

# DEVELOPMENTS IN THE USE OF FORCE IN MARITIME LAW ENFORCEMENT OPERATIONS\*

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## ABSTRACT

*Most coastal states intend to use and control their own sea areas as stated in the United Nations Law of the Sea Convention. In that regard, the distinction between, 'sovereignty' and 'sovereign rights' of states become very important as it defines the framework for accomplishments. On the contrary, many prohibited activities i.e. illegal fishing, narco-transport, gun-running, human trafficking and smuggling occurs when a state is realised to be ineffective. To prevent these illegal activities, actions must be conducted by the relevant agents of coastal state, engaged in Maritime Law Enforcement (MLE) operations. Police and security forces are normally used for such enforcement purposes and they are mandated to serve and protect the communities and people. In such operations, 'force' may be applied for compliance purposes as the perpetrators rarely subject themselves to law. In many instances' loss of life, serious injury and considerable damage to vessels have been reported during the conduct of MLE operations as briefly explained in the four case studies. Subsequently, the rationale paved way for what is known as the 'Saiga Principles' which are 'Unavoidableness', 'Reasonableness' and 'Necessity'. These may be considered in the articulation of Rules of Engagement (ROE) of a state agency. In practice, these principles must be considered in MLE operations to ensure safety of both life and property. Further, the overall adherence to the 'Saiga Principles' would offer a higher credence to the overall conduct of the MLE operation, the agency and the coastal state concerned.*

**Keywords:** Maritime Law Enforcement, Saiga Principles, Use of Force

## INTRODUCTION

'Use of Force' is inherent to human nature and this natural instinct of man has been demonstrated at various degrees, from maintaining order within his own clan to the extent of violent execution of force against enemy parties. Thus force has always entailed submission by the opponent by bending the will of a group or community for one's own advantage. This was observed in numerous confrontations that occurred amongst communities, states and even alliances. Having experienced the

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destruction of the two World Wars, numerous calls were made to regulate the use of force in general. The preamble to the UN Charter emphasises the importance of international peace and security, stipulates certain conditions for the use of force in the global system (The Charter of the United Nations, 1945). Similarly, 'coercion' may be applied by Law Enforcement (LE) agencies of the state in times of need, to shape the human behaviour and thereby preventing harm to the society (Lersch, 2008, p.282). In fact, "use of force and firearms", "arrest and detention", "search and seizure" are recognised as fundamental law enforcement powers (International Rules and Standards for Policing- ICRC, 2015, p.34). Such application of force by state agents would be considered normal, for the possible indocile behaviour of the perpetrators they are after. As Klockars stated in 1985, "No police anywhere has ever existed, nor is it possible to conceive of a genuine police ever existing, that does not claim a right to compel other people forcibly to do something. If it did not claim such a right, it would not be a police" (Lersch, 2008, p.283). In contrast, the use of force if exceeded beyond justification, might affect the normativeness of legitimacy (Gerber and Jackson, 2016, p.79). Therefore, it is better to know the importance and the correct method of use of force, in the contemporary setting.

The vast ocean space of over 70% of the globe is considered woefully under protected which needs regulation and control constantly (Urbina, 2019, p.xiv). It is well-known that boarding is being conducted for checking purposes, yet, could be dangerous when done at sea, since such boarding may not always be obliged by the receiving party. Therefore, the use of force in the maritime environment by agents of state, is not uncommon to compel 'obedience' by subjects. This helps maintain the legal status of affairs in the ocean. After all, a prime function of the law is said "to regulate the consequences of illegality" (Berman, 2006, p9-10).

Therefore, it is required to examine the scope of the use of force in the context of law enforcement (LE) operations in the maritime domain. This article examines the relevant aspects of international law that applies in Maritime Law Enforcement (MLE) operations. Then, a few of the prominent cases in which the use of force has been examined by national/international tribunals regarding MLE were discussed to bring out current and salient principles of application that are accepted in the global context.

## **THE LEGAL CONTEXT**

There are different systems of law i.e. international and national. Both are considered parallel, complementary, equally correct and legitimate in implementing maritime law (Kelsen, 1959, p.627). The use of force at sea has been observed in naval battles during general war situations as well as in MLE operations, in times other than war. MLE may include actions that include investigation and prosecution in implementing all applicable laws of the state on the conduct or consequences of

a subject, under and over national and international waters (McLaughlin, 2016, p.465). These would normally be governed by the customary international law if no legislation to that effect is available, whereas, warfare at sea would be considered under the International Human Rights Law (IHL) (Moore, 2016, p.27). Besides, national legislations which have duly incorporated Customary International Law would empower LE officials to act in such a way to “exercise police powers, power of arrest and detention” in exercising sovereign rights during which a defiant may be compelled to surrender, as a result of the use force (UNODC Resource Book, 2017). What is more, such use of force is generally defined as “Physical action, including the use of firearms, which may threaten or cause harm, including lethal harm to a person, damage their property, or restrict their movement” (The Caribbean Human Rights and Use of Force Model Policy, 2018, p.8). It could be seen that the notion of the use of force has been embedded practically in international law as well as the national law systems. The national legal framework is to ensure the actual applicability of international law within the domestic system, in conformity, a member state would align its national laws for the fulfilment of international obligations. After all, it is the international law that governs the relationship between entities with legal capacities, thus setting a common standard.

Law remains the foundation in enforcement where a system of established behaviour is to be adhered to by subjects: this may be equally applied in the maritime environment. The United Nations Law of the Sea Convention (UNCLOS) provides different prescriptive jurisdictions for states in their capacities of flag, port and coastal status (Shearer, 1986, p.320). There are maritime applications under UNCLOS which has been strengthened by other International Conventions i.e. fisheries, customs, immigration, suppression of violence at sea, narcotics and security in common interest where use of force is permissible (Moore, 2016, p.28-29). Clearly, the law is expected to “define (and define properly) the very limited number of situations in which the use of force is permissible; to regulate and control the use of force even when it is permissible; to determine when force that has been used was not permissible; and to regulate the consequences of resort to force, both permissible and impermissible” (Berman, 2006, p.10). Ultimately, the responsibility of maintaining peace and security through law and order would be vested upon the state, therefore, law enforcement operations would be inevitably conducted for its best interests.

Accordingly, coastal states can exercise enforcement jurisdiction, thus empowering its officials as prescribed in Article 224 of Part XII of the UNCLOS that is dedicated to the “Protection and Preservation of the Marine Environment”. However, the UNCLOS remains silent on the way or steps a coastal state might take in the use of force against delinquent vessels. At the same time, in the Article 225 of LOSC, it is specifically stated that the safety of navigation and risk of pollution of the marine environment shall be averted (Shearer, 1986, p.342). Yet, at the outset in its preamble, the UNCLOS, 1982 promotes the “peaceful uses of the seas and oceans”

and allows member states with the execution part to their best of ability, thereby stressing upon the effect in the broadest terms.

Domestic (National) laws are meant for the appropriate empowerment of authorised officials/agents of the state in following the due process of discharge of their LE duties. Owing to this, credence would be higher when no customary international law is breached in the functional aspects as sanctioned by the domestic laws.

## PROTECTION OF LIFE

All such possible protective measures have been instilled by law for the possibility of authorised officials' potential usage of firearms and weapons, which is considered lethal (UNODC Resource Book on the Use of Force and Firearms in Law Enforcement, 2017, p.20). Almost all international LE instruments have iterated the 'safety of life' as an outcome of aforesaid principles, in the potential use of force at sea (Moore, 2016, p.30-34). Consequently, having offered the 'functional immunity', the state must render guidance and bear the responsibility for the acts of its authorised officials/agents. In 1964, the then USSR was faulted by USA as 'excessive' for directing fire on an American vessel named 'Sister Katinge' (O'Connell, 1975, p.67). Apart from this, State officials engaged in LE operations on land are additionally advised on 'precaution', 'non-discrimination' and 'accountability' in their discharge of duties (UNODC Resource Book on the Use of Force and Firearms in Law Enforcement, 2017, p.16). These additions seem to have connections to human rights and developed from the application of customary international law principles. After all, the right of life of any person is upheld universally — through MLE, it is only intended to prevent wrongful actions through the control of perpetrators' behaviour. The principles developed through passage of time could be applied in the Rules of Engagement (ROE) which are devised in Standard Operating Procedures (SOP) for State agencies which are involved in MLE operations.

## THE CASE OF THE SAILING VESSEL 'I'M ALONE'

Having the sanctions of the state to use force alone has not made affairs easy for authorised officials engaged in MLE operations. The case of the sailing vessel *I'm Alone* (1929) where the United States Coast Guard (USCG) was involved in the MLE activities is one such instance (Shearer, 1986, p.341). On 22nd March 1929, during a period of prohibition, this Canadian flagged schooner type vessel was returning from Belize with contraband liquor, when she was intercepted in the Gulf of Mexico by *USCGC Wolcott*. A hot pursuit was initiated as the vessel disobeyed orders to stop. The schooner later sank due to the firing of *USCGC Dexter*, which too had joined in the hot pursuit. One member of the sailing vessel was reported dead during the incident and the remaining seven were rescued and imprisoned in the USA. During the arbitration, it was noted that the Government of USA had

the right of hot pursuit, the use of necessary and reasonable force for boarding, searching, seizing and bringing the suspected vessel into port (UN Reports of International Arbitral Awards, 1933 and 1935). If the sinking of the vessel *I'm Alone* occurred incidental to aforesaid action, the actions of USCG was pronounced to be entirely blameless. However, the use force for the intentional sinking of *I'm Alone*, it was held, could not be justifiable for which compensation was ordered. It was known for the sailing vessel's attempt to outrun and out manoeuvre its pursuers for two days, which was stopped as a result of the firing by *USCGC Dexter*. it was held that the principle of necessity of the application of proportionate force had been violated by the USCG Officials.

### THE CASE OF THE FISHING TRAWLER 'RED CRUSADER'

A similar MLE incident made history which occurred on 29th May 1961, in the North Atlantic sea area off the Faroe Island. The Danish frigate *HMDS Niels Ebbesen* opened fire on the Scottish trawler *Red Crusader*, which had been fleeing with the fish catch and an unarmed Danish boarding party. The skipper of the fishing trawler had decided to escape even after being arrested for an alleged fishing offense, within the EEZ of Denmark (Mclaughlin, 2018, p.91). The captain of the Danish frigate had escalated in the application of force to stop the fleeing trawler, by opening fire using 20 mm and 40 mm non explosive rounds. The *Red Crusader* had continued her escape to Aberdeen, Scotland, in spite of having sustained damages to her bow, masts and antenna. Before that, the skipper of the *Red Crusader* had allowed the Danish boarding party to disembark, after the intervention of the Royal Navy frigate *HMS Troubridge*. Luckily, no personnel were reported to have been injured during the incident. *HMDS Niels Ebbesen* had continued the pursuit of the trawler until it reached the territorial waters of the UK. During the arbitration, it was noted that the *Red Crusader* was duly arrested for a fishery violation by *HMDS Niels Ebbesen*. Afterwards, the skipper of the fishing trawler had fled to evade detention, with an unarmed Danish boarding party. The Commanding Officer of *HMDS Niels Ebbesen* was found to have exceeded the legitimate use of armed force for firing without an appropriate warning in the way of a solid gunshot. The coercive action is believed to have continued with the direct firing at the *Red Crusader*, thereby creating danger to human life on board (UN Reports of International Arbitral Awards, 1962). It was opined that other means should have been used to stop the fleeing vessel rather than firing upon at first. In this instance, it appears that principles of unavailability and reasonableness were not fulfilled in the conduct of said MLE operation (Moore, 2016, p.35). Practically, such defiant manoeuvres may be quite challenging for a ship's captain in the execution of his duties. However, it was concluded that the resentment caused by evasion of arrest, abducting the boarding party and non-compliance to orders does not permit violent action in the conduct of MLE operations.

## THE CASE OF THE FISHING TRAWLER 'GOLFSTRIM'

There had been incidents of use of force that had been purely handled by national legislations. On 22nd June 1968, the Argentinian destroyer *ARA Santa Cruz* fired upon the Soviet fishing vessel *Golfstrim*, when it defied the orders to stop her evasive movement (O'connell, 1975, p.67). When the order was given, she was found illegally fishing within the newly proclaimed 200-mile territorial/patrimonial sea with another Russian fishing vessel *Pavlov*. The Soviet fishing vessel *Golfstrim* suffered multiple holes in the hull and the destruction of four cabins after receiving five rounds of explosive shells, however, no personnel were found injured. Subsequently, both ships were arrested, detained, investigated and released after the due payment of the prescribed fine to the Argentinian Courts by the Soviet shipping agency (Pons, 1977, p.119). Initially, the Russian authorities had documented a protest through its diplomatic channels on the illegality of the action taken by Argentinian authorities. Eventually, both nations had accepted the court verdict, therefore, the situation had not escalated any further.

It is evident from the three cases discussed above that some form of 'force' has to be used in the execution of the MLE operations as it is very difficult to combat crime and apprehend the perpetrators at sea. None of the skippers nor the crew have submitted themselves to be questioned or arrested by the authorities. Naturally, this could be for the likelihood of detention as well as the confiscation of the catch/goods which tempts them to flee, by using all available means. Therefore, authorised agents of the State are much likely to use some form of force to imply submission.

## THE CASE OF THE 'MV SAIGA'

On 28th November 1997, the International Tribunal for the Law of the Sea (ITLOS) delivered its judgement on the prompt release of the St. Vincent and the Grenadines flagged oil tanker *MV Saiga* and its crew from the arrest made by Guinea. The case concerned the arrest of the bunkering vessel *MV SAIGA* off the coast of West Africa by the Guinean officials and was the first judgment made within a duration of less than a month. Much later, a landmark decision was made by the International Tribunal for the Law of the Sea in its second case of *MV Saiga 2* in 1999 with regards to the use of force in MLE operation. In that, the ITLOS pronounced the existence of three basic principles that will regulate the use of force in stopping a private vessel. The principles identified were 'unavoidability', 'reasonableness' and 'necessity' which are to be met in the use of force during MLE operations (Tondini, 2017, p.253). Therefore, these 'Saiga Principles' are now being widely accepted as basic considerations in arriving on the appropriateness of the decision of the use of force.

The earlier cases decided by international courts and tribunals had paved way in the judicial process by the ITLOS in deciding the *MV Saiga* case 2 which are considered to be classical and a landmark decision on the use of force, thus, creating namesake principles (Moore, 2016, p.28). The *MV Saiga* was an oil tanker flying the flag of St. Vincent and the Grenadines. It was owned, chartered, and managed by Cyprus, Switzerland and Scotland entities respectively. During the period of concern, it was serving as a bunkering vessel that supplied fuel to fishing vessels and other vessels off the coast of Guinea in West Africa. On 28th October 1997, *MV Saiga 2* was arrested by a Guinean customs patrol boat in the high seas after a hot pursuit which began from the Guinean EEZ. In the progress of the arrest, *MV Saiga 2* was fired upon with live ammunition and as a result, two crew members were reported to have severely injured. The arrested vessel was taken to the port of Conakry in Guinea, where the ship and its crew other than injured were detained. During the arbitration of the second case of ITLOS, it was revealed that the Guinean officials had not effectively commenced the hot pursuit, neither given necessary auditory and visual signals to stop (International Tribunal for Law of the Sea - case no 2, 1999). It was noted that the Guinean officials had fired live ammunition at *MV Saiga* without a warning, when the tanker did not heed to their radio calls to stop. The tanker had been fully laden with its oil cargo and moving at a slow speed of 10 knots into which a boarding may have easily been done. Subsequent to the boarding where no resistance was experienced from the crew, Guinean officials were reported to have fired live ammunition arbitrarily at the decks and at the engine to stop it. The intentional discharge of firearms had resulted in causing severe injuries to two crew members and damaged the radio room and the engine room. Such use of excessive force and endangering human life by Guinean officials were pronounced to have violated rights of St Vincent and the Grenadines and hence compensation was awarded. Accordingly, what is now known as the 'Saiga Principles' came into being and resultantly 'Unavoidableness', 'Reasonableness' and 'Necessity' being upheld as vital principles to be considered in the use of force in MLE. In this case, it was found that all above principles have been violated by Guinean officials.

## UNAVOIDABLENESS

As per the first principle, force may be used as there is no possible alternatives in the attainment of defensible interests. In fact, the availability of other less extreme means may remain ineffective in the achievement of the lawful objective at sea. In 1994, there had been an attempt of ramming by an illegal trawler when the Norwegian coast guard vessel attempted cutting the trawl wire as an alternative method of LE in the fishery protection zone of Svalbard (Skram, 2016, p.296). Similarly, use of force may be considered necessary in extreme situations where there is a potential risk of life to the authorised official whose duty is to protect/enforce laws of their state. This is supposed to answer the question, whether it is the

lawful for the use of force (Tondini, 2017, p.262). Conditions of implementation are broadly explained in the UN guidelines for Law Enforcement Officials of 1990 as well as the Caribbean Human Rights and Use of Force Model Policy of 2017.

## **REASONABLENESS**

Reasonableness is the second principle. It desires the action to stem from reason and sound judgement. Actually, every effort must be made to exclude the use of firearms, if used, it should be objectively intended, and no exceeding force must be applied. Each use of the weapon must precede careful assessments of the situation, the maximum permissible force and minimum requirement of force in the attainment of the objective. This as a decision cycle is required to be repeated for each use, after considering the results of the immediately preceding operation? (UNODC Resource Book on the Use of Force and Firearms in Law Enforcement, 2017, p.78-79). This is supposed to answer the question of means and methods of use of force (Tondini, 2017, p.262-263). In fact, the limiting condition is well expressed in the UN Code of Conduct for Law Enforcement Officials of 1979, which may be used as a guideline by others.

## **NECESSITY**

Necessity being the third principle goes in tandem with proportionality. The use of force must be undertaken 'with restraint', 'absolutely necessary' and 'strictly proportionate' in achieving the intended objective (Tondini, 2017, p.264). There must be a delicate and a graduated balance of the force applied to the resistance offered in response to the MLE situations. It is emphasised to inquire the seriousness of the offence committed, to that end, benefits achieved must outweigh the harm caused through the use of force. This will answer the question why force was used and is mentioned in the Article 3 of the UN Code of Conduct for LE Officials of 1979.

## **CONCLUSION**

The ultimate responsibility of maintaining peace and security in its territory through law and order is vested upon the state. Agents of state, in their tour of duty may use force to compel 'obedience' by perpetrators in preventing harm to the society. Such applications may not be uncommon in the maritime environment, but in there, the applicable legal regimes might vary in forms of Flag State, Coastal State and Port State. Excessive use of force has been denounced and the importance of human life is stressed in almost all legal instruments.



Boarding is conducted at sea for checking purposes, yet, could be dangerous when the receiving party is not acting obeisantly. Also, it is not so easy to regulate the consequences of illegality at sea, due to the inherent nature of the environment. This was clearly observed in the cited cases in which the use of force had been examined by national/international tribunals regarding MLE. Therefore, it is found that that the knowledge of current and salient principles of application is important for compliance purposes.

The 'Saiga Principles' remain noteworthy in the global interpretation of use of force, as LOSC does not directly address this aspect, which can only be decided relying on the customary international law and the decided cases. These principles had been subsequently applied in the ITLOS case number 19 involving MV Virginia (Panama versus Guinea-Bissau) and found that state action taken had been legitimate (Moore, 2016, p.30). Much prominence is now given to the safety of personnel on board and to the ship they travel. Moreover, the credence upon the whole effort of MLE would be preserved through the establishment of 'Saiga Principles', thereby, creating standards for all stakeholders. Sovereign rights of the State in MLE operations could be exercised through the validation of such widely accepted principles.

In the functional aspects, 'Unavoidableness', 'Reasonableness' and 'Necessity' could be applied for adjudicatory purposes as well as in the formulation of the Rules of Engagement (ROE) for MLE operations. In the conduct of MLE, a force is reckoned to be used in controlling the behaviour of perpetrators, by the agents of state. In these scenarios, the actual use of force or else the display of intent may be done for compliance purposes without which, defiance would be most probable. Perpetrators may use all means and methods to evade arrest, however, the burden of the conduct of duty is directly vested on the state, through its agent. Force is meant to be used as the last resort and it is vital to ensure that life is not endangered in so far as practicable. In no way the resentment caused by evasion of arrest and non-compliance to orders should permit the agent of the state to resort to the undue use of force, or as a as punitive measure, during MLE operations. In essence, the 'Saiga Principles' are expected to preserve human life and property in a highly dangerous and dynamic environment under which the MLE operations are executed at sea.

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