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Maritime Law Enforcement and Human Security at Sea

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INTRODUCTION

Maritime law enforcement is an essential component of our efforts to achieve maritime security. States rely on navies and coast guards to enforce their laws within their maritime zones as prescribed by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). At the same time, the concept of maritime security has grown to encompass many threats, including threats to human security. Accordingly, law enforcement is indispensable not only to achieve maritime security but also to safeguard human security at sea. There are instances, however, in which maritime law enforcement operations have an adverse impact on persons found at sea. This policy brief will therefore discuss law enforcement and human security at sea. It will start by explaining the concept of human security and its maritime dimensions. It will then discuss the interconnection between human security and maritime security underlining the importance of integrating human security in maritime security policies and operations. Finally, it will explain the core legal issues of

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jurisdiction and will discuss how law enforcement operations, especially those involving use of force, should be conducted in order to protect persons at sea.

WHAT IS HUMAN SECURITY?

The notion of “human security” was introduced in the [1994 Human Development Report of the United Nations Development Programme](#) (UNDP). The report revisited the concept of security and distinguished between the security of nations and the security of people placing emphasis on the latter. As noted in the report, “with the dark shadows of the cold war receding, one can now see that many conflicts are within nations rather than between nations.” ([UNDP Report, p. 22](#)). To further understand the concept of human security, it is worth highlighting some key points of the report.

Human security does not have a fixed definition. Broadly speaking, it is understood as the “freedom from fear and freedom from want” ([UNDP Report, p. 24](#)). Inevitably, this has meant that people understand human security differently across the world. In a country with a repressive regime, human security might be understood as the freedom to freely express one’s views or not be persecuted for practising one’s religion; for those living in a developed country, it might mean returning home safe after a night out or not losing one’s house to a wildfire or a flood; while in a low-income country, its meaning might be equated with job security or access to basic health care. To systematize the threats to human security, seven main categories have emerged. These are the following: economic security, food security, health security, environmental security, personal security, community security and political security.

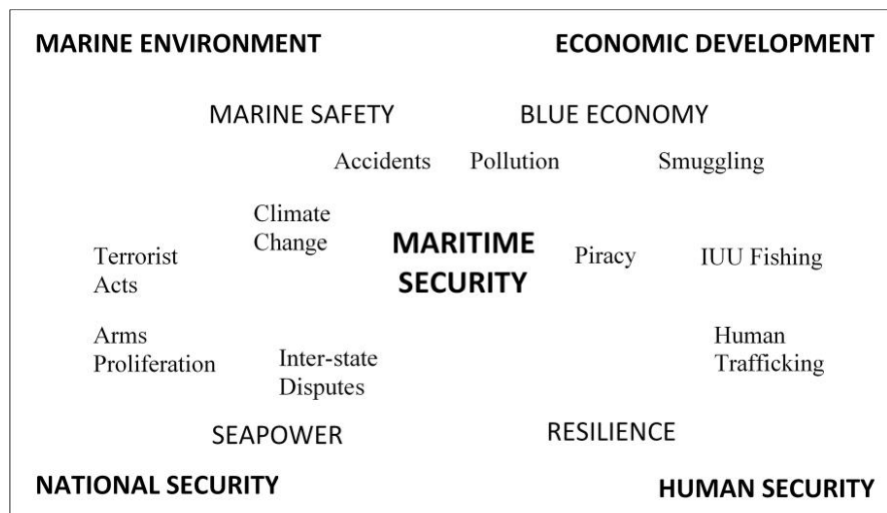
HUMAN SECURITY AT SEA

Over the years, human security acquired two maritime dimensions – a collective and an individual ([Kittichaisaree, 2010](#)). The collective dimension is understood to refer to the

economic and environmental interests of coastal communities and the risks posed to these communities by illegal fishing, environmental crimes, climate change and sea-level rise, piracy, etc. On the other hand, the individual dimension is understood to refer to the safety and protection of persons on board vessels from abuses. Initially, individual human security at sea concerned mostly the security of seafarers. Given the very dangerous nature of seafaring, the emphasis on the security of seafarers is easily understood. Nevertheless, due to the emergence of accounts of human rights violations at sea, individual human security at sea is now understood to refer to any person who faces human rights violations at sea (Galani, 2020).

HUMAN SECURITY AND MARITIME SECURITY

Human security has emerged as an essential component of our understanding of maritime security. While maritime security remains a “buzzword” (Bueger, 2015), various attempts have been made to define it in the literature and in the strategies of States and regional actors in which we see that the references to human security have gained more visibility (Bueger & Edmunds, 2017). Bueger, for example, has developed the following matrix to conceptualise maritime security, arguing that maritime security revolves around four pillars: the marine environment, economic development, national security and *human security* (Bueger, 2015).



The [2005 US National Strategy for Maritime Security](#), the earliest national maritime security strategy, does not define maritime security but makes it clear that safeguarding the security of the oceans is essential for the security and welfare of *its people*. On the other hand, the [2014 EU Maritime Security Strategy](#) states that maritime security ‘is understood as a state of affairs of the global maritime domain, in which international law and national law are enforced, freedom of navigation is guaranteed and *citizens*, infrastructure, transport, the environment and marine resources are protected’. This reinforces the argument that human security has become an integral part of every maritime security strategy. This becomes more visible if one looks at the efforts of the African Union to achieve maritime security. Both the [2050 Africa’s Integrated Maritime Strategy](#) and the [Lomé Charter](#) widely acknowledge the positive impact that maritime security has on human security and persons at sea.

Looking beyond the theoretical underpinnings of maritime security, we will see that human security is inextricably intertwined with maritime security in practice. First, it is crucial to understand that criminality at sea is a symptom of insecurity on land. For example, Somalia struggled to contain the spread of pirate attacks because, as a failed State, it lacked the capacity to implement its laws and secure its waters. This had a tremendous impact on the security of the thousands of seafarers taken hostage as well as on the coastal communities that could no longer survive on tourism in the areas where pirate gangs were active. Another characteristic of (in)security at sea is that it has no borders. While threats might originate from a handful of countries, these can easily spread across the seas. The collapse of the Ghaddafi regime in Libya, for example, has turned the country into a hub for irregular migration with thousands of people risking their lives to cross the Mediterranean while at the same time fears have been expressed that terrorists use the migration routes, threatening the security of the countries bordering the Mediterranean and their citizens.

The strong interconnection between human security and maritime security means that human security at sea can be achieved only if it is integrated in maritime security operations, initiatives and policies. In light of this finding, the next section will explain how maritime law

enforcement, one of the key tools employed to achieve maritime security, should be conducted in order to safeguard human security at sea.

LAW ENFORCEMENT AND HUMAN RIGHTS JURISDICTION AT SEA

Law enforcement operations range from surveillance and patrols to vessel inspections, arrest and prosecution of suspects or rescue of victims of criminal activities at sea ([Burke, 1994](#)). These are essential for implementing national and international laws at sea, securing the oceans and safeguarding the human security of coastal communities and individuals found at sea. Law enforcement operations, however, may also have an adverse impact on the security of persons caught up in the middle of an operation. Accordingly, it is important to examine how maritime law enforcement operations should be conducted giving due regard to individual human security at sea. In doing so, we will evaluate the relevant human rights framework and its application in the context of maritime law enforcement operations.

The most challenging question that arises during a maritime law enforcement operation is when State agents exercise jurisdiction over persons found at sea for the purposes of human rights. The complexity of this question arises because jurisdiction at sea is understood differently under the law of the sea and human rights law ([Gavouneli, 2007](#); [Papanicolopulu, 2018](#)). When navies and coast guards conduct an operation, they must first turn to UNCLOS to see whether they have jurisdiction to operate ([Klein, 2011](#)). The fact, however, that States may exercise jurisdiction under the law of the sea does not mean that they exercise human rights jurisdiction. To understand this point, let us look at two different scenarios.

Scenario 1

A private yacht flying the flag of State A exercises its right of innocent passage through the territorial waters of State B. State B is informed that the yacht is involved in dealings of illegal drugs with other yachts in its territorial waters. In line with articles 2 and 19 of UNCLOS, State B has sovereign powers within its territorial sea and may stop, search and arrest the vessel and its crew as its passage is no longer innocent. If the same private yacht, however, exercises its right of innocent passage and State B has information that on board are forced to work trafficked women, then State B does not have jurisdiction to intervene under article 19 of UNCLOS as it is difficult to establish that human trafficking is prejudicial to the peace, good order or security of the coastal State.

Scenario 2

The navy of State A patrols its EEZ and inspects a fishing boat. During the inspection, it is established that the fishing boat does not have a fishing licence. In this case, State A has the right to arrest the vessel and its crew as under article 56 of UNCLOS it has sovereign rights and may exercise jurisdiction for the purpose of exploring and exploiting, conserving and managing its natural resources within its EEZ. If in the same scenario, during the inspection it is established that the fishing boat has a valid fishing licence but on board are found fishers forced to work in poor labour conditions, then State A does not have jurisdiction under article 56 of UNCLOS to intervene and release them.

Both scenarios highlight the challenges that law enforcement agents may encounter because of the way the current legal framework of the law of the sea and human rights law operate. While they may come across victims of human rights violations during a law enforcement operation, they may not be permitted to exercise jurisdiction to protect them. This is not to say that the international law of the sea is totally human rights blind. The International Tribunal on the Law of the Sea (ITLOS), in its famous *MV Saiga (No.2)* [1999] dictum, stated that ‘the considerations of humanity must apply in the law of the sea as they do in other areas

of law' indicating that due consideration has to be given to human rights when interpreting and applying the law of the sea. In the *Artic Sunrise case* [2015], it was further underlined that 'if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of [a vessel] and the arrest and detention of those on board is reasonable and proportionate'. While there is an emerging consensus that the law of the sea cannot be interpreted and applied in isolation from other areas of international law, including human rights law, this is not enough to address the complexities of enforcing human rights law at sea.

The main reason is that the question that remains unanswered is: when do law enforcement agents exercise jurisdiction for the purposes of human rights? To answer this question, we ought to have a look at the cases of human rights bodies and courts. At the time of writing, there have been several cases in which human rights violations during interdiction, interception or search and rescue operations have taken place at sea. Accordingly, a State is bound by human rights law when its agents exercise:

a) De jure control by detaining persons on board a vessel that fly its flag

In *Hassan v France* [2014], for example, the European Court of Human Rights found that the French state agents had jurisdiction over the pirate suspects who they arrested and held in custody on board a French vessel off the coasts of Somalia before they transferred them to France on board a French military aircraft to be prosecuted. In *Hirsi Jamaa v Italy* [2012], the European Court of Human Rights concluded that Italy had jurisdiction over the migrants and refugees who were intercepted by the Italian coast guard and were then transferred to Italian warships and returned to Tripoli.

b) De facto control by detaining persons on board a vessel that fly a different flag or by exercising some other form of control over persons at sea

In *J.H.A. v Spain* [2008], the UN Committee against Torture found that Spain exercised human rights jurisdiction over the migrants that it had rescued and then forced to stay on board the vessel that was carrying them until their fate was decided. In *Medvedyev v France*

[2010], the European Court of Human Rights found that the French agents exercised jurisdiction over the crew of a Cambodian flagged vessel who they ordered to remain confined in their quarters while a drug trafficking investigation was under way. In *Fatou Sonko v Spain* [2012], the UN Committee against Torture concluded that Spain exercised jurisdiction over four African migrants that it had intercepted and forced to swim back to the Moroccan waters. Similar situations may arise in pushback operations.

c) Control by proximity or “contactless” control over persons found at sea

This type of control has come to be added to the effective de jure or de facto control test relatively recently. In *AS, DI, OI and GD v Italy* [2021], the UN Human Rights Committee found Italy responsible for the death of migrants in a shipwreck that took place within the Maltese search and rescue area of responsibility because of the way it mishandled the victims’ distress calls and because it failed to order one of its warships that was near the shipwreck site to provide help until it was too late. While this is the first time that a human rights body interprets jurisdiction at sea in such a broad manner (Milanovic, 2021), it may have an impact on pending complaints in which coastal States failed to respond to distress call and discharge their search and rescue obligations (Giuffré & Moreno-Lax, 2019).

USE OF FORCE DURING MARITIME LAW ENFORCEMENT OPERATIONS

Once human rights jurisdiction is established, then maritime law enforcement agents have to comply with human rights law. Depending on the nature of the operation, States have to protect the right to life, the right to liberty, the freedom from torture or ill-treatment, or any other right affected by the operation. Specific attention needs to be paid to the use of force during maritime law enforcement operations (Guilfoyle, 2015). The human rights courts and bodies have developed specific criteria that must be complied with. While these criteria have been developed by examining operations conducted on land, it is argued that these criteria should also apply to operations conducted at sea (Galani, 2016) More specifically, when force is used during a maritime law enforcement operation: a) there must be an accurate operation

plan in advance b) the use of force must be proportionate c) lethal force must be used only as a last resort and be absolutely necessary in defence of persons from unlawful violence d) all the precautions must be taken to minimise incidental loss of life and e) medical assistance must be readily available. Admittedly, operating in unfriendly and dangerous waters often in poor weather conditions may require these criteria to be adjusted accordingly to avoid placing an unreasonable burden on maritime law enforcement agents but nothing precludes them from applying at sea.

CONCLUDING REMARKS

The concept of human security was developed at a time that wars were no longer considered a great threat to the international community. The recent conflict in [Ukraine](#) has shown that wars were, are and will be a threat to global security and stability. Even in this case though, human security should not be overlooked. Over the years, the concept has gained significant attention and acquired maritime dimensions. As shown in this policy brief, human security is intertwined with maritime security in theory and in practice. Accordingly, it is essential to design and execute maritime security policies and operations in which human security is properly integrated. One way in doing so is by conducting maritime law enforcement operations that give due regard to persons at sea. While law enforcement agents turn to UNCLOS to know when they have jurisdiction to operate and tackle criminality at sea, it is also important not to overlook that in certain circumstances they also exercise human rights jurisdiction. This policy brief has discussed when human rights jurisdiction is exercised at sea underlining the impact that non-compliant with human rights law operations have on human security at sea.