

TOPICAL LEGAL ISSUES RELATED TO MARITIME OPERATIONS

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The Legal Basis of Intervention

- Military interventions at/from the sea can be ordered rather quickly/unexpectedly → - Limited time for planning
- Mandate/mission may change over time → - Mission documents need to be updated
- Lack of a UNSCR → - Need for an alternative legal basis
- Warships deployed at sea and then rerouted to other missions → - Need to quickly adapt to the new operational (and legal) scenario
- Coalition operations/Operations by IOs → - Different legal interpretations by participants

Choice over the Legal Basis 'ONCE AND FOR ALL'

The Legal Basis of Intervention

- CONSEQUENCES



- Mandates/Missions publicly described/announced in moral, rather than legal terms



Legal justifications to be aligned to moral theses

- Overreference to self-defence (*ius ad bellum*)
- Reluctance to admit the existence of an armed conflict
- Freedom of the high seas as a legal basis for naval operations

**- PARADIGM SHIFT TOWARDS THE LEGALITY OF
(AERMED/LIGHTLY ARMED) COUNTERMEASURES?**

New Means/Tactics, New Rules?

- USE OF CIVILIAN VESSELS BY STATE AND NON-STATE ACTORS



- Flag State jurisdiction (exclusive on the high seas)
- Flag alone does not reveal the “enemy character” of a ship
- During armed conflicts at sea, civilian vessels are exempted from attacks unless directly involved in hostilities or making an effective contribution to the enemy’s war efforts (including intelligence gathering)
- Neutral ships can be subjected to visit and search if there are reasonable grounds for suspecting that they are subject to capture
- **However... No armed conflict = No engagement...**
- Problem of open registries and flags of convenience (no “genuine link”)
- Use of force (not necessarily amounting to an armed attack) against a merchant vessel entails responsibility towards the flag State and possibly towards the crew’s States of nationality

New Means/Tactics, New Rules?

- USE OF CIVILIAN VESSELS BY STATE AND NON-STATE ACTORS



Should the flag State formal criterion be abandoned in favour of that of genuine link (or better the real link)?



Examples:

Sanctions to Russia by several States and the EU included ships “controlled”, “operated” by Russians or that changed flag after the invasion of Ukraine

Houthi Regime targets ships simply “linked” with Israel



Using criteria other than the formal nationality one ends up resembling the “enemy character” criterion

New Means/Tactics, New Rules?

- **STATE VESSELS
IN DISGUISE**



**HYBRID NAVAL
CONFRONTATION**



- Immunity of State vessels
(warships and other ships “owned or operated by a State and used only on government non-commercial service” have “complete immunity from the jurisdiction of any state other than the flag state”)
- But how to understand, at sea, if a ship is “owned or operated by a State and used only on government non-commercial service”?
- What if they are armed? (including floating armories)
- Consequences of a forcible boarding (are we launching an armed attack against the flag State?)

New Means/Tactics, New Rules?

- USE OF AERIAL, SURFACE, UNDERWATER DRONES



- No marks/signs that may reveal nationality or belonging
- Difficult to establish contacts with their remote-controllers (are there remote controllers?!)
- Should they be considered immune *per se*?
- Should surface/underwater drones be considered ships/submarines? In what circumstances?
- On the contrary, are they to be considered “weapons”, meaning missiles/mines/torpedoes?



Should they be engaged in self-defence?
Are they a safety, rather than only a security, hazard?

Issues of Responsibility

- “MARITIME SECURITY”



- Increasing interactions with civilian vessels
- Use of civilian vessels for State purposes or presence of State vessels in disguise
- Patrol operations (SLOC)
- Surveillance of portions of (high) seas
- Protection/escort of ships



Protecting the territorial integrity of a State from threats from the sea

Protecting State interests at sea



Manifestation of public authority



RESPONSIBILITY?

Issues of Responsibility



JURISDICTION

- “Effective Control” → instruction/direction/factual control
- “Control and Authority” → physical power and control
- “Overall Control” → “organising, co-ordinating or planning”
- Spatial Jurisdiction (?) → extraterritorial effective control of an area (strength of military presence)
- Functional Jurisdiction (?) → “contactless jurisdiction”/decision-making

Why Legality Still Matters

HYBRID NAVAL CONFRONTATION



Framing confrontation into legal categories



- Shows departure from existing legal principles and rules
- Helps in understanding if we are crossing “legal red lines”

- Brings in clarity and limits to the use of force
- Increases public accountability and scrutiny
- Improves the **“coherence of operations”**



Confrontation as a “dialogue” between parties

- Helps in understanding the opposing party’s viewpoints and contain hostilities
- Predictability of operations/use of force



Powerful tool for conflict resolution

**THANK YOU FOR
YOUR ATTENTION**