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THE RIGHT OF SELF-DEFENSE AND THE LAW OF NAVAL WARFARE

Natalino Ronzitti

The subject of my report is the problem of self-defense and how to reconcile the right of self defense with the law of naval warfare at sea. It seems that the first question scholars have to answer before embarking upon a study is whether the rules which now govern hostilities at sea are within the limitations on the use of force embodied in the United Nations Charter, and do they then have any part in the law regulating naval warfare? This law is very old and was established almost entirely in a period when the use of force in international relations was permitted. In effect, the states enjoyed a restricted right to wage war when most of these rules of naval warfare were drafted. They came into force and were applicable to the state of war then in existence. Minor forms of action which could not be claimed as war in a proper sense, the legal intercourse between the conflicting states on the one hand and third states on the other, continued to be governed by the law of peace. For instance, measures of economic warfare against third states and the institution of prize courts were not permitted.

Nowadays, it is difficult to say what the holdings are on naval warfare when the London Protocols on Submarines are brought into force. This is for two reasons. First, because the distinction between war and peace is blurred, states are unwilling to affirm that the state of war is in existence lest they be accused of acting in contravention of the United Nations Charter prohibition. Secondly, armed force is allowed only in self-defense and must meet the prerequisites of necessity and proportionality. Therefore, one wonders whether the theory of self-defense has any influence on the law of naval warfare. Put in a different way, the point at issue is whether the body of law which regulates hostilities between belligerents is brought into force in its entirety once armed conflict has broken out, or whether that law must be reconciled with the notion of self-defense as embodied in the Charter and needs to be selectively applied.

A preliminary question to be answered is what conditions are necessary for applying part of, or all of, the rules of warfare at sea. Are they to be applied in every instance of self-defense, or only if a true war of self-defense occurs? Are they to be aimed at the resisting arm of aggression or only if the states are conducting larger scale hostilities? As we will see, state practice shows that naval use

in bello has also been applied in the case of conflicts which could not technically be defined as war between the states. In effect, the Hague Conventions on Naval Warfare and the London Protocols on Submarines stated that they apply only if a war occurs. The four Geneva Conventions and Protocol I of 1977, shifted the conditions of application; they have to be implemented not only in case of a war, but also in case of armed conflict.

One can therefore say that the conditions of application of the rules existing prior to the Geneva Conventions, which have been almost entirely transformed into international custom, have increasingly changed. As you can see, that law must be updated according to the newly drafted rules, with the consequence that rules, now no longer fair, apply both in case of war and in case of any other armed conflict. Needless to say, this conclusion cannot solve all the difficulties which may arise. In effect, the doctrine of armed conflict can be of some help in finding rules to govern intercourse between the belligerents, since one can assume that the rules of naval warfare also apply in the case of small scale conflicts. This is confirmed by the International Court of Justice judgment in the *Nicaragua Case*, a classic instance of limited scale conflict, where the Court stated that the Hague Convention VIII should be applied by the states responsible for mining in Nicaraguan harbors.

Difficulties arise when instances occur in which belligerents are allowed to take measures against federal states enforcing the law of contraband. Are they permitted to the shore only if a state of war has been proclaimed, or even in cases involving measures short of war? The answer has to be found in the law of self-defense and in the test of necessity and proportionality. Enforcing belligerent rights against the federal states would be a permitted activity only if it can be justified in terms of self-defense. It is obvious that whatever measures belligerents are willing to take, these measures have to be enforced in the ways dictated by the law of war. For instance, should belligerents resort to the doctrine of contraband, they have to comply with rules on visit and search, and consequently they cannot sink neutral shipping on sight. The view that a formal state of war is no longer a condition for applying rules on naval warfare will have to be tested by state practice. For the sake of clarity, I have distinguished the relations between belligerents from those between belligerents and third states.

We will start with the relationship of belligerents. On this I would like to make four points. First is visit and search of belliger-

ent merchant ships; second, areas of naval oppression; third, landover mines; and fourth, humanitarian law. What about search and visit of belligerent merchant ships? One extreme view affirms that measures of economic warfare could not be resorted to in case of hostilities that are short of a war. Enemy merchants ships could even enjoy the right of innocent passage through straits controlled by the adverse party. However, state practice does not support this view. The following instances drawn from the Arab-Israeli conflict and from the Iran-Iraqi war can be quoted.

In the first conflict, Egypt exercised belligerent rights against Israeli shipping even though the operations were confined to Arab territorial and internal waters. Large scale operations of economic warfare have been resorted to and are still being carried out in the current Iran-Iraq conflict. Therefore, one can say that the measures of economic warfare are not in themselves inconsistent with the right of self-defense, but they are lawfully exerted in so far as they meet the test of necessity and proportionality. Taking into account the criteria of necessity, it is reasonable to state that in a larger scale conflict, measures of economic warfare are justified, while in a small conflict they are less justified or not justified at all. In areas of naval oppression, I see this topic only on the level of self-defense; otherwise, there would be some overlapping of law in this paper. The problem in this case is whether hostilities can be conducted anywhere, even on the high seas, or whether there are some restrictions.

Let us review the facts. At the time of the Arab-Israeli conflict, the hostilities were in general confined to territorial or internal waters. In 1967, when an Egyptian Styx-missile sunk the *Eilat*, an Israeli destroyer, Egypt claimed that the *Eilat* was within Egypt's territorial waters. During the Vietnam war, naval operations were confined to the contiguous zone of South Vietnam, and after the Gulf of Tonkin Incident, to the territorial waters of North Vietnam. The 1971 Indo-Pakistani war lasted a limited period of time, but naval activities were carried out with no area restrictions. In the Falklands-Malvinas conflict, hostilities were limited to an area of 200-miles around the archipelago, both in the case of the exclusion zone and the total exclusion zone. Since the United Kingdom proclamation reserved an additional measure outside the zone in order to meet the Argentine threat, the sinking of the Argentine cruiser *General Belgrano* outside the 200-mile zone was justified as a measure of self-defense under the Charter. Naval operations in the Iran-Iraqi war are almost entirely confined to the

Gulf area, even if this seems to be motivated by the factual situation rather than by deliberate legal policy.

What is my tentative conclusion at this point? I would say that the practice shows a tendency to confine naval operations to areas close to the coast of belligerents, and even today, their territorial waters. However, it is difficult to say whether this practice is dictated by a legal conviction regarding the coastline or by considerations of opportunity, as for instance, when belligerents have limited naval capability.

The third point is the problem of mine warfare. Apart from the *Corfu Channel Case* and that of floating mines in the Red Sea in 1984, mines have been employed three times since the Second World War. In 1972, the United States laid mines to block the North Vietnam harbor of Haiphong. During the Falklands-Malvinas war, Argentina laid mines around the archipelago. In its operation against Nicaragua, the United States mined a number of Nicaraguan harbors, claiming that it was acting in self-defense against Nicaragua, which was giving covert assistance to rebel forces in Honduras. According to the United States, and for this information I am indebted to Professor Lowe, the proportionate use of naval mines can be a legitimate means of interrupting a flow of arms destined for infiltration into the territory of the victim. This last measure was tested at the International Court of Justice in the *Nicaraguan Case*, and the World Court condemned the violation of the Hague Convention VIII, but did not rule out the laying of mines *per se* or as a measure which would be forbidden in all circumstances.

Last but not least, is the humanitarian law. Law dealing with purely humanitarian provisions of sea warfare, such as the status of hospital ships or the treatment of abandoned or shipwrecked persons was largely honored during the Falkland-Malvinas war. This law is mainly spelled out in the second Geneva Convention and in Protocol I. The law's application depends on the existence of an armed conflict and the fact that emphasis has shifted from a state of war to one of self-defense does not have any influence on the enforcement of humanitarian provisions.

Now we are going to deal with the more difficult problem of the relationship between belligerents and neutrals in terms of self-defense. According to a strict interpretation of the United Nations Charter, neutrality would have been abolished. In case of armed conflict, the Security Council would have determined which state was the aggressor and which had been the object of armed attack.

Member states would have been prevented from helping the aggressor, but they would have been free to help the attacked state. Since Chapter 7 has been implemented, this assertion is not realistic and one can only say that neutrality has been abolished only so far as the Security Council has determined who the aggressor is. If not, neutrality is an institution which still holds good in international law.

The problem is to see whether the old law of neutrality is still in force or whether it should be consolidated with the law of the U.N. Charter. I am distinguishing here between the rights of neutrals toward belligerents on the one hand and the rights of belligerents towards neutrals on the other. First, rights of neutrals toward belligerents. As the Colonel points out, it may be that the prohibition of the usual force under the Charter: "has deprived belligerents of the rights which they previously possessed against neutrals, such as the right of a visit and search on the high seas and seizure of contraband." He adds, "but to say if the comment is true, that the neutrals have no right would be to help them protect the victims of violence and would be retrogressive and hardly consistent with the aspirations of a contemporary international law." Therefore, one can say that the basic rule is that neutrals must not be molested in so far as they conform with the duties of neutrality. This is an elementary but important truth.

For instance, it is difficult to reconcile the above principle with the 200-mile total exclusion instituted by the United Kingdom around the Falklands, in so far as any third party merchant ship which ventured into the zone without being authorized was presumed to be assisting in the "Argentine invasion." It is worth pointing out that the writer affirms that the total exclusion zone is unlawful under the classic law of neutrality, but can be considered lawful under the rationale of self-defense. This is true even when third party rights are involved. My view is that if the total exclusion zone was unlawful under the classic rule of neutrality, *a fortiori*, it has to be considered unlawful under the law of self-defense as adumbrated in the Charter.

Even more difficult to assess are the relationships between belligerents and neutrals. Here I would like to address three points: first, the doctrine of contraband; second, that of reprisal; and lastly, that of a blockade.

Regarding contraband, the lawfulness of the exercise of traditional rights of visit, search, and seizure of contraband must be evaluated according to the requisites of necessity and proportional-

ity. These measures are not in themselves inconsistent with the right of self-defense, as one can imply from the practice of the states. First, during the Arab-Israeli conflict, Egypt exercised its right of visit and search over neutral shipping, even if the ships on the high seas were not boarded. In 1951, the United Kingdom stated that Egypt had no right to do so, since no state of war existed. The United Kingdom would not have questioned the traditional rights of belligerents, had such a status existed. During the Vietnam War, South Vietnam enacted a decree on April 25, 1965 under which any ship in South Vietnamese territorial waters could be visited and searched. The decree stated that ships were "subject to arrest and disposition as provided by the law of the Republic of Vietnam in conformity with the accepted principles of international law." Similar measures were also taken in an area of 12 miles, in addition to the coast, though this was justified more on the doctrine of the Maritime Exclusionary Zone than of conflict.

The Indo-Pakistani wars are also relevant. During the 1965 conflict, Pakistan seized Indian cargo on neutral ships and instituted a prize court. India challenged the Pakistani conduct on the ground that a formal state of war did not exist. Pakistan's counter-argument was that the maritime measures were a lawful exercise of the right of self-defense under the charter. During the 1970 War, India boarded and searched about 115 neutral ships and captured three Pakistani merchant vessels.

During the Falklands-Malvinas conflict, the United Kingdom established a total exclusion zone around the Falklands which had an impact on the navigation of neutral shipping. Any ship entering the zone without the authorization of the British Ministry of Defense was presumed to be assisting the Argentine occupation of the Falklands.

However, major belligerents have enforced the doctrine of contraband. A remarkable number of merchant vessels are involved in the Iran-Iraq conflict, and although I have not had the time to really study the problem of freedom of navigation in the Gulf as discussed at the Venice summit, I have reviewed a considerable body of practice. There are two Security Council Resolutions, number 540, which was passed in 1983, and number 552, which was passed in 1984, both of which affirm the right of free navigation. The latter condemns the attacks against commercial vessels and demands the end of "any interference with ships en route to and from states that are not parties to the conflict."

It is open to question whether Resolution 552 refers only to

the practice of attacking neutral shipping or also rules out the doctrine of contraband. The representative of the Netherlands seemed to affirm the law of neutrality and did not challenge the right of belligerent states to visit and search. Even the United Kingdom seems to allow the enforcement of the doctrine of contraband, as it did not protest when in January 1986 a British container ship was visited by the Iranian navy in the Gulf of Oman.

It is well worth noting that the United States recently decided to escort its vessels, and in May 1986 a United States ship was protected by the United States Navy, which prevented an arrest. This called for a protest from Iran, which claimed its right to enforce the doctrine of contraband. In October 1985, (I am relying on the Rousseau practice in the *Revue Generale de Droit International Public*) a French frigate prevented the French ship from being boarded by the Iranian navy.

These last practices have not been consistent, despite the fact that the United States regarded it to be in keeping with the law. Consider that on January 12, 1986, a United States freighter was visited by the Iranian navy and the exercise of right over this visit was not challenged. Even the Soviet Union did not challenge the right of visit when the Iranian navy visited two Soviet freighters in the Persian Gulf for the first time last September.

Reprisals. In naval warfare, belligerent reprisals affect the rights of neutrals more than in land warfare. In particular, one can quote the practice of war zones and restricted submarine warfare. The Iranian practice of attacking neutral shipping in retaliation for the war zone declared by Iraq around the Khargh terminal has met with protest from the affected states and was condemned by the two United Nations Security Council Resolutions just quoted. Taking into account the clear tendency to limit belligerent reprisals, one might conclude that such reprisals are not in keeping with the right of self-defense, at least in so far as rights of neutrals are affected. Therefore, if an operational or war zone is created as a reprisal against the wrongful conduct of an adverse party, it is sure to be operative only among belligerents and not against neutral shipping.

Turning now to the topic of blockades. Leaving aside the Hai-phong mining, since the Second World War there has been little or no practice to test the attitude toward blockade. In effect, the blockade seems to have become an obsolete method of warfare. Other methods, such as the laying of mines or the institution of war zones, seem to be preferred. During the 1971 Indo-Pakistani

war, rumors were raised of a blockade over the Gulf of Bengal, but no formal blockade was proclaimed. While blockades affect the rights of third states, in so far as it is confined to the territorial waters of the adverse party, it cannot be deemed inconsistent with the right of self-defense.

My conclusion to date is just a tentative conclusion. Leaving aside the humanitarian provisions, the extreme view states that the traditional law of naval warfare applies only if the state of war has been formally declared. In all other instances of armed conflict, hostilities should be confined to territorial waters of the belligerents and no measure of economic warfare should be enforced against third states.

This view, however, is neither based on sound rationale nor is it in keeping with international practice, and the end result is the curtailment of the the law of naval warfare. As practice shows, no state of war has been formally proclaimed since the United Nations Charter was entered into force, with the possible exception of the Iran-Iraq war. One has to point out that the rights of belligerents at sea nowadays flow from the institution of self-defense and not from a state of war, as the right to wage war has been abolished.

The problem is thus to reconcile the traditional law of naval warfare with the right of self-defense. The entering into force of the Charter has not completely abolished the traditional law of warfare at sea. However, the entering into force of the Charter and the general prohibition of the use of force has had an impact on the institutions of naval warfare, which were created during a time when international law allowed a restricted right to wage war.

The consequence is that the interpreter has to find out which routes have been extinguished, which have survived in their entirety, and which are undergoing necessary changes. The new law of the United Nations has limited the rights between belligerents regarding the areas where hostilities are fought. Since practice shows a tendency to confine naval operations close to the coast of the adverse party and to limit the zone of operations, the rules which seem to have undergone a major change are those granting belligerents rights against neutrals. These rights have been greatly influenced by Article 51 of the Charter. So, this conclusion applies, or should be applied, to the following institutions: to reprisals - in so far as they protect the rights of neutrals; to blockades - even though the blockade has become an obsolete method of warfare; to war zones - enforced against neutrals which in any case are re-

garded as unlawful according to the Charter law.

On the contrary, measures of economic warfare seem to be still lawful provided that they are justifiable in terms of necessity and proportionality; they are considered legitimate even if the rights of third states are involved. It would be completely unreasonable not to allow belligerents to take action against neutral vessels which may be loaded with cargoes of war material and bound for an enemy.

Thank you very much, Mr. Chairman.

