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LCdr J.D. Samson

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REFERENCES

- A. United Nations Conventions on the Law of the Sea, 1982.
- B. Canada Shipping Act, 2001.
- C. Regulations for the Prevention of Collisions at Sea, 2014.
- D. Naval Personnel and Training Order 4500-57, Sea Command Boards.

AIM

1. The aim of this service paper is to discuss the meaning of the term “warship” and the implications of this meaning on vessels operated by the Royal Canadian Navy (RCN). An additional aim is to determine the relevance of the terms “major warship” and “minor warship” within the RCN context.

INTRODUCTION

2. As the fleet undergoes extensive renewal vis-à-vis the National Shipbuilding Procurement Strategy (NSPS), it has been augmented by the Interim Auxiliary Oiler Replenishment (IAOR) ship, named the Motor Vessel (MV) ASTERIX. This vessel is owned and operated by Federal Fleet Services, a civilian corporation held under contract by the Government of Canada (GoC), which means that the vessel’s Captain and crew are civilian personnel. While there is a small military contingent onboard to conduct replenishment at sea (RAS) operations, the vessel may not be permitted to be registered or considered as a warship within international or domestic legal constructs. This distinction may require the consideration

of additional planning constraints to enable the IAOR to lawfully contribute to international exercises and operations.

3. The RCN defines the terms “major warship” and “minor warship” within Naval Personnel and Training Order (NPTORD) 4500-57 to address platform-based differences between Command Qualifications for Naval Warfare Officers (NWO). Unfortunately, these terms can also be misused to segregate fleet platforms by tonnage, an unfortunate distinction which can also be applied to discriminate between Regular Force (RegF) and Reserve Force (ResF) sailors and officers. As the RCN moves to adopt a traditional ‘total force’ construct for the employment of the Naval Reserves, these divisive terms have rightfully been placed under scrutiny.

DISCUSSION

Warships Under International Law

4. To determine the IAOR’s applicability as a “warship”, several definitions will be reviewed. The first comes from Article 29 of the United Nations Conventions on the Law of the Sea (UNCLOS), where the term “warship” is defined 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.¹

According to this definition, there are five requirements for a vessel to qualify as a warship under the UNCLOS. The vessel must belong to the armed forces of a state, it must operate under the national flag of that state, it must be commanded by a military officer commissioned by the state, the vessel must be registered with the United Nations (UN) as a warship, and the crew must also be members of the military, subject to military discipline. Although the MV ASTERIX's mission can be directed by the RCN, it does not belong to the RCN, nor is it Commanded by an appropriately qualified NWO. Furthermore, the primary crew of the vessel are not subject to military discipline, as noted within the National Defence Act. However, the MV ASTERIX does fly a Canadian flag and could be registered within the service list, at the discretion of the GoC and Federal Fleet Services.

5. Thus, within the confines of the definition at Article 29, the MV ASTERIX cannot be considered as a “warship” under international law. However, additional provisions contained within subsequent Articles of the UNCLOS render this distinction quite moot. For instance, Article 95 grants warships the right of immunity, stating that “warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.”² While a state-owned vessel (or warship) can lawfully board a vessel on the high seas to conduct a flag and/or state verification visit, this Article ensures that warships are excluded from any such

¹ United Nations General Assembly, *Convention on the Law of the Sea* (New York: UN, 1982), http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

² Ibid.

interference. While this is only a singular example of lawfully authorized interference between vessels under the UNCLOS, the importance of Article 95 is clear – it sets the conditions for any act of interference against another state’s warship to be considered as an act of war or aggression. As this paper has already determined that the MV ASTERIX cannot be considered a warship, Article 95 would have presented a potential quandary for the RCN, the GoC and Federal Fleet Services, had it not been for the contents of its immediately subsequent Article. Article 96 states that “ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.”³ Therefore, despite MV ASTERIX being excluded from consideration as a warship, it still lawfully possesses the immunity required by the nature of its employment, while operating on the high seas.

6. Later Articles within the UNCLOS describe authorized actions in the event of piracy (a concept that only exists on the high seas). These Articles too are normally associated solely with military vessels, e.g., warships, and thus require consideration within the context of the MV ASTERIX. Article 107 states that “a seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”⁴ Similar provisions are found within Articles 110 and 111, which confer the right of visit and the right of hot pursuit. While the wording of Article 111 is identical to that of Article 107, Article 110 is somewhat different. The provisions within Article 110 ensure that the right of visit is afforded to warships and military aircraft, as

³ Ibid.

⁴ United Nations General Assembly, *Convention on the Law of the Sea* (New York: UN, 1982), http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

well as “any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.”⁵ While the difference is subtle, it remains clear that any vessel being operated by a government for non-commercial purposes is permitted to conduct anti-piracy operations, visits in support of flag and/or state verification, as well as hot pursuit of any suspected pirate vessels.

7. Furthermore, Articles 224 (which grants powers of enforcement) and 236 (which grants Sovereign immunity from the protection/preservation of the marine environment), also contain language which grants these rights to vessels not otherwise defined as warships. While the allowances within Article 224 are very similar to Article 110 and do not require further mention, Article 236 grants even broader exceptions. It states that Sovereign immunity is granted 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.”⁶

8. When attempting to determine how the exceptions within these Articles apply to the MV ASTERIX, it is pertinent to note that the vessel is contractually authorized to operate in service of the GoC/RCN, that it is Canadian flagged, that it is being used for non-commercial purposes, and that it has been painted the same “haze grey” colour as other RCN combatants. Therefore, while it has been determined that the ASTERIX cannot be considered warship under the UNCLOS, the vessel and its crew are granted rights under specific Articles which are normally considered the sole purview of warships and military aircraft.

⁵ Ibid.

⁶ Ibid.

9. The activities noted above which are normally undertaken by warships, but through additional provisions also include the MV ASTERIX, may include significant risk to personnel and materiel. Although the details of any risk provisions contained within the contract were not available to review while writing this paper, it is expected that the contract between the GoC and Federal Fleet Services contains provisions to limit risk. As the MV ASTERIX is a privately-owned vessel with a civilian Captain and crew who are not subject to unlimited liability service as their RCN counterparts, the existence of risk provisions within the contract would therefore become the largest restraining factor in planning operations and exercises with the MV ASTERIX.

Warships Under Domestic Law

10. When attempting to discern the MV ASTERIX's applicability to be considered a warship under domestic law, two sources have been considered. The first is the Canada Shipping Act (CSA), which provides the legal framework under which all vessels within Canadian waterways, and those flagged as Canadian vessels, must abide. The second source is the Canadian modifications to the International Regulations for the Preventions of Collision at Sea (CRC), which are enabled by the CSA.

11. Within the CSA, the term "warship" is only utilized once in Schedule 3, Part 1 of the Act, which refers to the International Convention on Salvage, 1989. Within this part, the Act simply denotes that the convention shall not apply to "warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity

under generally recognized principles of international law unless that State decides otherwise.”⁷ This convention is meant to ensure “adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger.”⁸ As the government is granted the Sovereign right to include warships or state operated vessels should it desire to do so, and as salvage is not a mandate of the RCN, this convention should not have an impact on the operation of the MV ASTERIX.

12. Although the Act does not specifically define the term “warship,” there exists a very specific definition which describes the requirements under which a vessel can be considered a “government” vessel. The definition states that a government vessel is “a vessel that is owned by and is in the service of Her Majesty in right of Canada or a province or that is in the exclusive possession of Her Majesty in that right.”⁹ Within the confines of this definition, the MV ASTERIX cannot be considered a government vessel under Canadian domestic law as it is neither owned, nor is it the exclusive possession of the GoC. While the UNCLOS does not attempt to define a government vessel, as earlier described, it does refer to vessels that are operating “on government service.”¹⁰ This highlights a potential conflict between international and domestic law; how could the GoC/RCN operate the MV ASTERIX as a vessel in the service of a government under international law, when Canadian domestic law does not permit the same allowances.

⁷ Canada Shipping Act, S.C., c. 26 (2001).

⁸ Ibid.

⁹ Ibid.

¹⁰ United Nations General Assembly, *Convention on the Law of the Sea* (New York: UN, 1982), http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

13. Within the CRC, the term warship is neither defined, nor used. With the exception of the HMCS ORIOLE, all of the RCNs assets (including the MV ASTERIX), are considered to be power-driven vessels (PDVs). The term vessel is defined within the CRC as “every description of water craft, including non-displacement craft, WIG craft and seaplanes, used or capable of being used as a means of transportation on water.”¹¹ By extension, a PDV is defined as “any vessel propelled by machinery.”¹² There is however a single reference to a “ship of war,” which is undefined. Sub-paragraph (c) of Rule 1 states:

Nothing in these Rules shall interfere with the operation of any special rules made by the government of any state with respect to additional station or signal lights, shapes or whistle signals for ships of war and vessels proceeding under convoy, or with respect to additional station or signal lights or shapes for fishing vessels engaged in fishing as a fleet. These additional station or signal lights, shapes or whistle signals shall, so far as possible, be such that they cannot be mistaken for any light, shape or signal authorized elsewhere under these Rules.¹³

14. Thus, Rule 1 allows governments, including Canada, to create special lights and signals to enable safe convoy operations. This definition leads to some ambiguity, as the MV ASTERIX can neither be considered a warship under international law, nor can it be considered a government vessel under Canadian domestic law. Although the MV ASTERIX’s applicability as

¹¹ Collision Regulations, C.R.C., c. 1416 (2014).

¹² Ibid.

¹³ Collision Regulations, C.R.C., c. 1416 (2014).

a “ship of war” must be considered suspect, it is doubtful that this specific provision will hamper future operations.

15. As previously mentioned, the MV ASTERIX cannot be considered a government vessel within Canada, and under the CRC, this only poses a singular, potential limitation. Under Rule 45, only a government vessel can utilize a blue flashing light at sea for the conduct of law enforcement activities or for “providing assistance in any waters to any vessel or other craft, aircraft or person that is threatened by grave and imminent danger and requires immediate assistance.”¹⁴ As mentioned, this is merely a potential limitation, as the RCN does not use blue flashing lights on large surface vessels.

Major and Minor Warships

16. Within NPTORD 4500-57, the term “major warship” is defined as “surface warships carrying over-the-horizon, anti-air or ASW weapon systems, or which operate aircraft.”¹⁵ The opposite is true of the term “minor warships,” which are defined as “surface warships which do not carry over-the-horizon, anti-air or ASW weapon systems, and which do not operate aircraft.”¹⁶ While Command of either a minor or major RCN warship requires a Command Qualified NWO of the appropriate rank, these terms are used to delineate the two unique assessment standards used in Command Boards.

¹⁴ Ibid.

¹⁵ Royal Canadian Navy, Naval Personnel and Training Order 4500-57, *Sea Command Boards* (Ottawa: DND Canada, 2015), 2.

¹⁶ Ibid.

17. For ResF officers who have been trained and experienced solely within the fleet of Maritime Coastal Defence Vessels (MCDVs), they are assessed in Command Boards to determine their “potential to be a successful CO tomorrow of a minor warship.”¹⁷ Whereas RegF officers, are assessed to determine their “potential to be a successful Executive Officer (XO) tomorrow of a major warship or a successful Commanding Officer (CO) tomorrow of a minor warship.”¹⁸ While the ResF NOW training and qualification system maybe updated as the RCN adopts a total force concept, it is anticipated that the two distinct endorsement levels of the Command Qualification will remain.

18. These endorsement levels will be maintained in order to allow those ResF officer who chose to continue the current method of training to work towards Command of an MCDV, while others will be able to chose to pursue a new training path and work towards Command of either a Frigate or an MCDV, similar to their RegF counterparts. Unfortunately, while the differing endorsement levels are valid, there is a habit within the Fleet to use the minor and major warship terms to discriminate between both fleet platforms and the crew who operate within them. Given the potential for significant changes to the ResF training system which are expected to increase the integration between ResF and RegF sailors and officers within major warships, these terms should be changed to foster a more inclusive work environment.

¹⁷ Ibid., 3.

¹⁸ Royal Canadian Navy, Naval Personnel and Training Order 4500-57, *Sea Command Boards* (Ottawa: DND Canada, 2015), 3.

CONCLUSION

19. Although the MV ASTERIX cannot be considered a warship within the context of the UNCLOS, the GoC/RCN are lawfully permitted to use the vessel to conduct activities normally only associated with warships, due to additional provisions contained within the law. Within Canadian domestic law, the vessel cannot be considered a government vessel, however this does place any planning constraints on the use of the MV ASTERIX within Canadian waterways.

20. While the terms minor and major warships are appropriately used to describe separate endorsement levels and assessment standards of the NWO Command Board, the terms should be changed to foster a more inclusive work environment between ResF and RegF sailors and officers.

RECOMMENDATIONS

21. It is recommended that the terms used to describe Command Qualifications and Command Board assessment standards be modified to reflect a generalized level of capability, rather than a platform name (e.g., Halifax-class) or a term related to a platform's dimensions. Therefore, the term "Coastal Defence" is recommended to replace minor warship, the term "Surface Combatant" is recommended to replace major warship, and the term "Patrol Craft" is recommended to replace "ORCA-class Officer-in-Command (OIC)." If accepted, the terms used to describe NWO Command Qualifications would then be verbalized as follows; "Surface Combatant Command Qualification," "Submarine Command Qualification," "Coastal Defence Command Qualification," and "Patrol Craft Command Endorsement."

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