

# XVIII

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## Panel III

### Commentary—Maritime & Coalition Operations

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Neil Brown<sup>1</sup>

The United Kingdom's participation in operations against al Qaeda and the Taliban (in support of Operation ENDURING FREEDOM) is, with the exception of the contribution to the International Security and Assistance Force (ISAF) in Afghanistan, pursuant to the right to self-defense codified in Article 51 of the UN Charter. In those operations, the United Kingdom is participating in an extensive, US-led, multi-national coalition. No single set of coalition rules of engagement (ROE) exists for all states participating in Operation ENDURING FREEDOM. Each nation operates under its own national ROE, for what are perfectly understandable reasons. After all, the ROE are produced specifically for each mission, taking into account the threat, and it is each nation's policy and its view of the relevant international law which will define its national mission. Whereas for other coalition and combined operations, ROE are routinely shared, it seems more than likely, for reasons I will explain, that nations will, for the foreseeable future, keep a fairly close hold on the

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ROE applying to their forces undertaking missions in what is often referred to as the “global war on terrorism.”

The history of the United Kingdom is one that speaks to our marked involvement in the Gulf of Arabia over a long period. After all, oil production in the Gulf region began in earnest to meet the need for oil to fuel the Royal Navy’s ships. In recent years, the United Kingdom has routinely deployed warships to the Gulf, first to keep oil flowing through the Straits of Hormuz during the Iran–Iraq War, and (apart from initial operations against Iraq following the invasion of Kuwait) ever since then in support of UN Security Council Resolution 665.<sup>2</sup>

The Royal Navy’s familiarity with the region has been a tremendous operational strength, as has working with many of the same coalition members while adjoined to the US Central Command. In the days following September 11th, this familiarity was also, I sense, something of a complication. It is perhaps inevitable that differences between missions not sharing the same legal bases would not be immediately obvious, particularly when set against the political and media background presenting a united front in the war on terrorism. The fact that operations against al Qaeda and the Taliban are conducted under Article 51 as “collective self-defence” did not appear to many (other than the lawyers) to be significant at the outset. This only became an issue when it manifested in practice when UK ROE reflecting the precise scope of the UK mission were compared to, for example, the US ROE reflecting the US mission. The call to service lawyers that “there is an ROE issue,” did not necessarily mean then that there is an ROE issue of the sort usually capable of resolution between military commands, but represented instead a friction point between different national policies and law. In the area of our coalition maritime operations this has been the background to much important and interesting debate, especially in the area of terrorism.

The UK approach to operations against al Qaeda and the Taliban, both in terms of law and policy, has permitted participation both in operations in Afghanistan and in simultaneous coalition maritime operations aiming to capture, or deprive sea mobility, to terrorists on the high seas, the latter as part of a coalition of states all of whose armed forces and other government agencies have collaborated to ensure that the important issues have been coordinated

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2. S. C. Res. 665, U.N. SCOR, 45th Sess., U.N. Doc S/665/(1990) calls on all member states to “halt inward and outward maritime shipping to inspect their cargos and to ensure strict implementation with the provisions” contained in UN Security Council Resolution 661. S. C. Res. 661, U.N. SCOR, 45th Sess., U.N. Doc S/661/(1990) calls upon member states essentially to cease all trade with Iraq.

and addressed. That is not the same as saying that maritime operations are conducted as part of a global war against terrorism.

Terrorism is not a new phenomena to the United Kingdom, indeed it has been a part of our everyday lives for several decades. Terrorism has traditionally been dealt with as a law enforcement issue (albeit with military support to civilian authorities) and is thought by many in Europe to be essentially a criminal problem. It is accepted of course that the scale and character of the events of September 11th set them apart and are properly assessed as amounting to an armed attack for the purposes of Article 51 of the UN Charter, permitting states on this occasion to respond in self-defense with military force. In the context of this operation, the law of armed conflict clearly overlaps with international and domestic criminal law and it is the effect of this which we have worked hard to understand and deconflict.

Defining terrorism as a universal crime is a laudable goal but problematic. As Professor Shearer properly points out, "terrorism" when defined is immediately susceptible to politicization. This has probably stifled attempts to agree to a definition before now. By way of example, I recently heard a Russian flag officer, on extending his condolences and sympathy to the people of the United States for September 11th, make clear that in his view the situation in Afghanistan was identical to that faced by Russia in Chechnya. Without falling back on the trite and all too easy phrase about "one man's terrorist being another man's freedom fighter," this is a relevant example of the difficulty which will be faced in developing an internationally acceptable definition that will not be susceptible to political abuse.

Notwithstanding that offensive UK operations in Afghanistan may be conducted under Article 51 of the Charter, acting in collective self-defense with the United States, and that in Afghanistan (given the way in which al Qaeda and the Taliban are inextricably linked) operations are conducted under the law of armed conflict, it has not appeared clear to me that the same could necessarily be said for the simultaneous maritime operations. There is no al Qaeda Navy, nor is there an Afghan Navy. The terrorists, if they are at sea, may be on the high seas or in the territorial seas of a third state, and if their vessels are flagged at all will be in vessels which are also of a third state. The prospect of exercising belligerent rights in the current circumstances seems to me therefore to be implausible. And so it is my view that we have a situation where operations under Article 51 may not avail themselves of the full range of rights usually available to belligerents in an international armed conflict. The effect of this would be to say, for example, that although maritime units may use force such as is necessary and proportional, they may be required to do so

within the peacetime rules and conventions which apply at sea, a case in point being the United Kingdom's fairly conservative view of the doctrine of flag state consent. As an example, the Royal Navy recently boarded a merchant vessel in the English Channel on the basis of intelligence that the vessel was carrying terrorists who were armed with some sort of weapon which presented an imminent chemical or biological threat.<sup>3</sup> Recognizing that the boarding could have occurred under an Article 51 basis of self-defense, the United Kingdom nonetheless, and perhaps somewhat conservatively, requested and received the consent of the flag state to board and search the vessel. While Professor von Heinegg's concern that this approach might undermine the continuing right to stop and search a vessel pursuant to Article 51 is noted, I believe that the United Kingdom is simply not prepared to invoke the right of self-defense for such boardings without seeking flag state approval unless that is necessary and proportional in the operational circumstances, for example in circumstances where a flag state would be unwilling or unable to give it and the request would compromise the mission.

As noted earlier, the question arises as to how long coalition members can in good faith continue to rely upon Article 51 as the legal basis for their use of force. From a maritime perspective, existing peacetime law permitting warships to board third party vessels on the high seas is quite limited indeed. Article 110 of the UN Convention on the Law of the Sea (LOS Convention) provides only limited permission to board when such acts as suspected piracy, slave trading, and unauthorized broadcasting are taking place or the vessel is state-less.<sup>4</sup> This is somewhat unsatisfactory, and one wonders whether, had the LOS Convention been negotiated in 1992, Article 110 might have included powers to interdict drug traffickers, and whether in 2002 it might have been extended to include terrorism. Professor von Heinegg touched on this very important area of third party consent when he talked about it in terms of

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3. Unknown Author, *Anti-Terror Teams Intercept Ship*, IRISH TIMES, Dec. 20, 2001, available at LexisNexis Major World Newspaper (Oct. 1, 2002).

4. See U.N. Convention on Law of the Sea, U.N. Doc. A/CONF.62/122 (1982), art. 110, reprinted in BARRY CARTER AND PHILLIP TRIMBLE, INTERNATIONAL LAW SELECTED DOCUMENTS (2001), at 553. Article 110 provides in relevant part that "[e]xcept where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles and, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109; (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship."

tolerating the control which belligerents might exercise. To extend this right, available to belligerents where there are reasonable grounds to suspect that a neutral vessel is subject to capture, to member states of the UN acting in accordance with Charter rights (as verified by the UN Security Council in all of its subsequent resolutions), is one thing. Indeed, it is not unreasonable to expect and even require that third parties permit us to board their vessels when there is intelligence that Taliban or al Qaeda members are on board. To take that further, and suggest for example that there is a general right of visit and search of third party vessels without such intelligence, is quite another.