

Principles of International Law, 15.12.2023

The Case Concerning the Gulf of Winds (The Union v. Styria)

Please make sure that your answer does not exceed 650 words.

The Union and Styria are two states, separated by the Circle Sea. On the high seas, closer to the territorial waters of The Union lies an area called the Gulf of Winds, which has traditionally been a highly popular fishing place for both Union and Styrian fishermen.

Both The Union and Styria joined the UN in 1951 and posited Declarations with the Secretary-General of the United Nations under Article 36(2) of the Statute of the International Court of Justice. Both declarations stated that: “The Government declares that it recognizes as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice.” The Union, however, also posited a reservation which states that: “This Declaration shall not apply to any dispute with regard to matters which are essentially within the domestic jurisdiction of The Union, as determined by the Government of The Union.”

Throughout the 1950s, The Union considerably extended its navy, becoming the dominant military power in the region. On 11 May 1961, it declared the area from its territorial waters to the end of the Gulf of Winds on the opposite side to be its Exclusive Economic Zone (EEZ). In a press conference, King Guslav declared that the Union wishes to maintain good relations with all its neighbouring states but is prepared to do whatever it takes to protect its EEZ from activities of foreign nations, and in particular from illicit fishing. Styria’s Ambassador to The Union stated in a radio interview that she is “unpleasantly surprised to hear about The Union’s regrettable decision, which seriously compromises the good relations between our States”. Styria did not react in any other ways and Styrian fishermen stopped fishing in the Gulf.

In the early 1990s, The Union plunged into a chaotic state, following a civil war in its northern regions, skirmishes against the Gurkhul Empire in The Union’s former colonies, and King Guslav’s death. Starting in the late 1990s, Styria-flagged private fishing vessels started fishing again, with increasing frequency, in the Gulf of Winds. The Union’s Ministry of Foreign Affairs issued a number of press releases calling for the immediate cessation of such fishing activities. The Ministry also sent numerous diplomatic notes to the Embassy of Styria in The Union, protesting against the activities by Styria-flagged vessels. In the face of such protests, Styria’s government remained silent, not replying to any of the diplomatic notes sent by the Ministry of Foreign Affairs of The Union. The only official statement was made on 1 November 2005 by Styria’s Minister of Foreign Affairs, Ms. Monza Murcatto, who declared that “the capabilities of Styria’s law enforcement fleet are not sufficient effectively to prevent fishing in areas outside its territory.”

As a result of Styria's inaction, The Union's navy started patrolling more intensely in its claimed EEZ. The Union's navy expelled numerous fishing vessels on the ground that they did not possess a valid fishing licence as required under The Union's legislation, and confiscated seven cargoes of fish allegedly caught in its EEZ. However, these measures were not a sufficient deterrent against continued fishing by other Styria- flagged vessels.

Following the 2019 General Election, Styria's government changed. Shortly after it took office in April 2019, Styria's new Prime Minister, Ms Shylo Vitari, stated in a television interview that "Styria's government expresses solidarity with the owners and operators of vessels flying its flag, which conduct lawful fishing activities in international waters in the Bay of Winds".

In May 2019, several newspapers reported that groups of Union's fishermen had started patrolling the Bay of Winds, harassing Styrian vessels. Styrian fishermen reported being chased away from the Bay and in some cases having their vessels forcefully boarded and fish catches taken.

In October 2019, UN reports stated that "what were once fragmented groups of The Union's fishermen have apparently organized themselves into an armed fleet." The Report continued that "the fishermen are heavily armed with military-grade weapons and equipment," and that raids against Styrian vessels indicated "a high level of prior planning and training". Some witnesses also claimed having overheard the fishermen taking orders from what appeared to be Navy officers.

On 10 January 2022 at 23:50, the Styrian Coast Guard received a distress call from a Styrian fishing vessel. According to the captain of the vessel, it and two other vessels had been opened fire against in the Bay of Winds and were now chased full speed towards Styria's territorial waters, which they would reach within 25 minutes. The Coast Guard sought to contact the Union-flagged vessels chasing the Styrian vessels, as well The Union's state authorities. However, as the calls were not answered, Styria's military decided to prepare its fighter jets and the Coast Guard moved the three vessels that it had in the area to the high seas, just outside Styria's territorial waters, to intercept the vessels. A few minutes afterwards, the Coastal Guard vessels reported that the Styrian fishing vessels were approaching Styria's territorial waters, chased by four highly armed Union-flagged vessels, moving at alarming speed. Furthermore, a fifth, larger Union-flagged vessel, with what appeared to be a missile launcher on its deck, was further behind, also moving towards Styrian territorial waters, but about 10 minutes behind the others. The Coastal Guard also reported hearing shots fired between the vessels.

The Coastal Guard vessels tried once more to reach radio contact and, after failing, also attempted to visual signals and warning shots, but again to no avail. When the first four Union-flagged vessels were 10 seconds from Styria's territorial waters, Styrian fighter jets fired 12 missiles at them, sinking them all. After that, the fighters continued towards the high seas and sank also the fifth vessel, following the others further behind. None of the 28 persons on board the vessels survived.

Following the incident, The Union filed a case against Styria in the International Court of Justice, arguing that Styria had violated international law 1) through the illicit fishing activities

of Styria-flagged vessels in the Gulf of Winds; and 2) by sinking the five Union-flagged vessels and killing their crew. Styria answered that the ICJ does not have the jurisdiction to hear the second claim because it is a domestic Styrian matter, and that both of The Union's submissions are in any event without merit.

Styria is not a party to the UN Convention on the Law of the Sea. It has also persistently objected against the rules codified in it from becoming customary international law. The law of the sea is therefore not relevant for the present dispute, despite the dispute occurring on the seas.

You are an assistant to one of the judges of the ICJ. Please give your legal opinions on the following two questions:

- 1) Did the activities of the Styria-flagged fishing vessels in the Gulf of Winds constitute a breach of Styria's obligations under international law?
- 2) Does the Court have the jurisdiction to hear that claim regarding the sinking of the Union-flagged vessels, and assuming it does, did Styria violate international law in sinking the vessels?

Fallet Angående Vindviken (The Union v. Styria) (svarsutymme 650 ord)

The Union och Styria är två stater som är åtskilda av Cirkelhavet. Vindviken ligger i Cirkelhavet, närmare The Unions territorialvatten. Vindviken har traditionellt varit ett väldigt populärt fiskeställe för fiskare från båda länderna.

Både The Union och Styria gick med i FN år 1951 och placerade förklaringar till UN:s generalsekreterare enligt artikel 36(2) av den Internationella domstolens grundregler. Båda förklaringar löd som följande: "Regeringen förklarar att den erkänner Internationella domstolens behörighet ipso facto och utan särskild överenskommelse är giltig gentemot varje stat som godtar samma förpliktelse i alla tvister av internationell rättslig art". The Union däremot lämnade en reservation där det konstaterades att "Denna förklaring gäller inte tvisteärenden, som till väsentliga delar hänför sig till The Unions nationella jurisdiktion, såsom The Unions regering definierar den."

Under 1950-talet utökade The Union sin flotta betydligt, och blev den dominerande militärmakten i området. Den 11 maj 1961 förklarade den att området från dess territorialvatten ända till Vindvikens motsatta sida vara dess Exklusiva Ekonomiska Zon (EEZ). I en presskonferens proklamerade King Guslav att The Union vill uppehålla sina goda förhållanden med alla dess grannstater, men är förberedd att göra vad än det kräver för att skydda sitt EEZ från främmande staters aktiviteter, och särskilt från olagligt fiske. Styrias ambassadör till The Union konstaterade i en radiointervju att hon är "besviken att höra om The

Unions beklagansvärda beslut, vilket allvarligt kompromissar de goda förhållandena mellan våra Stater”. Styria reagerade inte på några andra sätt och styriska fiskare slutade fiska i Vindviken.

I början av 1990-talet sjönk The Union ner i ett kaotiskt tillstånd på grund av inbördeskriget i norra delen av landet, striderna med Gurkhul kejsardömet i The Unions gamla kolonier och Kung Guslavs död. I slutet av 1990-talet började privata fartyg under Styrias flagg åter fiska, i ständigt ökande omfattning, i Vindviken. The Unions utrikesministerium utfärdade ett antal pressmeddelanden där man krävde att denna fiske verksamhet omedelbart skulle upphöra. Ministeriet sände också flera diplomatiska noter till den styriska ambassaden i The Union, där verksamheten av fartygen under Styrias flagg protesterades. Styria svarade inte på protesterna. Det enda officiella yttrandet antogs den 1 november 2005 då Styrias utrikesminister Monza Murcatto konstaterade att ”Styrias brottsbekämpande myndighets flottas kapacitet är inte tillräcklig för att effektivt hindra fiske i områden utanför dess territorium.”

Som en följd av Styrias passivitet började The Unions flotta allt mera intensivt patrullera i EEZ:n som den förklarar. Flera fartyg deporterades av The Unions flotta på grund av att de inte hade ett giltigt fisketillstånd vilket förutsätts enligt The Unions lagstiftning och beslagtogs sju fiskfångster som påstods ha fiskats i dess EEZ. Dessa åtgärder var dock inte tillräckliga för att begränsa de styriska fiskarnas verksamhet i området.

En ny regeringen valdes in efter år 2019:s val. Strax efter att den nya regeringen tog makten i april 2019 förklarade den nye premiärministern Shylo Vitari i en TV-intervju att ”Styrias regering uttrycker sin solidaritet med ägare och besättningar av fartyg som för dess flagg medan de lagligen fiskar i internationella vatten i Vindviken.”

I maj 2019 rapporterade flera tidningar att grupper av The Unions fiskare hade börjat patrullera Vindviken och trakasserade styriska fartyg. Många styriska fiskare rapporterade att de hade jagats bort från Viken eller att deras skepp hade blivit bordade och deras byte stulits under hot om våld.

I oktober 2019 konstaterades det i UN:s rapport att ”de tidigare splittrade grupperna av The Unions fiskare har uppenbarligen organiserat sig till en väpnad flotta”. Rapporten fortsatte med att ”fiskarna är tungt beväpnade med vapen och utrustning av militärgrad,” och att angreppen mot styriska fartygen indikerade ”en hög nivå av planläggning och träning”. En del vittnen påstod också att de hade hört fiskare ta emot instruktioner från vad verkade vara flottofficerare.

Den 10 januari 2022 kl. 23:50 fick den styriska kustbevakningen ett nödmeddelande från ett styriskt fiskefartyg. Enligt kaptenen på fartyget hade man öppnat eld mot den och två andra fartyg i Vindviken, och som bäst jagades de med full fart mot de styriska territorialvattnen, som de skulle nå efter 25 minuter. Kustbevakningen försökte kontakta The Unions fartyg som jagade de styriska fartygen samt The Unions myndigheter. När ingendera av kontaktframställningarna besvarades, förberedde den styriska armen sina jaktplan, och tre av kustbevakningens fartyg i området flyttades till öppet hav precis utanför Styrias territorialvatten för att förbereda sig för att ta emot fartygen. Några minuter senare

rapporterade kustbevakningens fartyg att de styriska fartygen närmade sig Styrias territorialvatten, jagade av The Unions fartyg som rörde sig med alarmerande hastighet. Dessutom följde ett femte större fartyg under The Unions flagg, som verkade ha en missilkastare på däck, omkring tio minuter efter de andra och rörde sig också mot Styrias territorialvatten. Kustbevakningen rapporterade också att de hörde skottlossning mellan fartygen.

Kustbevakningen försökte än en gång få radiokontakt med The Unions skepp, och att efter att ha misslyckats prövade de också med visuella signaler och varningsskott, men utan resultat. När de fyra första fartygen under The Unions flagg befann sig tio sekunder från Styrias territorialvatten, avfytrade de styriska jaktplanen tolv missiler mot dem och sänkte dem alla. Efter detta fortsatte jaktplanen mot det öppna havet och sänkte även det femte fartyget, som följde efter de andra. Ingen av de 28 personer ombord fartygen överlevde.

Till följd av denna incident väckte The Union talan mot Styria vid Internationella domstolen och hävdade att Styria hade brutit mot internationell rätt på två sätt: 1) genom olagliga handlingar av privata fiskefartyg som för Styrias flagg i Vindviken, och 2) sänkandet av fem fartyg under The Unions flagg samt dödandet av deras besättningar. Styria svarade att domstolen inte har behörighet att pröva det andra påståendet, eftersom det faller under Styrias nationella behörighet, och att The Unions båda argument i vilket fall som helst saknar rättslig grund.

Styria är inte medlem i UN:s havsrättskonvention (UNCLOS) och har ihärdigt motsatt sig att dess kodifierade regler blir bindande sedvanerätt. Havsrätten är därför inte relevant för den tvisten, trots att tvisten förekommer på havet.

Du är assistent till en av ICJ-domarna. Du har blivit ombedd att ge din juridiskt motiverade opinion på frågorna nedan:

- 1) Bröt den verksamhet som de privata fiskefartygen under Styrias flagg utövade i Vindviken mot Styrias internationellrättsliga förpliktelser?
- 2) Är Internationella domstolen behörig att pröva påståendet om nedsänkning av fartyg under The Unions flagg, och förutsatt att den är det, bröt Styria mot internationell rätt när den sänkte fartygen?

Model answers

These answers are written from the perspective of The Union. However, an answer that gained full points could be written from either side, or from a 'neutral' perspective. Some pointers for Styria can be found in the Notes. Furthermore, it should be emphasized that these model

answers are not “perfect” (although they would result in full points), and it was indeed possible to gain points for details and arguments not mentioned in the model answers.

Question 1

Examples of relevant things to mention

- Art 2 ARSIWA
- Elements of Art 2
- Lotus principle
- Acquiescence OR regional custom
- Requirements of acquiescence OR custom
- Cases (Temple/Pedra Branca OR Fisheries/Asylum/Right of Passage)
- (Unilateral declaration might yield points, if very well-argued)
- (Analysing different legal rules, if particularly well-argued)
- Attribution
- Art 11 ARSIWA
- Elements of Art 11
- Tehran Hostages case
- Failure to prevent

According to Article 2 ARSIWA, which reflects customary international law, a state is responsible only for breaches of international law that are attributable to it. There are therefore two issues in this question. The first is whether there is an obligation prohibiting Styria from fishing in the Gulf of Winds. The second is whether Styria can be held responsible for the actions of the private fishing vessels.

To start with the first issue, according to the Lotus principle, states are free to act as they wish until they are prohibited from doing so by a rule of international law. The question to be raised is whether there exists a rule that binds Styria to respect The Union’s acclaimed EEZ and its prohibition against illicit fishing. According to the rule of acquiescence, recognized for example in the Temple of Preah Vihear case, silence or inactivity can under certain circumstances create a binding obligation. As stated in the Pedra Branca/Pulau Batu Puteh case, the requirements are that the situation called for a response and that the other party has relied on the silence in good faith. The duration of the silence may also play a role.

In the case at hand, Styria’s Ambassador regretted The Union’s decision, but Styria did not protest in other ways. In particular, Styria did not state that it challenges the lawfulness of The Union’s decision. Furthermore, the Styrian fishing vessels stopped fishing on the Gulf. As The Union’s public statement – which was likely to have an impact on the legal relations between the states – called for a response from a protesting party, and Styria seemed to comply with

The Union's decision for decades, The Union had a right to rely on Styria's acquiescence in good faith and Styria was estopped from changing its mind later on.

[See note 1 for an alternative argument regarding (regional) custom and persistent objection, as well as regarding threat of use of force. See also note 4 on unilateral declaration]

As to the issue of attributability, the starting point is that a state is responsible only for the acts of its organs. However, under certain circumstances, the acts of private actors can also be attributable to the state. The applicable rule for the circumstances of the present case is the customary rule codified in Article 11 ARSIWA, which holds that an act is attributable to a state "if and to the extent that the State acknowledges and adopts the conduct in question as its own." This was the case for example in the Tehran Hostages case where the Ayatollah Khomeini approved the actions of the students that had taken American citizens as hostages, did not intervene in any way, and even used the hostages as a bargaining chip against the USA. Somewhat similarly, in the case at hand, Prime Minister Vitari has expressed the government's solidarity with the private fishing vessels and claimed that their actions are lawful. Styria can therefore be seen to have acknowledged and adopted the acts, which have hence become attributable to it. [See note 2 for the opposite view]

Furthermore, although not a question of attribution per se, states can be held responsible for their failure to prevent actions of private actors within their jurisdiction that can violate the right of other states, provided that those violations are foreseeable, and the state could prevent them by acting diligently. Styria has been well aware of the acts of the private vessels as a consequence of The Union's protests but has elected not to do anything to stop this. The illicit fishing has therefore been foreseeable to Styria, but it has not acted with due diligence to prevent them. It has therefore violated international law by failing to prevent the fishing.[For the opposite view, see note 3]

In conclusion, Styria's acquiescence had created a binding obligation forbidding it from fishing in the Gulf. As Styria had acknowledged and adopted the acts of the private fishing vessels as its own, it has violated that obligation. Alternatively, Styria has violated international law in failing to prevent the fishing.

*Note 1: It was in theory also possible to argue that there had emerged a (regional) custom related to the EEZ, much like in the Anglo-Norwegian Fisheries case. Many students had indeed gone in this direction, and I did award (up to maximum) points for that option as well. The difficulty with this line of argumentation is, however, that we don't know how other states reacted to the EEZ. Thus, the best line of argumentation in this regard would probably be based on some kind of historic rights-like regional custom, similar to the Right of Passage over Indian Territory case. If students opted for the custom route, then persistent objection also became a relevant issue. Styria probably didn't object persistently enough as its initial reaction was not an explicit rejection and it seemed to comply with the new EEZ for a long time (much like UK in the Anglo-Norwegian Fisheries case). Many students also argued that the Styria's silence may have been due to Union's threats of use of force. This is a reasonable argument, although I do not think that Union's ambiguous statement is explicit enough to

cross the threshold of threat of use of force. Styria could have also stated more explicitly that it does not accept the new (in its view unlawful situation), even if it stays away from the area out of fear of forceful measures by the Union.

****Note 2:** Styria has a strong counterargument here, making the case that although it has acknowledged the acts, it has not adopted them as its own. Indeed, unlike in the Tehran Hostages case, it has not sought to take clear advantage of the situation. It has also not explicitly stated that it would consider the acts as its own (although claiming that they are legal could implicitly do so).

*****Note 3:** The failure to prevent argument is not very strong. As the illicit fishing happens outside the territorial waters of Styria (and in an area over which The Union claims jurisdiction), its chances to control the actions of the private fishers is quite minimal. We should probably also give Styria the benefit of doubt that its statement about insufficient resources is an honest one.

******Note 4:** It is technically incorrect to treat The Union's statement as a unilateral declaration (like in the Nuclear Tests cases) since The Union is not promising anything or taking on an obligation but rather claiming a right. The situation is more similar to the Anglo-Norwegian Fisheries case. I did not punish students for this, however, as the issue is debatable and in any event something that we didn't clearly discuss during the lectures.

Question 2

Examples of relevant things to mention: Question 2

- Art 36(2) ICJ/optional clause declaration
- Reservation to declaration
- Reciprocity
- Norwegian Loans case (or Djibouti v. France – but this was not discussed during lectures)
- Genocide Convention AO (custom)/ Art 19(c) VCLT (not technically applicable (non-retroactivity))
- Prohibition of use of force: Art 2(4) UN Charter
- Self-defense Art 51 UN Charter/ Art 22 ARSIWA Caroline doctrine/ practice
- Non-state actors OR attributability to Union
- Proportionality
- Necessity
- Oil Platforms or other cases
- Distinguishing between the 5th vessel and the other four

There are two issues here: First, whether the ICJ has jurisdiction to hear the case; and secondly – if it does – whether Styria can justify the sinking of the vessels as self-defence.

Both states have accepted the ICJ's jurisdiction under Article 36(2) of the ICJ Statute. However, The Union has submitted a reservation that limits the ICJ's jurisdiction "with regard to matters which are essentially within the domestic jurisdiction of The Union, as determined by the Government of The Union". According to customary international law (later codified in Art. 21(1) VCLT, which is not directly applicable to the present dispute, both because the parties have not ratified it and because of its non-retroactivity), reservations can be invoked reciprocally, as exemplified by the Norwegian Loans case, where Norway invoked France's reservation which was almost identical to the present one. Hence, Styria, which has not objected to the Union's reservation, can invoke it to its own benefit. At this point, two further questions emerge. The first is whether an automatic reservation like the present one is valid at all. According to the customary rule recognized in the Genocide Convention Advisory Opinion (and now codified in Article 19(c) VCLT), reservations to treaties are possible as long as they do not are not incompatible with the object and purpose of the treaty. Whether 'automatic reservations' are compatible with the ICJ Statute is a debated question, but since Styria has not contested the current reservation (and is in fact now invoking it), and the ICJ has previously accepted similar reservations, the reservation is likely to be valid. The second question, then, is whether the Court can assess the Styria's use of the reservation, considering its automatic or self-executing character ('as determined by...'). In Norwegian Loans the majority of the judges held that it cannot, but more recent practice (e.g. Djibouti v. France) suggests that the Court might be able to assess whether the reservation was applied in 'good faith' [See Note 5 for an alternative view]. In the case at hand, Styria has sunk five Union-flagged vessels outside its territory. Hence, if the Court were to decide to assess the situation from a good faith perspective, it would be likely not accept its characterization as a domestic matter. Thus, the case does not fall under the reservation and the ICJ has jurisdiction. [For an alternative view, see Note 6]

As to the sinking of the vessels, the use of force is prohibited in international law, according to Article 2(4) of the UN Charter (UNC). However, there is one exception to this prohibition, namely self-defence under Article 51 UNC and Article 21 ARSIWA [Countermeasures are not applicable here! Neither is distress. See Note 7]. Attacks against military vessels trigger the right of self-defence, according to established state practice, and attacks against private vessels (like in the present case) most likely do so, too. According to the Caroline doctrine, self-defence must be a response to a threat that is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Hence, attacks against Styrian-flagged vessels and armed vehicles (almost) entering Styria's territorial waters can most likely trigger Styria's right to self-defence. Furthermore, a textual reading of the Article 51 UNC and state practice seem to suggest that self-defence is a right can be exercised also against non-state actors. [It was also possible to argue that the acts of the Union-flagged vessels are attributable to The Union. See Note 8]

However, use of force under self-defence must also meet two further criteria: it must be proportionate and necessary. In assessing these criteria, it is important to distinguish

between the four vessels that were mere seconds away from Styria's territorial waters, on the one hand, and the fifth vessel, that was further away, on the other. The first four vessels seem to pose an instant threat that left little deliberation to Styrian authorities. As they posed a direct threat to Styrian vessels and territorial integrity, use of force against them can be seen as necessary, especially since the authorities had done their due diligence in trying to contact and draw the attention of the vessels in various ways. As to proportionality, the use of force should be weighed against the threat posed. The intensity of the situation is such that the use of potentially lethal weaponry was most likely warranted, but the use of 12 missiles seems quite excessive [On the other, it could be argued that when the decision to use lethal force has been made, it matters little whether it is done with one precise missile or 12 of them].

When it comes to the fifth vessel, however, the assessment is different. Although the fifth vessel was more threatening in that it was armed with a missile launcher, it was further away. There was therefore still time to try to contact it or to see how it reacts to the use of force against the first four vessels. It seems therefore like a similar 'target of opportunity' as the Iranian oil platforms in the Oil Platforms case, in which the ICJ rejected USA's claim that the use of force was necessary. Furthermore, it can be questioned whether it was necessary for the Styrian authorities to move from their territorial waters to the high seas to 'hunt' for the vessel (although the fact that it was armed with a missile launcher could perhaps justify this). The lack of necessity also puts the proportionality of the use of force in question as the immediacy of the threat posed by the fifth vessel seems quite low.

To conclude, the ICJ has jurisdiction and Styria violated international law because sinking the fifth vessel was not necessary and the use of force went beyond what was proportionate.

*Note 5: One view, originally presented by Judge Lauterpacht in his opinion in Norwegian Loans, is that automatic or self-executing reservations are indeed against the object and purpose of the Statute of the ICJ. What this would mean in practice is another question. Lauterpacht himself argued that the result is that the reserving state has never accepted the ICJ's jurisdiction and the ICJ cannot therefore decide the case. Human rights courts and treaty monitoring bodies, by contrast, have taken the view (in the context of human rights treaties) that the reservation is null and void and the Court/body has jurisdiction as if the state had accepted it without the reservation.

**Note 6: Another, more technical, reading, with support from the Norwegian Loans case, would be that because it was indeed for Styria to determine what is within its domestic jurisdiction, it is not for the Court to involve itself in the assessment but that only Styria's view counts.

***Note 7: Countermeasures are not applicable because they cannot be used to justify use of force. And in any case the requirements would not be met. The tests under countermeasures and self-defence (or other circumstances precluding wrongfulness) should also not be mixed. The proportionality test under countermeasures (violation by other party vs countermeasures) is different than the proportionality test under self-defence (threat vs. the use of force in self-defence) and the rules are in any case completely separate from each other. Distress is not

applicable because the act cannot create a larger peril – which sinking five ships with over a dozen missiles no doubt is.

**** Note 8: There is some evidence suggesting that the Union-flagged vessels were under the control of The Union, in accordance with Article 8 of ARSIWA. They were armed with military-grade weapons and acted with the kind of discipline that suggested military training. They were also seen to communicate with military officials. Without further evidence of direct orders, however, it is difficult to argue effective control, in line with the Nicaragua case. The overall control test, applied by ICTY in the Tadic case, would probably be met, but the ICJ has made it quite clear in the Bosnian Genocide case that it prefers to use the effective control test. Article 11 of ARSIWA could also be applicable, although the case facts don't mention clear acknowledgment of the actions of the fishermen (and adoption is only implicit, too).