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Three multinational counter-piracy task forces operate in the Gulf of Aden to protect shipping in this vital transit corridor and respond to pirate attacks. These task forces and units from different states play a critical role in combating piracy, but also present challenges with regard to the legal and operational frameworks and coordination necessary to keep those operations running smoothly. The law applicable to counter-piracy operations governs the use of force against pirates, the treatment of captured pirates, and the prosecution of pirates, among other key issues. The relevant legal frameworks and rules of engagement create a complicated interrelationship that can pose challenges in the context of multinational operations. After analyzing the legal frameworks that could and do apply to counter-piracy operations by military forces, this article then builds on those frameworks with a discussion of rules of engagement and the specific challenges multinational operations face in coordinating and implementing effective rules of engagement in counter-piracy operations.

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I. INTRODUCTION

In response to the upsurge in piracy in the Gulf of Aden, the international community has established three multinational counter-piracy task forces to protect shipping in this vital transit corridor and respond to pirate attacks. Beginning in August 2009, NATO vessels and aircraft have patrolled the waters off the Horn of Africa as part of NATO Operation Ocean Shield. The overall mission is "to contribute to international efforts to counter maritime piracy

* Director, International Humanitarian Law Clinic, Emory University School of Law. I would like to thank Martin Bunt (J.D. 2013, Emory Law School), Laura Brockelman (J.D. 2012, Emory Law School), Katie Skeehan (J.D. 2013, Emory Law School), and Matthew Langton (L.L.B., Trinity College Dublin) for their valuable research assistance.

while participating in capacity building efforts with regional governments."[1] Operation Atalanta, a European Union naval force, has a mandate to "deter, prevent and repress acts of piracy and armed robbery off the Somali coast . . . to protect[] vessels of the World Food Programme (WFP) delivering aid to displaced persons in Somalia and . . . African Union Mission on Somalia (AMISOM) shipping."[2] Last, Combined Maritime Force Task Force 151 was established in January 2009, with a specific piracy mission-based mandate, in order to build on the then existing maritime security mission of Task Force 150. Task Force 151's mission is "to disrupt piracy and armed robbery at sea and to engage with regional and other partners to build capacity and improve relevant capabilities in order to protect global maritime commerce and secure freedom of navigation."[3] The three task forces—each of which involves vessels and manpower from many different states—coordinate regularly on both training and operations.

The multitude of task forces and units from different states are playing a critical role in combating piracy and protecting shipping, but the legal and operational frameworks and coordination necessary to keep those operations running smoothly also present substantial challenges and complexities. This article explores how the legal frameworks and the rules of engagement applicable to counter-piracy operations create a complicated interrelationship that can pose challenges in the context of multinational operations. Part II analyzes the legal frameworks that could and do apply to counter-piracy operations by military forces. Parts III and IV then build on those frameworks with a discussion of rules of engagement and the specific challenges multinational operations face in coordinating and implementing effective rules of engagement in counter-piracy operations.

II. LEGAL FRAMEWORKS

The law applicable to counter-piracy operations governs how a state or multinational force uses force against pirates, how pirates are treated if captured, the crimes for which pirates can be prosecuted, and the mechanisms that can be used in such prosecutions. The U.N. Convention on the Law of the Sea (UNCLOS) is the primary law

1. *MARCOM Factsheet—Operation Ocean Shield*, MAR. COMMAND NATO, http://www.mc.nato.int/about/Pages/Operation%20Ocean%20Shield.aspx (last visited Mar. 10, 2014).

2. *Countering Piracy off the Coast of Somalia*, EUNAVFOR, http://eunavfor.eu/ (last visited Mar. 13, 2014).

3. *CTF-151: Counter-Piracy*, COMBINED MAR. FORCES, http://combinedmaritimeforces.com/ctf-151-counter-piracy/ (last visited Mar. 13, 2014).

applicable to piracy, but it is also important to analyze any other relevant legal frameworks, particularly given the extensive involvement of national, regional, and international forces with the authority to use force in the process of deterring pirates and responding to pirate attacks. Under UNCLOS, force can be used to combat and apprehend pirates in accordance with minimum international law requirements of necessity and proportionality. For example, Article 8 of the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation declares, "[a]ny use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances."[4] The U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states:

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and *only when less extreme means are insufficient to achieve these objectives*. In any event, *intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life*.[5]

Few cases directly address how UNCLOS applies to the use of military force to combat piracy. In the *M/V Saiga (No. 2) Case*, the International Tribunal on the Law of the Sea determined that, in the absence of instructive provisions on the use of force in UNCLOS, general international law requires that "the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances."[6]

The use of military force and military units and vessels from many different states may suggest to some that the law of armed

4. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 8, *opened for signature* Feb. 14, 2006, IMO Doc. LEG/CONF.15/21 (entered into force July 28, 2010) (adding article 8*bis* to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation).

5. United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, ¶ 9, U.N. Doc. A/CONF.144/28/Rev.1 (emphasis added).

6. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 3 ITLOS Rep. 10, 61–62. The Tribunal declared a system of "normal practice" to be used in effecting arrests that includes requests to stop, warning shots and an eventual use of force as a last resort. *Id.* at 62.

conflict must govern any engagements between such military forces and any pirates. As one Member of the British Parliament noted at a House of Lords European Union Committee meeting, "[y]ou say that it is not a war; it looks quite like one to many of us serving on the side."[7] The law of armed conflict (LOAC)—otherwise known as international humanitarian law or the law of war[8]—applies only during an armed conflict. Accordingly, determining whether violence between states, between a state and a non-state actor, or between two or more non-state actors rises to the level of an armed conflict is a foundational analytical step. The 1949 Geneva Conventions set forth two primary and comprehensive categories of armed conflict that trigger the application of LOAC: international armed conflict and non-international armed conflict. Determining the existence of an armed conflict does not turn on a formal declaration of war—or even on how the participants characterize the hostilities—but rather on the facts of a given situation.[9] It is important to remember that this

7. EUROPEAN UNION COMMITTEE, COMBATING SOMALI PIRACY: THE EU'S NAVAL OPERATION ATALANTA, 2009-10, H.L. 103, ¶ 113 (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/103/103.pdf.

8. Int'l Comm. of the Red Cross [ICRC], *Advisory Service on International Humanitarian Law: What Is International Humanitarian Law?*, at 1 (July 2004), *available at* http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf. The law of armed conflict is codified primarily in the four Geneva Conventions of August 12, 1949 and their Additional Protocols. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

9. *See, e.g.*, First Geneva Convention, *supra* note 8, art. 2, 75 U.N.T.S. at 32 (stating that the Convention applies to "all cases of declared war or of any other armed conflict . . . between two or more [states], even if the state of war is not recognized by one of them"); Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 85 (2005) ("[I]t is worth emphasizing that recognition of the existence of armed conflict is not a matter of state discretion.").

objective paradigm applies regardless of whether a state is reluctant to characterize a situation as an armed conflict or a state is perhaps over eager to apply the armed conflict label (such as the rhetorical tool of a "war against piracy"). In either case, it is the facts on the ground that will determine whether an armed conflict exists such that LOAC is triggered. At the same time, however, if there is no armed conflict, LOAC will not apply.

Common Article 2 of the Geneva Conventions of August 1949 states that the Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[10] Thus, any dispute between two states involving their armed forces is an international armed conflict, regardless of duration, the nature of the engagement between the armed forces, or the denial by one or both parties of an armed conflict. Current counter-piracy operations do involve the armed forces of many states, but in no situation are the forces of two states in conflict with each other. Instead, states are combating private actors or, at most, non-state groups operating for pecuniary gain. As a result, counter-piracy operations do not qualify as international armed conflict, even if and when force is used.

Common Article 3 of the Geneva Conventions of August 1949 sets forth minimum provisions applicable "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[11] Non-international armed conflict is generally defined as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[12] Characterization of non-international armed conflict is more complex than the identification of international armed conflict, because the line between government response to internal disturbances and unrest, such as crime and riots, and government

10. Common Article 2 of the Geneva Conventions. *See, e.g.*, First Geneva Convention, *supra* note 8, art. 2, 75 U.N.T.S. at 32.

11. Common Article 3 of the Geneva Conventions. *See, e.g.*, First Geneva Convention, *supra* note 8, art. 3, 75 U.N.T.S. at 32.

12. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). This so-called *Tadić* test has not only been the driving factor in the ICTY's jurisprudence, but it was also adopted by the drafters of the Rome Statute establishing the International Criminal Court and by the International Criminal Tribunal for Rwanda. *See* Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90; *see also* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 620 (Sept. 2, 1998) (noting that in order to determine the existence of an internal armed conflict, it is necessary to evaluate the intensity and organization of the parties); Cullen, *supra* note 9, at 98.

response to an armed dissident threat resulting in a situation of armed conflict can often be quite blurry. Courts and tribunals generally look to two primary criteria—the intensity of the violence and the organization of the parties—to help "distinguish[] an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."[13]

With regard to piracy and counter-piracy operations, the analysis of whether pirate attacks and the involvement of state and multinational forces to combat those attacks with military force, if needed, constitutes armed conflict must look to the intensity of the violence and the organization of the parties. One other factor is equally useful: the nature of the response of the government or state armed forces in seeking to quell the violence.[14] Although the intensity of the violence associated with piracy seems to accord with, or even exceed, that found in some conflicts, the response of the international community, the lack of any organization or coordination among the pirates, and the nature of the military response demonstrates that the situation in the Gulf of Aden (or other current pirate hot spots) does not constitute a non-international armed conflict.

Piracy certainly involves the use of sophisticated weaponry and causes serious damage to both property and human life. In particular, although the loss of life does not rise to a level often seen in armed conflicts, the frequency of encounters is striking. In 2010 alone, for example, there were 489 incidents of piracy, an increase of 20.4 percent over the previous year.[15] In addition, the U.N. Security Council has recognized that "incidents of piracy and armed robbery at sea in the waters off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace

13. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

14. *See* INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR VOL. III, at 36 (Jean S. Pictet ed., A. P. de Heney trans., 1960) (advising that one of the "convenient criteria" for determining a non-international armed conflict is whether the government is "obliged to have recourse to the regular military forces against insurgents organized as military").

15. Int'l Maritime Org. [IMO], *Reports on Acts of Piracy and Armed Robbery Against Ships: Annual Report – 2010*, ¶ 5, IMO MSC.4/Circ.169 (Apr. 1, 2011), *available at* http://www.imo.org/ourwork/security/piracyarmedrobbery/pages/piratereports.aspx. *But see* Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, 6 MELB. J. INT'L L. 141, 146 (2010) ("[D]espite the frequency of reported pirate attacks, close to 99 per cent of all vessels that transit the Gulf of Aden do so without coming under pirate attack and only a minority of such attacks result in hostage-taking.").

and security in the region" and has authorized countries to use force under Chapter VII of the U.N. Charter.[16] As the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted in the *Tadić* case, the involvement of the Security Council can be a relevant factor in the identification and characterization of armed conflict. However, in the specific situation of piracy and counter-piracy operations, the Security Council has also explicitly stated that UNCLOS is the legal framework applicable to combating piracy,[17] which significantly diminishes any argument that current counter-piracy operations amount to armed conflict.

The other two factors—organization and the nature of the state's response or operations—point definitively to the lack of any armed conflict. First, pirates may answer to the captain of their ship, but that relationship is more akin to a criminal group than a level of organization ordinarily sought in the characterization of armed conflict.[18] Pirates, as a broader group, have neither a superior-subordinate hierarchy, nor a responsible authority similar to military organizations. Furthermore, different groups of pirates do not usually coordinate their attacks, and pirates do not control either a defined territory or a population. Second, the use of military force to combat piracy in and of itself does not signal the existence of an armed conflict. As the Inter-American Court of Human Rights noted in *Abella v. Argentina*, internal disturbances (which do not qualify as non-international armed conflicts) are often characterized by "authorities in power call[ing] upon extensive police forces, or even armed forces, to restore internal order."[19] Indeed, in the context of piracy, the use of military vessels and force rather than police units is a matter of necessity rather than one of choice, and, notwithstanding this use of military force, piracy has historically been considered to be outside the law of war.[20]

Last, piracy can occur at the same time as or in some way related to a concurrent armed conflict, such as in Somalia, where a

16. S.C. Res. 1851, pmbl., para. 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

17. *Id.* pmbl.

18. *See* Prosecutor v. Limaj et al., Case No. IT-03-66-T, Judgement, ¶ 90 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) (listing factors to consider with regard to organization as the "existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms"). Guilfoyle, *supra* note 15, at 145 (explaining that the fact that pirates may be organized "along clan lines or upon business models" or have "bosses or masterminds" is not enough).

19. Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 150 (1997).

20. Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 16 (2008).

non-international armed conflict (and even an international armed conflict when Ethiopia invaded in 2006) has continued in fits and starts over the past few decades. Iraq offers another example: significant counter-piracy efforts took place in the mid- and late 2000s at the same time as the armed conflict in Iraq. In general, the existence of an armed conflict does not change the nature of counter-piracy as a genuine law enforcement operation. Thus:

> [T]he mere existence of an already high level of violence does not automatically transform each and every law enforcement operation into an involvement in a non-international armed conflict governed by [LOAC]. After all, even a government already undisputedly involved in a non-international armed conflict may still carry out regular law enforcement operations unrelated to the armed conflict that are subject merely to human rights law. Consequently, the mere fact that Somalia's Transitional Government, with which third parties are currently co-operating in the attempt to repress piracy, is engaged in an ongoing non-international armed conflict is not in and of itself a decisive criterion for legal qualification of the counter-piracy operations as part of such a conflict.[21]

Afghan and international counter-narcotics efforts in Afghanistan fall within the same framework: law enforcement operations occurring within the context of an armed conflict.[22]

As a result, LOAC does not apply to piracy and counter-piracy operations. The use of force by multinational counter-piracy forces therefore stems from two international law sources, building on the UNCLOS framework set forth above. First, force can be used to enforce the right to stop, board, and arrest a pirate ship, where such force is unavoidable, reasonable, and necessary.[23] The International Tribunal for the Law of the Sea upheld this framework in the *M/V Saiga* case, noted above, and the Arbitral Tribunal created

21. Robin Geiss, *Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties*, 91 INT'L REV. RED CROSS 127, 141 (2009); *see* Douglas Guilfoyle, *Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts*, 57 INT'L & COMP. L.Q. 690, 695–96 (2008).

22. *See 2011 International Narcotics Control Strategy Report: Afghanistan Through Costa Rica*, U.S. DEP'T OF STATE (Mar. 3, 2011), http://www.state.gov/j/inl/rls/nrcrpt/2011/vol1/156359.htm (describing how active insurgency areas account for the majority of illegal poppy cultivation).

23. *See* Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 401–02, 414 (2009).

under UNCLOS has endorsed it in at least one subsequent case as well.[24] Second, in accordance with these rights to enforce the law against piracy, it is a "general principle of law recognised by States that individuals can use force when necessary to protect life, subject to the requirement that the degree of force used shall not exceed that reasonably required in the circumstances."[25]

III. RULES OF ENGAGEMENT

In any military operation—whether occurring during an armed conflict or not—rules of engagement (ROE) are essential to the planning and execution of that operation. ROE are directives to military forces regarding the parameters of the use of force during military operations. ROE are based on three key components: law, strategy, and policy—the legal framework of LOAC or other applicable international law, the military needs of strategy and operational goals, and the national command policy of the state or states involved. Equally important, all ROE, whether the Standing ROE (SROE) for peacetime or mission-specific ROE, provide for the right of all troops to use force in self-defense. The San Remo ROE Handbook explains the role and purpose of ROE as such:

> ROE are issued by competent authorities and assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives. ROE appear in a variety of forms in national military doctrines, including execute orders, deployment orders, operational plans, or standing directives. Whatever their form, they provide authorisation for and/or limits on, among other things, the use of force, the positioning and posturing of forces, and the employment of certain specific capabilities.[26]

ROE thus are intended to give operational and tactical military leaders greater control over the execution of military operations by subordinate forces.

The SROE "provide implementation guidance on the inherent right of self-defense and the application of force for mission

24. *See* Guyana v. Suriname, Award of the Arbitral Tribunal, at 147 n.518 (UNCLOS Arb. Trib. 2007), www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf (accepting the *M/V Saiga* decision holding that force may be used, provided that it is unavoidable, reasonable, and necessary).

25. Andrew Murdoch, *Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia*, *in* SELECTED CONTEMPORARY ISSUES IN THE LAW OF THE SEA 139, 148 (Clive R. Symmons ed., 2011).

26. ALAN COLE ET AL., INT'L INST. OF HUMANITARIAN LAW, RULES OF ENGAGEMENT HANDBOOK 1 (2009).

accomplishment [and] are designed to provide a common template for development and implementation of ROE for the full range of operations, from peace to war."[27] The SROE define individual and unit self-defense, distinguish between the use of force in self-defense and in furtherance of the mission, and provide guidance for understanding the concepts of hostile force, hostile act, and hostile intent. Furthermore, multinational operations have multinational and combined ROE. These ROE can often present multi-layered challenges, as the U.S. Army JAG School's Operational Law Handbook explains:

> Each nation's understanding of what triggers the right to defense is often different, and will be applied differently across the multinational force. Each nation will have different perspectives on the [law of war], and will be party to different [law of war] obligations that will affect its ROE. And ultimately, each nation is bound by its own domestic law and policy that will significantly impact its use of force and ROE.[28]

In essence, therefore, ROE represent the intersection of law, policy, operational strategy, and even diplomacy or multinational coordination—the center of four interlocking frameworks.

The maritime task forces operating in the Gulf of Aden and the Indian Ocean have robust ROE that include extensive cooperation with national law enforcement agencies as needed. Military forces involved in the EU's Operation Atalanta and NATO's Operation Ocean Shield can board vessels, arrest and detain persons suspected of taking part in piracy, and use force to stop a pirate vessel or intervene in a hijacking.[29] Recently, steps have been taken with regard to all three task forces to bolster their authority and capability to act against pirates, including enhanced boarding capabilities, aerial surveillance, and even attacks against pirate camps on land.[30] As

27. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 76 (William Johnson ed., 2013).

28. *Id.* at 79.

29. *See* NATO, Parliamentary Sub-Committee on Future Security & Defence Capabilities, *The Challenge of Piracy: International Response and NATO's Role*, at 7–8, 12 (Nov. 2012); *MARCOM Fact Sheet*, *supra* note 1 (describing the scope of NATO anti-piracy missions); EUROPEAN UNION COMMITTEE, *supra* note 7, ¶ 34.

30. NATO, *supra* note 29, ¶ 69; James M. Bridger, *Safe Seas at What Price? The Costs, Benefits and Future of NATO's Operation Ocean Shield* 3 (Research Div., NATO Def. Coll., Research Paper No. 95, 2013); EUROPEAN UNION COMMITTEE, *supra* note 7, ¶ 61 (mentioning how the EU is taking a comprehensive approach by considering economic, political, and security aspects of the piracy crisis).

these revisions and enhancements in ROE continue, and the nature of the operations against pirates increases in complexity, the challenges described in the next section will expand, even while the success of the operations against pirates continues and grows.

IV. MULTINATIONAL COORDINATION AND CHALLENGES

Multinational operations—whether during armed conflict, counter-piracy, or other situations—require extensive coordination in all areas, from procedures to communication to ROE. As a result, such operations can face significant challenges in developing and maintaining an effective level of collaboration and coordination, notwithstanding the inherent differences between national approaches to issues from detention to the use of force. Incompatibilities with regard to ROE can prove to be one of the most difficult obstacles that multinational operations must address.

In some situations, coordination challenges can stem from different coalition partners actually applying different legal frameworks. For example, while the United States has declared that it is in an armed conflict in Afghanistan with both the Taliban and Al-Qaeda, coalition partners such as Germany remained reluctant, until recently, to characterize their involvement under the aegis of the International Security Assistance Force ("ISAF") as an armed conflict.[31] Thus, even within the same coalition, some nations would not apply the same legal framework to their activities, creating differing interpretations of rights and obligations. Those different legal frameworks naturally lead to different ROE altogether: the authority to use force within armed conflict is fundamentally different from the authority to use force outside of armed conflict.

Even when general agreement exists among the members of a multinational force on the governing legal framework, as appears to be the case with regard to the counter-piracy operations and the three task forces in the Gulf of Aden, additional considerations can still complicate coordination on ROE. For example, states often take different approaches regarding how the ROE should actually be applied, even within the commonly accepted law enforcement and

31. *See* Timo Noetzel, *Germany's Small War in Afghanistan: Military Learning amid Politico-Strategic Inertia*, 31 CONTEMP. SECURITY POL'Y 486, 487 (2010) ("Foreign Minister Guido Westerwelle, speaking explicitly as a representative of the government as a whole, announced before the Bundestag that Germany now considered the conflict in all of Afghanistan, and thus including the northern part of the country, an 'armed conflict in terms of international humanitarian law.'") (quoting Guido Westerwelle, Foreign Minister, Policy Statement before the German Bundestag on Germany's Engagement in Afghanistan (Feb. 10, 2010), *available at* http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Reden/2010/100210-BM-BT-Afghanistan.html).

UNCLOS framework for counter-piracy operations. Some states take a more permissive approach, meaning that action is permitted unless the ROE expressly prohibit that action. In contrast, other states use a more restricted approach, meaning that action is prohibited absent an express authority in the ROE. These differences can be extremely significant, particularly in the context of a legal paradigm that strictly constrains the use of force, as the law enforcement and UNCLOS paradigm does. Indeed, "[t]he common objective of a multinational operation may succeed or fail on the basis of how well or how poorly ROE (whether an individual nation's or a multinational force's) are conceived, articulated, understood, and implemented by each member of the multinational operation."[32]

In the context of counter-piracy operations, coordination and common understandings of ROE are relevant not only in the use of force arena, but also with regard to detention and prosecutions. Some states within a multinational task force may have authority to detain pirates, but others will not. Few states have a regularized system for the prosecution of pirates, which can make decision-making difficult in the aftermath of capturing pirates. In some cases, states within the multinational task force will have agreements with states for transfer and prosecution of pirates, such as with the Seychelles, Kenya, or other designated states.[33] However, the lack of such authority or agreements can lead to situations where captured pirates are simply released because there is no mechanism or plan for handling the post-operation process.[34] Some have even argued that warships should not capture pirates at all, to avoid such problems.[35]

To the extent that states in a multinational operation can sort out differences in both legal interpretations and application and interpretation of ROE, that is the best method to ensure the most

32. Eric S. Miller, *Interoperability of Rules of Engagement in Multinational Maritime Operations* 4 (Ctr. for Naval Analyses, Research Memorandum CRM 95-184, 1995).

33. *See* ROBIN GEISS & ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 204 (2011) (describing piracy transfer agreements that the Seychelles and Kenya have with the EU).

34. For example, in September 2008, the Danish warship *Absalom* detained ten suspected pirates and held them for six days while awaiting instructions on what to do with the detainees. Eventually, the pirates were released on the beach in Somalia after Danish authorities concluded that there was no feasible venue for prosecuting them. *See* Murdoch, *supra* note 25, at 150.

35. *See* Vice Admiral William Gortney, DoD News Briefing (Jan. 15, 2009) (transcript available at www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4341) (stating that until operational authority is clear, orders will include disrupting and deterring pirates, but not capturing them).

effective coordination and execution of operations. Given the host of considerations that play a role in how states create and interpret ROE, however, differences in interpretations will continue. Therefore, an essential step is to address and continue to enhance how multinational forces can function most effectively notwithstanding gaps in approaches and interpretations.


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