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Panel V

International Cooperation in Securing the Maritime Commons



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Legal Interoperability Issues in International Cooperation Measures to Secure the Maritime Commons

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The life of the law has not been logic, but experience.

—Oliver Wendell Holmes, Jr., *The Common Law*

Introduction

I would first like to say that I much prefer the phrase “securing the commons” to the more provocative and inaccurate “command of the commons.” The latter is impossible to objectively assess and, more important to me, a legal oxymoron. The commons are just that: a shared space not subject to any nation’s sovereignty or control, and, for that reason, a space where all states have an obligation to promote and enforce the public order necessary to prevent a tragedy in those commons, whether by overuse, abuse, or malevolent misuse. The U.S. approach reflected in the National Strategy for Maritime Security (2005) eschews any pretension to “command” of the maritime commons, calling instead for enhanced maritime domain awareness and an active, layered defense, together with measures to reduce vulnerability and improve consequence management readiness.

In a workshop of distinguished economists, I confess my lack of competency on all matters involving the dismal science and will instead focus my remarks on some of the salient legal issues raised by the title of this panel—more specifically, on legal interoperability issues. On this question I am happy to report that over the past five years or so the law has adapted to our often tragic “experience” (to quote Justice Holmes) in a number of proactive ways, in an effort to anticipate conflicts and eliminate them where possible. However, more work lies ahead.

Combined operations—particularly coalition operations—are one area where more remains to be done. The U.S. Army’s *Operational Law Handbook* sets the scene. It explains that

The United States often chooses to participate in operations alongside other nations. While some of these operations are conducted within an established alliance such as NATO, others are coalition action. Coalition action is multinational action outside the bounds of established alliances, usually for single occasions or longer cooperation in a narrow sector of common interest. Recent examples are Operation Enduring Freedom and Operation Iraqi Freedom. Unlike NATO operations, coalition action by its nature does not have a predetermined structure or decision-making process.

[One] disadvantage of coalition action is that it often raises significant interoperability issues that need to be resolved to ensure success of the operation.

1. Charles H. Stockton Chair in International Law, U.S. Naval War College. I am indebted to Colonel Michael Hoadley, JAGC, USA, a professor at the U.S. Army War College, for his insights into legal interoperability issues and for alerting me to the U.S. Army *Operational Law Handbook* coverage of the subject; and to Commander Sean Henseler, JAGC, USN, of the U.S. Naval War College faculty, for sharing his recent first-hand experience on the subject.

Interoperability issues arise for a number of reasons. First, the coalition partner may have different legal obligations, such as being signatory to a treaty to which the United States is not a party and which the United States does not consider customary international law. Second, the United States and the coalition partner may both be legally bound by a provision of international law, by treaty or custom, but may interpret their obligations differently. Finally some differences may not result from law at all, but from the application of domestic policy.²

Planning for multinational operations in the maritime commons may take one of several forms. In established alliances, such as NATO, planners can address interoperability issues through prior agreements, such as the Allied Publication series and the NATO standardization agreements (STANAGs). In what is sometimes referred to as proactive, “Phase Zero” planning, the geographic combatant commanders prepare theater security cooperation plans for their areas of responsibility. Those plans typically call for military-military exchanges and other relationship-building measures with other forces in the theater, to improve military capabilities and interoperability. Finally, there is the ad hoc planning approach, hopefully drawing on planning models and templates.

Actual maritime security operations within the various theaters may be carried out unilaterally, by established alliances, such as NATO, or by coalition actions, such as the Commander Task Force 150 operations in the far western Indian Ocean and Red Sea approaches off the Horn of Africa. Other recent, and nongeographically specific, partnering initiatives include the Proliferation Security Initiative and the 1,000-ship navy concept—now called the Global Maritime Partnership.³

At-sea maritime operations take a variety of names, including maritime security operations (mentioned above),⁴ or more specific labels, such as maritime interception operations,⁵ maritime interdiction operations,⁶ or maritime law enforcement operations.⁷ In some cases the legal basis for the maritime operation comes from a UN Security Council resolution or a right of individual or collective self-defense, but in many of the boardings the legal basis for the “end game” ultimately lies in the extraterritorial application of some nation’s domestic law. Regardless of the form of the cooperative arrangement, the participating states often come to the table with divergent rule sets (legal authorities and restrictions).⁸ Despite the pressure of globalization to

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2. U.S. Army Judge Advocate General’s Legal Center and School, *Operational Law Handbook* (Charlottesville, Va.: U.S. Army Judge Advocate General’s Legal Center and School, 2006), at pp. 527–30.
 3. The U.S. Navy CNO has called the 1,000-ship navy “a network of international navies, coast guards, maritime forces, port operators, commercial shippers and local law enforcement, all working together.”
 4. Maritime security operation missions include ensuring freedom of navigation, the flow of commerce, and the protection of ocean resources, and securing the maritime domain from nation-state threats, terrorism, drug trafficking, and other forms of transnational crime, piracy, environmental destruction and illegal seaborne immigration. Chief of Naval Operations and Commandant of the Marine Corps, *Naval Operations Concept* (2006).
 5. U.S. Navy, *Maritime Interception Operations*, NTTP 3-07.11/CGP 3-07.11 (2003) (defining “interception” as the “legitimate action of denying suspect vessels access to specific ports for import or export of prohibited goods to or from a specified nation or nations, for purposes of peacekeeping or to enforce imposed sanctions.”). “Expanded” MIO refers to interception operations in the absence of a collective security measure.
 6. See Chairman, Joint Chiefs of Staff, *Doctrine for Joint Interdiction Operations*, Jt. Pub. 3-03 (1997), which defines interdiction as “an action to divert, disrupt, delay or destroy the enemy’s surface military potential before it can be used effectively against friendly forces.” Within the U.S. *National Strategy for Maritime Security* framework, interdiction is described as “actions taken to divert, delay, intercept, board, detain, or destroy, as appropriate, suspect vessels, people, and cargo.” “Interdiction” is the favored term in most NATO countries. It is also used in the Proliferation Security Initiative “Statement of Interdiction Principles.” On the other hand, it is disfavored by some states, particularly China.
 7. Maritime law enforcement operations refer to activities by officials with the legal authority to detect crimes, apprehend violators, and gather the evidence necessary to support prosecution.
 8. For the lawyer, legal interoperability questions are typically analyzed under the “conflict of laws” framework. Proactive lawyers seek to avoid conflicts by, for example, working to unify and/or harmonize the laws, or at least being clear about which law will apply to a given transaction, through insertion of a choice of law clause.

harmonize the law and make it more uniform, differences continue to exist, whether on matters of trade, immigration, maritime crime, security cooperation, disclosure of intelligence, or the interpretation or application of law of the sea or law of armed conflict issues. As a result, the participating states must confront several recurring legal interoperability issues. For this synopsis, several issues are highlighted for possible discussion:

- Rules of Engagement
- Rules regarding the right to exercise self-defense
- Targeting issues (i.e., what is a “military objective”; proportionality issues)
- Use of certain means and methods (landmines, chemical riot control agents)
- Status and treatment of detainees
- Status of armed forces (SOFAs, VFAs, Article 98 agreements)
- Access to information and intelligence.

Theater security cooperation plans can help avoid or mitigate some of the common legal interoperability problems, but they have never received the funding needed to reach their full potential. In some cases, the divergent rule sets can in fact be harmonized into “combined forces” rules, as in the case of Combined Rules of Engagement (CROE). Another commonly used approach to work through or around such issues calls for the participating states to collectively prepare a “legal matrix” that displays the key elements of their respective rule sets and reveals any variations. The difference in the two approaches is an important one: in the first, the relevant rules are in fact harmonized (often, however, by reducing the rules to the least common denominator); in the latter, national differences are maintained, but once collected into the matrix by the operational commander they are at least *available* for communication to the participating units, though classification issues and other objections might impede the full realization of that goal.

The U.S. Naval War College, with the support of its International Law Department and the affiliated Naval Reserve components, has taken the initiative to address a number of these recurring issues, by, for example, sponsoring flag- and general-officer-level courses for Combined Forces Maritime Component Commanders, where interoperability issues can be analyzed and minimized as much as possible; and by its work on drafting model CROE and on collecting and clarifying the discordant laws governing maritime exclusionary zones. One subject where additional efforts to promote legal interoperability are needed is in intelligence matters.⁹

Legal Interoperability on Intelligence Matters

It has become commonplace to criticize the intelligence community for its secretive, stove-piped approach, which, as famously described by the U.S. 9/11 Commission, impedes their ability to “connect the dots.” While such criticism might be politically popular, it reveals a shameful disregard for the underlying legal and policy issues, to say nothing of the practical limitations that militate against wider disclosure of some classified information. Nevertheless, a number of recent studies, presidential directives, statutes, and international agreements have called for greater intelligence-sharing. Not surprisingly, the 9/11 Commission was among the first. Congress soon followed, demanding greater intelligence-sharing in the 2004 Intelligence

9. The author is indebted to Captain Santiago R. Neville, USN, the RADM Edwin Layton Chair in Intelligence at the Naval War College, and to Captain Maureen Neville, USN, Officer-in-Charge of the Office of Naval Intelligence Detachment at NWC, for their helpful suggestions on intelligence interoperability issues.

Reform and Terrorism Prevention Act. The new catchphrase admonishes that the old “need-to-know” restriction must give way to a “need-to-share” approach, an approach that’s increasingly facilitated by the policy directing members of the intelligence community to “write for release.”¹⁰ In 2003, the states participating in the Proliferation Security Initiative agreed to a Statement of Interdiction Principles that provides a framework for intelligence-sharing in counterproliferation operations. In 2004, the G-8 states entered into an agreement that called upon the member states to pass legislation if necessary to ensure that terrorism information can be shared internally with police and prosecutors and externally with other countries. The G-8 agreement also recommended that each state ensure it can legally use a variety of “special investigative techniques,” such as wiretaps, audio and visual surveillance, and interception of electronic communications.

The call for greater intelligence-sharing in some areas of common concern and concerted action carried over into the National Strategy for Maritime Security and its eight supporting plans. One of those supporting plans lays out the means to achieve greater Maritime Domain Awareness (MDA); another provides the framework for Global Maritime Intelligence Integration. But any discussion of sharing must give careful consideration to the applicable legal limits on doing so. It is almost certainly the case that some components of the MDA system, or information in the MDA system, will not be disclosable to foreign nations under existing law. Doing so may reveal sources and methods in a way that may cost the lives of the former and the long-term effectiveness of the latter. Within the United States, we must also grapple with the legal restrictions on providing proprietary information and information obtained through intelligence channels to law enforcement agencies—a question only partly addressed by the Foreign Intelligence Surveillance Act, USA PATRIOT Act, and Maritime Operational Threat Response plan. This is not the forum to explore these technical and partly classified interoperability issues. Let me just say that more work might be needed, either to clarify the restrictions or to at least avoid unreasonable expectations on the part of coalition partners.

Let me close with a short list of some of the recurring intelligence- and law-related interoperability issues that coalition commanders and operators and their intelligence officers and lawyers should be prepared to address and respond to (I would be happy to discuss any of these with the distinguished panelists):

- A request to disclose the factual basis for invoking the right of self-defense (i.e., proof of an imminent threat) to the UN Security Council, a regional security body, or a coalition partner.
- A request by a partner state to disclose the basis for concluding that a potential target constitutes a “military objective,” or that striking that target would not violate the prohibition on “disproportionate” use of force.
- A request by a partner state (or flag state) to disclose the basis for a boarding, search, seizure, or arrest, where the governing legal standard is “reasonable basis to believe,” “probable cause to believe,” or something similar.
- A request from a partner state (or an international criminal tribunal) to disclose intelligence for use in a criminal prosecution. In U.S. prosecutions, this issue is addressed in the less-than-pellucid or -predictable Classified Information Procedures Act.

10. See, e.g., Director of Central Intelligence, Directive 8/1 (June 4, 2004) (defining “write to release” as: “A general approach whereby intelligence reports are written in such a way that sources and methods are disguised so that the report can be distributed to customers or intelligence partners at lower security levels. In essence, write-to-release is proactive sanitization that makes intelligence more readily available to a more diverse set of customers. The term encompasses a number of specific implementation approaches, including sanitized leads and Tearline reporting.”).

Conclusion

In a workshop of legal experts from around the world, held in this same room last week, 94 percent of the experts stated that they believe future U.S. Navy operations will be “more combined.” Assuming they are right, the effectiveness of future international cooperation in securing the maritime commons will require us to continue to work toward resolving legal interoperability questions. Experience has shown that information-sharing not only serves to improve security-related decision making, it can also be an effective trust-building measure. Although there are plainly good reasons to facilitate timely and effective information-sharing in many cases, it is important not to lose sight of the fact that increased disclosure might come at the expense of the long-term effectiveness of the intelligence community. The solution to legal interoperability issues is not to eliminate every national restriction, but rather to carefully review the disclosure laws and policies, to ensure any unnecessary restrictions on disclosure are removed, to follow the write-for-release policy when drafting intelligence products as much as possible, and then to ensure that our maritime security partners understand the remaining restrictions on disclosure and the reasons for them.

Addendum



INTERNATIONAL COOPERATION IN SECURING THE MARITIME COMMONS

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SIMPLIFYING TASKS

- Inventory the range of maritime threat scenarios
- Ensure prescriptive regime for all of the threat scenarios is adequate
- Enforcement: allocate responsibility for all of the threats:
 - Threats to domestic order
 - National security threats
 - Transnational threats
 - Regional threats
 - Global threats


Which are of
MARSTRAT concern?
Which are not?

SIMPLIFYING TASKS

- Draft objective criteria for taking action on each threat (too difficult?)
- Determine who should be responsible (risk manager) for all such threats, based on magnitude and location:
 - Peace and good order threats
 - Ordinary magnitude threats (LEDET/MSST level)
 - Extraordinary magnitude (need for SOFs or CBRN)
 - Remote location & transnational threats
 - True national defense threats

RANGE OF SECURITY THREATS, EVENTS & RESPONSES

- Armed attack on the homeland (or an ally?)
 - Armed attack on U.S. warship/military aircraft (*USS Cole*, 2000)
 - Vessel transporting nuclear device to a red entity
 - Vessel transporting CBR to a red entity
 - Armed attack on merchant vessel (T/V *Limberg*, 2002)
 - Terrorist incident on a merchant vessel (*Achille Lauro*, 1985)
 - Incident closing vital international strait (*Nagasaki Spirit*, 1992)
 - Law of sea crimes that threaten SLOCs/commerce (piracy; SUA)
 - Other UN Crimes (trafficking in drugs, weapons, humans)
 - Other threats to territorial integrity (illegal migration, quarantine)
 - Common crimes (theft, assault)
 - Public welfare offenses (pollution, illegal fishing)
- Armed force



Law Enforcement

COMPARATIVE ADVANTAGE

- What's primary?
 - What *must* you do?
 - What *essential service* do you provide that no one else can do?
- What's secondary?
 - What *should* you do?
 - What do you do better than anyone else?
- All else? Not our in-box

MARITIME SECURITY MISSIONS

- "Traditional" missions:
 - Forward presence
 - Crisis response
 - Deterrence
 - Sea control
 - Power projection
- "Non-traditional" missions:
 - Civil-military ops
 - Counter-insurgency
 - Counter-proliferation
 - Counter-terrorism
 - Maritime security operations
 - Information operations
 - Air/missile defense
 - Security cooperation
- According to the NOC, these remain the "cornerstone of our force capability"

Source: *Naval Operations Concepts 2006 (NOC)*

MARITIME SECURITY OPERATIONS

- The 2006 *Naval Operations Concept* lists the following activities under its section on "Maritime Security Operations":
 - "ensure freedom of navigation, the flow of commerce and the protection of ocean resources"
 - "secure the maritime domain from nation-state threats, terrorism, drug trafficking and other forms of transnational crime, piracy, environmental destruction and illegal seaborne immigration."

How many of these require an exercise of law enforcement authority?

STRATEGIC SORT

Responder Magnitude	UN Security Council Ch. VI & VII	Regional Arrangements (Chapter VIII)	States: Coalitions Unilateral	Private Entities (Self-Help)
Threat to Int'l Peace and Security				
Threat to Regional Peace and Security				
Threat to One Nation's Security				
Threat to Domestic Order				

STRATEGIC SORT

- Presumption 1: security—on land, in territorial seas and in global commons—is a national law enforcement issue
 - Assess strictly the adequacy of the rule set (prescriptions)
 - Assess adequacy of enforcement measures
 - National Strategy for Maritime Security (+8 supporting plans)
 - Roles of flag states, coastal states, port states
 - What happens when the "able and willing" states step in?
- Presumption 2: if it exceeds the jurisdiction or capabilities of a single nation's law enforcement entities it's a transnational law enforcement issue
 - Bilats/MLATs, cooperation/coordination among L/E agencies
 - Are the commons (high seas) really a "special case"?

Has ADM Mullen's new Maritime Strategy kicked in yet?

STRATEGIC SORT

- Presumption 3: if the threat exceeds the multinational L/E entities' capability or capacity, it's a multinational/regional security issue (it might also be a threat to international peace and security)
 - UN Charter, Chapter VI, VI $\frac{1}{2}$, or VII)
 - Regional defense and security arrangements
- Presumption 4: if it exceeds the regional organization's capability or capacity, it's a threat to international peace and security
 - UN Charter, Chapter VII
- Last Possibility: ***When regional and collective security fail***:
 - What action do you take WRT the threat? Unilateral/preemption, etc
 - What action do you take WRT the rule set?

When does ADM Mullen's new Maritime Strategy kick in?

RESPECTIVE STATE ROLES

- Jurisdiction over vessels and persons aboard the vessel varies by:
 - Flag of the vessel (*ratione personae*)
 - The vessel's location (*ratione loci*)
 - Vessel activity (*ratione materiae*)
- States that might have jurisdiction
 - The flag State
 - The coastal State
 - The port State
 - An "enforcing" state (the "willing and able")

UNCLOS ARTICLE 110: RIGHT OF APPROACH

- A warship may approach (and board) a foreign vessel on the high seas if the warship has reasonable ground to believe the vessel is:
 - Engaged in piracy
 - Engaged in the slave trade
 - Stateless or of the same flag as the warship
 - Engaged in unauthorized broadcasting (huh?)
- The next move? A right of visit for any crime with the "generally accepted international standards"? (e.g., the 13 UN terrorism treaties)

U.N. SECURITY COUNCIL: INT'L PEACE AND SECURITY

- What did the legal experts say about the UNSC?
 - 72% said the UNSC is the most influential int'l organization in the global legal order
 - Only 50% thought it would expand beyond the P-5; if it did, the US Senate would never ratify the amendment
 - 83% believed that even if the UNSC made an Art. 39 finding, there was only a 50-50 chance that it would impose any sanctions