

The difficulties of conflict classification at sea: Distinguishing incidents at sea from hostilities

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Abstract

Incidents at sea between warships and military aircraft often involve more than provocative actions – they may be aggressive and can sometimes result in death and destruction. In view of the low threshold of a resort to armed force by one State against another that would bring an international armed conflict into existence, it is rather difficult to determine whether incidents at sea remain below that threshold. Similar, albeit less difficult problems arise with regard to forceful measures taken by States against foreign merchant vessels. Here it is important to clearly distinguish between law enforcement at sea and the exercise of belligerent rights.

Keywords: international armed conflict, resort to armed force, warships, military aircraft, merchant vessels, incidents at sea, harassment, law enforcement at sea, exercise of belligerent rights, visit and search, capture.

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Introduction

The sea is a special environment. For good reasons, the ships of all States enjoy freedom of navigation and other well-established rights, because their economies

are highly dependent upon the use of the world's oceans. At the same time, coastal States enjoy various rights in the sea areas off their coasts, which they may enforce against foreign vessels, including by a use of proportionate force. Moreover, some coastal States have territorial and maritime claims that conflict or overlap with the claims of other States, and they are prepared to assert those claims by the use of their navies, coast guards or other State vessels. Again, such assertions may include aggressive operations sometimes amounting to what seems to be a use of force against the flag State of the vessels affected. It goes without saying that, at sea, there is an increased potential for tension and conflict.

Interference with foreign vessels or inter-State confrontations are not necessarily the rule, but they occur repeatedly. Hence, the question arises of whether and to what extent operations at sea qualify merely as “incidents at sea”, or as a use of force by one State against another State bringing an international armed conflict into existence. The present paper is an endeavour to provide criteria for an operable and reasonable distinction. It should be emphasized that although dealing with the concept of use of force, the paper merely addresses the *jus in bello*, not the *jus ad bellum*. Hence, the legality of the conduct under scrutiny according to any applicable international legal regime other than the *jus in bello* lies outside the paper's scope. Finally, the paper is based on the premise that a State's use of force against a foreign merchant vessel is presumed to be legal and, therefore, does not trigger the flag State's right of self-defence.¹

The present paper aims at a distinction between incidents at sea and situations that may trigger an international armed conflict. It will address the following questions: (1) Which State conduct directed against foreign warships and military aircraft qualifies as a use of force? (2) Does a use of force against merchant vessels² or civil aircraft bring an international armed conflict into existence? (3) Can the use of civilian government agencies for purposes other than law enforcement qualify as a use of force bringing an international armed conflict into existence?

Distinction between international armed conflict and incidents at sea according to the updated ICRC Commentary of 2016

The position of the International Committee of the Red Cross (ICRC) regarding the definition of “international armed conflict” and its distinction from incidents at sea may be summarized as follows. The Commentary on Article 2 common to the four Geneva Conventions starts from the premise that the “determination of the existence of an armed conflict within the meaning of Article 2(1) must be based

1 For a discussion of the *jus ad bellum* and for the contrary view, see Tom Ruys, “Armed Attack” and Article 51 of the UN Charter: Evolutions in Customary Law and Practice, Cambridge University Press, Cambridge, 2010, pp. 204 ff.

2 The term “merchant vessel” as used here applies to all vessels that are not State ships – i.e., cargo ships, cruise ships, yachts etc. which are not used for exclusively governmental, non-commercial purposes.

solely on the prevailing facts demonstrating the *de facto* existence of hostilities between the belligerents, even without a declaration of war”.³ The characterization of a given situation by governments is irrelevant. Hence, an international armed conflict exists as soon as one or more States resorts to armed force against another State,⁴ in particular when “classic means and methods of warfare ... come into play”.⁵ An international armed conflict may also come into existence “even if the armed confrontation does not involve military personnel but rather non-military State agencies such as paramilitary forces, border guards or coast guards”.⁶ For the purpose of common Article 2(1), any use of force, irrespective of its intensity or duration, suffices;⁷ as long as the “situation objectively shows for example that a State is effectively involved in military operations or any other hostile actions against another State, neutralizing enemy military personnel or assets, hampering its military operations or using/controlling its territory, it is an armed conflict”.⁸

While the ICRC thus defines the concept of “international armed conflict” in a broad manner, it is not necessarily prepared to consider incidents at sea as a use of force bringing an international armed conflict into existence. One may not be prepared to accept the ICRC’s reliance on an “objectivized belligerent intent”. This, however, is without relevance for the purposes of this paper, which deals not with *ultra vires* actions or actions resulting from mistakes but with actions that are either directed or endorsed by the respective government.

In sum, the ICRC seems to provide a clear and operable distinction between situations of international armed conflict and incidents at sea. However, in view of recent events it is worth taking a closer look at the conduct of States at sea.

Use of force against foreign warships and military aircraft

Use of traditional means and methods of warfare

According to the position taken here, the ICRC’s position is correct insofar as a State’s use of traditional methods and means of warfare against another State’s

3 ICRC, *Commentary on Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva, 12 August 1949, 2nd ed., 2017 (online version) (ICRC Commentary on GC II), Art. 2, “Application of the Convention”, para. 233.

4 *Ibid.*, para. 235, 240, *inter alia* referring to the *Tadić* judgment.

5 *Ibid.*, para. 247.

6 *Ibid.*, para. 248. See also para. 251: “Even if armed conflicts under Article 2(1) generally imply the deployment and involvement of military means, there might be situations in which the use of force by other State officials or persons qualified as ‘agents’ of a State would suffice. However, only the use of force by the *de jure* or *de facto* organs of a State, but not by private persons, will constitute an armed conflict.”

7 *Ibid.*, paras 258 ff. In this context, the ICRC recognizes the position of some States, which have considered that an international armed conflict triggering the application of the Geneva Conventions had come into existence after the capture of just one member of their armed forces (para. 260). See also paras 264 ff., where the ICRC rejects the position according to which an international armed conflict requires a certain intensity and duration.

8 *Ibid.*, para. 263.

warships or military aircraft⁹ is concerned. There is no requirement of the target State responding by also resorting to a use of force. The most recent case of an international armed conflict – although of a short duration – having come into existence by the unilateral use of traditional means of warfare against a foreign warship is the sinking of the *Cheonan*.¹⁰

On 26 March 2010, the South Korean warship *Cheonan* was hit by a torpedo, broke in half and sank. Forty-six South Korean sailors died. While the Democratic People's Republic of Korea (DPRK) denied responsibility, a multinational Joint Investigation Group concluded that the torpedo had been manufactured in the DPRK. A Multinational Combined Intelligence Task Force found that the torpedo had been launched from a DPRK submarine. The latter finding was confirmed by a Special Investigation Team established by the United Nations (UN) Command Military Armistice Commission, which considered the evidence to be “so overwhelming as to meet the ... standard of beyond reasonable doubt”.¹¹ Still, the Republic of Korea did not respond by using force against DPRK warships or against DPRK territory. The ICC prosecutor, relying on the findings of the International Criminal Tribunal for the former Yugoslavia, the ICRC and legal writings, concluded that the “resort to armed force between States’ in the form of the alleged launching of a torpedo into the *Cheonan* ... created an international armed conflict under customary international law”.¹² This finding of the existence of an international armed conflict is undoubtedly correct because a torpedo is a traditional means of warfare and the target was another State's warship.

Distinguishing “incidents at sea” from a use of force

The distinction between a resort to armed force, which brings into existence an international armed conflict, and measures which remain below that threshold is more complicated when States resort to a conduct that does not involve the use

9 According to the UN Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3, 297, 10 December 1982, Art. 29, “warship” is defined as “a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline”. For a discussion of those elements, see Wolff Heintschel von Heinegg, “Warships”, *Max Planck Encyclopedia of Public International Law*, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e443?rskey=nrBmY2&result=4&prd=EPIL (all internet references were accessed in March 2017). According to Rule 1(x) of the *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Program on Humanitarian Policy and Conflict Research, Harvard University, 2013 (HPCR Manual), “military aircraft” means “any aircraft (i) operated by the armed forces of a State; (ii) bearing the military markings of that State; (iii) commanded by a member of the armed forces; and (iv) controlled, manned or preprogrammed by a crew subject to regular armed forces discipline”.

10 For the factual findings see International Criminal Court, Office of the Prosecutor, *Situation in the Republic of Korea: Article 5 Report*, June 2014 (Article 5 Report), pp. 4, 10 ff, available at: www.icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf.

11 Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2010/398, 23 July 2010, p. 7.

12 Article 5 Report, above note 10, p. 12.

of traditional methods and means of warfare but that nevertheless may be considered aggressive or amounting to physical coercion – i.e., violence. The following cases show the varying degree of provocative conduct at sea that may or may not qualify as a use of force for the purpose of determining the existence of an international armed conflict. It needs to be emphasized that these cases are referred to solely for the purposes of illustrating the issues at stake. They may not be understood as an assessment of the legality of the respective conduct.

Examples of incidents involving warships and military aircraft

On 12 February 1988, USS *Yorktown* and USS *Caron* conducted freedom of navigation operations¹³ in the Black Sea approximately 7 to 10 nautical miles off the Crimean peninsula, within the territorial sea of (at the time) the Soviet Union. Soviet warships transmitted warnings to terminate the alleged violation of the “State borders of the Soviet Union” and then rammed the US warships, which were damaged, albeit not severely.¹⁴

On 1 April 2001, a US Navy EP-3E reconnaissance aircraft was harassed¹⁵ by People’s Liberation Army Navy fighter aircraft at about 70 nautical miles off Hainan island, in international airspace. The harassment resulted in an accidental collision of a Chinese F-8II jet fighter and the EP-3E. While the Chinese aircraft crashed into the sea with the pilot lost, the US crew made an emergency landing of their damaged aircraft onto Hainan island. They were detained for eleven days.¹⁶

In 2014, forty incidents involving Russian military aircraft occurred in the Baltic Sea area, some of which were of a “more aggressive or unusually provocative nature, bringing a higher level risk of escalation”.¹⁷ In October of that year, Sweden conducted a search for a suspected Russian submarine in the sea areas off Stockholm.¹⁸

In March 2015, Russian fighter jets used two NATO warships in the Black Sea as simulated targets in training exercises.¹⁹ A similar incident occurred in the Black Sea on 12 April 2016, when a Russian military aircraft conducted simulated

13 For the US Freedom of Navigation Program, see US Department of State, “Maritime Security and Navigation”, available at: www.state.gov/e/oes/ocns/opa/maritimesecurity/.

14 For the facts and an assessment, see William J. Aceves, “Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea”, *International Law Studies*, Vol. 68, 1995. See also John H. Cushman Jr., “2 Soviet Warships Reportedly Bump U.S. Navy Vessels”, *New York Times*, 13 February 1988, available at: www.nytimes.com/1988/02/13/us/2-soviet-warships-reportedly-bump-us-navy-vessels.html.

15 “Harassment” is defined as “repeated, deliberate and intimidating activities intended to discourage, impede and disrupt”. See NATO Glossary, AAP-06(2014), 2014, p. 2-H-1, available at: wcnjk.wp.mil.pl/pplik/file/N_20130808_AAP6EN.pdf.

16 See Shirley A. Kan, “The EP-3 Incident and U.S. Interests”, in Shirley A. Kan *et al.* (eds), *China-U.S. Aircraft Collision Incident of April 2001: Assessment and Policy Implications*, Congressional Research Service, October 2001, pp. 1 ff.

17 Thomas Frear, Łukasz Kulesa and Ian Kearns, “Dangerous Brinkmanship: Close Military Encounters Between Russia and the West in 2014”, policy brief, European Leadership Network, November 2014, p. 3.

18 “Russia Baltic Military Actions ‘Unprecedented’ – Poland”, *BBC News*, available at: www.bbc.com/news/world-europe-30429349.

19 Ian Kearns, “Avoiding War in Europa: The Risks from NATO-Russian Close Military Encounters”, Arms Control Association, November 2015, available at: www.armscontrol.org/ACT/2015_11/Features/Avoiding-War-in-Europa-The-Risks-from-NATO-Russian-Close-Military-Encounters#notes.

attacks on USS *Donald Cook*. In April 2016, a Russian jet harassed a US Air Force surveillance aircraft over the Baltic Sea, conducting a dangerous manoeuvre that came within 50 feet of the US aircraft's wings.²⁰

On 17 June 2016, Japanese military aircraft intercepted²¹ two Chinese fighter jets over the East China Sea. Allegedly, the Japanese aircraft released infrared jamming shells and locked their fire-control radar on the Chinese aircraft.²²

Provocative/aggressive conduct or resort to armed force?

According to the ICRC Commentary, “even minor skirmishes between the armed forces, be they land, air or naval forces, would spark an international armed conflict and lead to the applicability of humanitarian law”.²³ This does not, however, mean that any form of physical coercion by a warship or military aircraft against foreign warships or military aircraft will qualify as a use of force resulting in an international armed conflict.²⁴ Arguably, the intentional ramming of a foreign warship, which occurred in the Black Sea in 1988, is an act of violence by the use of a traditional means of warfare – i.e., a warship. Seemingly, there is no difference between shots being fired and ramming because both are designed, or may reasonably be expected, to cause damage or even injury and death. The ICRC is seemingly not willing to share this conclusion, because the Commentary refers to numerous maritime incidents that involved various degrees of physical coercion, including the use of guns, and that are not considered as having created a situation of international armed conflict.²⁵ However, in none of the cases quoted was physical coercion applied against a foreign warship. Therefore, the situations referred to merely qualified as measures enforcing coastal States' rights under the law of the sea or the applicable domestic law. Moreover, the ramming was undertaken with a view to hampering another State's military operations at sea, which, according to the ICRC Commentary, is a military operation bringing into existence an international armed conflict, if it is endorsed by the State concerned.²⁶ Nevertheless, it would seem odd to hold that the ramming, which is also referred to as the “Black Sea bumping incident”, initiated an international armed conflict between the U.S. and the Soviet Union because neither of the two States would have publicly drawn that conclusion. Obviously, the ramming, although an act of violence, did not pass the threshold necessary for qualifying as a use of military force.

20 Andrew Tilghman, “Russian Fighter Jet Taunts U.S. Military Aircraft over Baltic Sea”, *Military Times*, 18 April 2016, available at: www.militarytimes.com/story/military/2016/04/18/russian-fighter-jet-taunts-us-surveillance-aircraft-over-baltic-sea/83188528/.

21 Air interception is “an operation by which aircraft effect visual or electronic contact with other aircraft.” See NATO Glossary, above note 15, p. 2-A-9.

22 Sam LaGrone, “Chinese and Japanese Fighters Clash Over East China Sea”, *USNI News*, 5 July 2016, available at: <https://news.usni.org/2016/07/05/chinese-japanese-fighters-clash-east-china-sea>.

23 ICRC Commentary on GC II, para. 259.

24 For the exclusion of *ultra vires* actions or actions resulting from mistakes, see *ibid.*, para. 263.

25 *Ibid.*, para. 249.

26 *Ibid.*, para. 263.

Neither did the 2001 EP-3 incident trigger an international armed conflict – at least insofar as the damage inflicted to the aircraft is concerned. Supposedly, the Chinese aircraft were on an official mission aimed at harassing the US aircraft. The Chinese conduct resulted in severe damage to the EP-3 and the loss of a Chinese pilot. Seemingly, the use of force was sufficient to have initiated an international armed conflict between the United States and the People’s Republic of China (PRC). However, the Chinese acts did not amount to armed conflict because they were the result of a mistake. Obviously, the harassment, albeit seriously dangerous, was not designed to damage or down the US aircraft. As rightly emphasized in the ICRC Commentary, the existence of an international armed conflict is not determined by acts “done in error” or by “situations that are the result of a mistake or of individual *ultra vires* acts, which – even if they might entail the international responsibility of the State to which the individual who committed the acts belongs – are not endorsed by the State concerned”.²⁷ These findings are without prejudice to whether the detention of the EP-3 crew following the emergency landing on Hainan island can be considered as having brought into existence an international armed conflict.

In contrast, an unconsented-to military operation in the territory of another State that is undertaken with the approval of the flag State “should be interpreted as an armed interference in the [coastal State’s] sphere of sovereignty and thus may be an international armed conflict under Article 2(1)”.²⁸ Accordingly, the intentional presence of a foreign submarine operating submerged in the internal waters of another State without that State’s consent could qualify as a use of force bringing into existence an international armed conflict. This situation should not be confused with a mere violation of Article 20 of the 1982 UN Convention on the Law of the Sea (UNLCOS) by a foreign submarine not navigating on the surface and not showing its flag.

It follows from the foregoing that certain military operations against foreign warships or military aircraft do not constitute a use of force, although they are provocative or aggressive in nature because they are neither intended nor expected to directly result in damage or injury. The same holds true if they in fact, but mistakenly, result in damage or injury. State practice provides sufficient evidence that there are certain actions which are to be strictly avoided because they have the potential of escalating a given situation, but which do not as such bring an international armed conflict into existence.

In 1972, the Soviet Union and the United States concluded an agreement aimed at the prevention of incidents at sea.²⁹ In 1989, the two States concluded a

27 *Ibid.*, para. 263.

28 *Ibid.*, para. 259.

29 Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, signed Moscow, 25 May 1972 (entered into force 25 May 1972) (US–USSR Agreement); Protocol to the Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, signed Washington, 22 May 1973 (entered into force 22 May 1973) (US–USSR Protocol); both available at: www.state.gov/t/isn/4791.htm.

similar agreement on the prevention of dangerous military activities.³⁰ On 9/10 November 2014, the United States and the PRC concluded a Memorandum of Understanding on Rules of Behaviour for the safety of air and maritime encounters.³¹ All these agreements are more or less identical with regard to the following military operations that are to be avoided:³²

- Simulation of attack by aiming guns, missiles, fire-control radars, torpedo tubes, or other weapons in the direction of military vessels or military aircraft encountered;³³
- Except in cases of distress, the discharge of signal rockets, weapons, or other objects in the direction of military vessels or military aircraft encountered;
- Illumination of the navigation bridges of military vessels or military aircraft cockpits;
- The use of a laser in such a manner as to cause harm to personnel or damage to equipment onboard military vessels or military aircraft encountered;
- Aerobatics and simulated attacks in the vicinity of vessels encountered;
- The unsafe approach by one Side's small craft to another Side's vessels; and
- Other actions that may pose a threat to the other Side's military vessels.³⁴

Unless required to maintain course and speed under the rules of the road,³⁵ ships operating in proximity to each other “shall remain well clear to avoid risk of collision” and shall avoid manoeuvring “in a manner which would hinder the evolution of the formation” of foreign ships.³⁶ Furthermore,

[s]hips engaged in surveillance of other ships shall stay at a distance which avoids the risk of collision and also shall avoid executing maneuvers embarrassing or endangering the ships under surveillance. Except when required to maintain course and speed under the Rules of the Road, a surveillant shall take positive early action so as, in the exercise of good seamanship, not to embarrass or endanger ships under surveillance.³⁷

30 USSR–US Agreement on the Prevention of Dangerous Military Activities of 12 June 1989 (entered into force 1 January 1990), *International Legal Materials*, Vol. 28, No. 4, 1989.

31 Memorandum of Understanding between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China regarding the Rules of Behavior for Safety of Air and Maritime Encounters, reprinted in Office of the Secretary of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2016*, 26 April 2016, Appendix III, pp. 110 ff., available at: www.defense.gov/Portals/1/Documents/pubs/2016%20China%20Military%20Power%20Report.pdf. See also Annex II of the Memorandum of Understanding, “Rules of Behavior for Safety of Surface-to-Surface Encounters”, pp. 117 ff.

32 *Ibid.*, Section VI ii, p. 118.

33 See also USSR–US Protocol, above note 29, Article II.

34 For a critical assessment, see Pete Pedrozo, “The U.S.–China Incidents at Sea Agreement: A Recipe for Disaster”, *Journal of National Security Law and Policy*, Vol. 6, No. 1, 2012.

35 In the maritime context, the rules of the road are laid down in the International Regulations for Preventing Collisions at Sea.

36 US–USSR Agreement, above note 29, Article III(1) and (2).

37 *Ibid.*, Article III(4).

Although dangerous and to be avoided under the respective agreements, manoeuvring in close proximity to other vessels and harassment or illumination of foreign warships and military aircraft do not qualify as a use of force bringing an international armed conflict into existence. The same holds true for the locking on of a fire-control radar, although the target ship or aircraft would most probably be entitled to consider the situation an imminent attack or hostile intent triggering its right of self-defence (and then an international armed conflict). The latter situation, as well as simulated attacks on foreign warships or military aircraft, shows how difficult it is to clearly distinguish between mere harassment and an imminent use of force/armed attack. However, the existence of an imminent armed attack is relevant for the *jus ad bellum* only – i.e., for the exercise of the right of self-defence according to Article 51 of the UN Charter. For the determination of the existence of an international armed conflict, there must in fact be a resort to a use of military force; an imminent or allegedly imminent use of force or armed attack does not suffice.

In view of the above findings, the ICRC may consider an amendment or modification of its Commentary on common Article 2, which *inter alia* holds that an international armed conflict exists “when a situation objectively shows for example that a State is effectively involved in military operations or any other hostile actions against another State, ... hampering its military operations”.³⁸ Of course, during an armed conflict such conduct will qualify as a contribution to the enemy’s military action or a participation in the hostilities. In times of peace, however, the mere hampering of another State’s military operations not involving a use of force beyond the threshold of harassment will hardly bring an international armed conflict into existence.

Enforcement measures against foreign warships and military aircraft?

The ICRC Commentary holds that,

under international law applicable at sea, States may, in certain circumstances, lawfully use force against a vessel owned or operated by another State, or registered therein. This may be the case, for example, when coast guards, suspecting a violation of their State’s fisheries legislation, attempt to board such a vessel but meet with resistance.³⁹

This seems to suggest that, according to the law of the sea, a coastal State may take enforcement measures not only against fishing and merchant vessels but also against foreign State ships, including warships.

However, as far as foreign warships or other State ships enjoying sovereign immunity are concerned, the law of the sea does not provide the coastal State with enforcement rights. The only provision recognizing a coastal State’s right to take measures against foreign warships is Article 30 of

38 ICRC Commentary on GC II, para. 263.

39 *Ibid.*, para. 249.

UNCLOS.⁴⁰ This provision does not explicitly provide a right to use forceful means to compel a foreign warship to leave the territorial sea, although such a vessel would no longer benefit from the right of innocent passage.⁴¹ In this context it is important to bear in mind that the continuing presence in the territorial sea of a foreign warship which has not complied with a demand to leave may be considered a use of force not only under the *jus ad bellum*, but also under international humanitarian law.⁴² If the intentional but unconsented-to presence of foreign armed forces in another State's land territory is considered a use of force bringing into existence an international armed conflict, there would be no reason to treat the non-innocent passage of a foreign warship differently, if the coastal State has required it to leave the territorial sea. After all, the territorial sea is part of the territory of the coastal State.⁴³ The fact that foreign ships, including warships, enjoy the right of innocent passage would not justify the conclusion that different criteria apply at sea. At first glance, this would not hold true for those parts of the territorial sea forming part of an international strait. Although UNCLOS defines the concept of transit passage,⁴⁴ it is silent on the coastal State's rights with regard to passage that is not expeditious or in normal mode or otherwise contrary to the law of the sea. Seemingly, the coastal State has no right to require the respective ship to leave, or to take enforcement action with a view to terminating transit passage that is not in compliance with the law of the sea. It is, however, important to note that the special rules applying to international straits are without prejudice to the legal status of the sea area, which continues to be territorial sea and, thus, part of the coastal State's territory.⁴⁵ Hence, it could be held that a warship which is engaged in transit passage not in conformity with the law of the sea may be required to leave. If it does not comply, the same rules as those applicable to the territorial sea apply.

If one is not prepared to consider a non-innocent passage of a foreign warship in the territorial sea, including an international strait, a use of force because there is no prohibition of passage that is not in compliance with Articles 19 and 38 of UNCLOS,⁴⁶

40 Article 30 of UNCLOS provides: "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately."

41 For an assessment of the presence of foreign submarines in the territorial sea, see James Kraska, "Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters", *Columbia Journal of Transnational Law*, Vol. 54, No. 1, 2015, available at: <http://jtl.columbia.edu/putting-your-head-in-the-tigers-mouth-submarine-espionage-in-territorial-waters/>.

42 See ICRC Commentary on GC II, para. 245: "[...] an unconsented-to invasion or deployment of a State's armed forces on the territory of another State – even if it does not meet with armed resistance – could constitute a unilateral and hostile use of force by one State against another, meeting the conditions for an international armed conflict under Article 2(1)."

43 UNCLOS, Art. 2.

44 *Ibid.*, Art. 38.

45 *Ibid.*, Art. 34(1).

46 Any activity of a foreign warship which is not in compliance with Article 19 of UNCLOS would not constitute a violation of the territorial sovereignty of the coastal State, but would merely entail the coastal State's right under Article 30 of UNCLOS to require the vessel to leave the territorial sea immediately. In other words, the territorial sovereignty is *ab initio* limited by the right of passage, including non-innocent passage. In case of non-innocent passage, the only remedy available to the coastal State is the right to require the warship to leave the territorial sea immediately.

then an international armed conflict will only come into existence if the coastal State uses its armed forces to compel the warship to leave the territorial sea or strait.

A use of force against foreign warships or military aircraft in the sea areas and the above airspace beyond the outer limit of the territorial sea will most likely qualify as a use of force and bring an international armed conflict into existence. An illustrative example is the case of USS *Pueblo*.

USS *Pueblo* was the second ship in the Auxiliary General Environmental Research (AGER) programme of the United States.⁴⁷ The AGER programme was established in 1965 for the purpose of collecting signals intelligence. AGER operations, which were conducted in coordination with the National Security Agency within the Pacific Command, were also intended to “determine Soviet reaction to a small unarmed naval surveillance ship deployed in Soviet naval operating areas, and to test the effectiveness of this type of ship acting alone”.⁴⁸ The secondary mission of USS *Pueblo* was “to search for and record any signals emanating from” the DPRK.⁴⁹ Before her deployment, the *Pueblo* was armed with two 50-calibre machine guns. “Orders to PUEBLO specifically forbade her to approach closer than 13 miles to the North Korean coast.”⁵⁰ On 22 January 1968, a DPRK submarine chaser circled the *Pueblo* at close range, followed by three DPRK patrol boats. The exact position of the *Pueblo* at that point in time was, and continues to be, a contested issue between the United States and the DPRK. According to the DPRK government, the *Pueblo* was 7.1 nautical miles offshore;⁵¹ according to the US Department of State, she “was seized slightly more than fifteen miles from the nearest land”.⁵² After several warnings by the DPRK warships that remained unheeded, the DPRK vessels opened fire at the *Pueblo* and eventually she was boarded and taken to Wonsan in the DPRK. One sailor had died; the remaining eighty-two officers and personnel were removed from the ship and taken to Pyongyang, where they were detained until their repatriation on 23 December 1968. According to the DPRK, USS *Pueblo* “was seized ... in the territorial waters of the [DPRK]”, and committed “grave acts of espionage ... against the [DPRK] after having intruded into the territorial waters of the [DPRK]”.⁵³

Leaving aside the issue of the exact location of USS *Pueblo*, it is safe to hold that she was not operating within the territorial sea of the DPRK because, in 1968, the 12-nautical-mile breadth of the territorial sea was not yet

47 The USS *Pueblo* is therefore also known as *AGER-2*.

48 Court of Inquiry to Inquire into the Circumstances relating to the Seizure of the USS *Pueblo* (*AGER-2*) by North Korean Naval Forces, which Occurred in the Sea of Japan on 23 January 1968, and the Subsequent Detention of the Vessel and the Officers and Crew, Summary Report, 9 April 1969 (*Pueblo Report*), p. 34, available at: www.jag.navy.mil/library/investigations/pueblo%20basic%20pt%202.pdf.

49 The secondary mission and mission objectives of USS *Pueblo* are laid down in a formerly secret but now declassified document (DOCID: 4121723).

50 *Pueblo Report*, above note 48, p. 36.

51 See US Department of State, telegram, 8 February 1968, reproduced in “Contemporary Practice of the United States Relating to International Law”, *American Journal of International Law*, Vol. 62, No. 3, 1968, pp. 756–757.

52 *Ibid.*

53 The document is reprinted in *American Journal of International Law*, Vol. 63, No. 3, 1969, pp. 684–685.

generally recognized.⁵⁴ Accordingly, the *Pueblo*'s presence either 7.1 or approximately 15 nautical miles off the DPRK coast can under no circumstances be considered unlawful or a use of force, which would have entitled the DPRK to take enforcement measures. Hence, an international armed conflict only came into existence when the DPRK ships opened fire. Arguably, that international armed conflict lasted until 23 December 1968, the date of the release and repatriation of the crew and personnel.

Use of force against foreign merchant vessels and civil aircraft

In order to trigger an international armed conflict, a use of armed force need not be directed against another State's military forces or military equipment and infrastructure. For the purposes of common Article 2(1), an international armed conflict may also be triggered by a use of force against another State's "territory, its civilian population and/or civilian objects, including (but not limited to) infrastructure".⁵⁵ However, in the maritime context law enforcement measures involving a use of force taken against foreign merchant vessels will regularly not bring into existence an international armed conflict between the coastal State and the respective flag States, unless the measures extend to the territorial sea of a State other than the coastal State. That said, as stated in the ICRC Commentary, it "cannot be excluded ... that the use of force at sea is motivated by something other than a State's authority to enforce a regulatory regime applicable at sea. Depending on the circumstances, such a situation may qualify as an international armed conflict."⁵⁶ Hence, it is important to clearly distinguish between, on the one hand, maritime law enforcement under the law of the sea, which benefits from a – rebuttable – presumption of legality and which is not considered a resort to a use of force against the flag State or an exercise of belligerent rights; and, on the other, a resort to force at sea outside the law enforcement paradigm.

The law of the sea

UNCLOS and other multilateral and bilateral treaties⁵⁷ contain provisions entitling States to take enforcement measures against foreign merchant vessels. In view of the

54 See UN Department of the Law of the Sea, *Law of the Sea Bulletin*, No. 15, May 1990, p. 29. Claims in (1960) and in 1969: 3 nm: (22) 28; 4 nm: 3; 6 nm: (10) 13; 9 nm: 1; 10 nm: 1; 12 nm: (13) 42; 130 nm: 1; 200 nm: (1) 5. The mere fact that between 1960 and 1969 the number of claims to a 12 nm territorial sea increased from thirteen to forty-two is not sufficient evidence of a general State practice because during the same period, claims to a 3 nm territorial sea increased from twenty-two to twenty-eight. Accordingly, it is safe to conclude that a 3 nm territorial sea, as recognized by the United States in 1968, was considered as being in accordance with customary international law, whereas claims to a 12 nm territorial sea or beyond were not (yet) generally recognized.

55 ICRC Commentary on GC II, para. 246.

56 *Ibid.*, para. 249.

57 See, for instance, the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, UN Doc. LEG/CONF.15/21, 1 November 2005; UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN Doc. E/CONF.82/16, 20 December 1988, reprinted in *International Legal Materials*, Vol. 28, No. 2, 1989.

limited space available, it suffices to refer to the contribution in this volume by Rob McLaughlin on law enforcement at sea and the peacetime standards for the use of force.⁵⁸ For the purposes of this paper it suffices to mention that the coastal State's rights to enforce its domestic civil or criminal law are limited to the internal waters, the territorial sea and, where applicable, the archipelagic waters. Within the contiguous zone, the coastal State may only enforce its customs, fiscal, immigration or sanitary laws.⁵⁹ Within the exclusive economic zone (EEZ), enforcement measures may only be taken within the safety zone around artificial islands, installations and structures,⁶⁰ or in the exercise of the coastal State's sovereign rights enjoyed in the EEZ.⁶¹ On the high seas, measures against foreign ships may be taken only on the basis of Articles 105, 110 or 111 of UNCLOS.⁶²

Accordingly, any action, in particular any use of force, against a foreign vessel will violate the exclusive jurisdiction of the respective flag State, if none of the said provisions provide a legal basis. The same holds true if the force used is disproportionate.⁶³ It is, however, open to doubt whether a use of force against a foreign merchant vessel can be considered as bringing an international armed conflict into existence only because there is no legal basis. After all, merchant vessels, while subject to the sovereignty of the flag State, cannot be assimilated to territory (no "swimming territory"). Accordingly, disproportionate or otherwise illegal measures, including disabling fire (i.e., shots into the rudder or bridge) or the sinking of a foreign merchant vessel, cannot be considered a use of force by a State against the flag State.⁶⁴ This may, however, be different if the measures are taken not against individual ships only but against the entire merchant fleet of

58 See Rob McLaughlin, "Law Enforcement at Sea: The Applicable Legal Framework", in this issue of the *Review*.

59 UNCLOS, Art. 33.

60 *Ibid.*, Art. 60.

61 *Ibid.*, Art. 73.

62 For a comprehensive analysis, see Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, Hart, Oxford and Portland, OR, 2014; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, Cambridge, 2009.

63 For a disproportionate use of force see, *inter alia*, International Tribunal for the Law of the Sea, *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, para. 155: "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."

64 For a similar but more cautious approach, see ICRC Commentary on GC II, para. 249: "In the naval context, under international law applicable at sea, States may, in certain circumstances, lawfully use force against a vessel owned or operated by another State, or registered therein. This may be the case, for example, when coast guards, suspecting a violation of their State's fisheries legislation, attempt to board such a vessel but meet with resistance. The use of force in the course of this and other types of maritime law enforcement operations is regulated by legal notions akin to those regulating the use of force under human rights law. In principle, such measures do not constitute an international armed conflict between the States affiliated with the vessels, in particular where the force is exercised against a private vessel. It cannot be excluded, however, that the use of force at sea is motivated by something other than a State's authority to enforce a regulatory regime applicable at sea. Depending on the circumstances, such a situation may qualify as an international armed conflict."

another State.⁶⁵ Still, it should not be forgotten that, particularly in view of the widespread use of so-called “flags of convenience”, it is virtually impossible to determine that a State has resorted to a use of force against another State’s merchant fleet.

Law enforcement or exercise of belligerent rights?

The ICRC Commentary is rather cryptic as regards a “use of force at sea ... motivated by something other than a State’s authority to enforce a regulatory regime applicable at sea”.⁶⁶ Unfortunately, the respective paragraph provides neither a clarification nor a reference to a situation that could be considered as triggering an international armed conflict by the use of force against foreign merchant vessels. As seen, the lack of a legal basis or the disproportionate nature of the force used will scarcely suffice to qualify as a resort to a use of force against the flag State.

In this context, it may be worthwhile to consider a situation in which a State captures the merchant ships of a single flag State only. At first glance, this may be but yet another example of unlawful conduct rather than an inter-State use of force or a conduct triggering an international armed conflict, in particular if the affected merchant vessels are not sunk. However, under the law of naval warfare, belligerent acts are not limited to attacks. They also include the exercise of so-called prize measures taken against enemy and neutral merchant vessels or civil aircraft.⁶⁷ For the purposes of this paper, prize measures against neutral merchant vessels and civil aircraft can be discarded because maritime neutrality requires the existence of an international armed conflict.

Arguably, an international armed conflict may come into existence by an exercise of prize measures directed against the merchant vessels of only one specific State. By such conduct the State exercising prize measures implicitly qualifies the affected flag State as an enemy and the capture of the flag State’s vessels could be considered an exercise of belligerent rights rather than mere maritime law enforcement. In theory, the distinction between an exercise of belligerent rights and maritime law enforcement may be possible. In practice, however, it is rather difficult because the respective measures – visit, search, capture – are more or less identical. Hence, visit, search and capture of the merchant vessels of a single flag State will not as such suffice to justify the conclusion that a State has transited from law enforcement to belligerency; such a conclusion will be possible only if further factors come into play. For instance,

65 Although it exclusively defines a *jus ad bellum* concept, it may be recalled that “an attack by the armed forces of a State on the ... marine and air fleets of another State” is considered an “act of aggression”. See Article 3(d) of the Definition of Aggression annexed to UNGA Res. 3314 (XXIX), UN Doc. A/RES/29/3314, 14 December 1974.

66 ICRC Commentary on GC II, para. 249.

67 See Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, Part V, paras 112–158; HPCR Manual, above note 9, Section U (Rules 134–146).

the respective State may have established a prize court that is to judge the legality of a capture under the law of naval warfare as distinguished from the peacetime rules of the law of the sea. There may be official government statements, according to which the measures are designed to bring down the flag State's economy. In other words, the determination of whether a State has resorted to an exercise of belligerent rights is dependent upon the circumstances ruling at the time. There is no established or agreed-upon objective criterion that would enable States to clearly distinguish between maritime law enforcement and belligerency at sea.

Use of civilian state agencies for purposes other than law enforcement

The situations referred to above have in common a use of force or aggressive conduct by warships and military aircraft. There are, however, some recent incidents in which States have made use not of their navies or air forces but of their civilian law enforcement agencies, such as their coast guard, which seemingly were not limited to conducting traditional maritime law enforcement operations. In the East and South China Seas in particular, the bordering States have used their coast guard or other vessels to assert their territorial claims to islands, rocks and reefs.⁶⁸ In some instances, the coast guard vessels of two States were engaged in dangerous manoeuvres, including the ramming of ships, and other aggressive operations, including the use of deadly force against foreign fishermen.

The coming into existence of an international armed conflict does not depend upon armed confrontations involving the regular armed forces of two or more States. As rightly stated in the ICRC Commentary, an international armed conflict also comes into existence through armed confrontations involving "non-military State agencies such as paramilitary forces, border guards or coast guards. Any of those could well be engaged in armed violence displaying the same characteristics as that involving State armed forces."⁶⁹ However, the mere fact that coast guards are used for purposes that may no longer be considered as traditional maritime law enforcement will hardly suffice to justify the conclusion that an international armed conflict has come into existence. After all, the identification of tasks that State organs or agencies are entrusted with is part of the sovereign prerogative that is not limited by international law, including

68 See Dan Parsons, "South China Sea Dispute Shaping Up as Coast Guard Showdown", *National Defense Magazine*, June 2014, available at: www.nationaldefensemagazine.org/articles/2014/6/1/2014june-south-china-sea-dispute-shaping-up-as-coast-guard-showdown; Bonnie S. Glaser, "Conflict in the South China Sea", Council on Foreign Relations, Contingency Planning Memorandum Update, 7 April 2015, available at: www.cfr.org/report/conflict-south-china-sea; "China's Coast Guard Cause Most South China Sea Clashes, US Report Finds", *CNBC*, 6 September 2016, available at: www.cnb.com/2016/09/06/chinas-coast-guard-cause-most-south-china-sea-clashes-us-report-finds.html. See also James Kraska and Michael Monti, "The Law of Naval Warfare and China's Maritime Militia", *International Law Studies*, Vol. 91, 2015, available at: <http://stockton.usnwc.edu/ils/vol91/iss1/13/>.

69 ICRC Commentary on GC II, para. 248.

international humanitarian law. In the same vein, there is no rule of international law prohibiting States from asserting territorial claims by resorting to conduct that is perceived of as less aggressive than the deployment of naval forces. For an international armed conflict to come into existence, the conduct of coast guards or other civilian law enforcement agencies must by necessity qualify as a resort to force against another State. Accordingly, the same criteria distinguishing maritime law enforcement and “harassment”, on the one hand, from a resort to force at sea, on the other, apply.

Concluding remarks

The grand battles between navies belong to the past. Direct hostilities between navies, as in the case of the *Cheonan*, may still occur, but for the time being they will be the exception rather than the rule. Of course, many of the situations and incidents referred to in this paper could have escalated into direct military confrontations between the States involved. The fact that some coastal States have shown, and continue to show, an increasingly aggressive conduct vis-à-vis the vessels of other States is undoubtedly worrying and detrimental to international (maritime) security. This does not concern international humanitarian law, however, as long as the conduct does not qualify as a resort to force by one State against another State. As we have seen, not every confrontation at sea results in an international armed conflict. Although aggressive in nature or legally doubtful, most maritime operations, worrying as they may be, remain within the paradigm of incidents at sea.