



The use of force during law enforcement in disputed maritime areas[☆]

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ABSTRACT

The issue of law enforcement in disputed maritime areas is highly relevant to maritime rights protection and of great interest among coastal States. This issue can cause tension among surrounding coastal States and may involve the use of force during the course of law enforcement. This paper commences by defining disputed maritime areas, and then focuses on measures that could be adopted for law enforcement. It is also important to discuss the legal basis and limitations of using force. This paper concludes by suggesting that further strengthening of the maritime law enforcement system will not only provide a legal basis for due process but also facilitate better protection of the maritime rights of coastal States.

1. Introduction

The establishment of exclusive economic zones, as prescribed by the 1982 United Nations Convention on the Law of the Sea (UNCLOS),¹ has sometimes resulted in overlapping and disputed claims. UNCLOS calls for delimitation agreements to be negotiated by neighbouring States. For example, China is faced with various unsettled maritime boundary delimitation disputes. While the Sino-Vietnam agreement provides for border demarcation in the Gulf of Tonkin [1], other disputes remain, such as that of the continental shelf delimitation in the East China Sea with Japan and South Korea [2], maritime area dispute in the Yellow Sea with South Korea [3], Diaoyu Islands dispute with Japan [4], and South China Sea disputes [5].

In recent years, with the further exploitation of maritime biological and non-biological resources, States have become increasingly focused on the oceans [6]. In the Yellow Sea, South Korea has issued strict law enforcement policies, allowing the use of force against Chinese fishing vessels by the Korean Coast Guard, including the firing of on-board cannons and ramming [7]. In the East China Sea, the Japanese Coast Guard has pursued significant damages against the captain of a Chinese fishing vessel after it collided with a Yonaguni patrol boat [8]. In the

South China Sea, the continuously strengthening presence of China, Vietnam, the Philippines, Malaysia, Brunei, and Indonesia is evident through their 'effective development', resulting in constant conflict not only with but also from China [9]. Moreover, on 15 December 2016, a US underwater naval drone attached to the USNS Bowditch was seized by the Chinese navy while operating in the South China Sea near the Philippines. China declared that the seizure of the US underwater naval drone was to prevent the device from harming the safety of the navigation and personnel of passing ships [10].

Such incidents in the South China Sea reflect that States within and outside the region are engaging in military activities, that occur within a grey area in the international law of the sea.² Effective law enforcement is essential to the stability and security of any coastal State's maritime rights and interests. But this can be contentious and sensitive in disputed waters. For example, in Submission No. 13 of the *South China Sea Arbitration*, the Philippines alleged that China had breached its obligations under UNCLOS by operating its law enforcement vessels in a dangerous manner, encouraging the risk of collision to Philippine vessels navigating in the vicinity of the Scarborough Shoal. This action challenges China's right to exercise law enforcement power in the South China Sea [11].

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¹ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 U.N.T.S. 397 (entered into force 16 November 1994).

² There are no clear definitions or distinctions concerning 'scientific research', 'hydrologic survey' and 'military activity' within UNCLOS. It is difficult to differentiate the above mentioned activities which in turn create the grey area in practice.

Most recently, in the *Case Concerning the Detention of Three Ukrainian Naval Vessels*,³ three Ukrainian naval vessels and their 24 crew members were arrested and detained by Russia near the Kerch Strait in the Black Sea. Ukraine asserted that the dispute concerned law enforcement activities, not military activities as claimed by Russia.⁴ In this context, research on law enforcement operations in disputed maritime areas would help to encourage the stability of the surrounding disputed maritime areas and enhance the ‘reasonableness’ of law enforcement activities [12].

Therefore, it is suggested that a better understanding of the rules of competition and norms of international law be established, especially those functioning as the legal basis for handling affairs in the aforementioned grey area. If this were done, coastal States could promptly engage in internal awareness-raising efforts and take the initiative in external communication when facing challenges in disputed maritime areas concerning law enforcement activities [13]. In light of the aforementioned concern, this paper commences by defining disputed maritime areas. It is important to note that maritime areas such as the Yellow Sea, East China Sea, and South China Sea have caused tension among surrounding States in recent years. The examples discussed in this paper largely focus on the aforesaid maritime areas, although practices from other areas are cited when relevant. Attention has also been paid to the distinctions between maritime law enforcement and the use of force. While a legal basis for the use of force during law enforcement at sea is noteworthy, conditions of and restrictions on its use during law enforcement in disputed maritime areas are also discussed.

2. Definition of disputed maritime areas

Disputes are one of the inherent elements of international relations, particularly when conflicts involve natural resources that may be claimed [14]. Under international law, a ‘dispute’ refers to a situation where the proposition or claim of one party over factual, legal, or policy matters encounters rejection, denial, or counter proposals from the other party [15]. There are primarily two types of disputed maritime areas: First, delimitation disputes (based on overlapping jurisdictional claims), and second, sovereignty claims are disputed (based on island sovereignty claims). A disputed maritime area, therefore, should be defined as occurring when there is a divergence over the sovereignty, sovereign rights, jurisdiction, or delimitation among surrounding States [16]. In terms of basic claims, disputed maritime areas are classified into the following types, coupled with relevant examples in practice:

(I) Disputed maritime areas based on disputed sovereignty claims over islands

Regarding the East China Sea, there is the Sino-Japan sovereignty dispute over the Diaoyu islands. In the South China Sea, the focal point of sovereignty disputes relates to which coastal States may claim sovereignty over certain or all the islands and sovereign rights over the corresponding maritime area. Parties to the dispute include China, Vietnam, the Philippines, Malaysia, Brunei, and Indonesia, among which Vietnam claims to own undisputable sovereignty over the Spratly islands (Truong Sa) and Paracel islands (Hoang Sa). In a 2011 submission to the United Nations, Vietnam suggested its willingness to relinquish its claims over the Spratly islands in exchange for recognition of wider rights over resources in the South China Sea [17]. Malaysia, based on its continental shelf under UNCLOS, claims sovereignty over 12 of the southernmost Spratly islands. Brunei has put forward the same claim as Malaysia, while the Philippines

claims sovereignty over the easternmost Spratly islands, namely the Kalayaan island group. By way of a provision in Article 2 of the 1992 *Law on the Territorial Sea and Contiguous Zone*, China claims sovereignty over the Pratas islands (Dongsha islands in Chinese), Paracel islands (Xisha islands in Chinese), Macclesfield Bank (Zhongsha islands in Chinese), and Spratly islands (Nansha islands in Chinese). Given that UNCLOS adopts the principle of domination of the land over the sea [18], the above sovereignty claims over islands would accordingly have an impact on claims over the surrounding maritime area. Thus, the State with sovereignty over an island also has sovereignty over the corresponding territorial sea and sovereign rights over the EEZ and continental shelf. As such, the disputed maritime area is relative to the disputed sovereignty claims over the relevant islands.

(II) Overlapping maritime areas claims with undecided EEZ or continental shelf delimitation

Regarding the Yellow Sea, China and South Korea have concluded the *Fishery Agreement between the Governments of the People’s Republic of China and the Republic of Korea*. Disputes in this maritime area primarily consist of two aspects, namely the delimitation of maritime areas outside the territorial seas and determination of fishing quotas for fishermen of the two States. In the East China Sea, China and Japan face not only the issues of EEZ and continental shelf delimitation but also the complication of a disputed sovereignty claim over the Diaoyu islands. In the South China Sea, coastal States in the area have raised a number of competing claims over EEZ or continental shelf delimitation.

The scope of the right to the sea claimed by coastal States is constantly expanding with the development of the law of the sea [19]. Maritime boundary disputes are considered the most prolific source of dispute between States as a by-product of the extension of national jurisdiction [20]. As for disputes in the South China Sea, the surrounding States have claimed a 200-nautical mile EEZ or continental shelf through declarations, domestic legislation, or extended continental shelf submissions [21].⁵ Robert W. Smith and Bradford Thomas highlight two concerns in respect of maritime zone delimitation: First, the establishment and definition of maritime zones should comply with UNCLOS. Second, given the involvement of various maritime claims by various States, delimitation must be handled with care [22]. Nevertheless, the international nature of maritime delimitation suggests that such action should not be arbitrarily decided by the provisions of domestic laws.

The preceding discussion explained the term ‘disputed maritime areas’ and its two classifications, and provided appropriate examples in practice concerning various claims by different States in the disputed maritime areas. There is therefore a need to establish a recognised law enforcement mechanism over disputed maritime areas to seek consensus in terms of countermeasures to reduce potential conflicts.

3. Maritime law enforcement and the use of force: defining the terms

(I) Maritime law enforcement

Maritime Law enforcement refers to the activities of national authorities to enforce the law at sea using administrative law enforcement powers [1]. Specifically, it refers to activities such as boarding, inspection, arrest, and detention performed by entities with domestic law authorisation to safeguard national maritime

³ *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, International Tribunal for the Law of the Sea, List of Cases: No. 26, 25 May 2019.

⁴ *Ibid.*, paras. 30, 48, 50.

⁵ Such as the 1977 Vietnamese Declaration on the Territorial Sea, Contiguous Zone, Exclusive Economic Zone, and Continental Shelf; the Presidential Decree No. 1599 of 1978 by the Philippines; the 1980 Declaration by the Government of Indonesia concerning the Exclusive Economic Zone of Indonesia, the 1982 Brunei Darussalam Fishery Limits Act, and the 2009 Joint submission by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf (CLCS).

rights, national security, or the common interests of mankind. Maritime law is enforced by bodies with law enforcement competence, which is capable of performing law enforcement activities in their own name and assume the corresponding responsibilities [2].

The objects of the activities of maritime law enforcement include dealing with persons engaged in breaching legal provisions. The provisions of UNCLOS⁶ and State practice showed that the purpose of law enforcement activities was primarily to enhance the control of relevant sea areas and safeguard the State's maritime interests. As a result, the objects of maritime law enforcement usually involve foreign elements. Furthermore, given that vessels are a key subject matter for States' jurisdiction under UNCLOS [7], the subject matter of maritime law enforcement discussed in this paper is restricted to that concerning foreign vessels. In addition, pursuant to the principle of *par in parem non habet jurisdictionem* [23] and Articles 31, 32, 95, and 96 of UNCLOS, naval craft and other government ships operated for non-commercial purposes have total immunity from the jurisdiction of any State other than a flag State. However, the *Case Concerning the Detention of Three Ukrainian Naval Vessels* revealed that 'the distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the activities in question'.⁷ There is a need to objectively assess the nature of the activities in question considering the relevant circumstances on a case-by-case basis.⁸

It is also necessary to identify the specific role of law enforcement activities in disputed maritime areas, namely the suppression of transnational maritime crimes; prevention of illegal, unreported, and unregulated (IUU) fishing; protection of the marine environment; and protection of the safety of life at sea [23]. Since disputed maritime areas are normally located at strategic points or involve geo-political complexity, law enforcement activities will inevitably be concerned with foreign affairs. All actions, in particular the use of force in the course of law enforcement, should always be exercised with great caution.

(II) The use of force in disputed maritime areas

In some cases, the use of force is inevitable in the course of law enforcement at sea; however, such force must only be used on the basis of self-defence or reliance on the consent of the flag State [24]. The lawful use of force during the course of law enforcement in disputed maritime areas should serve the following two objectives: First, ensure the safety of fishermen and law enforcement officers, and second, facilitate effective law enforcement activities [25]. The use of force may be categorised as the use of force in 'maintaining international relations' and in 'conducting law enforcement activities'. While the former is regarded as violence between States or military forces, the latter refers to police activity. The 1945 Charter of the United Nations (hereinafter the Charter) provides in Article 2, Paragraph 4 for the principle of refrainment from the use of force, which is considered a fundamental principle for international peace and security: '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 other manner inconsistent with the purposes of the United Nations'. Echoing the Charter, UNCLOS also provides for the same principle in Article 301, emphasising the peaceful uses of the seas even in 'disputed maritime areas'.

For example, in 2007, the Arbitral Tribunal dealt with the case of *Guyana and Suriname* concerning an incident in a maritime area disputed between two coastal States. In this case, both States had officially issued licences for mineral resource exploration activities and fishing in a maritime area with overlapping claims [26]. In the dispute between the Suriname Navy and a Guyana oil company (with oil exploration operations in the disputed maritime area), which only received a warning from the Suriname Navy. However, Guyana later stated that it (the warning to stop the exploration) should be considered as the use of force or a law enforcement activity [27]. The use of force is not completely prohibited under international law. The exercise of the right of self-defence under Article 51 of the Charter is considered as permitting the use of force under special circumstances including in disputed maritime areas. Regarding the right of hot pursuit, Article 111 of UNCLOS tacitly permits the use of reasonable force when necessary in the course of arresting ships [28]. The similarities between the force used in international confrontation and that in law enforcement at sea including in delimited areas mean that forcible action by a coastal State against a foreign fishing vessel may be considered an armed attack should the action result in casualties or major property damage⁹ and consequently, lead to the exercise of the right of self-defence [29].

(III) Brief reflection

As indicated earlier, law enforcement in disputed maritime areas by nature largely relates to transboundary issues, particularly those concerning the suppression of transnational maritime crimes, prevention of IUU fishing, protection of the marine environment, and protection of safety at sea. There is a need to create a solid foundation for cooperation among States in the disputed areas. Taking the South China Sea as an example, it is observed that bilateral cooperation, rather than multilateral cooperation, has been the norm in the region.

China and Vietnam concluded the Joint Fishery Agreement in 2000, which came into force in 2004. In accordance with this arrangement, coast guards of the two States regularly conduct joint patrols, ship visits, and joint exercises regarding search and rescue, and exchange and share information on illegal fishing. Since January 2016, the two coast guard services have informed each other about their respective patrols and violating fishing vessels on a monthly basis [30]. China and Vietnam also concluded a Memorandum of Understanding on 27 June 2016 to promote cooperation on anti-maritime crimes, joint patrol, and search and rescue activities. Under the Memorandum of Understanding, the two parties also agreed to maintain 24/7 contact [22].

In addition, Vietnam and the Philippines concluded a Memorandum of Understanding for the operation of a hotline on 23 August 2013. The hotline is available at all times via telephone, fax, and the Internet, and connects the headquarters of the two coast guards. Regular contact is made monthly and irregular contact is used for immediate coordination of fisheries surveillance activities against IUU fishing; emergency response to distressed Filipino and Vietnamese fishermen operating within the two parties' maritime zones and on the high seas; and suppressing maritime crimes such as trafficking, illegal immigration, piracy, and armed robbery [31]. Practically, it is also evident that the Vietnam Coast Guard has been working closely with their Malaysian counterparts

⁶ Articles 27 and 28 on criminal jurisdiction and civil jurisdiction on board a foreign ship of the coastal State in its territorial sea, Article 73 on measures and procedures for enforcement of laws and regulations of the coastal State in its exclusive economic zone, Article 110 on the right to visit and Article 111 on the right of hot pursuit all concern foreign counterparts.

⁷ *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, International Tribunal for the Law of the Sea, List of Cases: No. 26, 25 May 2019, para. 64.

⁸ *Ibid.*, para. 66.

⁹ Article 3 of the United Nations General Assembly Resolution 3314 (XXIX) (Definition of Aggression): An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State shall qualify as an act of aggression.

regarding the Sunrise and Orkim Harmony cases [22]. The Vietnam Coast Guard and the Maritime Security Agency of Indonesia signed a letter of intent on enhancing cooperation in August 2017 and demonstrated good practice.

In terms of the use of force in the course of law enforcement activities, less aggressive forms thereof fall within the scope of Article 2, Paragraph 4 of the Charter on the prohibition of the use of force, even though such activities do not constitute armed attack under Article 51 of the Charter. As a practical matter, the degree of force employed in maritime law enforcement may be greater than that of 'less grave forms of the use of force' used on other occasions. In *Guyana v. Suriname*, the Surinamese navy took no action, merely ordering 'the rig to leave the area or responsibility for unspecified consequences from not fulfilling this demand would be its...'. In the opinion of the arbitral tribunal, this demand constituted an explicit threat of force that fell into the 'less grave forms of the use of force', as cited by the Court in *Nicaragua v. United States of America*. In contrast, in the 'I'm Alone' case, the shelling and sinking of a Canadian vessel suspected of smuggling liquor by a United States Coast Guard patrol boat was considered as an 'excessive use of force', which resulted in the payment of a fine by the United States to Canada.¹⁰

In addition, as indicated in the *Case Concerning the Detention of Three Ukrainian Naval Vessels*, the legal status of the ship employed in law enforcement activity does not necessarily determine the nature of any force used.¹¹ Article 107 of UNCLOS provides for the law enforcement powers of warships against piracy, with Articles 110 and 111, respectively with regard to the right of boarding and examination, and right of hot pursuit. In practice, the navy's participation in law enforcement at sea is becoming increasingly common. For example, the French Navy is a major law enforcer on the seas, and performs anti-piracy, anti-terrorism, anti-drug, pollution prevention, and harbour security responsibilities [32]. The *Prefectura Naval Argentina Organic Act* also provides that, in addition to maritime patrol and illegal fishing control, the Prefectura Naval Argentina is authorised to use force when necessary [33]. During the Cod Wars, the Icelandic Navy performed forcible law enforcement activities against British trawlers. As a result, engagement by the military should not be too quickly equated to the use of military force, which is prohibited by the Charter [34].

Last, lawfulness under the coastal State's domestic law is irrelevant to the legality of the use of force. For instance, in the *M/V Saiga (No. 2) case*, Guinean Customs patrol boats, in accordance with *Law 94/007/CTRN* and the *Code des Douanes* (Customs Code), 'attacked' and arrested the *M/V Saiga* as the latter was sailing in the south of the Guinean EEZ. However, under Article 60, Paragraph 2 of UNCLOS, in the EEZ, Guinea could not apply the *Code des Douanes* in areas other than artificial islands, installations, and structures. In reality, the Guinean *Code des Douanes* was used as the basis of law enforcement for the entire EEZ. The International Tribunal for the Law of the Sea held that provisions of the Guinean *Code des Douanes* were in contravention of UNCLOS and that the use of force in the course of arrest was, in this case, excessive and unreasonable [35].

In contrast, for domestic legislation consistent with UNCLOS, if forcible action is not taken for the purpose of enforcing the domestic law in question, such action may also constitute the use of force in international relations. In *Guyana v. Suriname*, in support of its stance that the measures it undertook were law enforcement measures, Suriname relied on Article 2, Paragraph 6 of its *Mining Act*, which provides that mining activities without a licence are punishable by imprisonment or a fine. When consulted before the action in question took place, they supported

this view by citing the opinion provided by their Attorney General. The Tribunal held, however, that judging from the circumstances of the case, including the 'disputed maritime area' where the incident took place, diplomatic exchanges by the Presidents of both parties, and instructions given to Surinamese patrol boats, the action mounted was more akin to a threat of military action in defending the asserted sovereignty than a mere law enforcement activity [18].

4. Legal basis for the use of force during law enforcement at sea

(I) Rules of international law

Articles 27, 28, 73, 105, and 110 of UNCLOS provide for the jurisdiction of coastal State under various circumstances, expressly recognising the coastal State's right of boarding, examination, arrest, and seizure. The use of force is not mentioned; therefore, it is necessary to allow the minimum use of force for the purposes of law enforcement given that the compulsory measures taken by the coastal State to curb violations might meet armed resistance. In addition, Article 111 of UNCLOS authorises the exercise of the right of hot pursuit by naval craft or other ships on government service against foreign ships reasonably suspected of violating its domestic laws or regulations. This provision does not, however, clearly address the issue of the use of force. Nevertheless, law enforcement would not be possible should the term 'hot pursuit' only include closing in on the pursued target but exclude the use of force as an auxiliary measure [36]. Commentators have also argued that the right of 'hot pursuit' falls within the scope of police powers. Just as in the course of law enforcement a police officer is authorised to use force against any violator disregarding a police warning, a law enforcement ship of a coastal State may also use force when a foreign ship ignores orders to stop [37].

Furthermore, Article 38 of the 1945 Statute of the International Court of Justice defines international custom as 'evidence of a general practice accepted as law'. As such, any international custom consists of two fundamental elements: State practice and *opinio juris*. The domestic laws of States, decisions of international judicial bodies, and international treaty-making efforts are all sources of the customary rules of international law [38]. Provisions on the use of force during maritime law enforcement are found in various international legal instruments, including those involving disputed maritime areas. The 1979 Code of Conduct for Law Enforcement Officials (hereinafter 'the Code of Conduct') stipulates in Article 3 that 'law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty'. The 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea, of 10 December 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter the 'Fish Stocks Agreement') stipulates in Article 22, Paragraph 1, subparagraph f that the inspecting State shall ensure that its duly authorised inspectors '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'.

Article 74 and Article 83 of UNCLOS deals with disputed maritime areas as a 'Delimitation of the exclusive economic zone between States with opposite or adjacent coasts' and 'Delimitation of the continental shelf between States with opposite or

¹⁰ 'I'm Alone', State of New York, Appellate Division, Second Department, January 5 1935, 1935 WL 57893, 1935 A.M.C., p.197.

¹¹ *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, International Tribunal for the Law of the Sea, List of Cases: No. 26, 25 May 2019, para. 64.

adjacent coasts', respectively.¹² It is observed that the methodological limitations relating to State practice in the context of establishing the content of Articles 74(3) and 83(3) of UNCLOS is that activities, especially fishing, in disputed maritime areas would probably not 'jeopardise or hamper' activities, but enforcement measures against the vessels of another party to the delimitation dispute would likely be taken [39]. The presence of the naval vessels of neighbouring coastal States can be misinterpreted and may be considered as indicating that these coastal States intend to exercise their claims over disputed areas, which may lead to military or political tension. In the case of coastal activities including the exploration and exploitation of mineral resources and fishing, also in disputed maritime areas, the rule of international law should be strictly followed. If this is not the case, conflict may arise between two coastal States. The use of force in similar cases is not, however, necessarily justified, as the rule of international law provides every coastal State with the right to explore and fish in the open seas.

The 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter the '2005 Protocol') provides in Article 8bis that 'when carrying out the authorised actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorised actions'. The 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders provides for circumstances under which a law enforcement official may resort to the use of force in Articles 4, 9, and 13.

(II) Principles established by international cases

As discussed above, when carrying out law enforcement activities at sea, domestic provisions on the use of force are widely adopted by States as a measure to effectively exercise their jurisdiction under UNCLOS and to ensure the security of their maritime interests. Such provisions also typically include their interests and perceptions that coastal States (who are the parties to such disputes) have over any disputed maritime areas. However, such use of force has triggered various disputes between States, many of which have been submitted to the International Court of Justice, the International Tribunal for the Law of the Sea, or arbitral tribunals. The necessity of the use of force during the course of maritime law enforcement is generally accepted by adjudicators. Nonetheless, Article 59 of the Statute of the International Court of Justice makes it clear that 'the decision of the Court has no binding force except between the parties and in respect of that particular case'. In addition, *stare decisis* is not applicable under international law. Nevertheless, an examination of the attitude of international judicial bodies towards the use of force would facilitate a better understanding of the current rules in this respect and provide guidance for determining the legality of force used in the course of law enforcement at sea [27].

In the *I'm Alone* case, the arbitral tribunal held that a coastal State may 'use necessary and reasonable force for the purpose of affecting the objects of boarding, searching, seizing and bringing into port the suspected vessel'.¹³ In the *Fisheries Jurisdiction* case, the International Court of Justice concluded in its judgment that the 'use of force authorised by the Canadian legislation and regulations falls within the ambit of what is commonly understood as enforcement of conservation and management

measures', and that '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 this concept' [40]. In the *M/V Saiga* case, the International Tribunal for the Law of the Sea reaffirmed the principle of 'necessary and reasonable use of force', noting that where force is used for purposes of protecting rights or enforcing laws, the degree of force used shall not exceed proportional to the circumstances, and specified the procedure for the use of force in exercising the right of hot pursuit [8]. In *Guyana v. Suriname*, the arbitral tribunal accepted that in international law, 'force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary' [40].

Based on the judicial cases above and domestic legislation, a three-tier system can be developed concerning the use of force during the course of law enforcement at sea including disputed maritime areas. First, the use of force should be prohibited, unless for self-defence purposes. As a general rule, no force may be used for violations of fishery regulations or relatively slight pollution. Second, the use of force should be allowed only when circumstances deem it necessary. Thus, force should be used as a last resort and only after exhausting all other lesser measures. The deliberate shelling and sinking of vessels should be absolutely prohibited. Third, the use of force must comply with the principle of the balance of interests. When determining the form of force used, the possible resulting losses must be balanced against the interests to be protected. The degree of force used must be proportional to the violation committed by the target vessel and must not be excessive.

5. Conditions of and restrictions on the use of force during law enforcement in disputed maritime areas

(I) Conditions of the use of force

Even though the use of force at sea, including in disputed maritime areas, may be justified under international law, strict conditions apply. The excessive use of force may result in State liability. An examination of existing domestic legislation, judicial cases, and international legal instruments shows that at least three conditions must be considered. First, in principle, the use of force is prohibited. Second, the use of force is allowed only in defined circumstances. Third, the force must be used considering a balance between the potential losses caused and result achieved, and may not exceed the degree deemed necessary [5]. The 'defined circumstance' is understood to include the following:

The first is obstruction in the exercise of law enforcement power, including forcible resistance and the possible flight on the part of the violating ship in the absence of the use of force [40]. For example, the Fish Stocks Agreement limits the use of force to the purposes of 'ensuring the safety of the inspectors and eliminating obstructions to the execution of the inspectors' duties'. Article 8bis of the 2005 Protocol provides 'officials being obstructed in the execution of the authorised actions' as a condition for the use of force. Commentary on Article 3 of the Code of Conduct indicates that 'firearms should not be used except when a suspected offender offers armed resistance'. Article 15 of the Ordinance on the Vietnam Coast Guard stipulates that opening fire is only allowed 'when violators use weapons to oppose the means of the Vietnam Coast Guard'.

Second, a defined circumstance is self-defence by law enforcers. Human life is of the highest value. Law enforcers are allowed to use force at sea, including in disputed maritime areas, as a measure for self-defence in cases where their safety is threatened. The 2005 Protocol, Code of Conduct, and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials all allow the use of force to ensure the personal safety of law enforcers. The exercise of the right of self-defence is, however, not without restrictions. The use of force is only justified in

¹² United Nations, 'Article 74, Para. 3, and Article 83, Para. 3 of the United Nations Convention on the Law of the Sea' (United Nations, 1982) <http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf> accessed March 09 2019.

¹³ "I'm Alone", State of New York, Appellate Division, Second Department, January 5 1935, 1935 WL 57893, 1935 A.M.C. p.197.

cases where safety is actually jeopardised or faces a serious threat [40].

Third, a defined circumstance is for the purposes of addressing crime at sea. Serious crimes at sea, whether within any State's waters or in disputed waters, include the disruption of legal order, contravention of the common interest of mankind, and jeopardising the lives and property of people. As such, UNCLOS provides for jurisdiction over the transport of slaves, piracy, illicit traffic in narcotics or psychotropic substances, and unauthorised broadcasting from the high seas in Articles 99, 100, 108, and 109. When carrying out law enforcement activities against such maritime crimes, law enforcers may adopt forcible measures, which may extend to the disputed but under control maritime areas of a coastal State. This condition is also recognised by domestic laws. For example, the *Law on Punishment of and Measures against Acts of Piracy* of Japan authorises the use of weapons to deter pirates who try to avoid law enforcement measures.¹⁴

(II) Restrictions on the use of force

In domestic administrative law, the principle of proportionality requires that the performer of an administrative activity balances the objects of such activity against the interests of its administrative counterpart, ensuring the minimum level of negative impact of the administrative activity on the administrative counterpart and maintaining proportionality between the purpose of an administrative activity and its potential negative impact [1]. The principle of proportionality is widely accepted in international law, and consists of two elements: the principle of necessity and principle of the balance of interests. It provides coastal States with the right to protect interests at sea including in disputed maritime areas, but limits its extent within the scope of the principle of proportionality.

The principle of necessity requires that when various means are available for the realisation of the same objective, the one likely to incur minimal injury to people must be adopted. In addition, when the objective has already been realised, the counterpart's interests may not be further harmed. Specific to law enforcement at sea, the use of force must be as a last resort, adopted only after all other less punitive means have been exhausted. When force is used, weapons likely to inflict minimal harm should be used first before switching to weapons with more potential to inflict serious injury [6]. This principle is embodied in both legation and judicial practice. Article 3 of the Code of Conduct provides that 'law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty', while Paragraph (c) of the comment of the same article restricts such use cases where 'the less extreme measures are not sufficient to restrain or apprehend the suspected offender'. Articles 5 and 6 of the *Act of Use of Weapons and Requisite Instruments by the Coast Guard Authority of Taiwan* allows the necessary use of force only in cases of emergency and with arms that cause minimal harm. In the *Red Crusader* case, the Commission of Enquiry concluded that the failure of the Danish Navy to try other

means to persuade *Red Crusader* to stop before opening fire exceeded the legitimate use of armed force.¹⁵ In the *M/V Saiga (No. 2)* case, the International Tribunal for the Law of the Sea held that only after the pursuing vessel may as a last resort use force only when the appropriate action of giving an auditory or visual signal to stop fails [6]. The result of the aforementioned is that the necessity of armed action in the course of hot pursuit is a critical indicator for determining the legality of the use of force at sea and in disputed maritime areas.

Second, the principle of the balancing of interests requires the measures taken to achieve an administrative objective be proportionate to the injury so caused to the administrative counterpart. Where the injury is greater than the interest protected, this measure should not be taken [36]. Specific to law enforcement on the open sea and in disputed maritime areas, the purpose for the use of force must be to incapacitate the violator from conducting further violation or escaping law enforcement, rather than to disproportionately incapacitate the violator. In cases where the use of force is strictly necessary, the degree of violation must be weighed against the value of human life. The primary measure should be a warning, with a direct personal attack on the crew avoided. In addition, measures should be taken to minimise any harm caused and prevent all forms of injury [29]. Article 22 of the Fish Stocks Agreement requires that 'the degree of force used shall not exceed that reasonably required in the circumstances'. The 2005 Protocol provides in Article 8bis that the use of force should not exceed the minimum degree necessary and be reasonable in the circumstances, and that where a State Party takes measures against a ship, it should take due account of the need to not endanger the safety of life at sea. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials stipulates in Article 5, Paragraph (a) that whenever the lawful use of force and firearms is unavoidable, law enforcement officials should exercise restraint in such use and act in proportion to the seriousness of the offence and legitimate objective to be achieved.

Cases adjudicated by international judicial bodies show that the use of force will be determined as excessive once it causes injury and damage or threatens personal safety [28]. In the *I'm Alone* case, the Commissioners held that while the use of force might be acceptable in the course of pursuit, the intentional sinking of the 'I'm Alone' was not justified by the Convention.¹⁶ Since the suspected violation was rum-running and there was no indication of the suspected vessel escaping or conducting armed resistance, the State should not have endangered the lives of the crew through the use of force. In the *Red Crusader* case, the Commission of Enquiry held that although the 'Red Crusader' disobeyed the Danish Coast Guard's order, attempted to escape during the trip to Thorshavn for investigation, and took steps to elude the Danish law enforcement agents, opening fire at the vessel was illegal. The firing endangered human life on board the 'Red Crusader' without proven necessity and exceeded the legitimate use of armed force.¹⁷ It is apparent that in this case, the Commission of Enquiry applied the strictest standards to the use of force. Opening fire and thereby threatening the lives of the crew on-board is considered illegitimate where law enforcement activities have encountered no resistance, even if there is the possibility of escape. In the *M/V Saiga (No. 2)* case, the International Tribunal of the Law of the Sea was of the opinion that at a maximum speed of 10 knots, the *Saiga* could have been boarded without much difficulty by the Guinean officers. As the *Saiga* was almost fully laden with gas oil, the use of gunfire posed an excessive threat to

¹⁴ Article 6 of the Law on Punishment of and Measures against Acts of Piracy of Japan: In the course of deterring acts of piracy prescribed in Paragraph 3 of Article 3 (limited to the crime as referred to in item (vi) of Article 2 actually committed, a Coast Guard Official and an Assistant Coast Guard Official may use their weapons, provided that the perpetrator or the ship disobeys other measures to deter and continues the acts of piracy and that there is probable cause to believe in the lack of any other appropriate measures to stop the navigation of that ship, to the extent reasonably necessary and according to the situation, in addition to the case that a Coast Guard Official may use weapons as stipulated in Article 7 of the Law concerning the Execution of Duties of Police Officials (Law No. 136 of 1948), as applied, mutatis mutandis, pursuant to Paragraph 1 of Article 20 of Japan Coast Guard Law.

¹⁵ Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on 15 November 1961, p. 538.

¹⁶ 'I'm Alone', State of New York, Appellate Division, Second Department, January 5 1935, 1935 WL 57893, 1935 A.M.C. p.197.

¹⁷ Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on 15 November 1961, p. 538.

the safety of the persons on-board. Having boarded the ship without resistance and without any threat of force from the crew, the indiscriminate use of gunfire, which caused severe injuries to two of the persons on board, was also illegitimate [39]. The above cases indicate the requirement that when using force during maritime law enforcement, including in disputed maritime areas, the objective of the intended action will be weighed against the value of human life. Excessive injuries to persons on-board resulting from a lack of humanitarian considerations would be in contravention of the rules of international law.

In the *M/V Saiga (No. 2)* case, the International Tribunal for the Law of the Sea summarised the procedure for the use of force in the exercise of the right of hot pursuit as follows: 'The first step used to stop a ship at sea is to give an auditory or visual signal to stop using internationally recognised signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bow of the ship. Only after the appropriate actions fail may the pursuing vessel use force as a last resort. Even then, an appropriate warning must be issued to the ship, and all efforts should be made to ensure that life is not endangered' [36]. Based on the above, procedures for the use of force in the course of maritime law enforcement, especially in disputed maritime areas, should consist of the following steps:

Step one: Signals to stop have been delivered to the violating vessel. When the order to stop is ignored, a specific warning should be given using internationally recognised auditory or visual signals. The warning must clearly indicate the possibility of using force to deter the pursued target. Internationally recognised visual signals include those sent by flag hoist, flag semaphore, and signal lamps, and auditory signals include whistle signals and sound sent by an amplifier [21]. Article 10 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials also requires law enforcement officials to identify themselves as such and give a clear warning of their intent to use firearms.

Step two: In the event that the pursued vessel still refuses to stop after receiving warning signals, warning shots may be fired. Also known as a 'shot across the bow', a warning shot is considered as indicating a threat to take hostile measures if the pursued vessel continues to try to evade investigation [3]. Warning shots should first be fired with water cannons, and only when this fails may gunshot or shells be used. Weapons may be fired using signal flares or blanks, while live shells may be fired across the bow towards the open water [1].

Step three: In the event that the warning shots also fail to stop the pursued vessel, live ammunition may be fired. Such shots should be targeted at non-critical areas such as the bridge or helm with the purpose of disabling the vessel and forcing it to stop [8]. Live ammunition shots should avoid areas below the waterline so as not to sink the pursued vessel.

Following the legitimate procedures for the use of force would to a significant extent avoid unnecessary casualties and prevent the escalation of circumstances, including in disputed maritime areas. Compliance with such a procedure is an important indicator of the legality of the use of force. The legitimate use of force involves three warnings being issued in the form of the signal to stop, warning shots, and only then, live ammunition shots. Only when the signal to stop is unsuccessful may the right of hot pursuit be exercised. Warning shots may only be fired when the pursued vessel still refuses to stop in the course of hot pursuit. Live ammunition must be fired before the initiation of the use of force against the persons on-board. Compliance with this three-step procedure would reinforce law enforcement and prevent misfeasance.

6. Conclusions

Law enforcement in disputed maritime areas is of vital importance to coastal States. The use of force is sometimes inevitable in the course of law enforcement at sea. When applied, force should be used in accordance with Article 2 of the Charter and Article 301 of UNCLOS and in strict compliance with the applicable conditions and restrictions.

Otherwise, the inappropriate use of force may trigger international implications and responses. As UNCLOS contains somewhat ambiguous guidance for the delimitation of maritime areas, parties to maritime disputes exercise concurrent jurisdiction before the final resolution of such disputes [36]. The arbitrary use of force during law enforcement activities at sea is inconsistent with the obligation of the peaceful resolution of disputes, as enshrined in the Charter and UNCLOS. In addition, any deviation from the 'use of force rules' could escalate a situation and hinder expedited settlement. The indiscriminate firing of weapons demonstrates a lack of consideration for the safety of crewmen and violates the proportional principle.

The following measures are proposed to better safeguard maritime interests and ensure the greater protection of crews. First, the inappropriate use of force in disputed maritime areas by law enforcement officials might constitute a violation of the requirement of refrainment and be considered an action likely to worsen a dispute. In the event that use of force is required to handle the situation, the abovementioned restrictions should be followed with great care so as not to trigger international disputes. Second, in cases where foreign law enforcing agents adopt forcible measures to deter fishing vessels, arrest fishermen, or cause injury to human life, the government should seek diplomatic resolution in accordance with Article 73, Paragraph 2 of UNCLOS. Where foreign law enforcers visit or pursue fishing vessels in violation of Articles 110 and 111 of UNCLOS, the government should provide the necessary legal assistance to victims seeking remedies and request the infringing state to issue an official apology. Where necessary, the incident may be submitted to international judicial bodies such as the International Court of Justice or International Tribunal for the Law of the Sea. Third, coastal States should enact substantive and procedural legislation specifically relating to law enforcement at sea. In light of the above, it is desirable to improve the law enforcement legal system so that law enforcement at sea can be conducted on a more solid legal basis. Finally, coastal States should engage in joint law enforcement patrols with foreign law enforcing agencies in handling detected violations by a flag State. This action would enhance mutual trust and thus, contribute towards reducing potential conflict.

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