

# Policing the High Seas

## **An Italian Navy Non-Paper on the Identification of the Current Legal Gaps Preventing the Most Effective Use of Maritime Forces in Maritime Law Enforcement (MLE), in the Framework of Maritime Security Operations (MSO)**

### **1. Background**

**1.1 At the end of the 8<sup>th</sup> edition of the Regional Seapower Symposium (RSS), held in Venice on 19-22 October 2010**, the Italian Navy Chief of Staff highlighted the need to promote international participation in Maritime Security Operations (MSO), with the aim of protecting the freedom of navigation, maritime trade, energy lines and maritime critical infrastructure worldwide, and in full compliance with international treaty and customary law.

Further to that, he noted that ‘the experience gathered so far in conducting multinational operations, such as anti-piracy, should be properly capitalized’ and recalled the need to identify current legal gaps preventing the most effective use of maritime forces in MSO, in order to find suitable solutions in national and international legislations. To this aim, the present non-paper will circulate for comments and to stimulate national initiatives on the matter.

**1.2 In general terms, leaving aside any theoretical approach and taking into account the recent naval practice, we can define MSOs as**

*Measures undertaken by Navies, autonomously or in cooperation with other governmental authorities, aimed to counter the threat of illegal activities in the maritime domain and to safeguard national and international interests. These operations are focused on both the prevention and prohibition of activities carried out in violation of peace-time maritime international law, and the maintenance of international peace and security<sup>1</sup>.*

Therefore, the MSO concept could be considered as a more comprehensive notion of maritime intervention, which:

- a) is in compliance with the UN Charter;
- b) may be carried out on the basis of a UNSCR or as a part of those constabulary activities – **also called Maritime Law Enforcement (MLE) – that can be conducted under the UNCLOS legal framework;**
- c) is characterized by both the legal constraints to the use of force at sea in peacetime and the restrictions related to the obligation of not unnecessarily limiting the freedom of navigation of vessels flying foreign flags; and

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<sup>1</sup> The Chiefs of European Navies (CHENs) define MSOs as:

‘Those measures performed by the appropriate civilian or military authorities and multinational agencies to counter the threat and mitigate the risks of illegal or threatening activities in the maritime domain, so that they may be acted upon in order to enforce law, protect citizens and safeguard national and international interests. Developing these operations will focus on terrorism, proliferation, narcotic trafficking, illegal migration, piracy and armed robbery, but might also include smuggling, the protection of national resources, energy security, the prevention of environmental impact and safeguarding sovereignty. In defining these activities, it is to be understood that the lead in the majority of issues is not a military remit but that a successful strategy for an increasingly secure maritime domain lies in a coherent civilian and military partnership’.



d) reflects the reality of the various (but connected) threats characterising the current maritime scenario.

**1.3 This document also highlights the rules pertaining to the use of force within the MLE domain. Accordingly, this document does not consider operations whose legal foundation and mandate rests exclusively on the UN Charter, such as *naval embargoes*.<sup>2</sup> Out of the scope of this paper are also the operations of *naval blockade*, as well as those of *visit and search* performed by a State as a measure of self defence against an act of aggression and thus based on the Law of Armed Conflict (LOAC) at sea and the related Law of Maritime Neutrality. As matter of fact, all these kinds of operations are *sui generis* categories of intervention, whose legal foundations lie – in the worst case scenario – upon both State practice and the treaty law of continuing validity. A comprehensive examination of the various international norms regulating wartime naval activities has been successfully conducted by the International Institute of Humanitarian Law (IIHL) in June 1994, when – in cooperation with the International Committee of the Red Cross (ICRC) – it adopted the ‘San Remo Manual on International Law Applicable to Armed Conflicts at Sea’.<sup>3</sup> The Manual does not represent a binding text, having been prepared by a group of scholars and naval experts (in many cases belonging to Navies) in their private capacity. Nonetheless, the San Remo Manual is considered ‘the only comprehensive international instrument that has been drafted on the law of naval warfare since 1913 [...] and that consolidate contemporary international customary law’<sup>4</sup>. It is well known that many Navies deem it as a basic point of reference for their activities in MSOs and embody its rules in their manuals (as also the Italian Navy did in 1998).**

**1.4 Whilst the San Remo Manual does not deal with peacetime naval operations, the present non-paper is instead focused on MLE activities carried out by warships in policing the high seas, according to the UNCLOS and related customary law, as codified in the same Convention. In short, here MLE operations are considered as interventions aimed at exercising constabulary powers in international waters regulated by a specific legal regime – such as the Contiguous Zone (CZ) or the Exclusive Economic Zone (EEZ) – as well as on the high seas beyond those zones, towards foreign merchant vessels or vessels without nationality, which are suspected of being involved in illegal activities.**

## **2. MLE as a Non-Military Task for Navies**

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<sup>2</sup> See for instance the embargo against the former Yugoslavia, which applied in the Adriatic Sea in 1992-1995 on the basis of relevant UNSCRs)

<sup>3</sup> As the book description reads:

‘The San Remo Manual is a contemporary restatement of the law applicable to armed conflicts at sea which has been drafted over a six-year period by an international group of specialists in international law, and naval experts convened by the International Institute of Humanitarian law. The accompanying explanation is written in the form of a commentary and indicates the sources used by the experts for each of the provisions of the Manual, and the discussion which led to their adoption. It is the first analysis of the law regulating armed conflict at sea which has been undertaken by an international group of experts since 1913. The work is based on treaty law of continuing validity and State practice, and takes into account developments in related areas of international law, in particular the effect of the United Nations Charter, the 1982 Law of the Sea Convention, air law, and environmental law’ (the book description is available at <http://www.ebooks.cambridge.org/ebook.jsf?bid=CBO9780511622052>).

On the Manual’s development and adoption, see L. Doswald-Beck, ‘San Remo Manual on International Law Applicable to Armed Conflict at Sea’, 35(309) *International Review of the Red Cross* 1995, 583-594.

<sup>4</sup> Ibid., at 593-594.



**2.1** Needless to say that the reason for the existence of Navies lies in the national defence at sea: this is their principal role since the 1856 Paris Declaration on the Naval Warfare, which prohibited the s.c. 'Privateering', thus recognizing warships as the unique legitimate combatants at sea. **Leaving aside some specific non-military functions assigned to them by domestic law,<sup>5</sup> Navies are also State organs entitled to policing the high seas in peacetime on the basis of customary international law, as codified by UNCLOS.**

**2.2** Policing the high seas may require the use of military force, even if it is a non-military function. On the other hand, it is well known that in almost all countries military personnel cannot use force in police activities on land, unless authorized by the Government as a means of last resort in case of emergency. Nonetheless, 'for many, no distinction exists between the Navy dealing with narcotics smuggling, pollution, and fisheries violations at sea, and the army conducting aid to civil power operations on land. The latter are very visible, affect large numbers of citizens, and can be intrusive upon normal life, whereas naval enforcement operations are largely invisible to the majority [of citizens ...]. **Due to this lack of distinction, negative biases derived from perceptions of the army's operations are unconsciously applied to those of the Navy**'.<sup>6</sup>

To avoid confusion of concepts, it should be clarified that Navies exercise MLE functions *proprio jure* under international law, although, interventions are obviously carried out according to domestic law. Indeed, Navies' constabulary powers reflect customary rules which are accepted worldwide.

**2.3** Another issue to be considered is the possible lack of law enforcement powers with regard to some Navies<sup>7</sup>. Accordingly, **Navy units may embark Coast Guard personnel to conduct boarding operations, under domestic law (including the power to arrest and prosecute criminals or seize a cargo)**<sup>8</sup>.

### **3. The MLE International Legal Framework**

**3.1** The international legal framework of MLE provides generally accepted rules governing specific situations and circumstances in which intervention on merchant vessels flying a foreign flag is authorised. However the degree and extent of force to be used in MLE operations remains widely undetermined and subject to different national views. Constabulary powers may be exercised according to the UNCLOS or other treaties, and mostly with the consent of the flag State as a requirement. Alternatively, they may be based on *ad hoc* arrangements expressing the consent of the flag State *ex ante*. **Treaty law may be complemented by customary rules, as derived from the international maritime practice of Navies.**

<sup>5</sup> Reference can be made to the policing activities carried out by several Navies (the Italian Navy is among them) for the preservation of fisheries in maritime areas under national jurisdiction.

<sup>6</sup> See Cpt (N) L.M. Hickey, 'Enhancing the Naval Mandate for Law Enforcement: Hot Pursuit or Hot Potato?', 7(1) *Canadian Military Journal* 2006, 41-48, at 45.

<sup>7</sup> possible overlapping between the functions of Navies and Coast Guards or similar organizations. Examining this problem is out of the scope of this text. **Nevertheless it may be observed that the relationship between Navies and Coast Guards (which in some country – like Italy – belong to the Navy anyway) has to be seen in terms of complementarity, since both the organizations perform MLE duties, although not in the same manner and in the same maritime zones.** As matter of fact, Coast Guards are destined to operate not in *brown* and *green waters*, whilst *blue waters* are the *arena* in which Navies normally operate. They are usually equipped with naval units which are smaller than the Navies' ones and so more suited, in terms of proportionality, to engage small vessels not too far from the coast

<sup>8</sup> Lack of law enforcement power may be the consequence of a choice of lawmakers, but also the consequence of Constitutional constraints prohibiting the exercise by the military of law enforcement tasks.



**3.2 The UNCLOS codifies several situations in which vessels flying a foreign flag, may be visited on the high seas by warships (as well as state vessels) exercising constabulary powers, either on the basis of a treaty/with the consent of the intercepted vessels' flag State, or in the specific cases listed in Article 110 of the Convention itself. Such situations, however, although codified, are to some extent outdated, in light of several considerations:**

- (1) Leaving aside the particular situation of the HoA, where operations are temporarily limited – due to the mandate established in relevant UNSCRs – Articles 100 and 105 of UNCLOS are commonly interpreted as authorizing – rather than obliging – warships to pursue pirates. Current practice shows a trend towards the splitting of the obligations to intervene/interrupt the attack of pirates and those related to the subsequent prosecution of captured pirates/armed robbers;
- (2) In light of that, and considering that piracy represents a worldwide threat to the freedom of navigation, a wider interpretation of the international obligation to counter piracy could even hamper its suppression in different contexts, as it may induce Navies to refrain from engaging prosecuting suspects<sup>9</sup>. **Therefore, even beyond the relevant provisions included in UNSCRs, counter-piracy operations may be considered as a permanent task for the Navies, which may operate according to a mandate conferred by their Governments. It may be also observed that such a task represents the first non-military mission assigned to Navies in the past centuries by the 'Law of Nations' (*Jus Gentium*)<sup>10</sup>.** In this context, there may be the need to specify: a) the legal notion of 'Armed Robbery' as an emerging crime of international concern, as connected to piracy; b) the reality of practice, which shows, for instance, the availability 'on the spot' of pirate-ships, including mother-ships; c) **the (rather ambiguous) 'private ends' requirement, considering that piracy may also have political (or terrorist) aims<sup>11</sup>;**
- (3) **Satellite broadcasting and the internet** have clearly made UNCLOS provisions on illegal broadcasting outdated. Today such norms are of historical interest at best. Besides, those rules have increasingly become incompatible with the need to secure the freedom of information to a widest extent;

<sup>9</sup> Mandatory prosecution of captured pirates may lead to political/diplomatic embarrassment and a certain degree of discretion as to the transfer/release of pirates may be beneficial in creating consent to counter piracy operations.

<sup>10</sup> In principle this view might not be shared by those States which consider anti-piracy rather as a military operation to counter a threat to international peace and security, in the attempt to prohibit or limit the exercise of law enforcement tasks by military personnel. In both cases, some States could be encouraged to conclude agreements with other countries on the transfer of captured pirates.

<sup>11</sup> The issue of 'private ends' was resolved as a result of the 'absence of competent authority test' in an early decision by the *Kings Bench*, in *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd*, [1909] 1 KB 785. In that case the Court held that: 'the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state'. In the attempt to tackle the issue of 'private ends' – having also regard to the essence of the conduct – the 'purpose of brigandage' was used as a test for piracy in *Banque Moneta & Carystiaki v Motor Union Insurance Company Ltd*, [1923] 14 Ll. L. Rep. 48. On the possibility to couple the status of 'insurgent' with piracy activities, see *The Magellan Pirates*, [1853] 1 Sp. Ecc. & Ad. 81, at p. 83. The Belgian Court of Cassation, in *Castle John v NV Mabeco*, [1986] 77 ILR 537, held that a Greenpeace vessel had committed piracy against a Dutch vessel when it attacked it, taking into consideration that act of violence was 'in support of a personal [– not a political –] point of view'. More recently, with regard to the prosecution of 9 pirates captured by the Italian Frigate *Maestrale* off the HoA on 22 May 2009, the Italian Prosecution office had initially qualified the criminal conduct as 'attempted kidnapping for terrorist ends' and 'piracy', under the aggravating circumstance of 'terrorist ends'. This view was shared by the judge for preliminary investigations, who considered the action to be 'a part of a plot to undermine the safety and the security of navigation in the area of the GoA and the Somali basin'. The Italian jurisdiction on the case was established by means of a special statute for the prosecution of piracy and 'connected crimes' off the HoA – without referring to the definition of piracy *iure gentium*.



(4) Relevance of *hot pursuit* is currently in the negative, as the so-called reverse *hot pursuit* is not codified.

3.3 Moreover, UNCLOS lacks a number of codified provisions on the prevention of illegal trafficking of hazardous wastes.<sup>12</sup> The same lack of regulations affects arms smuggling,<sup>13</sup> including WMD. Both these illegal activities could be considered in the context of MLE operations, although they may also fall within a more general framework for the use of force in international relations<sup>14</sup>. However, it should be also noted that, in parallel with the UNCLOS, the fight against other illicit activities has been regulated in international conventions and/or bilateral agreements concerning maritime terrorism, drug trafficking, trafficking in human beings, smuggling of migrants. Their provisions are also relevant to define a conventional legal regime for MLE operations.

3.4 UNCLOS also codifies a pre-existing customary rule, establishing exceptional situations in which interference with the freedom of navigation of a foreign flagged vessel is authorized. Such situations cannot be interpreted by analogy in order to widen their sense and purpose, but have to be read strictly. In addition, policing international waters is a prerogative of warships (and state vessels), which has to be exercised *ratione materiae*, i.e. considering the list of cases regulated by Article 110 of UNCLOS as exhaustive.

3.5 The 'authorization' conferred to warships under international maritime law to visit and possibly divert and/or seize a foreign flagged vessel is exclusively related to the 'an' of such activities, whilst the '*quomodo*' remains a topic subject to different views, especially as far as it concerns the following issues:

- (1) Modality and degree of the use of force aimed at stopping, visiting and searching a merchant vessel (or even a boat) under Article 110 of UNCLOS;
- (2) Manoeuvres and other kinetic means intended to stop a merchant vessel, in light of the potential application of the 'Convention on the International Regulations for Preventing Collisions at Sea' (COLREGS 72);
- (3) General 'proportionality' requirements, related to such activities, according to the international naval practice;
- (4) General safeguards establishing duties to refrain from/delay the intervention (as a matter of proportionality and/or best practices/due diligence);
- (5) Specific safeguards contained in international agreements (as a matter of 'accepted' degree of risk by flag States authorizing intervention on their own vessels);
- (6) The limits under which the master of a merchant vessel, autonomously or upon request, can give to a foreign warship performing MLE tasks the permission to visit and search his/her ship;<sup>15</sup>

<sup>12</sup> The matter is currently dealt with by the 'Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal' – an international treaty which entered into force in 1992. This convention, however, does not contain enforcement provisions, nor rules concerning the application of the Convention itself to dismissed vessels, which may represent themselves 'ecologic bombs'.

<sup>13</sup> According to some scholars, 'a provision on boarding of vessels could be inserted into a new convention focusing on terrorist travel and transport of weapons' (see S.L. Hodgkinson et al., 'Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap', 22(4) *American University International Law Review* 2007, 583-671, at 668).

<sup>14</sup> See e.g. C.H. Allen, 'Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives', 35 *Israel Yearbook on Human Rights* 2005, 115-180.

<sup>15</sup> Flag State consent remains a requirement for actions implying enforcement. Current practice shows the attempt to justify enforcement actions with the Master's consent/compliance. The legal basis for such a practice remains



- (7) **Human rights obligations** of intervening States imposing due care of the right to life of seafarers (such a topic may be subject to different views as to the 'outreach' of human rights treaty law to what remains an extraterritorial application of human rights treaties and to possible derogations in light of the parallel application of LOAC);<sup>16</sup>
- (8) **Relevance of domestic law in respect to forcible actions at sea**, considering that, although international maritime law provides a firm legal basis for a number of interventions towards foreign-flagged vessels on the high seas, domestic legal systems have sometimes barely implemented such powers.

## **4. Controversial issues on the use of force at sea**

### **4.1 Criteria and principles as to the degree of authorized force.**

International law sources (as defined by Article 38 of the Statute of the International Court of Justice<sup>17</sup>) show, at the current stage, the existence of common principles defining the level of authorized force in maritime operations. **In the attempt to develop practical rules from the above-mentioned sources, the following points may be generally considered:**

- (1) Under international law, unavoidable, reasonable and necessary force may be used in law enforcement activities<sup>18</sup>. **Mentioning 'law enforcement activities'** implies an implicit reference to the existing domestic legislation. The activities in question are indeed implemented with the purpose of enforcing national statutes. The latter end up reflecting the intervening States' interests, according to relevant international law;
- (2) The **Reasonableness requirement** implies using direct force with the aim of minimizing damage to the vessel;
- (3) The **Necessity** requirement entails taking into consideration all the codified operational safeguards. This basically means to opt for viable/suitable alternatives to the use of force in any given situation, including postponing the action.

### **4.2 Modality of Boarding (how to compel vessels to stop).**

The unavoidable, reasonable and necessary character of the use of force needs to be assessed by taking into account the criteria developed in the relevant international case law such as the *I'm*

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questionable. Indeed, several other legal sources still requires the express consent of flag State to intervene (see in the case of anti-drug operations, trafficking in human beings, smuggling of migrants, etc.). Other provisions, mainly related to situations in which the security of a vessel is at a stake, concern the Master's consent (see e.g. Art. 27 of UNCLOS, referred to the intervention of coastal States).

<sup>16</sup> In general terms, vessels on the high seas are exempted from foreign interference (apart from the codified situations mentioned above) as they represent an outpost of the flag State. As an 'outpost' vessels are subject to – and at the same time are an expression of – the sovereignty of flag States. However, they are mostly outside the reach of a timely intervention of their judicial authorities.

<sup>17</sup> '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations'.

<sup>18</sup> Arbitral Tribunal, Guyana/Suriname, Final Award (aka Guyana/Suriname Award), 17 September 2007, para. 445, available at <http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf>: 'The Tribunal accepts the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary'.



Alone, the *Red Crusader*, and the *Saiga*<sup>19</sup>. The latter **reflect customary international law principles, which apply to the MLE legal regime as well.**<sup>20</sup> Accordingly, as it is highlighted in the ITLOS judgement on the *Saiga* case<sup>21</sup>:

*‘[T]he use of force must be avoided as far as possible and, where [...] unavoidable, it must go beyond what is reasonable and necessary in the circumstances [...] The normal practice [...] is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warnings must be issued [...] and all efforts should be made to ensure that life is not endangered.’*

The rationale of this judicial *dictum* lies primarily upon the said **reasonableness** requirement, under which the ‘disabling fire’ must be preceded by warning shots and ‘non-disabling fire’ – i.e. small calibre shots directed to non-vital parts of the ship and aimed at putting pressure on the master and the crew – in order to **minimise** the use of **force**. Strictly related to the same rule is the **proportionality** requirement. The latter implies – in particular situations (e.g. small boats), whereas the risk to endanger life is higher – the use of an appropriate calibre, together with the need to compare the purpose of the specific law enforcement activity with the risk to the life of people on board, as well as the consequences of inaction.<sup>22</sup>

These principles should assist in the interpretation of the safeguards contained in **Article 8-bis(3) of the 2005 Protocol to the SUA Convention**. Such a norm restates the general principle of minimum, reasonable, necessary and proportionate use of force to a greater extent. Apparently, it ends up discouraging boarding at sea, affirming that:

*‘States Parties shall take into account the dangers and difficulties involved in boarding a ship at sea and searching its cargo, and give consideration to whether other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere’.*

However, the sense of this safeguard is clearer if we consider that **each boarding ‘must take in due account the necessity not to endanger the safety of life at sea’.**<sup>23</sup> As a matter of fact, however, the question is wider than it appears since it is related to **the problem of whether warships have to respect the COLREGS 72 when conducting a forcible boarding**. In this regard, it is noteworthy that Article 110(2) of UNCLOS<sup>24</sup> regulates the right of visit in a

<sup>19</sup> See *Canada/United States*, 30 June 1933 and 5 January 1935, U.N.R.I.A.A., Vol. III, p. 1609 ff.; Commission of Enquiry, Denmark - United Kingdom, 23 March 1962, I.L.R., Vol. 35, p. 485; ITLOS, *Saint Vincent and the Grenadines v. Guinea*, Judgment of 1 July 1999, aka *M/V Saiga (No.2)*, para. 155.

<sup>20</sup> D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, 2009, p. 277.

<sup>21</sup> *M/V Saiga (No. 2)*, para. 155.

<sup>22</sup> In carrying out such a comparison, it should be considered that several States do not allow under domestic law firing at cars not stopping at checkpoints and that authorized force in maritime operations should not exceed (apart from situations representing a threat) the level permitted in law enforcement operations on land. In these circumstances, a dual/double standard might even infringe the legitimate purpose of law enforcement activities and turn into an illicit discrimination.

<sup>23</sup> Art. 8 bis(10)(a)(i) of the SUA Protocol.

<sup>24</sup> UNCLOS, Art. 110(2):

‘In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration’.



general manner, making no reference to the respect of such Rules. On the other hand, the UNCLOS itself quotes the COLREGS 72 in Articles 21(4)<sup>25</sup> and 39(2)(a).<sup>26</sup> Therefore, according to the Latin saying *ubi lex voluit, dixit; ubi noluit, tacuit*, **one might conclude that, since the obligation to respect COLREGS 72 is not explicitly recalled in Article 110(4), they should not be applied.** Nevertheless, it has to be observed that since boarding relates to the right of visit, it must be exercised – as already said – by taking in due account the need not to endanger the safety of life at sea. Apart from this general rule, **the strict application of COLREGS 72 is out of the range of MLE and in some way might even contradict its scope.** In sum, bearing in mind that coercive boarding is *per se* a form of use of force at sea, we may conclude that such a practice is lawful if – even when the obligations included in COLREGS 72 are partially derogated – it respects the general requirements of **reasonableness and proportionality.**

- 4.3** A further crucial question concerning MLE is the **legality of ‘compliant boarding’, i.e. carried out with the master’s consent.** Indeed, naval practice shows uncertainty in the application of the principle codified in Article 92 of UNCLOS, under which a merchant vessel on the high seas is immune from the jurisdiction of other states. For instance, NATO forces participating in ‘Operation Active Endeavour’ (OAE) – whose legal foundation mainly lies upon UNCLOS – normally request the consent of both the flag state and the ship’s master, before inspecting a vessel.<sup>27</sup>
- In the end, Article 110 of UNCLOS neither provides for the admissibility of the compliant boarding nor prohibits it.<sup>28</sup> However, although **there is no doubt that the master can request warships to visit his/her ship for security reasons<sup>29</sup> or for the purposes provided for in Article 27(3) of UNCLOS<sup>30</sup>, the OAE practice – i.e. that of requiring both the permission of the flag state (which may be also given in advance) and the master’s consent, seems the best solution, especially in light of the master’s responsibility towards the flag State in terms of safety of navigation. Such an authorization could be contained in bi/multilateral agreements or otherwise also expressed as a declaration to be deposited at the IMO Secretariat, in analogy with the ‘opting in’ procedure set out by Article 8-bis of the SUA Protocol.<sup>31</sup>**

<sup>25</sup> UNCLOS, Art. 21(4): ‘Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea’.

<sup>26</sup> UNCLOS, Art. 39(2)(a): ‘Ships in transit passage shall comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea’.

<sup>27</sup> The procedures applied by Nato maritime forces may be explained as follows:

‘If irregularities are discovered, not necessarily related to terrorism, this information will be relayed to the appropriate law-enforcement agency in the vessel’s next port of call [...]. The suspect vessel will then be shadowed until action is taken by a responsible agency [...]. If a vessel refuses to be boarded, NATO will take all necessary steps to ensure that it is inspected as soon as it enters any NATO country’s territorial waters’ (see Adm. R. Cesaretti, *Combating Terrorism in the Mediterranean*, 1 July 2005, [http://www.nato.int/cps/en/SID-4D30A260-87930705/natolive/opinions\\_21878.htm](http://www.nato.int/cps/en/SID-4D30A260-87930705/natolive/opinions_21878.htm)).

<sup>28</sup> See D.G. Wilson, ‘Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of His Ship by Foreign Warships’, 55 *Naval Law Review* 2008, 157-212.

<sup>29</sup> See Hodgkinson, *op. cit.*, pp. 664-666.

<sup>30</sup> UNCLOS, Art. 27(3):

‘In the cases provided for in paragraphs 1 and 2, the coastal State shall, **if the master so requests**, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship’s crew. In cases of emergency this notification may be communicated while the measures are being taken’.

<sup>31</sup> Worthy of mention is Hodgkinson’s opinion, according to whom:

‘The IMO would be well served to focus strongly on improving regimes of communications between flag states,



**4.4** Related to the principle of the master's consent is the question concerning the possibility to **board stateless vessels or vessels flying a flag of convenience (FOC)**. Under Articles 92(2) and 110(1) of UNCLOS, there is no doubt that warships can board a vessel suspected of being without nationality without its consent. Nevertheless, an interest to perform such an action must exist, in order for the warship to intervene. The rationale of the power to board stateless vessels is that no State takes the responsibility for their safety and conduct, thus representing a 'danger' by definition. Accordingly, boarding in this case is aimed at preserving the safety of navigation, not at repressing a crime. Nevertheless, practice reveals that sometimes States act on the basis of a proportionality test, by using the risk of inaction as a parameter for intervention **Unquestionably, as FOC ships are frequently involved in illicit activities, FOC states normally do not respond to a boarding request.** This is the reason why States may stipulate boarding agreements with 'FOC States', in order to obtain their consent in advance<sup>32</sup>. However, apart from such agreements – whose development is certainly advisable – **the fact that FOC ships are characterized by the absence of a genuine link<sup>33</sup> may strengthen the argument for the legitimacy of 'compliant boarding'.**

**4.5 The maritime arena of MLE is the high seas.** Article 111 of UNCLOS only codifies the well-accepted principle of 'hot pursuit', according to which coastal States have the right to continue pursuing in the high seas vessels which have violated laws and regulations in their territorial waters.<sup>34</sup> This principle is nevertheless of little use when it comes to MLE, since experience shows that the 'pursuit' (or better, the 'shadowing') of suspect vessels most frequently begins in international waters and ends when the target enters the territorial waters of a third State. This is particularly true as for anti-piracy operations off the HoA, considering that this led the UNSC to authorize foreign warships to enter the Somali territorial waters, having also obtained the consent of the Somali TFG to do so. In such situations, the intervening State has normally the duty to request, on a case-by-case basis, the coastal state to authorize the *s.c. reverse hot pursuit* in its territorial waters. This procedure is usually regulated through bilateral agreements. However, a rule could be developed on the basis of the **necessity principle, adopting by analogy the requirements provided for in Article 18(2) of UNCLOS.**<sup>35</sup> The latter concerns the derogations from the principle of innocent passage for SAR purposes or – based on a stricter interpretation of the rule – to exercise the right of 'assistance entry'.

**4.6 As it is well known, the legal regime of the high seas is different from that of international waters, which comprise both the EEZ and the contiguous zone.** In particular, under Article 58(1) of UNCLOS,<sup>36</sup> in the EEZ States enjoy the same freedoms

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their masters, the vessels, and third countries' (Hodgkinson, *op. cit.*, p. 666).

<sup>32</sup> More information can be found on the Proliferation Security Initiative's website, available under <http://www.state.gov/t/isn/c10390.htm>.

<sup>33</sup> See UNCLOS, Art. 92.

<sup>34</sup> See UNCLOS, Art. 111.

<sup>35</sup> See UNCLOS, Art. 18 (*Meaning of passage*):

'1. Passage means navigation through the territorial sea: [...] Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation **or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress**'.

<sup>36</sup> See UNCLOS, Art. 58(1) (*Rights and duties of other States in the exclusive economic zone*):

'In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those



recognized to them on the high seas. Furthermore, Article 58(2)<sup>37</sup> of UNCLOS explicitly affirms that the EEZ applies, *inter alia*, to the UNCLOS rules concerning piracy. **Therefore, under international treaty law there is no doubt that counter-piracy operations can be conducted in foreign EEZ without any authorization or prior notification,<sup>38</sup> as the State exercising exclusive economic rights does not exercise a ‘territorial’ but rather a ‘functional’ jurisdiction within that zone.**

**4.7** In forcible boarding, coercion is used on a progressive basis and includes:

- Sending audio/visual warnings and being sure that such warnings have been received by the vessel concerned; this entails issuing audio warnings in a language which can be understood by the crew, or otherwise should be understood, taking into consideration the flag of the vessel, the port of registration and the composition of the crew themselves;
- Warning shots should be fired if – in the specific situation – this does not expose the crew to the risk of being hit;
- Disabling fire should be preceded by a specific and comprehensible warning, indicating which part of the vessel fire will be directed to, and requiring the people on board to move to another part of the vessel. Direct fire should be directed first to the upper part of the bow, then to the rudder, and preceded by ‘non-disabling fire’, i.e. using small arms fire against the vessel’s steering or propulsion system; in case of small boats, direct fire should be aimed at neutralizing outboard engines, if such a solution entails fewer risks for the people on board; apart from situations in which the vessel to be boarded is involved in a flagrant criminal activity implying harm or potential harm to the life or physical integrity of intervening forces, direct fire should be considered as a viable means only if proper medical assets are available on site.

**4.8** In the lack of specific provisions contained in the UNCLOS, **a number of rules on the use of force in MLE have been developed as a matter of customary law and applied in naval operations, being also included in national directives and manuals.** Sometimes, these rules are contained in bilateral and multilateral agreements. An example can be found in Article 22 of the 2003 Agreement Concerning Co-Operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (**Caribbean Agreement**)<sup>39</sup>, concerning the use of force. This provision may represent a model for future international agreements as well as national directives and manuals in the field of MLE:

*‘1. Force may only be used if no other feasible means of resolving the situation can be applied.*

*2. Any force used shall be proportional to the objective for which it is employed.*

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associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention’.

<sup>37</sup> See UNCLOS, Art. 58(2): ‘Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part’.

<sup>38</sup> On the matter of military activities carried out in foreign EEZ, Italy made the following declaration upon signature (7 December 1984) and confirmed it upon ratification (13 January 1995): ‘Upon signing the United Nations Convention on the Law of the Sea of 10 December 1982, Italy wishes also to confirm the following points made in its written statement dated 7 March 1983:

*[...] According to the Convention, the Coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the Coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorize them’.*

<sup>39</sup> See Guilfoyle, *op. cit.*, p. 278.



3. *All use of force pursuant to this Agreement shall in all cases be the minimum reasonably necessary under the circumstances.*
4. *A warning shall be issued prior to any use of force except when force is being used in self-defence.*
5. *In the event that the use of force is authorised and necessary in the waters of a Party, law enforcement officials shall respect the laws of that Party.*
6. *In the event that the use of force is authorised and necessary during a boarding and search seaward of the territorial sea of any Party, the law enforcement officials shall comply with their domestic laws and procedures and the directions of the flag State.*
7. *The discharge of firearms against or on a suspect vessel shall be reported as soon as practicable to the flag State Party.*
8. *Parties shall not use force against civil aircraft in flight.*
9. *The use of force in reprisal or as punishment is prohibited.*
10. *Nothing in this Agreement shall impair the exercise of the inherent right of self-defence by law enforcement or other officials of any Party’.*

## **5. Conclusion: MLE Key Points**

- 5.1 The aim of this non-paper was to present a comprehensive overview of the legal issues stemming from MLE operations.** Many of these issues are related to the specific domestic law provisions on the use of force, which may apply according to the flag States of both the intervening warships and the boarded vessel. In addition, problems may arise from the respective views on the application of international law and its relationship with domestic law. Nevertheless, some common principles can be found, bearing in mind the need to respect the existing international legal framework. **Furthermore, Navies, as state organs, operate on the high seas in close relationship one another, and in light of this, they need to find a common operational approach.**
- 5.2 The need for the Navies to adopt a common approach to MLE also arise from the practice of recent counter-piracy operations off the HoA, where several Navies currently perform MLE functions, including the power to arrest pirates and seize ships and arms, under Article 105 of UNCLOS<sup>40</sup> and specifically trained experts in order to collect evidences.**
- 5.3 Having said that, and taking into account the legal issues discussed above, the following key points may be indicated in order to facilitate the free exchange of opinions among all the relevant actors in MLE operations:**

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<sup>40</sup> See UNCLOS, Art. 105 (*Seizure of a pirate ship or aircraft*):

‘On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith’.



- (1) Currently, the provisions which can be found in both the UNCLOS and other international conventions do not provide for a sufficient legal coverage of MLE operations; the latter are aimed at countering threats of an increasingly international concern;
- (2) Whilst the adoption of a specific provision on the matter is highly advisable, **in some situations the 'master's consent rule' should be considered as legally valid on a reciprocal basis.** These situations may involve vessels flying a flag of convenience as well as threats to the security or safety of the vessels themselves, irrespective of the vessels' location and without prejudice to the prerogatives of coastal States;
- (3) **The use of force in MLE should pass a strict proportionality test** and take into account the specific purposes and aims of the law enforcement activity being performed;
- (4) **The proportionality requirement must reflect:**
  - the enforcement activity's preventive or repressive character;
  - the nature and gravity of the threat or violation;
  - the international standards on the use of force, establishing that deadly force is only a means of last resort to protect the right to life<sup>41</sup> and must not be less strict than when exercised in the domestic domain; dual/double standards on the use of force are in principle to be avoided;

Operational safeguards must include:

  - The best operational practices in order to minimize risks;<sup>42</sup>
  - Due consideration for the circumstances which may induce to refrain from the enforcement action or to postpone it;
- (5) COLREGS 72 are basically aimed at preventing collisions at sea; in the context of enforcement actions and – specifically – forcible boarding, such rules do not apply; nevertheless, COLREGS 72 must be taken in consideration in situations in which the vessel to be boarded has a poor manoeuvring capability;

**5.4 It is not so easy figuring out how to incorporate in a new agreement of general application the issues discussed in the present non-paper. Nevertheless the fight against piracy off the HoA or elsewhere demonstrates the need of new legal instruments, since the UNCLOS provisions on piracy have proven to be inadequate in this regard. It is also remarkable that the authorization conferred by the UNSCRs on piracy is limited in time and extent. In addition, – as it is expressly stated – the Security Council's mandate 'shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations, under the [UNCLOS] Convention'. For the time being, the most suited way to solve the above-mentioned controversial aspects of MLE could be that of drafting on a regional basis an agreement on counter-piracy operations, modelled around the Caribbean Agreement. Alternatively – and leaving aside**

<sup>41</sup> See on the matter United Kingdom, *The Use of Force in Counter-Piracy Operations*, Discussion Paper presented at the meeting of the UN Contact Group on Piracy off the Coast of Somalia – Working Group No. 2 on Legal Issues, Copenhagen, 26-27 August 2009.

<sup>42</sup> In this regard, the *UK Discussion Paper* (*ibid.*) suggests that:

'Equipping warships with suitable weapons for a mission against criminal activity, used in accordance with well-considered tactics and procedures, is entirely consistent with the UN Principles. Principle 11 states that national guidelines should ensure that firearms are used only 'in a manner likely to decrease the risk of *unnecessary harm*' and should 'prohibit the use of those firearms and ammunition that cause *unwarranted injury* or present an *unwarranted risk*' [emphasis added]. Adherence to this recommendation, and the relevant UN Principles, does not prevent Commanders from using lethal force when necessary to protect life; it is only aimed at preventing the use of excessive force which may cause unnecessary loss of innocent life'.



anti-piracy operations – the MLE legal regime could be spelled out in more detail in a soft-law instrument, like a non-binding statement of principles, reflecting our best practices. The latter could be adopted by a number of like-minded Navies and turn into a useful tool to gradually create a broader consensus among other relevant international and domestic actors.