

The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)

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Abstract

Even though states often resort to the use of force in the maritime domain, there is certainly ambiguity as to its legal justification. States and international scholars oscillate between justifications provided under the *jus ad bellum* and self-defence or under the rules on law enforcement. At the same time the relevance of traditional law of naval warfare is heavily questioned. The present article attempts to delineate the legal contours of the use of force at sea and demonstrate that it may be subject to different and discrete legal regimes.

Keywords

use of force, law of the sea, law-enforcement operations, sovereign rights, human rights law

The use of force at sea has been traditionally approached from the perspective of the law of naval warfare, i.e. the laws that govern the armed hostilities at sea. It is truism in international law to distinguish the law of recourse to force (*jus ad bellum*) from the law governing the conduct of hostilities (*jus in bello*) (Stahn 2006). The latter addresses the reality of a conflict without considering the reasons for or legality of resorting to force and its application is triggered by the existence of an armed conflict, whether international and non-international.¹ Indeed, many international instruments, such as the 1907 Hague Regulations, govern legally armed hostilities at sea. Nevertheless, there have been considerable doubts as to whether the traditional law of naval warfare remains intact in the post-Charter era (Lowe 1991, 130).

What about peacetime? Leaving aside the case of maritime interdiction operations pursuant to SC Resolutions authorizing the use of force for the implementation of the relevant sanctions (Soons 2000), states also employ force in the course of everyday law-enforcement operations at sea. These operations aim either to counter threats to maritime security, such as maritime terrorism or to fight organized crime at sea, like piracy, illicit trafficking in narcotic drugs or smuggling of migrants as well as to safeguard states' maritime sovereign rights, e.g. sovereign rights over their continental shelf. Is this use of force subject to the rules on the use of force (*jus ad bellum*)?

According to article 2(4) of the UN Charter, all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations'. Article 2(4) thus prohibits all threats to use force, as well as the actual use of force. It is the first treaty provision by which international community disavows comprehensively forcible action by States, since in an earlier attempt in 1928, the so-called Kellogg-Briand Pact (or Treaty of Paris), the signatories merely 'condemned recourse to war' and 'renounced it as an instrument of national policy.' The exceptions to this fundamental principle of the post-Charter era are the use of force in self-defence (article 51 of the UN Charter) and the authorization of armed force by the Security Council under chapter VII of the UN Charter.

Accordingly, any use of force, including the use of force at sea, to be justified should come under the scope of one of these exceptions (the so-called *jus ad bellum* or more aptly *jus contra bellum*). Otherwise, it is questioned whether it may

1 For a definition of 'armed conflict' see *Prosecutor v Tadić*, Case no. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 70.

fall under the scope of a different set of rules, namely the rules governing law-enforcement operation. Moreover, is there any room for the application of human rights law in this regard? These questions have arisen in many cases before international tribunals and they have significant legal repercussions also in contemporary world politics. Incidents like these occurring in the South China Sea (Zou 2014) highlight the need for clarity in the applicable legal framework. It is one thing to consider every instance of the use of force in the maritime domain as a potential breach of article 2(4) of the UN Charter and another to consider it as inherent in law enforcement and thus subject to the rules of engagement of policing operations.

It is the purpose of the present paper to discuss these questions concerning the use of force at sea against the background of the relevant rules of international law. First, the relevance of the armed conflict paradigm today will be critically assessed; then, the use of force in peacetime will be canvassed in light of the pertinent jurisprudence. The assertion will be that there is a fundamental distinction between the use or threat of the use of force in the course of the protection of sovereign rights and the respective use of force in every-day law-enforcement operations. Finally, the rules applicable in law-enforcement operations at sea will be analyzed.

THE LAW OF ARMED CONFLICT AT SEA IN CRISIS

It is a truism that the law of naval warfare has lost considerable part of its steam in the contemporary international legal discourse. This is mainly because the legal framework governing armed hostilities at sea dates back to the 1907 Hague Regulations and has not recently been revisited.² Other relevant international instruments are equally dated: the Paris Declaration of 1856,³ the Declaration of London

2 The relevant Hague Regulations are the following: The Hague Convention for the Pacific Settlement of International Disputes (1907); The Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (1907); The Hague Convention VII Relating to the Conversion of Merchant Ships into Warships (1907); The Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines (1907); The Hague Convention IX Concerning Bombardment by Naval Forces in Time of War (1907); The Hague Convention XI Relative to Certain Restrictions With Regard to the Exercise of the Right of Capture in Naval War (1907); The Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War (1907). These conventions are compiled in Ronzitti (1988).

3 The Declaration of Paris represented the first codification of the rules of maritime war to be generally accepted among maritime states; see Declaration Respecting Maritime Law, 16 April 1856, 1 AJIL (Supp 1907) 89.

of 1909,⁴ and the London Protocol relating to the Rules of Submarine Warfare of 1936. In view of the considerable age of the Hague Regulations and of the other instruments, it is obvious that they might be ill-suited to meeting the realities of modern weaponry and contemporary methods and means of naval warfare (Politakis 1998, 643). As Roach observes “[t]here is virtually no modern treaty law governing the use of force in naval warfare” (Roach 2002, 368).

Furthermore, the absence of serious interest in naval warfare may be due to the simple fact that major naval powers are not anymore conducting warfare operations; or at least, that is what they claim. Naval warfare is squeezed between action in “self defense” and “law enforcement operations” (Sergis 2014, 524). On the one hand, the relation between *jus ad bellum* and *jus in bello* in the context of naval operations is not well defined, with self-defense serving as a panacea for military action, displacing regulation of the conduct of hostilities.⁵ On the other, modern naval operations are primarily focused on the enforcement of public order at sea. Navies’ modern role is to conduct Maritime Interdiction Operations (MIOs), fighting for example piracy, combating drug-trafficking, dealing with migrant-smuggling and enforcing Security Council’s Resolutions.

Nonetheless, the basic principles the traditional naval warfare are still generally recognised as reflecting customary international law (Heinegg 2006, 154). Recently, two texts have been produced by private bodies, namely the San Remo Institute⁶ and the International Law Association,⁷ which even though they have no formal status, are both widely considered, in the most part, as restatements of the contemporary customary law applicable to armed conflicts at sea (Dinstein 1994, 350). Green has commented in respect of the San Remo Manual that ‘although it is an unofficial statement, it is generally regarded as expressive of accepted customary law’ (Green 2008, 45). Moreover, the US has submitted before the International Court of Justice that ‘most of [the San Remo Manual’s] provisions reflect

4 The London Declaration Concerning the Laws of Naval Warfare (1909) was the first and only exhaustive, yet ill-fated compilation and codification of all the aspects of maritime warfare. See JB Scott, ‘The Declaration of London of February 26, 1909’ 8 AJIL (1914) 274.

5 As A. V. Lowe argues “in essence, there appear to be two almost entirely distinct bodies of law and principle—the traditional laws of war and neutrality, and “Charter” rules on self defense—which may be used as criteria of legality, neither of which is clearly established in international law to the exclusion of the other” (Lowe 1989, 199).

6 See International Institute of International Humanitarian Law, San Remo Manual on International Law Applicable at Armed Conflicts at Sea, paragraph 118 (hereinafter: San Remo Manual).

7 See ILA, Helsinki Principles on the Law of Maritime Neutrality (hereinafter: Helsinki Principles).

customary international law.⁸

In any case, the question remains whether the law of armed conflict at sea is still relevant in the 21st century, notwithstanding the fact that States scarcely invoke its rules today. The arguments against its contemporary application revolve mainly around the idea that this legal framework has been superseded either by the UN Charter or by the law of the sea.

In more detail, there is the argument that since the outlawing of the use of force by the UN Charter, no 'state of' war' can lawfully arise. Accordingly, 'the criterion for the applicability of the Laws of the War cannot be met, the legality of all uses of force henceforth being judged by reference to the terms of the Charter' (Lowe 1991, 130). Nevertheless, 'other scholars maintain that the much-acclaimed prohibition of resort to the force in article 2(4) or *jus ad bellum*, is basically unconnected with the laws of war properly so called, or *jus in bello*, and therefore the traditional laws remain unaltered by the Charter limitations on the use of force' (Politakis 1998, 7). The merits of these opposing arguments have been canvassed *in extenso* elsewhere and this task will not be repeated here (Ronzitti 1994, 138); nonetheless, it is submitted that, in principle, a state's use of force at sea is subject to the basic rules governing naval hostilities, as amended and qualified by the collective security system of the Charter (Doswald-Beck 1995, 197).

In any event, from the moment armed force is used between two or more states, the customary international law of armed conflict at sea applies to all the parties to the conflict, irrespective of who was the aggressor and who is acting in self-defence. As M Bothe rightly underscores, 'once an armed conflict has started because aggression has occurred, it is not possible to ask the question, whether there is an armed attack or a situation of self-defense, for each individual shot fired. Within the framework of an armed conflict, the legal yardstick for the individual act of violence is the law of war only and not the *ius contra bellum*.' (Bothe 1991, 393). Equally, the San Remo Manual stipulates that 'the parties to an armed conflict at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used' (San Remo Manual, paragraph 1). When the resort to force is the outcome of a decision of the Security Council under chapter VII, the UN Member States are obliged to abide by the terms of the decision and support a United Nations action. (San Remo Manual, paragraphs 7-9). As stated in the San Remo Manual, 'neutral States are bound not to lend assistance other than humanitarian assistance to that State,' i.e. the state against

8 *Oil Platforms (Islamic Republic of Iran v United States of America)* (Counter-Memorial and Counter-Claim Submitted by the United States of America) 23 June 1997, 130 fn 2925; available at <www.icjci.org/ijcwww/ldocket/iop/ioppleadings/iop_ipleadings_19970623_countermem_us_04.pdf>.

which the Resolution was adopted (paragraph 7).

Significant in these modern restatements of the law of naval warfare is the lack of any reference to the traditional distinction between international armed conflicts and non-international armed conflicts. The San Remo Manual speaks mainly of international armed conflicts, although it leaves open the possibility for the application of its principles to non-international armed conflicts, as in paragraph 1, it refers vaguely to the 'parties to an armed conflict,' without further distinction. According to the Commentary to the Manual, 'although the provisions of the Manual are primarily meant to apply to international armed conflicts at sea, this has intentionally not been expressly indicated in paragraph 1 in order to dissuade the implementation of these rules in non-international armed conflicts involving naval operations.' Hence, it is assumed that the law of naval warfare applies *in toto* to armed conflicts, regardless of whether the conflict is international or non-international.

A second issue concerns the impact of the UN Convention on the Law of the Sea⁹ on the laws of naval warfare. As Natalie Klein reports: 'the arguments have varied from one extreme to the other—from considering that UNCLOS is not applicable during the armed conflict, to UNCLOS being applicable because the laws of naval warfare are no longer relevant with the changes in laws relating to when States may lawfully resort to force. As may be expected, a more moderate position whereby "the maritime rights and duties States enjoy in peacetime continue to exist, with minor exceptions, during armed conflict' is the most tenable view' (Klein 2011, 259).

Indeed, although it is common ground that the UNCLOS does not directly bear on the law of naval warfare,¹⁰ it has an extensive impact on the rules defining the 'regions' of naval operations, and especially the extent of these regions. Belligerent measures may be exercised on the high seas, the EEZ or in the territorial seas of belligerents, but not in areas under the sovereignty of neutral states (Heinegg 1995, 19).

The San Remo Manual sets out in this respect that 'hostile actions by naval forces may be conducted in, on or over (a) the territorial sea and internal waters,

9 United Nations Convention on the Law of the Sea, 1833 UNTS 397; entered into force 16 November 1994; as at 10 January 2014, LOSC has 166 parties, including the EC; see at <[http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea)>.

10 While none of the 1958 Geneva Conventions expressly so provide, it is true that the International Law Commission, which prepared draft articles on the subject, intended the articles to apply in time of peace; see YbILC (1956-II) 256. The UNCLOS is similarly silent, although here, too, it was understood that the Conference was concerned with the peacetime law of the sea.

the land territories, the exclusive economic zone and continental shelf and, where applicable, the archipelagic waters, of belligerent States; (b) the high seas; and (c) subject to paragraphs 34 and 35, the exclusive economic zone and the continental shelf of neutral States.’ As regards the EEZ and the continental shelf of neutral States the Manual makes explicit reference that the belligerents shall have due regard for the rights and duties of the coastal States.¹¹ Of significance is a plea that the drafters of the Manual make concerning the protection of marine environment; according to paragraph 11 of the Manual ‘the parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing: (a) rare or fragile ecosystems; or (b) the habitat of depleted, threatened or endangered species or other forms of marine life. Truly, this appears more a wishful thinking rather than a pragmatic prediction. Finally, in view of the special legal status of the high seas and of the rights that neutral states continue to enjoy on them, belligerents are obliged to pay due regard to these aspects and refrain from interference therein (San Remo Manual, paragraph 12).

Having ascertained that neither the UN Charter nor the UNCLOS has overruled the law of naval warfare, it is apt to refer to the relevant state practice in support of the continuing significance of this category of international law. First, mention should be made to the Falklands Islands/Islas Malvinas conflict (1982) (Coll and Arendt 1985), even though every single episode of the conflict, as well as the establishment of the relevant war zones, namely the Maritime Exclusion Zone and the later Total Exclusion Zone (TEZ),¹² was justified by the British exclusively in terms of self-defence.¹³ This was also the reason given for the sinking of the *General Belgrano* while it was steaming south-west and well outside the 200 nautical mile exclusion zone.¹⁴

It is beyond the scope of the present enquiry to have regard to the legal merits of this incident. Suffice to note, however, that the *Belgrano* incident, assessed against the background of the classical laws of naval warfare, would pose no legal problem; it involved nothing more than a warship being spotted and sunk on sight by an enemy vessel on the high seas. However, ‘when an unprovoked attack, even against hostile warships, comes to be appraised with self-defense standards,

11 See also Hague Convention XIII article 2 and 5 and Helsinki Principles paragraph 2.1.

12 In the course of the two-month conflict, the UK established four different types of war zone in succession; see Politakis 1998, 77.

13 See eg the statement of the UK Representative, A Parsons, in the course of the UN Security Council debate of 22 May 1982, 53 BYIL (1982) 551-553.

14 On 12 May 1982, the Argentine cruiser *General Belgrano* was torpedoed and sunk while steaming some 36 nautical miles outside of the Total Exclusion Zone.

it is no longer free of legal objections' (Politakis 1998, 85). In other words, it would be more consistent with both the *jus ad bellum* and *jus in bello* to avoid the claim of self-defence in this regard, as well as to abstain from imposing self-limitations upon the theatre of war. This serves as an illustration of the unnecessary legal problems created by the conflation of these two normative categories.

Another conflict in which the rules of naval warfare, such as the belligerent right of visit and search, were of relevance was the war between Iran and Iraq (1980-1988). Neutral vessels were systematically stopped and boarded, mainly by Iranian forces at the entrance of the Persian Gulf, and eventually diverted and detained in Iranian ports (Momtaz 1993, 24). It is of importance to note that several foreign governments, amongst them, the US, Italy, the Netherlands, France and the Soviet Union, through various statements, acknowledged the belligerent right of visit and search, as well as the doctrine of convoy.¹⁵ Moreover, most legal commentators were of the view that the Iranian practice of boarding and diverting neutral vessels was in keeping with the customary law of naval warfare, and reaffirmed the continued validity of established principles on the subject.

However, it is the view of the present author that it was the recent "Mavi Marmara" episode which corroborated that the law of naval warfare should find application in the 21st century. It is beyond the scope of the present article to narrate the events of the 31st May 2010 concerning the interception by the Israeli forces of the flotilla bound for Gaza, which resulted in the death of nine people, and have been already extensively dealt with.¹⁶ Rather, we will focus more on the serious legal issues that this incident raised in relation also to the above discussion over the application of the law of naval warfare.

The various Commissions that dealt with the matter oscillated between the

15 See relevant references in Politakis, 544 and D Guilfoyle, 'The Proliferation Security Initiative: Interdicting Vessels in the International Waters to Prevent the Spread of Weapons of Mass Destruction' 29 *Melbourne University Law Review* (2007) 733, 744.

16 Turkey and Israel conducted their own independent inquiries. The Turkish Commission released its report, hereafter 'Turkish Report,' in February 2011 (Turkish National Commission of Inquiry, 'Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010,' available at <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf>, visited 2nd September 2012). The Israeli Commission, known as Turkel Commission published its report, hereafter 'Turkel Report' in January 2011 (The Turkel Commission, 'The Public Commission to Examine the Maritime Incident of 31 May 2010,' available at <<http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf>>. These two national reports were reviewed by a high level committee appointed by the UNSG which issued its report, hereafter 'Palmer Report,' in September 2011 ('Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident,' available at <http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf>. The UN Human Rights Council also established an independent Fact Finding Mission., which released its report, hereafter FFM Report in September 2010 (UN Doc A/HRC/15/21 available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.21_en.PDF>.

law enforcement and the armed conflict paradigm. In accordance with the Turkish Report, the armed conflict paradigm had no application in the incident; therefore the interception should have been evaluated by the law enforcement paradigm.¹⁷ In sharp contrast, the Turkel Report and more importantly, the Palmer Report gave preeminence to the armed conflict paradigm and the naval blockade.¹⁸

The Report took the view that the blockade of Gaza was legal; however, Israel was found to have used ‘excessive and unreasonable’ measures in boarding the *Mavi Marmara*, resulting in ‘unacceptable’ loss of life; and to have subsequently engaged in ‘significant mistreatment’ of those detained.¹⁹

It is beyond the scope of the present enquiry to address extensively the merits of the Palmer Report or whether Israel had the lawful right to declare and enforce a naval blockade (Guilfoyle 2011). The Report itself, based on ‘the facts as they exist on the ground’ (paragraph 73), considered that ‘the conflict should be treated as an international one for the purposes of the law of blockade. This takes foremost into account Israel’s right to self-defence against armed attacks from outside its territory’ (paragraph 73). In the appendix of the Report, its authors laid down the ‘Applicable International Legal Principles,’ in which it was argued that, even if the conflict in Gaza is not designated an international one,²⁰ ‘the law of blockade would also be applicable in non-international armed conflicts in which the parties and/or neutral countries recognize each other as belligerents’ (appendix I, paragraph 23). This assertion was premised, on the one hand, upon the *Prize* cases during the US Civil War²¹ and was inferred, on the other, from the silence of the San Remo Manual on the question of the applicability of the law of naval warfare in non-international armed conflicts (appendix I, paragraph 24).

Whether international or non international the conflict in question, what is of significance for present purposes is that the Palmer Report re-introduced in the contemporary international legal discourse the law of armed conflict at sea. Thus as long as naval warfare remains a possible method of warfare, the need for its

17 Turkish Report, Conclusions no. 29 and 30, at 115. That is why the report speaks about the “laws of peace time” that govern the high seas and the “long-standing universally accepted rule” of the freedom of navigation on the high seas.” The drafters of the report devoted the eight pages (from 50 to 57) in order to analyze the law enforcement paradigm during peace time.

18 Palmer Report, paragraphs 69-82, at 36-45 and Turkel Report, paragraphs 29-55, at 38-61.

19 See Palmer Report, paragraphs 117, 134, 145.

20 Nonetheless, it is also argued that a conflict becomes international if it takes place between an Occupying Power and rebel or insurgent groups-whether or not they are terrorist in character- in occupied territory,’ such as in the Palestinian Occupied Territories; see Palmer Report, appendix I, paragraph 20.

21 See *The Prize* cases 67 US (1863) 635, 666-669.

regulation will be essential for the international community and it should not be considered as in desuetude.

THE USE OF FORCE AT SEA IN PEACETIME

Using Force in the Course of Maritime Interdiction Operations (Law Enforcement Paradigm)

The question of the permissibility of the use of force in the course of peacetime naval operations, mainly maritime interdiction operations, has been long discussed both in theory and practice (Guilfoyle 2009, 271-298). At the outset, it is evident from the face of article 110 of UNCLOS, which regulates the right of visit on the high seas that the pertinent provision of UNCLOS fails to provide a concrete answer to this question. According to Shearer, the sole reference to the degree of force to be used in enforcement measures under the 1982 Convention appears in article 225, which states:

‘In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk’ (Shearer 1986, 342).

With regard to the relevant multilateral or bilateral treaties, they have scarcely addressed the topic of the use of force. Article 22, paragraph 1(f) of the 1995 Straddling Stocks Agreement, for example, states:

1. The inspecting State shall ensure that its duly authorized inspectors:

...

(f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.²²

The 2003 Caribbean Agreement includes a final savings clause providing, *inter alia*, that nothing in the treaty impairs the exercise of the inherent right of self-defence and requiring that the discharge of firearms against or on a suspect vessel

²² See UN Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995, 2167 UNTS 88.

is to be reported as soon as possible to the flag state (article 22),²³ while a similar provision is included in the 2008 CARICOM Agreement. Article XIV stipulates that ‘the use of force pursuant to this Agreement shall in all cases be (a) in strict accordance with the applicable national laws and policies and (b) the minimum reasonably necessary under the circumstances.’²⁴ Only the reference to the use of force in these treaties entails that it should not be disallowed *ipso jure*.

According to the preponderant view, the intercepting state may, in principle, use force but in extreme moderation and in strict accordance with the requirements of necessity and proportionality (Lowe 1991, 162). This is not without resonance in the jurisprudence of international courts and tribunals. In the *I’m Alone* arbitration, the incidental sinking of a vessel in the course of efforts to board, search and seize a suspect vessel was considered acceptable, but the intentional sinking of such vessel was not justified.²⁵ The *Red Crusader* incident also considered the legitimate use of force to stop a vessel. There, a Commission of Inquiry considered that firing without warning of solid (as opposed to blank) gunshot and creating danger to human life on board was in excess of what was necessary in pursuit of a fishing vessel fleeing arrest.²⁶

The nature of the use of force in law-enforcement operations at sea was clarified by the International Court of Justice in the *Fisheries Jurisdiction* case (*Spain v Canada*). In rejecting Spain’s argument, the ICJ had stated that the

‘Court finds that the use of force authorized by the Canadian legislation and regulation falls within the ambit of what is commonly understood as enforcement of conservation and management measures...*Boarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures* according to a ‘natural and reasonable’ interpretation of the concept.’²⁷

As to the content of such enforcement measures, the *locus classicus* in this regard has been the judgment of the International Tribunal for the Law of the Sea

23 See Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, concluded on 10 April 2003, at San José, Costa Rica and entered into force on 18 September 2008.

24 CARICOM Maritime and Airspace Security Cooperation Agreement, signed at Bolans, Antigua and Barbuda on 4 July 2008; available at <www.caricom.org/jsp/secretariat/legal_instruments/agreement_maritime_airspace_security_cooperation.pdf>.

25 See *I’m Alone* case 3 *Reports of International Arbitral Awards* (1949) 1609.

26 See *The Red Crusader* (*Commission of Enquiry Denmark v United Kingdom*) 35 ILR (1962) 485.

27 See *Fisheries Jurisdiction (Spain v Canada)* Jurisdiction of the Court, Judgment, ICJ Reports 1998, 432 (emphasis added).

(ITLOS) in the *M/V Saiga* (no. 2) case (1999). The Tribunal expressed the view that

‘international law requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.’²⁸

The Tribunal also set out the applicable *modus operandi*:

‘The normal practice used to stop a ship at sea 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 warning must be issued to the ship and all efforts should be made to ensure that life is not endangered.’²⁹

The *Saiga II* principles were reiterated in the last Judgment of ITLOS in the *Virginia G* case (April 2014).³⁰ In that case, Panama contended that Guinea-Bissau violated the principle that the use of force should be avoided, and that even when it cannot be avoided, it should not exceed what is reasonable and necessary.” In more detail, Panama stated that:

‘[t]he use of force and intimidation used during the boarding and inspection was unjustified and went drastically beyond what was reasonable. The FISCAP officers boarded the vessel without identifying themselves, they acted in a forceful, inconsiderate and intimidating manner, brandishing weapons, and confined the crew at gunpoint even though no resistance was made by the crew.’ (paragraph 351).

Nevertheless, the Tribunal was of the view

‘that the information provided to it by the Parties does not indicate that excessive force was used against the *M/V Virginia G* and its crew. The Tribunal considers that the standards referred to by the Tribunal in the *M/V “SAIGA”* (no. 2) Case were met and therefore does not find that Guinea-Bissau used excessive force leading to physical injuries or endangering human life during the boarding and sailing of the *M/V Virginia G* to the port of Bissau.’ (paragraph 362).

In concluding, the ITLOS as well as other arbitral tribunals have clearly set out the principles applicable in the course of maritime interdiction operations or

28 ITLOS, *M/V ‘SAIGA’* (no. 2) (Saint Vincent and the Grenadines v Guinea) case, 1 July 1999, paragraph 155.

29 *Ibid*, paragraph 156.

30 ITLOS, *Virginia G* case (Panama v. Guinea Bissau) (Case no. 20), Judgment of 14 April 2014.

under the law-enforcement paradigm. The use of force is not prohibited, yet it must be in strict compliance with the principles of necessity and proportionality. More importantly, the use of force in this context should be considered as a *lex specialis* case, and not falling within the ambit of the generic prohibition of the use of force under article 2(4) of the UN Charter. As the authoritative *Simma's UN Charter Commentary* states,

‘Although the terms “territorial integrity” and “political independence” are generally not intended to restrict the scope of the prohibition of the use of force they lend an argument in favour of the widely accepted view that certain cases of the threat or use of force within the law of the sea are not comprised by article 2(4)’ (Randelzhofer 2002, 124).

Instructive for the assessment of the legality of the use of force in the course of interception operations would also be certain soft law instruments that apply in relevant cases, such as the Code of Conduct for Law Enforcement Officials or the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. The former was adopted in December 1979 by the UN General Assembly and consists of eight articles, which reiterate the fundamental principles of proportionality (force to be used only to the extent required) and necessity (force to be used only when strictly necessary).³¹ The latter were adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders (1990) and embodied 26 principles concerning the use of force by law enforcers.³²

Using Force to Protect Sovereign Rights

A different assessment of the legal regulation of the use of force at sea is called when states use or threaten the use of force in order to protect their sovereign rights in maritime zones, such the continental shelf. This has been evidenced in the arbitration between *Guyana and Suriname* (2007),³³ in which the ad hoc arbitral tribunal had to consider whether acts of Surinamese gunboats seeking to prevent drilling activities in a disputed maritime area could be viewed as law enforcement activities. The Tribunal accepted

‘the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary.

31 See Code of Conduct for Law Enforcement Officials; UNGA Resolution 34/69; 106th pl mtg (17 December 1979).

32 See the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Officers adopted in Havana, Cuba (27 August-7 September 1990); available at www2.ohchr.org/english/law/firearms.htm.

33 See *Guyana-Suriname Award* 47 ILM (2008) 164.

However in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity' (paragraph 445).

Similar arguments concerning the acts of States in disputed maritime areas were put forward in the Nicaragua-Colombia dispute before the International Court of Justice. In more detail, Nicaragua's Agent contended that Colombia has been using force since 1969, in order to "keep Nicaragua locked" inside the 82nd meridian.³⁴ This was refuted by the Counsel of Colombia and the Court did not make any reference to the 'use of force' in its 2012 Judgment. Nevertheless, the fact remained that states may perceive patrolling a maritime disputed area as falling within the ambit of the 'use or threat of use of force.'

It is the view of the present author that these cases, especially the Guyana/Suriname award is markedly different than the previously mentioned cases. The reason is clear: the Guyana/Suriname and Nicaragua/Colombia cases pertain to the assertion of sovereign rights in disputed areas of EEZ/continental shelf and the 'threat of the use of force' was, arguably, in order to protect such sovereign rights. Such assertion fundamentally differs from the right of visit of a foreign vessel on the high seas or from the enforcement measures taken within an undisputed EEZ, like in the *Saiga II* or the *Virginia G* cases, which are 'policing' rights ascribed to flag states by the law of the sea and not a 'sovereign' right, in close connection with the 'territorial integrity and political independence' of a coastal state. In other words, the distinction between cases like *Guyana/Suriname* and cases of interception on the high seas lies in the rationale behind the resort to the use of force: in the former case, it is the protection of 'sovereign rights' and in the latter, the advancement of the interests of international community (Papastavridis 2013, 71).

In any event, as Milano and Papanicolopulu, in commenting on the *Guyana/Suriname case*, assert,

'the limited use of force that may be needed in order to enforce the legislation of the coastal State in maritime areas claimed by it is conceptually different from the use of force in international relations prohibited by article 2 paragraph 4 UN Charter. While in the latter case the use of force is the content and the end of the action by the State, in the former case the use of force is instrumental to another activity, consisting in applying the legislation of the coastal State' (Milano & Papanicolopulu 2011, 622-623).

Moreover, the explicit reference to the exercise of a minimum use of force

³⁴ See *case concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia)* CR 2012/8, p. 23, paragraph 40 (ii) (Argüello). The author is indebted to the anonymous reviewer for this reference.

in the above-mentioned treaties lends credence to the view that such use of force does not fall under article 2 paragraph 4 of the UN Charter; otherwise, such reference would have amounted to a flagrant violation of the said provision, which reflects a peremptory norm of international law, and, as a result, the relevant treaties would have been null and void pursuant to article 53 of VCLT.³⁵

Another line of argumentation to the same end could be based upon the premise that article 2(4) of UN Charter purports to regulate or proscribe the use of force, which is not provided for or sanctioned by a permissive rule of international law. Such rule, however, exists in the present context, i.e. a minimum use of force is positively permitted in law enforcement operations by warships. Thus, it is submitted that the use of force in such cases does not fall within the scope of the negative scope of article 2(4), but rather it is intrinsic to the primary rule permitting the right of visit on the high seas (article 110 of LOSC).

In a similar vein, Douglas Guilfoyle, even though he does not disassociate the use of force in interception operations with the prohibition of article 2(4), avers that

‘Article 110 represents the prior consent of States to their vessels being interdicted in certain cases, not a non-exhaustive list of police powers. A ‘police action’ is not something other than a use of force; consent may simply render it not a *prohibited* use of force (Guilfoyle 2009, 276).

In conclusion, the *Guyana/Suriname case* and *Nicaragua/Colombia cases* warrant the assertion that in peace-time the use of force at sea is regulated twofold: on the one hand, the use of force in the course of ‘everyday’ policing of the seas will be subject to the canons governing law-enforcement operations, as set out in the *Saiga II case* as well as subject to international human rights law. On the other hand, the use or threat of the use of force to protect sovereign rights in disputed areas of continental shelf/EEZ, as those in East Asia, should be assessed against the backdrop of articles 2(4) and 51 of the UN Charter or, otherwise under *jus ad bellum* or, more apposite, *jus contra bellum*. Noteworthy is, however, that in both cases the same principles would apply, namely the principles of necessity and proportionality.

The Application of International Human Rights Law

As stated above, the rules governing policing on the high seas have been authoritatively put forward by ITLOS in the *Saiga II case* as well as by various soft-law in-

³⁵ Article 53 of VCLT provides that ‘A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.’

struments. In the assessment, however, of the legality of such policing operations, there is another category of norms that should be taken into account, i.e. international human rights law. Human rights law has also application in the context of international humanitarian law. The International Court of Justice first affirmed the applicability of international human rights law during armed conflicts in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons:

“The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war...’ (paragraph 25).³⁶

The right that is in need of protection in the course of maritime interdiction operations, in which force is used in order to interdict a vessel and arrest the suspects on board the vessel, is undoubtedly the right to life. All universal and regional human rights treaties provide for the protection of the right to life, which is considered as customary international law; for example, article 6 paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR, 1966) declares that ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.’³⁷

The right of life forbids States intentionally to deprive someone of his or her life unless it is ‘no more than absolutely necessary,’ amongst others, ‘in defence of any person from unlawful violence’ or ‘in order to effect a lawful arrest.’ Therefore, when States engage in law enforcement operations at sea should do ‘no more than absolute necessary ... to effect a lawful arrest.’ The fundamental tenets of necessity and proportionality are the cornerstones on which each and every case of lethal force would be assessed. As held by the European Court of Human Rights in the landmark case of *McCann and others v. United Kingdom* (1995),³⁸ deprivations of life must be subject to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances. In addition, as held by the same Court in *Osman v United Kingdom* (1999), article 2 requires States not only to restrain from causing death, but also to take measures to protect the lives of individuals within their jurisdiction.³⁹

36 See also the 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Rep (2004) paragraph 2.

37 See article 6 of the International Covenant on Civil and Political Rights, 19 Dec 1966, 999 UNTS 171. See also article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (November 4, 1950, 213 UNTS 221).

38 See *McCann and others v. United Kingdom* (1995), 27 September 1995, EHHR Series A no. 324.

39 See *Osman v United Kingdom* Application no. 87/1997/871/1083, Grand Chamber Judgment of 28 October 1998, 29 EHRR 245.

In the case-law of the Strasbourg Court, there has been only one case, in which a violation of article 2 of ECHR was invoked and which was relevant to the law of the sea, namely the *Xhavara et al. v. Albania and Italy* case. In this case, 16 Albanian refugees, who had survived the *Katar I Rades* incident, but had lost several family members, claimed that the Italian vessel had deliberately hit their boat and brought a complaint against both Italy and Albania, primarily for a violation of the right to life. The substance of the applicants' complaint under article 2 was that they had been deprived of a proper investigation of the Italian state's actions which led to the deaths of their parents. Even though ECtHR held that Italy did not act contrary to the right of a person to leave one's country (article 2(2) Protocol no. 4), it did rule that the interception activities which extended to international waters and to the territorial waters of Albania fell under Italian jurisdiction and that Italy therefore, had to take 'all the necessary measures to avoid, in particular, drowning.' Nonetheless, complaints under articles 2 and 3 (which involved substantially the same complaint) were rejected as inadmissible *ratione temporae*.

While it is not surprising that the Court did not rule upon the alleged violation of article 2 in the above-mentioned case, in light of the admissibility issues involved, it is surprising that in another relevant case, i.e. the *Medvedyev v. France* case, in which lethal force was used, the applicants did not raise any complaint under article 2 of the ECHR. In more detail, in the latter case, the French frigate had to fire some warning shots across the bow of the *Winner* in order to make it stop. In addition, the boarding team exchanged shots with members of the crew, which caused an individual to be wounded, resulting in his death a week later. It was reported in this respect that the deadly injury of a crewmember was an accident.⁴⁰ Even so, the firing of weapons into open doors as well as the firing of 'warning' shots against the crew casts doubts on the proportionality of the use of force *in casu*, especially in contemplation of the 'elementary considerations of humanity' applicable in law enforcement operations.⁴¹

What seems to be odd, however, is that neither the applicants nor the Court made any reference to this issue. The applicants did not even submit any complaint for violation of article 2 of the Convention. The same holds true in the *Rigopoulos* case, in which there was an exchange of fire between a Spanish warship and several members of the crew of a drug smuggling vessel *Archangelos*, who

⁴⁰ When they boarded the *Winner*, the French commando team used their weapons to open certain locked doors. When a crew member of the *Winner* refused to obey their commands, a 'warning shot' was fired at the ground, but the bullet ricocheted and the crew member was wounded'; (paragraph 13).

⁴¹ See *M/V SAIGA* (no. 2), at paragraph 155 and also *Corfu Channel Case* (United Kingdom v Albania) Judgment of April 9 1949, ICJ Rep 1949 4, 22.

had barricaded themselves into the engine room.⁴² This could be construed as a *sub silentio* acknowledgment that the *de minimis* use of force in law enforcement operations at sea is in full accord with the Convention; i.e. it is an intrinsic part of the “lawful arrest” under article 2. Nevertheless, it is submitted that the legality of the use of lethal force in such cases should not be lightly presumed. It would have been interesting to see what the Court would have ruled, should the applicants in the *Medvedev* have brought up a complaint under article 2.

CONCLUDING REMARKS

When states act in the maritime domain, either in the context of an armed conflict or in peacetime, it is inevitable that they will use force. This force may be justified under the pertinent rules of international law; if not, such use force would give rise to the responsibility of the wrongdoing state. It is readily apparent that it is of outmost importance to have a clear set of rules applicable in each and every case.

Depending on the circumstances of each case, the applicable rules of international law may be the following:

- i) when the use of force in question occurs in the context of an armed conflict, either international or non-international, such as in the case of *Mavi Marmara*, the law of naval warfare applies, including human rights law, as the ICJ has repeatedly held.
- ii) when the use of force takes place in the context of policing operations at sea, such as those taking place on an everyday basis to fight transnational organized crime (e.g. drug trafficking, illegal fishing, migrant smuggling, piracy etc), the rules governing law-enforcement operations do apply, including human rights law. Instructive in this regard are, amongst others, the pertinent treaties (e.g. 1995 Straddling Stocks Agreement, the 2003 Caribbean Agreement), the *Saiga II principles* and the relevant soft-law instruments (e.g. Code of Conduct for Law Enforcement Officials).
- iii) if the use of force or threat of the use of force, as in the case of *Guyana/Suriname*, aims at protecting sovereignty or sovereign rights, such as the right to explore the natural resources of the continental shelf, especially in disputes maritime areas, then article 2(4) and article 51 of the UN Charter comes into play.

⁴² See *Rigopoulos v. France case*.

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