Chapter 1
Law, Power, and the Sea

The principles of justice are unchanging as the great sea itself, the least variable thing, so far as its essential nature is concerned, in the external world; its applications are as inconstant as the many different kinds of craft that have floated and will float on, under and above that sea.¹

– Ernest Jelf, 1921

There are areas of legal certainty in matters relevant to naval peacekeeping, but not many.²

– Francoise Hampson, 1994

The impact of the 1982 Law of the Sea Convention, which entered into force on 16 November 1994, and the influence of that convention on naval operations, have yet to be fully felt.³

– David Letts, 2001

Context

On 11 September 1999, according to credible reports received by news agencies and human rights organisations,⁴ thirty-five young East Timorese men were forced by pro-Indonesian militias, with the possible complicity of members of the Indonesian military, to board an Indonesian vessel. They were then taken out to sea, executed, and their bodies dumped overboard. Four days later, on 15 September 1999, the United Nations Security Council (UNSC) passed Resolution 1264 (1999) authorising a multinational force – INTERFET – to deploy into East Timor. Its mandate was essentially to re-establish order in the wake of destructive post-referendum vio-

lence unleashed upon pro-independence East Timorese. If the chronology had been reversed, however, and INTERFET naval forces had been authorised and present at the time of these killings, forced relocations, and abuses at sea, the desire to respond, and then to act preventively, would likely have been overwhelming – on both a human and a political level. Indeed, when faced with as unambiguous a situation as that alleged to have occurred on 11 September 1999, few commanders would fail to want to act. The issue, however, is their authority to do so. And this specific circumstance is merely one example among a range of situations that may run counter to, or impede the effective discharge of, UNSC sanctioned missions.

What is at Stake?
The observations as to uncertainty encapsulated in the quotes prefacing this chapter remain as true today as in 1921, 1994, or 2001. As Politakis has rightly observed of the law relating to naval operations more widely

The subject matter does not lend itself to easy answers. In fact, long neglect has blurred the picture to the point that problems have now assumed an acute, some would even say insurmountable complexity.

What has changed, however, is the pressure for immediate, and immediately examinable, decisions to be made within this variable legal vacuum. This has enlivened the essential nature of the problem from one of academic interest to one of concurrent practical importance, carrying with it a concomitant pressure to decide. This pressure stems from the fact that any decision, even one not to intervene, is highly likely to be internationally visible, carrying in its wake instant political accountability. Justification invariably seeks solace in legal arguments, many of which, on reflection, often owe more to time constraints and expedience than to consistent legal provenance. Unless handled carefully, such ad hoc or expedient legal justifications can have unintended consequences which may impede the future development of more sustainable approaches. This is particularly so where the law being followed, exploited, or both (as is usually the case) operates in an internationally fractious and contested space – as is the case with UN naval peace operations, which are the focus of this book.
