MSA and BoardingOps

Dr. Christian Wesemann
Maritime Situational Awareness

- Terrorist activities
- Illicit WMD matériel
- Narcotics
- Migrant smuggling
- Environmental protection
Maritime Situational Awareness (pursuant to Draft ATP 101)

- Contributes to information superiority,
- is a critical enabler to trigger effective military action, and
- aims at information-sharing capabilities.
Maritime Situational Awareness (pursuant to Draft ATP 101)

- Sensor sources (e.g. shore stations, satellites)

- Non-sensor sources (e.g. approaches, boardings) based on human relationships / interactions which collect and share information and knowledge

→ Legal basis in international law?
Maritime Situational Awareness (pursuant to Draft ATP 101)

- What actions can be taken?

- Where can they be taken?
  - High Seas
    (International Straits / EEZ / Contiguous Zone / Territorial Sea)
Article 87
Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
   (a) freedom of navigation;
   (b) freedom of overflight;
   (c) freedom to lay submarine cables and pipelines, subject to Part VI;
   (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
   (e) freedom of fishing, subject to the conditions laid down in section 2;
   (f) freedom of scientific research, subject to Parts VI and XIII.

→ Any interference requires a legal basis
Maritime Situational Awareness Approach

(pursuant to Draft ATP 101)

„friendly approach“ (≠ „boarding“)

- Friendly interaction between a warship and a vessel not suspected of being involved in illegal activity
- Embarkation of the vessel is permitted at the invitation of the Master
Maritime Situational Awareness Approach
(pursuant to Draft ATP 101)

Any further action, such as

- inspection of the vessel,
- the documents or the crew,

is forbidden unless there is a **legal basis**.

→ The Master of the vessel is generally not vested with the authority to permit any such actions.
Standing Rules of Engagement (SROE) German Navy

→ Military orders that must be obeyed (policy)

214. It is permitted to go on board of a vessel upon the invitation of its master ("friendly approach") if there is no or not sufficient reason to suspect that the vessel is involved in illegal activity, e.g. for overt information collection or dissemination. Any sovereign action (e.g. searching the vessel, collecting personal data) shall be refrained from, even if the person in charge gives his/her voluntary consent. The obtained information including facts that lead to a suspicion of a conduct of illegal activity may be disseminated to third parties.

Remark:
Carrying of equipment or weapons necessary for personal protection is authorized.
Art. 92 (1) LOSC:

“Ships shall sail under the flag of one State only and [...] shall be subject to its exclusive jurisdiction on the high seas.”

- Prescriptive jurisdiction

- Enforcement jurisdiction

→ The exclusive flag State jurisdiction preserves each State’s interest in freedom of navigation by preventing interference of third States.
Art. 92 (1) LOSC:

“Ships shall sail under the flag of one State only and [...] shall be subject to its exclusive jurisdiction on the high seas.”

- Prescriptive jurisdiction
- Enforcement jurisdiction

→ Any action exceeding a mere “friendly approach” might constitute an enforcement operation and thus violate the exclusive flag State jurisdiction.
Art. 110 LOSC
Article 110
Right of visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;
(b) the ship is engaged in the slave trade;
(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
(d) the ship is without nationality; or
(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

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.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply mutatis mutandis to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.
If the vessel is suspected of having no nationality, a boarding is permitted in accordance with UNCLOS Article 110 to verify its nationality ("flag verification"), following approval of the competent operations command. The information that the vessel has no nationality as well as overtly collected information, including facts that lead to a suspicion of a conduct of illegal activity, may be disseminated to third parties.

- "flag verification" is limited by its purpose (no door opener)

- Information found in the course of the "flag verification" may be shared
Art. 8bis 2005 Protocol to the SUA Convention
5 Whenever law enforcement or other authorized officials of a State Party ("the requesting Party") encounter a ship flying the flag or displaying marks of registry of another State Party ("the first Party") located seaward of any State’s territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence set forth in article 3, 3bis, 3ter or 3quater, and the requesting Party desires to board, 
(a) it shall request, in accordance with paragraphs 1 and 2 that the first Party confirm the claim of nationality, and 
(b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter referred to as "the flag State") for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed, and
(d) Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality.
UNSCR
Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.
UN Security Council Resolution 1373 (September 2001):

“The Security Council […] Decides […] that all States shall […] refrain from any form of support […]; Take the necessary steps to prevent […] terrorist acts […]; Deny safe haven […]; Ensure that any person […] supporting terrorist acts is brought to justice […]; Afford one another […] assistance with criminal investigation […].”
Self-defense
Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
Caroline case

a necessity of self-defense, which is

„instant, overwhelming, leaving no choice of means, and no moment for deliberation“
UN Security Council Resolution 1368 (September 2001):

“The Security Council […], Determined to combat by all means threats to international peace and security caused by terrorist acts, Recognizing the inherent right of individual or collective self-defence in accordance with the Charter […].”
SROE German Navy

301. As a matter of principle, German forces have the unconditional and unlimited right of self-defence. Beyond that, they may act in defence of third parties, especially in the event of attacks that pose a threat to life or will very probably cause serious bodily harm or major restrictions of the personal freedom of the person(s) concerned.

Remark 1:
For German forces, self-defence is defined as the use of minimum force (up to and including deadly force) and other actions required to defend themselves against an imminent or actual attack.

Remark 2:
In exceptional cases the right of self-defence may be restricted on order only if death or serious bodily harm can reasonably be excluded.

Remark 3:
Extended self-defence encompasses the defence of allied forces, such as members of the own task force or other allied forces in the vicinity.
For a boarding operation based on the right of self-defense there needs to be a threat which can be described by the criteria of necessity and immediacy, a mere suspicion is not sufficient.
Counter-measures
Boarding as counter-measure in response to a flag State‘s violation of UNSCR 1368 / 1373?

A State which knowingly
- allows or otherwise assists terrorist related activities by non-State actors, and
- does not intervene by preventing them on board vessels flying its flag, commits an internationally wrongful act.
Article 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) that State individually; or

(b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

→ Actions short of self-defense

→ Requires solid intelligence ("specially affects that State")
Flag state consent / Master consent
Article 91
Nationality of ships

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.
Flags of convenience

- The shipowner registers a merchant vessel in a foreign ship register. The vessel flies the civil ensign of that country (the flag State).

- The genuine link must not be confused with the flag state duties pursuant to Art. 94 LOSC.

- If the genuine link is absent, non-recognition of a claim of nationality by other States is not an available sanction.
Flags of convenience

- If there is no flag State consent, what about a consent by the vessel’s master?
  - Yes: National legislation / treaty provisions
  - No: It is the flag State, which exercises the exclusive jurisdiction / Draft ATP 101 / No. 214 SROE German Navy
Bilateral Agreements
THE REPUBLIC OF LIBERIA
Bureau Of Maritime Affairs

10 March 2004

MARINE OPERATIONS NOTE: 2/2004

RE: Liberia and U.S. Agreement to Suppress the Proliferation of Weapons of Mass Destruction

Dear Owner/Operator:

On 11 February 2004, the Republic of Liberia and the United States of America entered into an Agreement to cooperate to suppress the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials by sea. The purpose of this document is to describe how this agreement will work between the U.S., Liberia and ship operators, masters and crew when, and if, this agreement is acted upon. We view the Agreement as a positive development in international maritime security as it puts the world on notice that Liberian ships are not available for terrorist activities. We will issue a Marine Notice, which will capture the information contained in this document and any changes to the procedures described herein, after we have gained experience with the Agreement. As such, we encourage any comments or concerns you may have regarding the procedures related to this agreement.
The Agreement: The agreement provides that a “competent authority” of the U.S., and the Republic of Liberia may request authorization from one another for their respective Security Force Officials to board and search vessels that are reported to be under their respective flags and which are suspected of carrying illicit shipments of WMD seaward of any State’s territorial sea. The “competent authorities” for purpose of implementation of the Agreement are the Liberian International Ship and Corporate Registry (LISCR) for Liberia and the U.S. Coast Guard for the U.S. Only after confirmation from LISCR, may U.S. Security Force Officials board and search suspected vessels registered under Liberian flag. The same provision applies to a request from Liberia to board and search suspect vessels registered under the U.S. flag. If a vessel is found carrying an illicit shipment of WMD the vessel may be detained, as well as items and persons on board. The nationality of the suspect vessel will be confirmed prior to providing authorization to board.

Applicability: For Liberia this agreement applies to suspect vessels confirmed to be under the Liberian Registry, or vessels claiming Liberian Registration that are:
   a. not flying the Liberian flag,
   b. not displaying any marks of its registration or nationality, and
   c. claiming to have no documentation on board the vessel, for the purpose of locating and examining the vessel’s documentation.

Conduct of Boarding’s and Searches: Boarding’s and searches pursuant to this Agreement will be carried out by Security Force Officials from Security Force vessels, as well as by vessels and aircraft embarked on or supporting such vessels. For the U.S., Security Force Officials, mean uniformed or otherwise identifiable members of the U.S. Coast Guard and the U.S. Navy, who may be accompanied by clearly identifiable law enforcement officials of the Department of Homeland Security and Justice, and other clearly identifiable officials duly authorized by the U.S.
“If there is no response […] within two hours of its acknowledgment of receipt of the request, the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching the vessel […]”
Conclusion

- For each boarding the legal basis needs to be considered carefully

- The flag State principle / freedom of navigation has to be kept in mind

- There is room for improvement concerning the international law
Thank you very much!

Dr. Christian Wesemann