United States of 11 September 2001.
>
> The permanent representatives made it clear that the military action that commenced on 7 October was taken in self-defense and directed at terrorists and those who harboured them. They stressed that every effort was being made to avoid civilian casualties, and that the action was in no way a strike against the people of Afghanistan, Islam or the Muslim world.
>
> The members of the Council were appreciative of the presentation made by the United States and the United Kingdom.[21]

Hence, self-defense is permitted not only in situations where a state, either with its armed forces or in some other way attributable to it, attacks another state but also where armed force is used against a state from outside its borders even when that use of force cannot be attributed to another state.[22] This situation

20. *Cf.* Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 PROC AM. SOC. INT'L L. 297, at 305 (1987).
21. Ambassador to the UN Richard Ryan, President of the Security Council, Press Statement (Oct. 8, 2001).
22. The same position is taken by T. Bruha & M. Bortfeld, *Terrorismus und Selbstverteidigung*, 5 VEREINTE NATIONEN, 161, at 165 (2001).

can be labelled a self-defense situation in a material sense only. Although this interpretation might exceed the wording of Article 51 UN Charter, it does not exceed the inherent, i.e., customary, right of self-defense.

This is confirmed by the reactions of the international community in the aftermath of the September 11th attacks. On 12 September the North Atlantic Council stated:

> [t]he Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.[23]

Moreover, the Organization for Security and Cooperation in Europe (OSCE)[24] as well as the majority of states obviously consider the United States as the state most entitled, according to the right of self-defense, to combat international terrorism by all necessary means.

Resolutions 1368 and 1373 must be understood in this broad sense. In the wake of September 11th, the Security Council has not by chance twice reaffirmed the right of self-defense. Nor has it pursued some kind of stockpiling policy in case that in some distant or near future the direct involvement of a foreign state can be proved. The express reaffirmation of the right of self-defense is contingent on the character of the terrorist attacks themselves. This is not based on the amount of damage done or lives lost, but instead because the attacks did not originate from US territory and could be carried out only due to the transnational character of the terrorist network. This network not only operates world-wide but it is also able to evade control by the authorities of the state in which it resides.

It can not be excluded that in some cases, state authorities acquiesce in the planning, organizing and execution of terrorist acts. In view of the special character of the al Qaeda network, it was not necessary for the Security Council to identify a state against which self-defense measures could be taken, for this form of international terrorism is far different from the context of "state-sponsored" terrorism or of a "classical" armed attack. This does not mean that

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23. NATO Press Release 124 (Sep. 12, 2001), *available at* http://www.nato.int/docu/pr/2001/p01-124e.htm (Nov. 21, 2002).

24. OSCE Ministerial Council Decision No. 1, *Combatting Terrorism* (MC(9).DEC/1, Dec. 4, 2001), *available at* http://www.osce.org/events/mc/romania2001/documents/files/mc_1007474752_o.pdf (Nov. 21, 2002).

criteria used in identifying and evaluating these are no longer of relevance. Armed attacks and sheltering terrorists may be very different and therefore may not necessarily trigger the right to self-defense.[25] However, there are clearly instances where acts of international terrorism can be attributed to another state.

Although no state currently exists against which the terrorist acts can be attributed and that therefore could be the legitimate object of measures taken in self-defense, the potential target states of international terrorism are not obliged to adopt a wait-and-see policy until there is sufficient evidence of the (direct) involvement of a foreign state or even until further terrorist attacks occur. To the contrary, the United States and its coalition partners are entitled to take all measures reasonably necessary to prevent such attacks as early and as effectively as possible. Such measures do not merely include the capture of international terrorists and of weapons or other goods destined for them. The United States and coalition partners may also control international shipping and aviation in order to verify the innocent status of such shipping and aviation. Of course, MIO are governed by the principle of proportionality.[26] Accordingly, they can be based upon the right of self-defense only if there are sufficient intelligence indicators of the integration of the affected vehicles into conspiracies to commit, or acts of, international terrorism. Indiscriminate implementation and enforcement of MIO covering vast sea areas would be disproportionate and not justified by the right of self-defense. If limitations such as these are observed, affected states are obligated to tolerate these measures. Moreover, there is no need for prior approval or consent of third states as it is neither feasible nor compatible with the right of self-defense. Were this the case, the inherent right to self-defense would be subjugated to the will of third states. Article 51 of the UN Charter provides no basis for such an understanding. Interestingly, no state has yet objected to the legality of MIO in the framework of Operation ENDURING FREEDOM.

The validity of the above findings is confirmed by the parallels between the given situation and an international armed conflict at sea. In such a conflict it is irrelevant whether one of the parties violated the jus ad bellum.[27] Instead, each

25. *See* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), 1986 I.C.J. 14, at 104 (1986), *available at* http://www.icj-cij.org/icjwww/icases/inus/inusframe.htm (Nov. 21, 2002) [hereinafter Nicaragua Case].

26. For the validity of the principle of proportionality in the context of self-defense and for further references, see A. Randelzhofer, *Article 51*, CHARTA DER VEREINTEN NATIONEN – KOMMENTAR, at note 37 (B. Simma ed., 1991).

27. *See* SEEKRIEGSRECHT UND NEUTRALITÄT IM SEEKRIEG, *supra* note 6, at 86.

party is entitled to verify by appropriate control measures, like visit and search, whether neutral merchant vessels and civil aircraft are contributing to the respective enemy's war-fighting efforts.[28] According to the law of maritime neutrality, neutral states are obligated to tolerate these measures in order to prevent an escalation of the conflict and in order to meet the interests of the parties to the conflict.[29] This also holds true if further measures are taken, such as when a neutral merchant vessel is incorporated into the enemy's intelligence system.[30] The flag state of the merchant vessel has no right to interfere or to otherwise prevent a belligerent from capturing or even sinking the vessel.

While the current situation differs from an international armed conflict insofar as there is no "enemy state," this is not sufficient grounds to remove the duty of third states to tolerate interference with their merchant shipping and civil aviation. In an international armed conflict that obligation exists for the mere reason that the parties to the conflict have decided to take such measures. As long as the Security Council has not authoritatively identified one of the belligerents as the aggressor, the duty of toleration persists. *A fortiori* this must hold true if the Security Council has expressly affirmed the existence of a self-defense situation even though there is no state to which the attacks can be attributed.

For these reasons the United States and its coalition partners are entitled to establish *maritime interdiction areas*, i.e., to restrict access to certain sea areas for the shipping and aviation of third states.[31] These areas should not be confused with safety zones[32] because they are not primarily designed to serve the safety of

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28. *See* SAN REMO MANUAL, *supra* note 5, para. 118; Helsinki Principles, *supra* note 6, at 5.2.1.; G.P. POLITAKIS, MODERN ASPECTS OF THE LAWS OF NAVAL WARFARE AND MARITIME NEUTRALITY, at 529 (1998) [hereinafter MODERN ASPECTS].

29. SAN REMO MANUAL, *supra* note 5, para. 118; Helsinki Principles, *supra* note 6, at 5.2.1.; MODERN ASPECTS, *supra* note 28, at 529.

30. *See* SAN REMO MANUAL, *supra* note 6, para. 67; SEEKRIEGSRECHT UND NEUTRALITÄT IM SEEKRIEG, *supra* note 6, at 5.2.1.

31. For the equivalent of such zones in the law of naval warfare see SAN REMO MANUAL, *supra* note 5, para. 105.

32. Such safety zones are sometimes labelled "naval vessel protection zones." *See, e.g.,* Regulated Navigation Areas and Limited Access Areas, 33 C.F.R. § 165 (2002). *See also* ANNOTATED SUPPLEMENT, *supra* note 9, at 7.8, which provides that:

> [w]ithin the immediate area or vicinity of naval operations, a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The immediate area or vicinity of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating.

The legality of such safety zones is undisputed. *See,* inter alia, D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER at 168 (1975); G.P. POLITAKIS, MODERN ASPECTS, *supra* note 26, at 104.

a warship or unit but to instead facilitate the identification of vessels and aircraft or to prevent international terrorists or weapons destined for them from getting access to the area concerned. Hence, the legal basis of maritime interdiction areas is to be found in Resolution 1373 and in the right of individual and collective self-defense. Note also that according to customary international law they are entitled to temporarily make exclusive use of restricted sea areas for military and security purposes.[33] However, it follows from the principle of proportionality that the exact coordinates of the sea areas affected as well as the measures to be taken there have to be published in advance—e.g., by a Notice to Mariners/Airmen. Moreover, foreign ships and aircraft may only be prohibited from entering the area as long as doubts persist about their identity, their cargo, their crews, and their passengers. If they refuse to give the relevant information or if they continue their journey regardless of a prior warning all necessary measures may be taken against them.

Legal Restrictions

The United States and its coalition partners are limited by more than simply the principle of proportionality however. If the jus in bello and the law of maritime neutrality are understood as an order of necessity, international law provides for situations in which two or more states consider themselves unable to adhere to the prohibition on the use of force,[34] then the legal restrictions laid down in that order of necessity, *a fortiori*, must be observed in situations that do

33. *Cf.* J. Astley & Michael Schmitt, *The Law of the Sea and Naval Operations*, 42 AF. L. REV. 119 (1997); Ch. E. Pirtle, *Military Uses of Ocean Space and the Law of the Sea in the New Millennium*, 31 OCEAN DEVELOPMENT & INT'L L. 7 (2000); R. Wolfrum, *Military Activities on the High Seas: What are the Impacts of the U.N. Convention on the Law of the Sea?, in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENIUM at 501 (Michael Schmitt & Leslie Green eds., 1998) (Vol. 71, US Naval War College International Law Studies). It may be added that the list of high seas freedoms in Article 87, paragraph 1 of the LOS Convention is not exhaustive. Accordingly, these freedoms also include the use of the high seas and of EEZ areas for military purposes. Moreover it is clear from the second sentence of that paragraph that freedom of the high seas is not only "exercised under the conditions laid down by this Convention" but also "by other rules of international law." *See* LOS Convention, *supra* note 4, at art. 87. The military uses of high seas areas (including EEZ areas) is governed by customary international law, by the law of naval warfare and by the law of maritime neutrality. Accordingly, and since military exercises traditionally have been conducted in those sea areas, such uses are generally acknowledged to be part of customary international law.

34. For this characterization see W. Heintschel v. Heinegg, *The Current State of International Prize Law*, INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT, 5–34 (H.H.G. Post ed., 1994).

not yet amount to an international armed conflict *strictu sensu*.[35] Hence, when conducting MIO, states are obliged to comply with the international minimum legal requirements of the law of naval warfare and of the law of maritime neutrality.

To begin with, they have to distinguish between state vessels and aircraft on the one hand and other vehicles on the other hand. State vessels and aircraft enjoy sovereign immunity and may not be interfered with unless they pose an imminent threat. That immunity is extended to merchant vessels travelling under the convoy of a warship. Therefore these merchant vessels are, in principle, exempt from the exercise of the right of visit and search.[36] However, the commander of the accompanying warship is obliged to provide all information as to the character of the merchant vessel and its cargo.[37]

If not travelling under convoy, foreign merchant vessels may be required to provide all information necessary to verify their identity, their destination, their route, their crews, their passengers and their cargo. If they refuse to provide this information, or if they otherwise try to evade identification, all measures necessary to enforce the duty of identification and information may be taken against them. Here again, the principle of proportionality applies. Accordingly, the use of armed force is admissible only as an *ultima ratio* measure; weapons may only be employed if there are no other means to stop the vessel or to prevent it from escape. Regularly, a warning shot fired away from the vessel will suffice. If not, it may be forced to stop by a shot into the rudder.

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35. The International Court of Justice, in the Corfu Channel and in the Nicaragua Case, referred to Hague Convention VIII of 1907 although in both cases there existed no international armed conflict. *See* Corfu Channel (Merits) (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9, 1949) [hereinafter Corfu Channel]; Nicaragua Case, *supra* note 25 at 112. *See also* Convention Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332 [hereinafter Hague VIII]. The principles laid down in Hague VIII were characterized by the ICJ as "certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war." *See* Corfu Channel at 22; Nicaragua Case at 112. Hence, the ICJ also seems to take the position that the rules and principles of the jus in bello mark the final limits of what is tolerable under international law.

36. ANNOTATED HANDBOOK, *supra* note 9, para. 7.6.; FEDERAL MINISTRY OF DEFENCE OF THE FEDERAL REPUBLIC OF GERMANY, HUMANITARIAN LAW IN ARMED CONFLICTS – MANUAL (ZDv 15/2), para. 1141 (Bonn, 1993); R. W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA, at 334 (1957); M. DONNER, DIE NEUTRALE HANDELSSCHIFFAHRT IM BEGRENZTEN MILITÄRISCHEN KONFLIKT, at 174 (Kehl A.R. et al., 1993); CH. ROUSSEAU, LE DROIT DES CONFLITS ARMES, at 431 (1983); SAN REMO MANUAL, *supra* note 6 at paras. 120, 127. "The right of neutrals to convoy is recognized. Consequently, neutral States have the right to accompany commercial ships flying their own or another neutral State's flag by their warships." Helsinki Principles, *supra* note 7, at 6.1.

37. SAN REMO MANUAL, *supra* note 6, at para. 120(d).

Stricter legal restrictions apply when it comes to the use of force against civil aircraft that are also obliged to identify themselves and to provide the said information. In view of the vulnerability of aircraft, the use of armed force must be limited to warning shots as long as there is no clear evidence of a terrorist activity. The only means available of using force is to require the aircraft to land.[38]

If, according to intelligence information, there are reasonable grounds to believe that a merchant vessel is transporting terrorists or goods destined to them, or if doubts persist as to the truth of the information provided by its master, a boarding team may be sent on board the merchant vessel that may take all measures necessary to clarify the circumstances (e.g., examination of documents and search of the vessel). The members of the boarding team may be armed in order to be able to defend themselves against attacks. If the initial suspicion proves true or if circumstances cannot be clarified to the satisfaction of the responsible commander, the vessel may be diverted to a port or sea area where a thorough search will be conducted. If the master refuses to obey the diversion order, the boarding team may capture the vessel by taking over command and control. Note that in the majority of cases, search on the high seas will be practically possible only with the master's consent, when the circumstances are easily clarified, and if no other difficulties are encountered. Absent these conditions, the vessel must either be diverted or allowed to continue its journey. In view of the considerable economic losses involved, a diversion must be in strict accordance with the principle of proportionality. Mere suspicion of involvement with terrorist activities will generally not suffice. Rather, the grounds for suspicion must be clear and reasonable which presupposes sufficient intelligence information. The same limitations apply with regard to capture. The legality of capture cannot be doubted if the merchant vessel resists visit and search because it is a means to enforce the obligation to tolerate these measures. If the master has complied with his obligations, however, capture, as a severe encroachment on the flag state's sovereignty, is justified only where there is strong suspicion of the commission of an offense.

With respect to individuals on board who are suspected of being international terrorists or who are suspected of having assisted international terrorism in some other way and with regard to cargo that is bound for groups of international terrorists, specific rules and principles must be observed. Terrorists may be taken prisoner to prosecute them for their illegal actions. They

38. For the special protection of civil aircraft against the use of armed force see Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, art. 3, ICAO Doc. 7300/6, 15 U.N.T.S. 6605 and SAN REMO MANUAL, *supra* note 6, at para. 153.

may be taken to a court of the capturing warship's flag state or to a court of one of its allies.[39] If Taliban members are captured, there is a presumption of their participation in the hostilities on behalf of, or with the consent of, the de-facto government of Afghanistan. They remain liable, of course, for all crimes they have committed. They may, however, not be prosecuted and tried for having taken part in the hostilities. Moreover, they are entitled to prisoner of war (POW) status.[40] The mere change in government does not nullify *ex tunc* the authorization or consent of the predecessor. If those taken prisoner are members of al Qaeda they are entitled to POW status only if they had been part of the Afghan armed forces or if they had otherwise "belonged" to Afghanistan as a party to the armed conflict. If neither of these conditions can be ruled out the presumption or rule of doubt laid down in Article 5(2) of Geneva Convention III comes into operation and an Article 5 tribunal must take place.[41] Nevertheless POW status does not preclude punishment for participation in, or commitment of, acts of international terrorism.[42]

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39. Transfer of prisoners to an ally will, however, pose considerable problems if the states concerned are bound by different rules of international law, especially with regard to the legality of the death penalty.

40. According to Article 4A of Geneva Convention III of 12 August 1949 relative to the Treatment of Prisoners of War not only members of the regular armed forces are entitled to POW status but also members of militias and volunteer corps either "forming part of such armed forces" or "belonging to a Party to the conflict." Also protected are "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." *See* Convention Relative to the Treatment of Prisoners of War, Aug. 12, art. 4, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter GC III]. **Editor's Note**—The US Government has taken the position that the Taliban are not entitled to POW status since the Taliban was never the legitimate government of Afghanistan and Taliban members do not meet the four part test found in Article 4 of GC III. *See* GC III at art. 4; *see* Statement by White House Press Secretary Ari Fleischer (Feb. 7, 2002).

41. "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." *Id.* at art. 5. This provision is generally accepted as customary international law based, in part, on the reaction of the international community and the media to the treatment of the detainees in Guantanamo Bay. For states parties to Additional Protocol I of 1977 a further obligation applies. According to Article 45 of this protocol, "a person who . . . is not held as a prisoner of war and is to be tried . . . for an offence arising out of the hostilities . . . shall have the right to assert the entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated." GPI, *supra* note 10, at art. 45.

42. However, according to Article 85, GC III "prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." GC III, *supra* note 40, at art. 85.

Weapons, ammunition and other military equipment destined for international terrorists or supply goods as well as everything serving for the financing of international terrorism, including drugs or other prohibited goods, may be captured and seized. Other objects and cargo have to be returned to the owner.

Captured vessels (and aircraft) may also be seized as soon as there exists sufficient proof that they are owned by al Qaeda or some other group of international terrorists. As for the rest it will depend on the respective national criminal law whether their confiscation is possible or not. International law provides no clear rule on that question unless the vessel or aircraft concerned had been used in a terrorist attack or had actively resisted visit and search or diversion. Therefore, in case of doubt, these vehicles should be returned to their respective owners if a participation in terrorist acts cannot be established.

If MIO are conducted beyond the territorial sea of third states—or within the territorial sea with the approval of the coastal state—their legal basis derives from the right of individual and collective self-defense as long as the legal restrictions referred to above are observed. Would a US warship or an allied warship also be entitled to enter the territorial sea if the coastal state did not consent and if a merchant vessel suspected of transporting international terrorists tried to evade capture by taking refuge, for example, in the territorial sea of Somalia? From the perspective of the law of the sea that operation, in view of the territorial sovereignty of Somalia, would be illegal unless exceptionally justified. Here again a plea of self-defense could serve as a justification. However, self-defense as traditionally understood might pose a problem insofar as the inactivity of Somali authorities would perhaps not be sufficient to establish the attributability necessary to legitimize actions taken against that state. Still, the legality of pursuing such a vessel into the territorial sea becomes evident if the law of maritime neutrality is again considered. According to that law neutral states are under an obligation to take the measures necessary to terminate any violation of the law by one of the belligerents, especially if that belligerent makes use of the neutral's territorial sea as a base of his military operations. If the neutral state fails to terminate the violation—be it because it is unable or unwilling to do so—the opposing belligerent, if certain preconditions are met, may use such force as is strictly necessary to respond to the threat posed by the violation.[43] Note that the behavior of the neutral coastal state need not amount

43. SAN REMO MANUAL, *supra* note 6, at para. 22; SEEKRIEGSRECHT UND NEUTRALITÄT IM SEEKRIEG, *supra* note 6, at 505.

to a direct and attributable contribution to the enemy's war fighting efforts. If that were the case that state would become a party to the conflict. The law of maritime neutrality would be replaced by the jus in bello.

In any event, the measures taken within neutral territorial seas must be restricted to the termination of the violation. Resolution 1373 obligates all states to prevent and suppress within their territories all acts of international terrorism as well as all activities in support of international terrorism. A state that is either unwilling or unable to comply with these obligations violates international law. This also holds true where, as in Somalia, the state has failed. Hence, there are good reasons that exceptional situations like the present limited actions taken within foreign territorial seas in order to capture international terrorists and weapons destined for them are justified by international law if the coastal state is unwilling or unable to take the measures necessary according to Resolution 1373.

Conclusion

As seen, MIO conducted within the framework of Operation ENDURING FREEDOM can be based upon the right of individual and collective self-defense and, additionally, on Resolution 1373 of the UN Security Council. Third states are obligated to tolerate the control measures taken against their shipping and aviation by the United States and its coalition partners. The UN Security Council has made sufficiently clear that self-defense is not restricted to armed attacks attributable to a given state. Rather, it has acknowledged that a self-defense paradigm can exist without a state being the potential object of armed countermeasures. This, however, does not mean that the United States and its coalition partners are free to interfere with foreign shipping and aviation at their will. They must observe the limitations imposed upon them by the law of naval warfare and by the law of maritime neutrality. This corpus of international law must be observed in spite of the fact that there exists no international armed conflict *strictu sensu*. Respect for these requirements is of utmost importance because only thus can the support of the international community in the fight against international terrorism be maintained.

Of course, in view of the varying treaty obligations and in view of different concepts of self-defense, a multinational operation like ENDURING FREEDOM is a difficult task. The most promising way to cope with these difficulties is to draw multinational rules of engagement in order to ensure that at least the common minimum legal denominator that is so important for international political support operates effectively.