

International Max Planck Research School for Maritime Affairs
at the University of Hamburg

Philipp Wendel

State Responsibility for Interferences with the Freedom of Navigation in Public International Law



Springer

HAMBURG STUDIES ON MARITIME AFFAIRS 11

International Max Planck Research School for Maritime Affairs
at the University of Hamburg

Philipp Wendel

State Responsibility

HAMBURG STUDIES ON MARITIME AFFAIRS 11

International Max Planck Research School (IMPRS)
for Maritime Affairs
at the University of Hamburg

Hamburg Studies on Maritime Affairs

Volume 11

Edited by

Jürgen Basedow
Peter Ehlers
Hartmut Graßl
Hans-Joachim Koch
Rainer Lagoni
Gerhard Lammel
Ulrich Magnus
Peter Mankowski
Marian Paschke
Thomas Pohlmann
Uwe Schneider
Jürgen Sündermann
Rüdiger Wolfrum
Wilfried Zahel

Philipp Wendel

State Responsibility
for Interferences
with the Freedom
of Navigation
in Public International Law

Dr. Philipp Wendel
Akademie Auswärtiger Dienst
Schwarzer Weg 45
13505 Berlin
philipp.wendel@gmx.de

Library of Congress Control Number: 2007934272

ISSN 1614-2462

ISBN 978-3-540-74332-3 Springer Berlin Heidelberg New York

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilm or in any other way, and storage in data banks. Duplication of this publication or parts thereof is permitted only under the provisions of the German Copyright Law of September 9, 1965, in its current version, and permission for use must always be obtained from Springer. Violations are liable to prosecution under the German Copyright Law.

Springer is a part of Springer Science+Business Media

springer.com

© Springer-Verlag Berlin Heidelberg 2007

The use of general descriptive names, registered names, trademarks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Production: LE-TeX Jelonek, Schmidt & Vöckler GbR, Leipzig
Cover-design: WMX Design GmbH, Heidelberg

SPIN 12110667 64/3180YL - 5 4 3 2 1 0 Printed on acid-free paper

Preface

No dissertation without a decent preface – and no legal dissertation without an elaborated structure, particularly if an author with a German background bears responsibility for it. Thus, even this preface will need to carry some structure. This study could not have been accomplished without three kinds of support: institutional, academic and personal.

As far as it concerns the institutional support, the International Max Planck Research School for Maritime Affairs deserves first-hand mentioning since it provided a scholarship and excellent research opportunities at the Max Planck Institute in Hamburg. Furthermore, the libraries at the University of Miami, the University of Hamburg, the International Tribunal for the Law of the Sea and the International Maritime Organization contributed significantly to the research for this study.

The academic support consisted mainly in the intensive dialogue with the author's teachers and colleagues. First of all, the supervisor of this thesis, Professor Dr. Rainer Lagoni inspired the author to choose this topic and by critically, but constructively questioning main arguments increased their respective strength. Both Professor Dr. Lagoni and the second reviewer, Professor Dr. Peter Ehlers were particularly helpful by speedily reviewing the thesis. Earlier teachers of the author such as Professor Dr. Wolfgang Graf Vitzthum, Judge Hugo Caminos of the International Tribunal for the Law of the Sea and Professor Bernard H. Oxman also provided some substantial input. Furthermore, the presentation of some of the thesis' arguments in discussions within the Research School led to new ideas, some of them central to the main results of the thesis. Finally, stimulating and witty conversations with Mr. Jens Bopp, a fellow Ph.D. student with a similar subject, reciprocally benefited the respective studies.

Thirdly, the author could rely on constant personal support by his parents Anke and Wolfgang and by Franziska Geibel.

The author would like to use this occasion to convey his most profound gratitude to the afore-mentioned persons because of their important contribution toward this study.

Hamburg, June 2007

Philipp Wendel

Contents

Abbreviations	XIII
Introduction	1
Chapter I: The perpetual conflict between freedom and security in the Law of the Sea	5
A. The freedom of navigation – cornerstone of the Law of the Sea	5
I. Freedom of navigation – an instrument of common sense rather than a legal argument	6
II. Exclusive Flag State Jurisdiction – from an instrument to maintain maritime power to a key to liberalize maritime transport	9
III. Free navigation for worldwide economic growth and development	12
B. Security concerns brought forward to interfere with navigation.....	16
I. Piracy – an ancient, but persistent business	17
II. Terrorism and weapons of mass destruction – the new dominant concern.....	25
1. Scenarios of terrorist attacks on maritime trade	26
2. Potential economic impact of terrorist attacks on maritime trade.....	28
3. Preventive and repressive measures to combat maritime terrorism	29
a) Ship and port security	29
b) Interception operations	32
III. Undocumented Migration	36
IV. Narcotic drugs and psychotropic substances.....	39
V. Illegal fishing	44
VI. Pollution.....	47
VII. Fading away and back-up grounds for interferences.....	49
C. Legal limits for interferences and the role of State responsibility	51
Chapter II: Principles drawn from the treaty provisions on State responsibility for interferences with navigation on the high seas	57
A. Treaty interpretation	58
I. Interpretation of the wording	60
II. Interpretation of the context.....	61

III. Object and purpose	63
IV. A hierarchy of methods under Art. 31 VCLT	64
V. Supplementary means of interpretation	65
B. An individual right to claim compensation?	67
I. The ordinary meaning of the relevant provisions	68
II. Context.....	70
1. The structure of the Law of the Sea Convention.....	70
2. The conventions succeeding the Law of the Sea Convention.....	71
3. Subsequent practice.....	72
4. Rules of general international law.....	75
5. Invocation of State responsibility by private entities in maritime matters	79
6. The primary right affected by the interference.....	84
a) Freedom of navigation: a right of the flag State or of the “ship”?	84
b) The relevance of the right to property	88
7. Conclusion	91
8. Meaning of “the ship”	91
III. Object and purpose	93
IV. Preparatory work	94
1. The Law of the Sea Convention.....	94
2. The Intervention Convention	97
3. The Straddling Fish Stocks Agreement.....	101
4. The Migrant Smuggling Protocol.....	104
5. The 2005 Protocol to the SUA Convention	106
V. Conclusion	111
C. The act entailing responsibility: requirement of wrongfulness?	112
I. Art. 110, para. 3 LOSC, the prototype of liability for lawful conduct in the Law of the Sea.....	113
II. Hot pursuit under Art. 111, para. 8 LOSC.....	115
III. The seizure of pirate ships under Art. 106 LOSC.....	116
IV. Interferences under the Intervention Convention.....	118
V. Liability for interfering with the navigation of fishing vessels under the Fish Stocks Agreement	120
VI. Interferences in order to combat Migrant Smuggling	120
VII. Terrorism interdiction operations under the 2005 SUA Protocol	122
VIII. The effect of the special nature of the compensation provisions	123
IX. Conclusion	125
D. Responsibility for attempted interferences	126
E. The liable entity – particularly in situations of multilateral boardings	127
I. Bilateral boardings.....	128
1. The few indications in the analyzed provisions	128

2.	The principles in the general law on State responsibility	130
a)	Attribution	130
b)	Participation.....	132
(1)	Aid and assistance.....	133
(2)	Direction and control	133
(3)	Vicarious liability for internationally lawful conduct?	134
3.	Joint and several liability?.....	135
II.	Interdictions within the framework of International Organizations	139
1.	The scope of interferences involving International Organizations	140
2.	Responsibility of the international or regional organization?	143
a)	The United Nations.....	144
b)	Regional organizations enforcing embargoes on the seas	146
c)	Operation Enduring Freedom	148
d)	Conclusion.....	149
3.	Responsibility of member States for wrongful acts by an International Organization.....	149
4.	The applicability of the compensation provisions to International Organizations.....	153
5.	Conclusion	156
F.	The effect of conduct by the boarded party	156
I.	Clean Hands Doctrine	156
II.	The limited reception of the doctrine in international maritime conventions	161
III.	Contributory negligence in the general law on State responsibility	162
IV.	Contributory negligence in cases codified by maritime conventions.....	164
G.	Consensual boardings	165
H.	The extent of responsibility	170
I.	A comparison of the different provisions.....	170
1.	The link between the conduct by the responsible State and the damage	170
2.	Qualification of the damage	173
a)	“Any loss or damage”.....	173
b)	“Any damage, harm or loss”.....	175
II.	The provisions and the general law on State responsibility	176
III.	Types of damages which may be claimed and their calculation	179
1.	Delay of the vessel	179
2.	Expected profits	182
3.	Value of the vessel and cargo.....	184
4.	Detention and mistreatment of the crew.....	186
5.	Punitive damages	189

6. Interest	192
a) Starting date.....	193
b) When does the interest stop to run?.....	195
c) The interest rate.....	195
7. Currency of the compensation	196
8. Damage to the flag state.....	197
9. Costs and expenses.....	198
10. The ability of the respondent State to compensate.....	199
IV. The Intervention Convention: distinction between disproportionate and proportionate damages?	200
J. Some procedural issues.....	203
I. The onus of proof.....	203
II. Competing claims of protection.....	207
III. An obligation to forward the compensation award to the victim?	210
Chapter III: The U.S. strategy: 28 bilateral treaties and the Proliferation Security Initiative.....	215
A. The 1924 Liquor Treaties	216
B. The 1981 Exchange of Notes.....	217
C. Bilateral anti-drugs and migration agreements	219
I. Shipboarding.....	222
II. Shipriders.....	223
III. Entry-to-investigate and pursuit.....	224
IV. Conclusion	225
D. Liability under the loose framework of the Proliferation Security Initiative .	225
E. Ship Boarding Agreements within the framework of the Proliferation Security Initiative	227
F. United States law on State Liability	229
Chapter IV: Compensation for interferences in international conflicts	233
A. The law of naval warfare	233
I. Three views concerning the legality of visit and search of neutral vessels in times of war	234
II. Compensation under the traditional law of naval warfare	236
III. Liability under the San Remo Manual	241
IV. The restrictive view and its consequences for State responsibility	242
V. The development of the damages covered in the law on State responsibility and its consequences for the law of naval warfare	242
VI. Conclusion	244
B. Interdictions authorized by the United Nations Security Council.....	244

Chapter V: Conclusions and outlook	249
A. Major conclusions.....	249
B. Outlook to the future of the liability regime concerning interferences with navigation on the high seas	251
Annex 1: Relevant compensation provisions	253
Annex 2: Bibliography	255
Annex 3: Table of cases	279

Abbreviations

A.C.	Law Reports: Appeal Cases
ADM	Annuaire du droit de la mer
ADMO	Annuaire de droit maritime et océanique
AFDI	Annuaire français de droit international
A.F. L. Rev.	Air Force Law Review
AJIL	American Journal of International Law
Asian Yb. Int'l L.	Asian Yearbook of International Law
ASIL	American Society of International Law
ASR	Articles on State Responsibility
ATS	Amphetamine-type stimulants
AVR	Archiv des Völkerrechts
Barn. & Ald.	Barnewall and Alderson
BGBI.	Bundesgesetzblatt
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BVerfG	Bundesverfassungsgericht
BYIL	British Yearbook of International Law
Can. Yb. Int'l L.	Canadian Yearbook of International Law
CFR	Code of Federal Regulations
Chinese J. of Int'l L.	Chinese Journal of International Law
Ch. Rob.	Christopher Robinson's Admiralty Reports
CHS	Convention on the High Seas
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
CSI	Container Security Initiative
CSO	Company Security Officer
CSR	Continuous Synopsis Record
Ct.Cl.	Court of Claims
C-TPAT	Customs-Trade Partnership against Terrorism
DADP	Draft Articles on Diplomatic Protection
Dods.	Dodson's Admiralty Reports
EC	European Community
ECJ	European Court of Justice
ECOMOG	Economic Monitoring Group
ECOWAS	Economic Community of West African States
E.C.R.	European Court Reports
ECT	Treaty Establishing the European Community
EEZ	Exclusive Economic Zone

Emory Int'l L. Rev.	Emory International Law Review
Eng. Rep.	English Reports
ETS	European Treaty Series
EU	European Union
EUV	Vertrag über die Europäische Union
FAO	Food and Agricultural Organization
FBI	Federal Bureau of Investigation
F.Cas.	Federal Cases
F.Supp.	Federal Supplement
FTCA	Federal Tort Claims Act
GYIL	German Yearbook of International Law
Harv. Int'l L. J.	Harvard International Law Journal
Hofstra L. Rev.	Hofstra Law Review
HVR	Humanitäres Völkerrecht
ICCPR	International Covenant on Civil and Political Rights
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICS	International Chamber of Shipping
ICSID	International Centre for the Settlement of Investment Disputes
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IMB	International Maritime Bureau
IMCO	Inter-Governmental Maritime Consultative Organization
IMO	International Maritime Organization
Ind. Int'l & Comp. L. Rev.	Indiana International and Comparative Law Review
Int'l J. Estuarine & Coast. L.	International Journal of Estuarine and Coastal Law
Int'l J. Mar. & Coast. L.	International Journal of Marine and Coastal Law
Iran-U.S.C.T.R.	Iran-United States Claims Tribunal Reports
ISPS	International Ship and Port Security
ISF	International Shipping Federation
ISSC	International Ship Security Certificate
Italian Yb. of Int'l L.	Italian Yearbook of International Law
ITF	International Transport Workers' Federation
ITLOS	International Tribunal for the Law of the Sea
ITLOS Pleadings	International Tribunal for the Law of the Sea, Pleadings, Minutes of Public Sitings and Documents
J. Int'l L. & Politics	Journal of International Law and Politics
J. Int'l Maritime L.	Journal of International Maritime Law

J. Mar. L. & Com.	Journal of Maritime Law and Commerce
LLP	Lloyd's of London Press
LNTS	League of Nations Treaty Series
LOSC	Law of the Sea Convention
LRAD	Long Range Acoustic Device
MARPOL	International Convention for the Prevention of Pollution from Ships
MOU	Memorandum of Understanding
MT	Motor Tanker
MV	Motor Vessel
NATO	North-Atlantic Treaty Organization
Naval L. Rev.	Naval Law Review
Netherlands Ybk. Int'l L.	Netherlands Yearbook of International Law
ODIL	Ocean Development and International Law
OECD	Organisation for Economic Cooperation and De- velopment
OJ	Official Journal of the European Communities
OPGE	Entscheidungen des Oberprisengerichts
P.	Probate Division (Law Reports)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PSC	Port State Control
PSI	Proliferation Security Initiative
RdC	Recueil des Cours de l'Académie de Droit Interna- tional
REDI	Revista española de derecho internacional
Rev. Gén. Dr. Int'l Publ.	Revue Générale de Droit International Public
RFO	Regional Fisheries Organization
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RIAA	Reports of International Arbitral Awards
SDN	Société des Nations
SODA	Status of Force Agreement
SOLAS	International Convention on Safety of Life at Sea
SS	steamer
SSO	Ship Security Officer
SSP	Ship Security Plan
SUA Convention	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
Sydney L. Rev.	Sydney Law Review
Syracuse J. Int'l L. & Com.	Syracuse Journal of International Law and Com- merce
TEU	Twenty foot equivalent unit
Tex. Int'l L. J.	Texas International Law Journal
Tul. Mar. L. J.	Tulane Maritime Law Journal
U.K.T.S.	United Kingdom Treaty Series
U. Miami Int.-Am. L. Rev.	University of Miami Inter-American Law Review