



Editorial: Navies, Oceans and Legal Entanglements

One of the points Vice-Admiral Dean McFadden stresses in his numerous speeches for the navy's centenary is the balance that must be maintained between *mare liberum* (the notion that the oceans are free for all to use) and *mare clausum* (the notion that the oceans can come under state control). Another point Admiral McFadden has been making is about the type of maritime force Canada needs. As he said in testimony to a Senate committee in May 2010, what Canada needs is a "sea-control navy." These notions incorporate an evolving mix of international and domestic laws. The growing body of law relating to ocean activity may make life more complicated for navies as they are asked to balance freedom of the oceans with attempts at state control.

When we think about law and the oceans, we think of the United Nations Convention on the Law of the Sea (UNCLOS). It establishes rights and responsibilities of states relating, among other things, to continental shelf jurisdiction, exclusive economic zones, resources, navigation standards, archipelagic islands, rights of transit, deep sea mining, protection of the marine environment, dispute settlement and scientific research. But do the incidents that have happened recently on the oceans incorporate facets of law not included in UNCLOS?

There have been some interesting events over the past six months relating to navies and/or oceans. In particular:

- piracy and hijackings in the Gulf of Aden and off Somalia/the Horn of Africa;
- smuggling of goods and people;
- Canadian disaster relief activity in Haiti, the vanguard of which was the Canadian Navy;
- the sinking of the South Korean warship in March 2010 (allegedly) by North Korea;
- the oil spill off the Gulf coast of the United States;
- the violence aboard *Mavi Marmara* as it approached the Israeli blockade of Gaza in May 2010.

These incidents all raise different elements of domestic and international law, and relate to control (or lack thereof) of the oceans.

Piracy off Somalia has been a concern for several years. Trading states agree that disruption of trade is a problem for everyone. Thus, European Union states, Canada, the United States, Russia, India, China, and others, have contributed naval forces to ensure shipping is not disrupted as it passes through this area. A number of pirate attacks have been interrupted, pirates have been apprehended and probably attacks have been deterred. The first trials of pirates are concluding – five pirates tried in Rotterdam for a failed hijack attempt were sentenced to five years' imprisonment each in June 2010.

Piracy has fallen into the category of universal jurisdiction for centuries but the response to it has been nowhere near universal. Different states have markedly different policy with regard to level of force and what to do with apprehended pirates. This is about policy but there are also questions of law. If pirates are killed by Western forces, could they be charged in international courts? What happens if pirates are killed by private security forces? If pirates are apprehended, where will they be tried, and under what laws? What happens if Canadian sailors transfer pirates to regional authorities and they subsequently get tortured? What happens if apprehended pirates are under the age of 18 years, and thus are by definition children? What happens if a hijacked ship runs aground when Canadian ships are pursuing it and causes an environmental disaster? These questions may become increasingly germane, and they all involve slightly different aspects of domestic and international law.

Once there are different laws, with different states claiming (or rejecting) jurisdiction, then you must have some way of deciding which set of laws will apply. Does this involve establishing a whole new set of rules to decide what rules apply when rules are disputed or conflict?



Hugo Grotius, one of the founders of international law, portrait by Michiel Jansz van Mierevelt, 1631.



Some states may dispute the jurisdiction of other states or international courts – as the United States does with regard to the International Criminal Court. Or states may claim jurisdiction because their nationals are involved, or they reject the efficacy of another court, or they may claim jurisdiction because they hold the culprits themselves. As well, transnational ‘public-interest’ litigation – lawsuits that involve some international element relating to human rights, the environment or corporate accountability – is increasingly being initiated (and succeeding). Changes in law may affect the Canadian Forces in ways we cannot yet imagine.

There was a recent success for the RCMP in Nova Scotia in intercepting a yacht which was (allegedly) transporting illegal immigrants into the province. Movement of illicit goods – whether cigarettes, drugs, weapons, or people – is a common occurrence on the oceans, and into littoral regions. Constabulary activities are not what the leaders of the Canadian Navy want to do, but these activities are a growing part of offshore activity to enforce Canadian law and someone will have to do them.

The sinking of the South Korean Navy warship *Cheonan* on 26 March 2010 is an interesting example of the state-on-state conflict with which we are so familiar from the good old days. The incident has the ability to destabilize the delicate balance between North and South Korea, and has put both China and the United States in very awkward positions. If, as South Korea claims, *Cheonan* was sunk by a North Korean torpedo, this involves all the legal elements of aggression and state-state war. But the incident is also (probably) about domestic issues and succession inside North Korea.

The oil spill off the United States involves issues of resource exploitation (and the regulation of it), corporate responsibility, negligence and pollution. BP has already been forced by the US government to establish funds to compensate those whose livelihoods have been affected by the spill, and BP executives have been grilled by congressional committees. Legal charges will wind their way through the courts over many years.

The boarding and deaths aboard *Mavi Marmara* as it approached the Israeli blockade of Gaza in May 2010 raises many questions. Whether you believe the boarding was a justified act by Israeli forces to an unacceptable provocation, or a heavy-handed murder of peace activists by Israeli forces, there are unanswered legal questions. Is the blockade legal? Were the actions of the Israeli forces legal? Was proportionate force used? Did the personnel onboard the *Mavi Marmara* provoke the heavy reaction of Israeli forces? Regardless of your perspective on the incident, there are



Photo: Internet

Freedom or order? A June 2010 G20 ‘demonstration’ in Toronto.

enough legal questions to go around.

What is the point of all this? Three points stand out. First, if the world is intertwined through global trade and finance, then these diverging perspectives on laws that apply to actions on the oceans are a complicating factor for navies. The law on land has been settled over centuries of evolution, but on the oceans some issues remain unresolved. The oceans may be there for all to use, but they will be a patchwork of laws and lawlessness.

Second, military forces are increasingly being drawn into standards of civilian law – the ‘civilianization’ of law. We can see this in the discussions about Afghanistan and the treatment of people taken prisoner there. We can see this in rules of engagement and scrutiny of the behaviour of military forces in all situations. This, I think, is a good thing, military forces should not exist outside the law. But it means that the most important person in any military operation may be the lawyer who must be consulted at every stage and figure out the increasingly tangled web of laws.

Third, as McFadden has stressed there is a delicate balance between freedom of the seas and control of the seas. But his call for Canada to have a ‘sea-control’ navy is interesting. Is there a contradiction between control and freedom? Obviously *order* is necessary for freedom, but while order implies *law*, control implies *force*. Can we control the oceans and still have freedom of the oceans? Just as on land, there will be people who disrupt order on the seas and this cannot be allowed, but without attention, freedom of the oceans could end up being defined as control by those with whom we agree. By advocating sea control are we advocating keeping the oceans free for everyone, or just those with whom we agree?

Can there be a surfeit of law? Yes, obviously there can be. The important task ahead is to make sure that the laws formed internationally and nationally complement rather than conflict, and that we think carefully about order on and control of the oceans. This could help maintain the balance between *mare liberum* and *mare clausum*. 🍷

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