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UNIVERSALISING THE LEGAL REGULATION OF NAVAL FORCES

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Abstract. It is impossible to study the development of the legal regulation of naval forces without analysing the supranational legal component. Although the law of the sea, as defined above, has traditionally had an international private and public legal dimension, the relevant sources have for a long time been primarily customary and concerned primarily the commercial exploitation of the sea and merchant shipping. All references to the maritime power of states and their rights at sea in this dimension did not concern aspects of the specificities of military activity at sea. In fact, both normative references and doctrinal reflections on international, supranational standards of naval activity only began to emerge in the nineteenth century. *The purpose* of the article is to define the legal acts for the administrative regulation of the naval forces and to formulate approaches to universalising their definition based on the ontology of holistic approaches to legal regulation and doctrine making. *Methodology*. This study applies the methodology of interdisciplinary comparison, methods of content analysis and integration of heterogeneous features into the system, which allowed to obtain a new scientific approach, namely to characterise the legal regulation of naval forces in the context of its universalisation and to consider the formation of maritime policy in the future, including the national one. The main impetus for the development of holistic approaches to this type of activity should be seen in the adoption of bilateral and collective intergovernmental agreements on maritime issues, in particular. In particular, it is possible to refer to the documents that initiated the standardisation of the treatment of neutral and enemy ships at sea, which can be traced back to 1780. In addition, military and legal practice, especially in the context of the Black Sea Straits regime, has repeatedly raised the issue of determining the criteria for the affiliation of a particular ship to the navy. In the course of the nineteenth century, a significant number of bilateral treaties regulating aspects of naval cooperation were developed, taking into account the practice of national unilateral acts and decisions of courts martial and tribunals, and then became the subject of research by relevant scholars who were closely involved in naval practice and, at the same time, in the formation of norms. *Results*. The author concludes that at the supranational level, the issues of regulating the activities of naval forces have been traced in the treaty dimension since the late eighteenth century, primarily in the concepts of sovereignty, prohibition of privateering and prosecution of piracy, and restrictions on the activities of naval forces in certain areas. The unregulated nature of a number of aspects of supranational naval activities, notably the right of entry to foreign ports, the procedure for stopping and inspecting foreign merchant ships at sea, and the limits of the powers of foreign coastal authorities over a warship, has led to an active search for appropriate acceptable international customs and attempts to substantiate them with legal doctrine based on national statutes and the established practice of maritime states. The development of the relevant legislation is still in progress and is far from being completed, given the challenges of Ukrainian naval doctrine and the level of implementation and incorporation of international and foreign experience. In this regard, the naval policy in its internal and external dimensions is of particular importance, which is regulated both by national acts of an administrative and legal nature and by international legal sources of various origins.

Key words: blockade, warship, naval policy, naval customs, naval forces, privateering, neutral vessel, vessel flag, embargo, Black Sea straits.

JEL Classification: F42, F63, K10, K33, K49

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1. Introduction

It is impossible to study the development of the legal regulation of naval forces without analysing the supranational legal component. Although maritime law, as defined above, has traditionally had an international private and public legal dimension, the relevant sources have for a long time been primarily customary and concerned primarily the commercial exploitation of the sea and merchant shipping.

All references to the maritime power of states and their rights at sea in this dimension did not concern aspects of the specificities of military activity at sea. In fact, both normative references and doctrinal reflections on international, supranational standards of naval activity only began to emerge in the nineteenth century.

2. Ontology of formation of holistic approaches to the legal regulation of the navy

The main impetus for the development of holistic approaches to this type of activity should be seen in the adoption of bilateral and collective intergovernmental agreements on maritime issues, in particular.

In particular, the Declaration of Armed Sovereignty of 1780, signed by Austria, Denmark, the Netherlands, Portugal, Prussia, the Russian Empire, Sweden and others, should be mentioned. This document laid down the principles of the inviolability of neutral trade and called for the definition of a port blockaded during hostilities, "into which a manifest danger insists on being entered by ships stationed in its vicinity by order of the attacking power".

The Declaration provided for the application of its rules in national legal proceedings and at the same time required the belligerent powers to "give similar instructions to their admirals and commanding officers, in accordance with the principles above stated, derived from the primitive code of nations, and so often recognised in conventions".

Although this 1780 declaration remained a historical act, similar principles were adopted at the Paris Conference in April 1856. The Declaration on the Principles of the International Maritime Law stated that "privateering is hereby forever abolished; the neutral flag covers enemy cargoes, except military contraband; neutral cargoes, except military contraband, are not subject to capture under the enemy's flag; a blockade, to be binding, must be effective, that is, supported by sufficient force to effectively prevent access to the enemy's coast". (Declaration Respecting Maritime Law)

It is noteworthy that the Declaration of 1856, which was signed by more than 50 States and has lost none of its force since then, justifies the adoption of these provisions by stating that "the maritime law in time of war has long been the subject of sad disputes" and that "the uncertainty of rights and duties in this matter is the cause of disagreements between neutral and belligerent States, which may give rise to serious difficulties and even to clashes". (Declaration Respecting Maritime Law)

At the same time, a significant number of bilateral treaties regulating aspects of naval cooperation were adopted in the nineteenth century; these, together with numerous unilateral national acts and decisions of courts and tribunals, became the subject of research by relevant experts, such as the German scholar and practitioner Ferdinand Perels, who, as a military officer and then legal adviser to the Imperial Admiralty, published the monograph "Modern International Maritime Law". (Perels, 2015)

F. Perels referred to the issues of supranational regulation in the naval sphere primarily as aspects of the rights of warships, naval ceremonies, provisions on the extradition of deserters, embargoes and angary. (Perels, 2015)

Theodore Ortolan had a similar approach to the subject of regulation, and in his monograph "Reges internationals et Diplomatie de la mer" he defined the aspects of interrogation and inspection of merchant ships by the military, issues of international jurisdiction over ships, including the aspects of fugitives and deserters, the legality of seizure of a ship, its differences from privateering and corsairing, aspects of maritime ceremonial, blockade, the right of shelter, angary, insult to the flag, violation of neutrality, mutiny on board ship and the status of parliamentarians.

By embargo, T. Ortolan actually understood sequestration, i.e., the seizure of foreign merchant ships in the port that did not comply with the reasonable orders of the military authorities, and by angary he understood the forced but paid use of foreign merchant ships detained in the port for sea transport. (Ortolan, 1864; Perels, 2015) At the same time, Ortolan and Perels' work explored a fundamental issue that will continue to accompany the development of supranational maritime standards, namely the difference between a naval vessel and a civilian vessel.

T. Ortolan believed that the proof of the nationality and character of a warship was "the flag at the stern and the pennant at the top of the mast, the testimony of its commander, if necessary given in good faith, and the orders received by the commander from the sovereign". As F. Perels added, "the flag and the pennant are visible signs; but in some cases they are trusted only when they are supported by a cannon shot", and as for the documents of a warship, "no foreign power has the right to demand their submission". (Perels, 2015)

F. Perels gives the example of the dispute between Denmark and Spain in 1782 over the seizure of a Danish corvette suspected of displaying a military flag. The Danish government argued that the only sign of a warship was its military flag, and Spain was reluctant to accept this principle, turning to the mediation of Poland and the Netherlands, which promised to respect their decision. According to these countries, the main characteristic of a warship should be the presence of a commander belonging to the navy, which is "an undoubted custom for all nations". (Perels, 2015)

In general, the question of the military or civilian nature of a ship was of great practical importance, since a number of international treaties of the time established different regimes for them, particularly with regard to the use of certain international straits. This was exemplified by the Treaty of London of 13 July 1841, which closed the Bosphorus and Dardanelles to the warships of all non-Black Sea countries. (Perels, 2015)

Later, the relevant issues were regulated by the Treaty of Paris of 30 March 1856, adopted at the Paris Conference. This document prohibited access to the Black Sea for warships of all states, with certain exceptions for the Black Sea states in the form of the maintenance of "a limited number of small warships for certain coastal needs, namely 6 steamers, each not exceeding 50 metres in length and with a displacement not exceeding 800 tonnes, and 4 light steamers or sailing vessels with a maximum displacement of 200 tonnes each", as well as the right for these states to maintain "two light military vessels each to ensure the maintenance of order and to supervise the strict application of the rules of navigation on the Danube".

3. Formation of the doctrine of international and national law

One of the clauses of the Treaty of Paris was the prohibition of the establishment and maintenance of naval arsenals on the Black Sea coast. (Perels, 2015)

In addition to the definition of a warship, the doctrine of international maritime law of the nineteenth century sought, in the absence of relevant treaty provisions, to establish and explain aspects of the customary regulation of the right of warships to compel merchant ships of all countries to fly their flag in times of peace (the so-called "enquête de pavillon"), as well as the right to search for and detect ships engaged in piracy. (Perels, 2015) At the same time, in the absence of a clearly defined procedure in the treaties, scholars attributed the approval of final decisions to the discretion of the warship commander (captain).

For example, T. Ortolan pointed out that "it is very likely that the ship with which we want to start negotiations will stubbornly refuse to fly its national flag. The commander must always remember that the responsibility for what has happened lies entirely with him". This researcher added that "if the behaviour of the captain of a warship is not of the greatest prudence, he may create considerable difficulties for his government. However, the question under consideration is so important that the commander of a warship, if he feels that he has some ground under him, should not fear responsibility". (Ortolan, 1864; Perels, 2015)

In addition, the legal doctrine of the time sought to generalise the customs regarding the practical possibilities of a warship entering a port and the rights of the coastal State to limit these possibilities and impose additional conditions. These concerned the length of stay, the number of ships in a port, the obligation to give prior notice of a ship's call, the obligation to provide the coastal authorities with information on the ship, namely its flag, name, armament, number of crew, position of the master, the purpose of the call and the approximate length of stay. They also studied and summarised national regulatory practices regarding the procedure for providing repair services, bunkering, exemption from customs and other similar forms of control and payments. (Perels, 2015)

Particular attention was paid to the situation of a warship in a foreign port, including aspects of firing, boat drills and the disembarkation of crew members ashore, particularly with regard to their weapons. In this respect, F. Perels cited a special provision of the bilateral agreement between Prussia and Portugal of 1864, according to which sailors and marines of one party could go ashore in the port of the other party without weapons, exceptions being made only for the need of protection or for solemn occasions. (Perels, 2015)

At the same time, F. Perels quotes the relevant norms on the dues for the passage of warships through the international Suez Canal, which amounted to 10 francs per registered ton of the ship, regardless of other parameters, while prohibiting the collection of other, additional dues. The same norms, the author adds, applied to the conditions of passage through the canal for merchant ships chartered to transport troops, but these ships were not identified with military ones. (Perels, 2015)

The researcher also analyses a number of bilateral agreements between Germany at the end of the nineteenth century on the procedure for the stay of German warships in the ports of the respective states and territories. In particular, he draws attention to the Treaty of Friendship and Navigation between Japan and the North German Union of 20 February

1869, which included a list of Japanese ports open to German ships, the conditions for procuring provisions for warships, customs inspection privileges, and rules for loading and unloading.

F. Perels also points to the Treaty of Friendship between Germany and the King of Tonga, dated 1 November 1876, which states that "the warships of both High Contracting Parties shall have the reciprocal right to enter all waters and harbours belonging to the other Party, as well as to anchor there, to stay for a longer or shorter time, to take on all necessary supplies, to repair, subject to full compliance with local laws and regulations". In order to implement these arrangements, the agreement provided that the Tongan authorities would make land available to Germany for the establishment of a coal depot, but "without prejudice to the supreme rights of the King of Tonga in these properties". (Perels, 2015)

The researcher cites the German Treaty of Friendship with the Kingdom of Samoa of 24 January 1879, under Article 5 of which German warships were granted "the right to enter freely into the port of Saluafata, to anchor there, to remain for a longer or shorter time, to take on necessary supplies and to repair; furthermore, the German Government is granted the right to make all arrangements or give all orders for the benefit of German warships and their crews".

To implement these agreements, the German government was given "the right to fly its flag on the shore over such buildings as it may desire, provided, however, that by this act the supreme rights of the Kingdom of Samoa shall not in any way be infringed", but the latter government was not to "grant to other nations, either in the port itself or on its shores, rights equal to those of the Germans".

In contrast to these obviously unequal agreements, which determined the specifics of the regulation of Germany's naval forces abroad, the 1879 agreement between Germany and the Kingdom of Hawaii, cited by F. Perels, only provided for "free entry of military vessels into all ports, rivers or other places open to free foreign trade, with the right to count on the assistance of the local authorities in case of repairs, the need to procure supplies and provisions". (Perels, 2015)

However, while on land the status and treatment of foreign warships naturally lay in the obvious interplay of the two legal systems, since even unequal treaties and even more so customary law did not grant such subjects complete immunity from the coastal authorities, the most heated doctrinal debates, in the absence of treaty regulation, concerned the jurisdiction of the coastal state over a foreign warship in its port or waters.

At the same time, the positions of the doctrine were different, in particular, the Italian researcher of the early nineteenth century Giovanni Lampredi pointed out that only a representative of these waters can have authority in national waters, and therefore any legal power belongs to him alone. (Lampredi, 2022) The Portuguese international lawyer of the same period, Sylvester Pinheiro Ferreira, noting that issues of discipline and service relations undoubtedly remain under the jurisdiction of a warship due to "its meaning and nature", believed that in other matters both the ship and its crew should be considered to be under the jurisdiction of the port. (Pinheiro Ferreira, 1863)

F. Perels, commenting on these theses, gives a system of examples of categorical disagreement with this approach on the part of some states at the time, including Great Britain. He cites an example of English warships not handing over to the coastal authorities slaves who had managed to escape to English warships during their stay in states where, unlike Great Britain, the principle of slavery was recognised as legal. (Perels, 2015)

In this respect, the nineteenth-century English internationalist Robert Fillimore was quite categorical, stating that "long practice and custom make it possible to define every warship as a part of the country to which it belongs, and therefore to place such a ship outside foreign jurisdiction". (Phillimore, 1854)

At the same time, the researcher notes that it is no longer known "whether this privilege is based on the strict principles of natural international law or whether it arose from the need for courtesy, which gradually became law". But in any case, R. Fillimore inferred from this situation the international custom according to which, with regard to a foreign warship, "any State which has not formally notified the non-recognition or denial of this custom of the civilised world, is deemed by its silence to be bound to grant this privilege to foreign warships in its ports". The same privileges are enjoyed by all the boats and guns of a warship, the author adds. (Phillimore, 1854)

The Italian international lawyer of the nineteenth century, Raphael Schiattarella, in his work "The Law of Neutrality in War at Sea", stated that the respective unlimited jurisdiction of warships is their exclusive property, based on "the respect that different independent States should show to each other", and therefore the author identified the subordination of a warship of one country to the laws of another as the subordination of one State to another. However, the author also pointed out the loss of the inviolability of a warship if its crew commits a crime on the coast or in the harbour of a foreign state against the interests of this state or its inhabitants. (Schiattarella, 1880)

4. Formation of Ukrainian Naval Doctrine

The analysis of the development of naval doctrine in terms of the relevant complex and at the same time integrated phenomenon, which undoubtedly includes both internal and external functions of the state, is undoubtedly impossible without a comprehensive consideration of the relevant historical experience, as well as a general understanding of maritime policy in the context of the development of the international legal order, as emphasised by contemporary authors (Hong, 1995, p. 97).

Of course, certain aspects of naval activities are reflected in the basic United Nations Convention on the Law of the Sea of 1982 (UNCLOS'82), developed in numerous supranational legal practices and implemented in modern naval standards, in particular with regard to the categories of warships, their immunities, rights of innocent passage, the powers of a warship to control events and vessels in waters under different legal regimes, etc.

It is clear that not only the development of relevant international standards, but also their national implementation face the same or similar organisational and legal challenges as the states of the eighteenth and nineteenth centuries. The relevant challenges for maritime administration are recognised by modern researchers (Vanchiswar, 1996, p. 6–7) and are undoubtedly part of the factors influencing the development of naval policy and practice and the conditions for its current implementation, particularly in the context of Russia's large-scale maritime aggression against Ukraine in the twenty-first century.

In this dimension, a number of approved national program documents can be mentioned, such as the National Program for Research and Use of Resources of the Azov and Black Sea Basins and Other Areas of the World Ocean for the Period up to 2000, approved by the Decree of the President of Ukraine of December 16, 1993, No. 595/92 (National Program, 1993) and the subsequent Maritime Doctrine of Ukraine until 2035 (Maritime Doctrine, 2009) in its gradual development (Maritime Doctrine 2009, Maritime Doctrine 2015, Maritime Doctrine 2018), in particular in the context of Ukraine's European and Euro-Atlantic integration.

In particular, the decision of the National Security and Defence Council of Ukraine (NSDC) of 12 October 2018 "On Urgent Measures to Protect National Interests in the South and East of Ukraine, in the Black and Azov Seas and the Kerch Strait", approved by Presidential Decree No. 320/2018 of 12 December 2018, cannot be ignored (On the Decision of the National Security and Defence Council of Ukraine of 12 October 2018 "On urgent measures to protect national interests in the south and east of Ukraine, in the Black Sea, the Azov Sea and the Kerch Strait": Decree of the President of Ukraine of 12 December 2018 No. 320/2018). This decision stipulated, inter alia, that Ukraine, in accordance with its obligations as a coastal state under the 1982 UN Convention on the Law of the Sea, should inform in the prescribed manner of the danger to navigation in the territorial sea and internal waters of Ukraine in the Black and Azov Seas and the Kerch Strait caused by the temporary occupation of part of Ukraine's territory and Russia's aggressive actions.

Referring to Ukraine's Maritime Doctrine, the NSDC decision stipulated that the consequences of Russia's creation of conditions complicating Ukraine's economic activity in the Black Sea, the Sea of Azov and the Kerch Strait should be analysed. These provisions were further developed in the Military Security Strategy of Ukraine, approved by the NSDC Decision and Presidential Decree No. 121/2021 of 25 March 2021 (On the Decision of the National Security and Defence Council of Ukraine of 25 March 2021 "On the Military Security Strategy of Ukraine": Decree of the President of Ukraine of 25 March 2021 No. 121/2021).

As stated in the Strategy, interaction in the process of Ukraine's comprehensive defence requires coordination of measures taken in the state in preparation for armed defence and protection in the event of armed aggression or armed conflict against Ukraine, during the post-conflict reconstruction period, with measures taken to assist Ukraine by the institutions of the European Union, NATO and its member states, other states and international organisations.

The document states that the legal basis for the comprehensive defence of Ukraine, naturally taking into account the needs for protection against maritime aggression, is the Constitution of Ukraine and other acts of Ukrainian legislation, international treaties ratified by the Verkhovna Rada of Ukraine, which corresponds to the sovereign inalienable right of any state to self-defence against aggression enshrined in the UN Charter. Thus, the analysis, consideration and implementation of international standards is an important component of Ukraine's defence against maritime aggression and, accordingly, it is an integral part of Ukraine's national naval doctrine and should be reflected in the legal and organisational support of the Ukrainian Navy.

These requirements are also reflected in the Strategy of the Naval Forces of the Armed Forces of Ukraine (AFU Navy) 2035. According to this document, published in 2021, the purpose of the Ukrainian Navy is to deter aggression, protect the sovereignty and territorial integrity of Ukraine, ensure maritime security, economic growth and international stability at sea and from the sea in cooperation with national

defence and security forces, strategic partners (Strategy of the Naval Forces of the Armed Forces of Ukraine 2035. The Navy of the Armed Forces of Ukraine).

According to the Strategy, the main objectives of the Ukrainian Navy in the course of operations (combat actions) at sea for the defence of the state should be to prevent enemy actions (sea denial) and, subsequently, to control a certain area of the sea (sea control). This can be achieved through air defence, anti-surface warfare, anti-submarine warfare, mine countermeasures, electronic warfare, missile and artillery strikes, amphibious assault, and special operations at sea and on rivers.

Ensuring a range of maritime security measures, the strategy adds, includes mastering the maritime environment, maintaining the safety of navigation, combating terrorism and the proliferation of weapons of mass destruction at sea, protecting critical maritime infrastructure, participating in international naval operations and exercises led by NATO, the European Union and the United Nations, and other military cooperation activities with partner states and organisations.

As Eduard Pleshko notes in this regard, in the context of a large-scale interstate armed conflict at sea, Russia's maritime aggression, which disregards international law and threatens international security, is a serious problem and extremely relevant for Ukraine. The temporary occupation of Crimea demonstrates to us the conduct of various hybrid operations to cover up the crime of aggression.

At the same time, the author emphasises that the 1994 San Remo Regulations on the Law of Naval Warfare are an example of modern international law taking into account the significant specificities of military operations in the maritime sphere, as opposed to the actions of ground forces. However, he also raises the question of whether international law should define the relevant specifics of maritime aggression (Pleshko, 2023).

It is necessary to acknowledge the importance of the parliamentary declaration "On the aggression of the Russian Federation in the Black and Azov Seas and the Kerch Strait" mentioned by the contemporary authors, approved by the Verkhovna Rada of Ukraine on 20 September 2022, No. 2595-IX (On the Statement of the Verkhovna Rada of Ukraine "On the Aggression of the Russian Federation in the Black and Azov Seas and the Kerch Strait": Resolution of the Verkhovna Rada of Ukraine of 20 September 2022, No. 2595-IX).

With this declaration, the Ukrainian Parliament recalled that the blockade of a state's ports or coasts by the armed forces of another state is an act of aggression, and that aggressive war is a crime against international peace. It states the indisputable duty of modern civilised States to maintain international peace and security and, to this end, to take effective collective measures to prevent and eliminate threats to peace and to suppress acts of aggression or other breaches of peace, with which one cannot but agree.

The thesis of the Declaration on the need not only to condemn the aggression of the Russian Federation in the Black and Azov Seas and the Kerch Strait, but also to support Ukraine, as a victim of aggression, in the exercise of its inalienable right to self-defence, as well as the need to take effective collective measures to eliminate the threat to peace and suppress acts of aggression by the Russian Federation in the Black and Azov Seas and the Kerch Strait, including operations to ensure freedom of navigation, deserves unquestionable support.

Thus, Ukraine's naval doctrine is currently in a state of constant development in view of the large-scale and systemic challenges posed by Russia's maritime aggression. It is the development of this doctrine, taking into account international standards and examples of its successful implementation and realisation by the leading maritime powers of today, that should form the basis for effective legal and organisational support of the activities of the Ukrainian Navy.

5. Conclusions

Thus, at the supranational level, the issues of regulating the activities of naval forces can be traced in the treaty dimension since the late eighteenth century, primarily in the concepts of sovereignty, prohibition of privateering and prosecution of piracy, as well as restrictions on the activities of naval forces in certain areas.

The unregulated nature of a number of aspects of supranational naval activities, notably the right of entry to foreign ports, the procedure for stopping and inspecting foreign merchant ships at sea, and the limits of the powers of foreign coastal authorities over a warship, has led to an active search for appropriate acceptable international customs and attempts to substantiate them with legal doctrine based on national statutes and the established practice of maritime states.

The implementation of the successful experience of supranational regulation of naval forces in Ukraine is based on the constant development of relevant strategic and programmatic documents on maritime activities in general, as well as on repelling and countering Russia's naval aggression and building the capabilities of the Ukrainian Navy in today's extremely difficult conditions.

At the same time, certain practical challenges faced by the Ukrainian Navy, namely the

determination of the criteria for the neutrality of ships, the identification of ships belonging to military forces, the use of the right of passage and the right to stay, especially in waters with a special legal status, are traditional for the legal support of naval forces and therefore undoubtedly require a thorough analysis of the development of relevant supranational standards, especially in the practice of their implementation by the world's leading maritime countries, especially in the Euro-Atlantic dimension.

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