Guidelines for Grey Zone Naval Incidents: Distinguishing between the Rules of Armed Conflict and Law Enforcement

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Matter commented on: Hybrid naval warfare; Distinction between naval warfare and maritime law enforcement

1. Introduction

This short blog post aims to provide guidance for parties to hybrid naval warfare for determining whether the rules of armed conflict or law enforcement are applicable to various situations where force has been used against ships. The guidelines are based on the relevant case law and systemized into three scenarios: first, a commercial ship vs. government ship/warship (State vessel) scenario; second, a State vessel vs. commercial ship scenario; third, a State vs. State scenario. The analysis focuses on the use of force against ships, but the rules apply *mutatis mutandis* also in relation to aircraft and installations and structures at sea.

2. Use of Force by State Vessels against Attacks Launched from Commercial Ships

Force may be used to defend a government ship or warship against an attack that has been launched by private persons on-board a commercial ship or structure (e.g., a platform). For example, the use of force may be necessary to counter a terrorist attack launched by explosive-laden boats or in response to irregulars who use a commercial oil platform as their base. Notably, if the government ship or warship was attacked by such private persons that were not acting on behalf of a foreign State and nor was a foreign State substantially involved in such attack by non-State actors, then the victim State cannot invoke the right of self-defence under Article 51 of the UN Charter (1986 Judgment of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*, para. 195; 2005 Judgment of the ICJ in *Armed Activities on the Territory of the Congo*, para. 146; Definition of Aggression, Art 3(g)).

The ICJ has found that: "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." (2004 Advisory Opinion of the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 139). The ICJ has not recognised that Article 51 would encompass actions by non-State actors which are not attributable to any State. Notably, the ICJ's strict position on that issue has been criticized in the relevant legal literature (see, e.g., Ruys and Verhoeven at p. 305), since Article 51 of the UN Charter does not *expressis verbis* limit the scope of perpetrators of an 'armed attack' to States. The ICJ's high threshold of an armed attack that triggers the right of self-defence under Article 51 raises questions of the range of available measures for a conflicting side against whom force has been unlawfully used.

If a private person uses force against government ship or warship, then its crew has the right to employ defensive measures to the degree necessary for deterring the attack. Depending on the situation, this may involve counterfire and deliberate sinking or destruction of the commercial ship or structure even if it means, in extreme circumstances, a potential loss of human life. Recourse to administrative law-based framework of law enforcement measures and criminal law-based concept of self-defence is available for the crew of the targeted government ship or warship. The criminal law-based concept of self-defence also applies in cases where a commercial vessel uses force against another commercial vessel, e.g. in a context where there is an armed security team onboard (for example, for counterpiracy purposes).

Under its case law, the ICJ has introduced an innovative concept of countermeasures (1980 Judgment of the ICJ in the *United States Diplomatic and Consular Staff in Tehran*, para. 53; 1986 Judgment of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*, para. 248; 1997 Judgment of the ICJ in *Gabčikovo-Nagymaros Project*, para. 82). Ruys and Verhoeven have characterised it as a "very controversial and contested concept" (at p. 309). It is unclear if States may employ proportionate countermeasures involving force (as suggested, for example, by Klein, at pp. 267, 270). The ICJ has not addressed the question if States are allowed to use firearms under the concept of countermeasures for deterring unlawful use of force. Yet it is doubtful that the use of force falls within the scope of the legal concept of countermeasures. Rather, the victim State cannot make use of the law of countermeasures as a legal basis for its use of force against an attack launched from commercial ships. The Annex VII Arbitral Tribunal has found that: "It is a well established principle of international law that countermeasures may not involve the use of force" (2007 Award of the Arbitral Tribunal in *Guyana vs. Suriname Arbitration*, para. 446; see also Article 50(1)(a) of the ILC Articles on State Responsibility).

The victim State needs to comply with Article 2(4) of the UN Charter when employing law enforcement or criminal law-based measures to counter such attacks of non-State actors that fall below the 'gravity threshold' of an armed attack, as set by the ICJ. Consequently, the victim State's use of arms needs to strictly stay within the confines of the limits of proportionality that are narrower in the law enforcement and criminal law paradigms as compared to the right of self-defence under Article 51 of the UN Charter. Hence, the measures employed by the victim State in response to an unlawful attack against a ship flying its flag may give rise to potential breaches of human rights law if it cannot rely on the derogation clauses of human rights law that apply in emergency situations or international humanitarian law as *lex specialis* (see, e.g. ECtHR's Guide on Art 15 of the ECHR, ICRC's guide on derogations).

Nonetheless, the victim State may invoke the right of self-defence under Article 51 of the UN Charter if it can prove another State's substantial involvement in the attack that was carried out by non-State actors. For this, the victim State needs to show that:

- The State suspected of sponsoring non-State actors meets the characteristics of "sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state" (Definition of Aggression, Art 3(g)).
- "[S]uch an operation [of non-State actors], because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces" (1986 Judgment of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*, para. 195).

If the victim State is successful in claiming that it has the right of self-defence against attacks launched by non-State actors, then its use of force under *jus in bello* must still comply with the limitations of necessity and proportionality (San Remo Manual, Rules 3-5 that reflect customary international law; in the context of *jus ad bellum*, see also 1986 Judgment of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*, para. 176 and 1996 Advisory Opinion of the ICJ in the *Legality of the Threat or Use of Nuclear Weapons*, paras. 41-42). Yet, as explained by Gill and Fleck in the Handbook of the International Law of Military Operations (at pp. 70, 77), the main difference here is that in law enforcement operations these principles imply that the destruction of life is prohibited except for extreme situations, whereas in an armed conflict enemy combatants are legitimate targets. Thus, the limits of necessity and proportionality in relation to the use of force are more flexible in an armed conflict.

3. Use of Force against a Commercial Ship in a Law Enforcement Operation

Law enforcement officials, particularly Navy's high-ranking military officers in cases where they are performing law enforcement in geopolitically sensitive situations, e.g., in disputed areas, must take caution that they issue clear orders to private persons against whom they are enforcing the coastal State's law. This is important for avoiding the law enforcement actions falling in the domain of *jus ad bellum*. This is exemplified by the *Guyana vs. Suriname arbitration* that concerned an order issued from a warship that Suriname had tasked to perform law enforcement in a geopolitically sensitive context. Its order for a commercial ship and a private structure to leave the disputed area in 12 hours left too much room for interpretation about the consequences that would follow in case it is not complied with (2007 Award of the Arbitral Tribunal, para. 433).

The *Guyana vs. Suriname arbitration* illustrates the risk that accompanies the issuing of ambivalent orders. Such vaguely worded orders may be interpreted by private persons on-board a ship and its flag State or any other State involved in the relevant actions in a disputed area as a threat of the use of force in breach of Article 2(4) of the UN Charter, the LOSC, and general international law. This may suffice for bringing the actions under the *jus ad bellum* paradigm even though the officials that issued the order might not have had any actual intention (from their subjective point of view) to consider undertaking military activities in a disputed area against a commercial ship and private property (an oil rig, a submarine pipeline/cable, etc).

Where force is used for stopping a ship, it needs to follow the principle of proportionality. Law enforcement officials or Navy servicemen onboard State-owned ships need to exercise self-restraint when they are using force against commercial ships; use of force "must be avoided as far as possible" (1999 Judgment of ITLOS in M/V "SAIGA" (No. 2), para. 155). Thus, in maritime enforcement, for the use of force to be lawful, it needs to be employed as a last resort. This means that it needs to be clearly shown that other, less-intrusive options for stopping a commercial ship had been exhausted. In normal circumstances, such means include the following practices (also referred to as the *Saiga* principles, see also Art 111 of LOSC):

- First, giving an internationally recognized auditory or visual signal to stop.

- If the order to stop is not complied with, the pursuing ship may proceed in its gradual response to use warning shots, including where necessary, the firing of shots across the bow of the ship.
- If the order to stop and warning shots fail, the pursuing vessel may use force as a last resort and provided that appropriate warnings are first issued. The use of force may include the ramming of the ship as well as targeted shots against the ship (ibid, para. 156). Recourse to force must have a basis in international law and needs to be unavoidable, reasonable, and necessary (2007 Award of the Arbitral Tribunal in *Guyana vs. Suriname Arbitration*, para. 445; 2015 Award of the Arbitral Tribunal in the *Arctic Sunrise case*, para. 222).
- When, as a last resort, force is used, the crew needs to avoid intentional sinking of a ship and must take all efforts to ensure that life is not endangered (*"I'm Alone" Case* Report, p. 330; *Red Crusader* Case Report, p. 499).
- However, as observed by Moore (at p. 36), in exceptional cases, the principle of proportionality does not exclude the possibility of intentionally sinking a commercial ship if it is unmanned and poses an imminent threat to the coastal State or the marine environment.

Provided that these rules are complied with, the use of force against a commercial ship in a law enforcement operation in principle meets the proportionality and necessity conditions. As discussed in the next section, a single episode of the use of force by a government ship or warship against a commercial ship usually does not exceed the threshold of an armed attack in terms of Article 51 of the UN Charter in response to which the flag State of the targeted commercial ship could claim the right of self-defence. Thus, as a rule, the use of force in maritime law enforcement operation against a commercial ship does not give rise to the application of the rules of armed conflict. However, in exceptional cases, attacks against commercial ships may amount to an armed conflict. Such instances are discussed next in the State vs. State scenario.

4. State vs. State Scenario

Determining whether the rules of armed conflict or law enforcement apply in situations where one State has used force against ships of another flag State can be difficult. On this question, there are contradictory views and considerable amount of ambiguity in the relevant case law and legal literature. The following sections are based on a differentiation between so-called tanker war scenario and clashes between warships or government ships of conflicting States.

4.1. 'Tanker war' Scenario

Based on State practice and case law, it is unclear if the use of force outside the law enforcement paradigm against a single commercial ship can amount to an armed attack under Article 51 of the UN Charter if it causes significant damage to the ship, its crew, or cargo. This matter was

at the heart of judicial proceedings before the ICJ in the *Oil Platforms Case*. The United States claimed that an attack against a single commercial ship amounted to an armed attack (*Oil Platforms Case*, 1997 Counter-Memorial and Counter-Claim of the United States, para. 4.10; *Oil Platforms Case*, 2001 Rejoinder of the United States, para. 5.22). By contrast, Iran maintained the opposite and substantiated its position with extensive references to views of well-known legal scholars supporting that view (*Oil Platforms Case*, Iran's 1999 Reply and Defence to Counter-Claim, paras. 7.37-7.41). The ICJ did not rule out the plausibility of either position but disregarded the United States' claim based on the lack of evidence of Iran's responsibility and the conclusion that the missile was not specifically aimed at that particular commercial ship, "but simply programmed to hit some target in Kuwaiti waters." (2003 Judgment of the ICJ in the *Oil Platforms case*, para. 64). Similarly, in its 2016 Commentary on Common Article 2, the ICRC (at para. 227) abstains from giving a definite answer on whether an attack against a single commercial ship can amount to an armed attack under Article 51 of the UN Charter.

Albeit the use of force against a single commercial ship might not trigger an armed conflict, the right to exercise self-defence under Article 51 of the UN Charter is certainly not excluded in cases where attacks against commercial ships of a specific flag State are systemic and cause significant damage (see below on the Definition of Aggression, Art 3(d)). For example, the episodes of alleged Iranian limpet mine attacks against foreign tankers in the Strait of Hormuz in 2019 and the systemic attacks against the commercial ships flying either Israeli or Irani flag in the recent Israel-Iran 'shadow war' on the long waterway from the Strait of Hormuz to the Mediterranean can potentially fall under the so-called 'tanker war' scenario (for an overview of the incidents, see the post on the NCLOS Blog). Yet there is not sufficient evidence of the suspected States' direct involvement in these attacks.

For invoking the right of self-defence under Article 51 of the UN Charter in response to attacks against commercial ships, it is necessary for a State to show, *inter alia*, that:

- There is persuasive evidence that the suspected State bears responsibility for carrying out such attacks (2003 Judgment of the ICJ in the *Oil Platforms case*, para. 64).
- The State responsible for the attack intentionally and systemically targeted ships flying the flag of the State that invokes the right of self-defence and that the attacks were not indiscriminate, e.g., a mine or missile was simply aimed to hit some target (ibid).
- The attack caused significant damage, either to ships, their crew, or goods. An act of aggression includes "[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" (Definition of Aggression, Art 3(d)). It is not certain how many attacks on a single flag State would suffice. Notably, the ICJ has found that cases of low-intensity use of force against ships can amount to an armed attack when assessed cumulatively. (2003 Judgment of the ICJ in the *Oil Platforms case*, para. 64).
- The attacked commercial ships, whatever their ownership, were flying the flag of the State that claims the right of self-defence so that the attacks on the commercial ships can be equated with an attack on that State (ibid).

Provided that these conditions are satisfied, the State acting in self-defence can use measures against the State that is responsible for the attacks. Its use of force under the law of self-defence

must comply with the principles of necessity and proportionality and the rules of armed conflict, including, first and foremost, the principles and rules of humanitarian law (1986 Judgment of the ICJ in *Military and Paramilitary Activities in and against Nicaragua,* para. 176; 1996 Advisory Opinion of the ICJ in the *Legality of the Threat or Use of Nuclear Weapons*, paras. 41-42). This implies, for example, that the use of force under the right of self-defence must be aimed against an appropriate military target, not against a "target of opportunity" (2003 Judgment of the ICJ in the *Oil Platforms case*, para. 74).

4.2. *Warship/Government Ship vs. Warship/Government Ship Scenario*

Under the LOSC, both warships and government ships (e.g., Coast Guard vessels) are entitled to perform law enforcement operations and may use force in that capacity (see, e.g., Articles 107, 111(5), and 224 of LOSC). The ITLOS has noted that: "[T]he traditional distinction between naval vessels and law enforcement vessels in terms of their roles has become considerably blurred /…/ and it is not uncommon today for States to employ the two types of vessels collaboratively for diverse maritime tasks." (2019 Order of the ITLOS in the *Case concerning the detention of three Ukrainian naval vessels*, para. 64). Thus, as explained by the Annex VII Arbitral Tribunal, "the mere involvement of military vessels or personnel in an activity does not *ipso facto* render the activity military in nature." (2020 Award of the Arbitral Tribunal on Preliminary Objections in the *Dispute Concerning Coastal State Rights*, para. 340). It follows that the status of the State-owned ship that uses force against another State's warship or government ship is not determinative for the legal classification of the incident.

Nonetheless, it is of great relevance whether the use of force is targeted against a foreign warship or not, since, as stated by the ITLOS, "a warship is an expression of the sovereignty of the State whose flag it flies." (2012 Order of the ITLOS in the *"ARA Libertad" Case*, para. 94). Where the aggression is directed against a warship, the following criteria can be distilled from the relevant case law for determining the applicable legal framework:

- The classification of the use of force is based on the actual merits of the incident, not its form. In the view of the ITLOS, "the distinction between military and law enforcement activities must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case." (2019 Order of the ITLOS in the *Case concerning the detention of three Ukrainian naval vessels*, para. 66). For example, the coastal State's use of potentially lethal measures, e.g. depth charges, to counter an unlawful incursion of a foreign submarine into its territorial sea can be viewed potentially from the perspective of either the law enforcement or *jus in bello* framework. In case the suspected vessel is a private submarine or unmanned submersible used for, e.g., drug smuggling, then the incident falls under the law enforcement paradigm. By contrast, where the coastal State's Navy is engaged in a standoff with a foreign State's submarine that has invaded the coastal State's territory and resists orders to leave, then the incident is *prima facie* governed by the rules of *jus in bello* (ICRC 2017 Commentary on the Second Geneva Convention, Art. 2, para. 259).

- The distinction between military and law enforcement activities and the legality of acting in self-defence under Article 51 of the UN Charter is based primarily on the objective assessment of the use of force, not by the subjective assessment of the situation

by the State invoking the right of self-defence. (2019 Order of the ITLOS in the *Case concerning the detention of three Ukrainian naval vessels*, para. 65)

- The use of force against "a single military vessel might be sufficient to bring into play the "inherent right of self-defence"" (2003 Judgment of the ICJ in the *Oil Platforms case*, para. 72). Consequently, this entitles the victim State to use force against the aggressor State and invoke the applicability of the rules of *jus in bello*.
- According to the ICJ, for the right of self-defence to apply, there needs to be:
    - Conclusive evidence that the State suspected of carrying out the attack is responsible for it. (ibid)
    - Evidence that the use of force against a foreign warship "was aimed specifically at" that flag State (vs. an indiscriminate attack). In other words, there needs to be clarity that the State that used force against a foreign warship had the "specific intention of harming that ship, or other /…/ vessels" flying the same flag. (ibid, para. 64)
- Other factors that indicate that a naval incident might be governed by the rules of armed conflict rather than maritime law enforcement include, *inter alia*:
    - Recognition of state of war by the parties to the conflict, although nowadays such declarations of war are rare, and it does not constitute a precondition for the classification of the use of force as an armed conflict (Common Article 2 of the Geneva Conventions; see also ICRC 2017 Commentary, para. 229).
    - The existence of a stand-off "involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another". (2016 Award of the Arbitral Tribunal in the *South China Sea Arbitration*, para. 1161)
    - Reciprocity in fighting, although, as noted by Wolff Heintschel von Heinegg (at p. 452), it is not a precondition for the aggressor State's use of force to be qualified as an armed attack triggering the right of self-defence of the targeted State that the latter 'fights back'. For example, if a tactical nuclear weapon is used in a surprise attack against a foreign warship, then it would meet the level of an intensity of fighting (see next) to constitute an armed attack triggering an international armed conflict between the two States even if the attack has such an effect on the targeted State that it does not respond militarily.
    - Intensity of fighting, but for the use of force to be categorized as an armed conflict it is not necessarily a precondition that the use of force reaches a high level of intensity, as examined next.

The criteria for the determination of the existence of an armed conflict are not uniform under the current case law of international courts and tribunals. The divergence appears to be caused by the somewhat different approaches of the ICJ and the International Criminal Tribunal for the Former Yugoslavia on this matter. According to the ICTY, "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."

(1995 Decision of the ICTY in *Prosecutor vs. Tadić*, para. 70). The ICTY has distanced itself from the 'gravity threshold' as it found that:

> "[T]he existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law. /.../ In its adjudication of the nature of the armed conflict with which it is concerned, the Trial Chamber is guided by the Commentary to the Fourth Geneva Convention, which considers that "[a]ny difference arising between two States and leading to the intervention of members of the armed forces" is an international armed conflict and "[i]t makes no difference how long the conflict lasts, or how much slaughter takes place." (1998 Judgment of the ICTY in the *Prosecutor vs. Delalić and others*, paras. 184, 208).

This view is shared by, e.g., the ICRC (at paras. 236-239) and the International Criminal Court (2007 Decision in the *Prosecutor vs. Lubanga*, para. 207). By contrast, according to the ICJ's position, the resort to use of force between States also needs to reach a level of sufficient gravity for it being legally categorized as an armed attack under *jus ad bellum* (1986 Judgment of the ICJ in *Military and Paramilitary Activities in and against Nicaragua*, para. 191; 2003 Judgment of the ICJ in the *Oil Platforms case*, para. 64). Only such use of force that qualifies as a "most grave form of the use of force" can qualify as an armed attack under the ICJ's case law. (ibid)

5. Conclusion

The ICJ's 'gravity threshold' for triggering the right of self-defence under Article 51 of the UN Charter leaves a significant room of manoeuvre for States to employ low-intensity use of force against adversaries. Legally speaking, this facilitates the ambiguous domain of hybrid naval warfare that exceeds the level of maritime law enforcement but falls below the threshold of an armed attack under Article 51 of the UN Charter. The victim State will likely be seen as falling under the *de minimis* threshold and needs to comply with Article 2(4) of the UN Charter when employing law enforcement or criminal law-based measures to counter such attacks that fall below the 'gravity threshold' of an armed attack, as set by the ICJ. Consequently, the victim State's use of arms needs to strictly stay within the confines of the limits of proportionality that are narrower in the law enforcement and criminal law paradigms as compared to the right of self-defence under Article 51 of the UN Charter.

In border-line cases, even international judicial bodies may be unable to definitely classify certain maritime incidents in their *ex post* assessments as either falling to the law enforcement or military operations category. In this context, the Annex VII Arbitral Tribunal's approach in the *Guyana vs. Suriname arbitration* to favour the 'stronger' categorisation, i.e. military activity over a law enforcement one, and relying on the subjective assessment of the situation by the targeted persons or State essentially supports the victim State in grey zone incidents. The different approach adopted by the ICJ in the *Oil Platforms case* entails that a victim State in a low-intensity hybrid naval warfare risks the possibility of being eventually dubbed as an aggressor State if it has subjectively deemed itself entitled to the right of self-defence. Whereas the objective *ex post* assessment (as made by, e.g., international courts and tribunals) reaches the opposite conclusion that the initial aggression did not meet the threshold of *most grave form of the use of force*.

Acknowledgements: The author would like to thank Magne Frostad for his insightful comments on this research.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Sklodowska-Curie grant agreement No 101018998. The blog post reflects only the author's view and the European Research Executive Agency is not responsible for any use that may be made of the information it contains.