

The Conference on Operational Maritime Law

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SYNOPSIS

This year's theme 'First Pioneers and Last Frontiers' ran throughout the Conference on Operational Maritime Law 2019, which brought together high-level naval officers, legal professionals, academics, scientists and members of civil society. The perfect backdrop for sharing new perspectives on the freedom of the seas on an operational and tactical level, with the ultimate goal to uphold the rule of law on our oceans.

COMMENTARY

From the history of the law of the sea to the use of unmanned systems and artificial intelligence, the conference successfully linked historical developments with current issues on the freedom of the seas and the future applications of new technologies.

First Pioneers of Naval Warfare

The Consolato del Mare is one of the earliest codified examples in the development of maritime law that recognizes the seas' strategic importance to project power, explore other parts of the world, and for the development of transnational commercial activities.

The concept of freedom of navigation emerged from the law of naval warfare, shaped not only by the major maritime powers but also influenced by other States' positions of weakness. The beginning of the modern law of the sea is attributed to Hugo Grotius' *mare liberum* when the freedom of the seas became an inalienable right and transformed itself from a wartime to a peacetime concept. During the Grotian era, the three pillars of the law of sea piracy, the law of naval warfare and exclusive flag State jurisdiction have operationalized the freedom of the seas. Naval warfare and armed conflict, in turn, have been considerably shaped by economic warfare and the legal regime of privateering, which only ended with the Paris Declaration in 1856, the first international agreement on the law of naval warfare.

In the 21st century, concerns about the freedom of the seas have partly shifted towards the concept of 'lawful seas' or *mare legitimum*, a rules-based regime that aims to guarantee lawful uses of the sea. At the same time, the traditional warfighting capabilities of navies have been partly reduced in favor of their increasing role as law enforcement bodies.

While some gaps in the law of naval warfare have been filled, there are new challenges ahead that need to be addressed, such as unmanned maritime systems, new naval weapons systems or non-international armed conflicts at sea. In this context, the San Remo Manual on international law applicable to armed conflicts at sea is in the process of being updated.

The historical outlook is indispensable to the exploration of current legal issues that threaten the freedom of the seas.

Current Security Challenges Jeopardizing the Freedoms of the Seas

In a world faced with significant legal challenges, the proper and legal use of the maritime domain is of crucial importance to counter threats such as piracy, armed robbery at sea, maritime terrorism, migrant smuggling, drug trafficking, IUU fishing or marine environmental hazards. Guaranteeing the freedom of navigation of our sea lanes of communication is a condition *sine qua non* to safeguard security and safety on the oceans.

New sea routes in the Arctic Sea are opening up and fueling great power competition, with Russia and China as the principal challengers to Arctic security. While untapped natural resources, undiscovered oil and gas, as well as faster shipping routes, bear great economic potential, hurdles remain due to the adverse geographical conditions in the Arctic. Maritime boundary disputes, as well as the increase of Russian military presence, further render the Arctic an area of potential vulnerability for the freedom of navigation.

In the South and the East China Sea, China's excessive maritime claims infringe upon the freedom of navigation, which runs the risk of turning into customary international law if left unchallenged. In response to the militarization of maritime features and Chinese power politics in the South China Sea, the United States engages in a comprehensive two-pronged strategy of diplomatic protest and operational challenges. The program includes routine maritime presence, reconnaissance and freedom of navigation operations to counter the establishment of a strategic triangle by China.

The freedom of navigation in the Kerch strait is also at stake, as Russia is hampering with transit and innocent passage. The loss of functional control of these maritime areas risks to plunge Ukraine into economic turmoil. The complexity of the issue manifests itself in the many unresolved questions related to the legal status of the Sea of Azov and the Kerch Strait. However, it is this status that determines the application of UNCLOS or customary international law, as well as the presence or inexistence of an armed conflict and thus the application or inapplicability of the law of naval warfare.

NATO and its members need to push back on China's and Russia's claims in these different areas, in order to avoid an unwelcome precedent. There can be no doubt that the freedom of the seas and the freedom of navigation are not up for debate and will never be relinquished.

Another challenge to the safety and security of the seas is the wide variety of civilian and military uses of unmanned maritime systems, which call into question use of force standards, rules of engagement and law enforcement operations. Coupled with the deployment of artificial intelligence, legal considerations are closely intertwined with ethics and permissibility both under the law of naval warfare and peacetime law.

The Reality and Future of Unmanned Systems and Artificial Intelligence

Legal constraints in the use of such technology have a direct impact on the decision-making process and influence defence capabilities. In relation to maritime security, questions arise whether existing laws may be applied to unmanned systems, whether they enjoy the same navigational rights in peacetime and whether they may be used in armed conflict to exercise belligerent rights in wartime.

The benefits of unmanned systems and artificial intelligence are already a reality. Marine robotics are increasingly used for surveillance operations, border patrols or search and rescue; they can be used for law enforcement purposes and intelligence gathering by state actors, and also by non-state actors for criminal activity. Due to the diversity in terminology, it is essential to differentiate between vessel-like and crew-like components, autonomous as opposed to unmanned or remote-controlled systems. Another difficulty pertains to the legal status of such systems; while they cannot be considered warships in the absence of a crew, they may still be on government service. All of these factors will determine the applicable legal regime in relation to the rights and obligations of the unmanned maritime system, such as the right of visit, the right of hot pursuit, innocent and transit passage, obligations to render assistance, marine scientific research, conditions of registration, etc. Clearly not all types of enforcement measures can be taken against or from an unmanned craft, and the principles of proportionality and rationality in regards to enforcement measures apply. States must be cautious not to exercise unwarranted interference with the freedom of navigation and individual rights of lawfully operated unmanned systems. Despite an existing firm legal basis, legal weaknesses remain with regard to the autonomy or crewing of the unmanned systems.

The deployment of artificial intelligence in the military domain, such as lethal autonomous weapons or next-generation cruise missiles, raises critical ethical considerations. Their level of predictability, reliability, admissible degree of autonomy and the attribution of responsibility are highly contentious. Such systems are expected to be capable of distinguishing between lawful targets, conducting collateral damage estimation, making proportionality calculations and possessing discrimination and distinction capabilities. Given these uncertainties, their use is in practice restricted to limited circumstances, and they are oftentimes deployed alongside soldiers, not as a replacement, thus preserving the element of human judgment.

Despite the dangers associated with robotics, artificial intelligence, on the other hand, also may bear the potential to reduce civilian casualties or human error. It is conceivable that artificial intelligence enhances legal compliance with international humanitarian law and performs even more ethically than human beings on the battlefield. After all, robots are not influenced by the instinct to protect themselves.

Improvements in the legal and regulatory framework should aim towards providing legal certainty, preventing abuse as well as clearly attributing responsibility for potential human rights violations.

CONSIDERATIONS

The Conference on Operational Maritime Law provides a unique forum to foster cooperation and active partnerships between navies and civil society. It greatly contributes to the interoperability and mutual understanding of the alliance and its partners. While many legal questions are yet to be resolved, the Conference on Operational Maritime Law has sparked the sort of thought-provoking discussions that are instrumental in addressing many of these challenges.

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