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Warships and noise regulation: The international legal framework

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ABSTRACT

The use of sonar by military vessels during military exercises may produce acoustic pollution of the marine environment. States have an obligation under international law to reduce and control this form of pollution. Regulation of the use of sonar is rendered more complex by the specific regime applicable to warships, i.e. sovereign immunity. Immunity however does not prevent in all cases action by States other than the flag State, notwithstanding the limitations imposed by Art. 236 of the United Nations Convention on the Law of the Sea. More importantly, immunity does not prevent the flag State from taking measures to reduce pollution caused by its own warships. Under some environmental treaties, flag States not only may, but have the obligation to adopt measures.

1. Underwater noise as pollution of the marine environment

According to the well known definition in Art. 1, para. 1 (4), of the 1982 *United Nations Convention on the Law of the Sea* (LOSC), pollution of the marine environment means "the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities". As illustrated by the other contributions in this issue, manmade underwater noise is a form of energy introduced by man into the marine environment and its effects may well be described as "deleterious" (Agardy et al., 2007; Arbelo et al., 2008; Buck, 2005; Dolman et al., 2009a; Evans and Miller, 2004; Fernández et al., 2004; Frantzis, 1998; ICES, 2005; Jepson et al., 2003; National Research Council, 2003; OSPAR Commission, 2009). Under international law, therefore, underwater noise is a form of pollution of the marine environment, as already clarified in legal literature (Dotinga and Oude Elferink, 2000; McCarthy, 2001; Scott, 2004; Gillespie, 2007). The recently adopted *Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy* (Marine Strategy Directive), further confirms this conclusion, specifying, in Art. 3 (8), that pollution of the marine environment means the "direct or indirect introduction into the marine environment, as a result of human activity, of substances or energy, *including human-induced marine underwater noise* ..." (emphasis added).

The classification of underwater noise as a form of pollution has important consequences on the legal level. It makes applicable the body of rules and principles on the protection and preservation of the marine environment, including the obligation of States to prevent and control pollution, the duty not to cause transboundary damage and the precautionary principle or approach, as it is also called (Firestone and Jarvis, 2007; Gillespie, 2007; Horowitz and Jasny, 2007; McCarthy, 2007; Weilgart, 2007).

The basic principle of this legal regime is set out in Art. 192 LOSC: "States have the obligation to protect and preserve the marine environment". This obligation is spelled out in more detail in the following articles of the LOSC, making up Part XII on the Protection of the Marine Environment.

Further rules are contained in other international treaties dealing with the protection of specific seas or specific species. On the basis of these rules, some acts specifically relating to underwater noise have been recently adopted. The Marine Strategy Directive, applicable to member States of the European Union, is so far the only binding instrument that addresses noise.[1] The remaining tools consist of instruments of soft law – which are not themselves legally binding but show a trend towards the formation of legal rules – dedicated specifically to the protection of marine species, and primarily marine mammals, from the harmful effects of acoustic pollution. Resolutions have been adopted, among others, by the European Parliament (*Resolution on the Environmental Effects of High-Intensity*

[1] The Marine Strategy Directive will not be specifically addressed in this paper, since it does not apply "to activities the sole purpose of which is defence or national security" (Art. 2, para. 2). The same provision adds that "Member States shall, however, endeavour to ensure that such activities are conducted in a manner that is compatible, so far as reasonable and practicable, with the objectives of this Directive".

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Active Naval Sonars (Resolution of 28 October 2004 in *Official Journal of the European Union*, C 174 E of 14 July 2005)), ACCOBAMS (Resolution No. 2.16 of 2004; Resolution No. 3.10 of 2007), ASCOBANS (Resolution No. 4 of 2000; Resolution No. 5 of 2003; Resolution No. 4 of 2006; Resolution No. 2 of 2009) and the Convention on Migratory Species (CMS, Resolution 7.5 of 2002; Resolution 8.22 of 2005; Resolution 9.19 of 2008).

Among the various sources of manmade acoustic pollution of the oceans, noise from sonar on board warships is maybe the one that encounters strongest resistance against the framing of an appropriate legal regime (Parsons et al., 2008). This resistance is often justified recalling security concerns, including the need to protect the State, as well as legal concepts such as sovereign immunity and Art. 236 LOSC. While regulation of sonar is a political problem that will eventually have to be addressed by States, discussions about it have to take into account legal concepts and regimes relating to both the protection of the environment and the capacity and operability of military vessels. This article will try to clarify some legal concepts relating to warships that may give raise to confusion, namely immunity, customary and treaty law, the distinction between peacetime and wartime activities and the obligations of the flag State. As far as its scope goes, this article proposes to consider some legal issues raised by the use of sonar by military vessels; it will not address the issue of installations and devices in the sea or on the seabed, the legal status of which may be different from that of military vessels (Treves, 1980).

2. Immunity

Art. 29 LOSC defines a "warship" as "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline". Due to the importance of warships for national security and the need to avoid interference by other States with their activities, international law provides a special status for warships: immunity from the jurisdiction of other States (Oxman, 1984; De Guttry, 1994). The LOSC grants immunity to warships in Art. 32; immunity is provided also under Art. 16 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Properties, which has not yet entered into force. This immunity is complete on the high seas, i.e. waters that do not fall under the sovereignty or jurisdiction of any State (Art. 95 LOSC), and suffers few limitations in the territorial sea. This however does not mean that military vessels do not have to abide by legal rules.

In the first place, a coastal State has prescriptive jurisdiction, i.e. the power to regulate activities by law-making, in its territorial sea also with respect to military vessels of all States (Art. 32 LOSC; Churchill and Lowe, 1999). In the territorial sea of a foreign State, military vessels may only exercise their right of innocent passage, as defined in Arts. 18 and 19 LOSC and cannot engage in any other activity without the coastal State's consent. Passage ceases to be innocent, among other cases, if any exercise or practice with weapons of any kind takes place (Art. 19, para. 2, b, LOSC), if any act of wilful and serious pollution takes place (Art. 19, para. 2, h, LOSC) or if any military device is launched, landed or taken on board (Art. 19, para. 2, f, LOSC). In this respect, it is uncontroversial that the deployment of sonar arrays by foreign ships in passage would be in breach of innocence, though there are some doubts as to the applicability of this provision to towed arrays (Lowe, 1986). In exercising their right of innocent passage, military vessels have to comply with the laws and regulations of the coastal State, including those on the preservation of the marine environment and the prevention, reduction and control of pollution (Art. 21 LOSC). Contrary to what has been sustained (Oxman, 1984), this obligation exists notwithstanding the text of Art. 236, which excludes the applicability to military vessels of rules of the LOSC concerning the protection of the marine environment. The right of the coastal State to adopt laws and regulations stems from its sovereignty over the territorial sea, and not from a rule concerned with the marine environment. However, if a military vessel does not comply with such laws and regulations and disregards any request for compliance therewith which is made to it, the coastal State has a limited range of options. It may require the warship to leave the territorial sea immediately (LOSC Art. 30) even, though this is not stated in the LOSC, by using eventually the necessary force, and may request damages from the flag State (Art. 31 LOSC). The coastal State cannot however take any other enforcement action directed against the warship, such as seizure or arrest.

Some doubts have been advanced with respect to the possibility of the coastal State to prescribe measures concerning warships in its exclusive economic zone. Apparently, military exercises may fall either under the "other internationally lawful uses of the sea" related to the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, provided by Art. 58, para. 1, LOSC or under the residual activities mentioned by Art. 59 LOSC (Scovazzi, 1990). In the first case, the flag State of the warship "shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State" (Art. 58, para. 1, LOSC). In the second case, Art. 59 LOSC will, in most cases of operations with weapons, play in favour of the coastal State (Scovazzi, 2000). In any case, it will be necessary to strike the right balance between the freedom of navigation and other rights enjoyed by all States, on one hand, and the rights of the coastal State, on the other.

In the second place and most importantly, immunity does not mean that nobody can regulate the construction and operation of military vessels and weapons: these vessels, in fact, are subject to the jurisdiction of the flag State (Scovazzi, 1990). Immunity therefore means that, unless otherwise provided, only the flag State can adopt laws and regulations regarding its own vessels, and only this State can control and enforce these laws and regulations in all sea areas. Under rules of international law, the flag State not only can, but in some cases must adopt measures, which may include legislative or operative measures, concerning its military vessels.

3. Treaty, custom and Art. 236 LOSC

It has been authoritatively maintained that the provisions of the LOSC on the protection of the marine environment may be considered as expression of rules of customary international law (Birnie et al., 2009; Sands, 2003). Unlike treaties, which are binding only once they enter into force and produce their effects only with respect to States parties, international custom binds all States. There is however a potential problem concerning Art. 236 LOSC. This is the only provision of the LOSC concerning pollution of the marine environment by military vessels and states that: "The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention".

This article imposes on the flag State of a military vessel the legal obligation to adopt appropriate measures to ensure that it does not harm the marine environment, as is evidenced by the use of "shall" (Nordquist et al., 1991). This obligation, however, is limited