

When is a ship a ship?

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Armed forces around the world are rapidly developing uncrewed maritime vehicles (UMVs) for use in military operations. Key to the strategic value of UMVs is that they have no people on board, and instead are remotely controlled or, in the future, will be able to carry out some or all of their mission autonomously. But will they fit into the existing categories of the law of the sea and the United Nations Convention on the Law of the Sea (UNCLOS)? This brief considers whether two of the basic classifications of this body of law — being categorised as a ‘ship’ and being a ‘warship’ — require people to be on board the vehicle and thus excludes UMVs. It argues that while the better interpretation of ‘ship’ in UNCLOS is wide enough to include both remotely controlled and autonomous UMVs, the same may not be true for the interpretation of ‘warship’.

Qualifying as a ‘ship’ will allow UMV access to important navigational rights

The category of ‘ship’ — synonymous with ‘vessel’ for the purposes of UNCLOS — is critical for the distribution of rights and obligations in the law of the sea. Categorisation as a ship allows for a much more straightforward assessment of what the device can do, where it can go, and how other States can respond to it. It would make it clear that UMVs could engage in navigation through the territorial waters of foreign states by engaging in innocent passage, transit passage and archipelagic sea-lane passage. This is key for their strategic value to state armed forces.



'Ship' in UNCLOS is broad enough to encompass U MVs

The word 'ship' is not defined in UNCLOS. However, its plain meaning is conducive to a broad interpretation. 'Ship' is a generic word and can refer to a wide range of devices, from large commercial container ships to much smaller sailing vessels. Indeed, most scholars who considered the status of U MVs accept that at least some will be ships.

In fact, the only requirement for qualification as a ship should be that the device is 'found in the sea' and has a link to the flag state. A narrower definition would be inappropriate given the role of the word in UNCLOS, and the nature of the UNCLOS regime. There may be provisions that apply differently in light of the size and capacity of the U MV, but this is no different to any other ship.

The interpretation of 'ship' is an example of when an evolutionary interpretation of international treaty law should be preferred. The history of maritime technology shows the drafters must have been aware that technological change would occur in shipbuilding, navigation, and means of propulsion, and would have intended that the concept of 'ship' in UNCLOS be able to accommodate these changes. The broad scope of UNCLOS suggests that the very significant threshold question of what amounts to a ship should be read widely to ensure that it continues to apply to new technology.

Could a U MV be a warship?

While it seems safe to conclude that U MVs will be ships that have access to navigational rights under UNCLOS, it is not at all clear that they will be able to be classified as a 'warship.' Warships — which are a subset of ships and vessels — are generally understood to be the only vessels that can exercise belligerent rights, including launching attacks and participating in blockades. Warships are defined in article 29 of UNCLOS 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.

It would be straightforward for a U MV to meet some of the requirements of this definition: they can belong to the armed forces of a state and could easily be given external marks. But can they be 'under the command of an officer' and 'manned by a crew'?

There are some indications that U MVs could be warships

The definition of warship ensures belligerent rights are only held by state vessels. The category of 'warship' emerged in international law in the 19th century to distinguish state vessels ('warships') from the vessels of privateers. Its role as part of an effort to outlaw privateering makes clear that the parts of the definition in relation to command and crewing were about ensuring it was not a private vessel, not about preventing uncrewed ships. There is also some precedent for expanding of belligerent rights to uncrewed devices. Several states have designated un-crewed aerial vehicles as 'military aircraft.'

The explicit requirement for warships to be 'manned' is a significant barrier for U MVs

Nevertheless, the requirement for a warship to be 'manned' by a crew and commander may be an insurmountable hurdle. The existing state practice suggests that this is the case. For example, the 2017 *US Naval Commanders Handbook* places U MVs in a separate category to warships. For a U MV to be a warship, it would have to be accepted that the object and the purpose of the definition — to distinguish state and private vessels and empower state vessels with belligerent rights — overrides the apparent plain meaning of the provision. State practice would be needed to convincingly justify such an approach.

States should put their views on the record

One cause of the current ambiguity is the unwillingness of states to make their legal position known. Given the best view is that U MVs are ships capable of exercising navigational rights, more states should be public about this conclusion. Doing so will help minimise the risk of conflict between states by helping other states appreciate the stakes of interfering with a U MV exercising a navigational right. ●



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