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Methods and Means of Naval Warfare in Non-International Armed Conflicts

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Introduction

The law of naval warfare is part of the larger body of law applicable to international armed conflicts.¹ Accordingly, it applies to an armed conflict between two or more States, including conflicts involving State-sponsored forces.² Whether the law of naval warfare also applies to situations of non-international armed conflicts is a contentious issue. Therefore, the distinction between international and non-international armed conflicts is important when it comes to the applicability of the law of naval warfare to a particular armed conflict.

Unfortunately, the distinction between international and non-international armed conflicts is less clear than it seems at first glance. On the one hand, the “facts on the ground” may make it difficult to draw the line of demarcation between the two.³ Additionally, international scholars have taken quite different positions. For some, the distinctive criterion is the identity of the parties to the conflict, with the issue being whether or not those parties qualify as States under public international law.⁴ For others, it is not the identity of the parties alone, but also the geography of an armed conflict; they are prepared to apply the law applicable to international armed conflict to any case in which armed conflict “crosses the borders of the state,”⁵ even if one of the parties is a non-State actor.⁶ Still others believe that the distinction has become irrelevant, because, they maintain, the formerly

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separate bodies of law have merged into a single body of law applying equally to both international and non-international armed conflict.⁷

With regard to the alleged merger, it is acknowledged that there has been a remarkable development of the law of non-international armed conflict during the last decade. Some treaties no longer distinguish between international and non-international armed conflicts.⁸ The concept of war crimes, until recently strictly limited to international armed conflicts, has been introduced into the law of non-international armed conflict.⁹ Still, it is doubtful whether that development justifies the conclusion that the two bodies of law have merged. First, those treaties that do not distinguish between international and non-international armed conflict have not become customary international law. Second, one of the prime references relied upon by the International Criminal Tribunal for the former Yugoslavia when addressing international and non-international armed conflict issues, the German *Humanitarian Law in Armed Conflicts Manual*, is under revision. The first edition did not distinguish between the two; however, the forthcoming second edition will contain a separate section on non-international armed conflicts. Third, those who advocate a merger focus on the obligations and prohibitions imposed upon the parties to the conflict. In other words, they maintain that in both international and non-international armed conflict the parties are increasingly bound by the same rules, while ignoring the fact that the law of international armed conflict offers belligerents certain rights, especially vis-à-vis the nationals of other States (neutrals). This especially holds true for the law of naval warfare, which provides for prize measures, blockade and various maritime zones. It is doubtful that the proponents of merger would be prepared to accept the exercise of the full spectrum of belligerent rights during a non-international armed conflict, even if exercised only by the State actor.

Those who focus on the identity of the parties to the conflict to determine the nature of the conflict are correct insofar as a non-international armed conflict presupposes that at least one party to the armed conflict is a non-State actor. This does not mean, however, that geography is irrelevant. To the contrary, according to Common Article 3, which appears in each of 1949 Geneva Conventions, the armed conflict must occur “in the territory of one of the High Contracting Parties.”¹⁰ Article 1(1) of 1977 Additional Protocol II applies to “all armed conflicts which take place in the territory of a High Contracting Party.”¹¹ Hence, it cannot be denied that non-international armed conflict is characterized by a territorial element.

Those who take the position that an international armed conflict comes into existence as soon as there is a trans-border element seem to base that position on a literal reading of the provisions of Common Article 3 and Additional Protocol II. However, mere “spillover effects” into the territory of another State do not

necessarily change the character of a non-international armed conflict into that of an international armed conflict as long as the governments concerned refrain from hostilities against each other.¹²

Differences of opinion on how to characterize a conflict increase if the situation under scrutiny does not easily fit into one of the traditional categories, as, for instance, the armed conflicts in Gaza and in Afghanistan/Pakistan. Very often the different approaches to distinguishing international from non-international armed conflicts seem to be guided by desired result rather than by a sober analysis of customary international law. Although the different characterization approaches are interesting, this article is not designed to provide further criteria of distinction nor to add yet another category of armed conflict to the existing categories of international and non-international. It starts, therefore, with the premise that the law of international armed conflict applies

- “whenever there is a resort to armed force between States”;¹³
- if the non-State actors in a non-international armed conflict obtain recognition of belligerency by the government;¹⁴ or
- for States parties to Additional Protocol I,¹⁵ if the conditions of Article 1(4) are fulfilled.

In those armed conflicts the law of naval warfare undoubtedly applies, at least insofar as measures taken by the State party to the conflict are concerned. The non-State party to the conflict may also apply methods and means of naval warfare against its State enemy. However, the non-State actor may not interfere with neutral shipping unless the neutral State has—either explicitly or implicitly—recognized it as a belligerent.

A non-international armed conflict exists whenever there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹⁶ The focus of the present article is on the question of whether, and to what extent, the parties to a non-international armed conflict are entitled to exercise belligerent rights under the law of naval warfare. The first part gives a short overview of nations’ practice involving the use of methods and means of naval warfare during non-international armed conflicts. The second part addresses the question of a geographical limitation of the hostilities. The third part deals with the conduct of hostilities and the fourth part discusses measures taken by the parties to the conflict that interfere with the shipping and/or aviation of other States. It will be shown that the law of naval warfare can be applied to non-international armed conflicts, albeit partly modified, between the parties to the conflict. If, however, the parties interfere with the shipping and/or aviation of

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other States beyond the outer limit of the State party's territorial sea or contiguous zone, an additional legal basis for the measures in question must be found.

Part I. Practice

A. American Civil War

The blockade during the American Civil War is an important example of applying the law of naval warfare to a non-international armed conflict. It must be borne in mind, however, that the declaration of the blockade by President Abraham Lincoln was considered as recognition of belligerency,¹⁷ thus triggering the applicability of the law of blockade and of the law of naval warfare. Moreover, the British government had proclaimed its neutrality, thus also recognizing a state of belligerency between the United States and the Confederate States.¹⁸ Accordingly, the blockade of the American Civil War serves as a precedent only in a limited manner for the general applicability either of the law of blockade or of the law of naval warfare to non-international armed conflicts. Nevertheless, it needs to be emphasized that, although recognition of belligerency has occurred only infrequently in recent State practice, it continues to exist as a legal concept.¹⁹ Moreover, as illustrated by the blockade of the Confederate States, recognition of belligerency may be explicit or implicit.

B. Spanish Civil War

During the Spanish Civil War (1936–39) a number of merchant vessels of various nationalities supplying the government forces were attacked by aircraft and submarines. The identity of the State or group to which the attacking aircraft and submarines belonged is uncertain; however, it is clear that it was not a party to the conflict.²⁰ In response, nine States, including the United Kingdom and France, concluded the 1937 Nyon agreements²¹ and decided on collective measures against submarines, surface vessels and aircraft that were, or that were suspected of being, engaged in unlawful attacks against merchant vessels. For the purposes of the present paper, the treatment of those attacks as “acts of piracy” is unimportant. It should be noted, however, that the parties to the Nyon Arrangement in the preamble emphasized that they were not “in any way admitting the right of either party to the conflict in Spain to exercise belligerent rights or to interfere with merchant ships on the high seas even if the laws of warfare at sea are observed.” Therefore, it is probably correct to state that “despite the scale of hostilities involved and the degree of international intervention on both sides . . . , no European state conceded to any party to the conflict any right to interfere with neutral shipping.”²²

C. Algeria

Both prior to and during the conflict between France and Algerian groups seeking independence, France instituted an extensive maritime control zone in the Mediterranean. Acting under a decree of March 17, 1956,²³ the French Navy intercepted more than 2,500 ships per year²⁴ in an effort to prevent the flow of arms to rebels in Algeria.²⁵ According to Articles 4 and 5 of that decree, vessels of less than one hundred tons were liable to visit and search inside the “customs zone” that extended fifty kilometers off the Algerian coast.²⁶ After 1958, vessels of more than one hundred tons were also subjected to visit and search. Whereas most of the measures were taken within fifty kilometers of the Algerian coast, a number of vessels were visited well beyond the “customs zone.”²⁷ Vessels were diverted when boarding was impossible due to adverse weather conditions or the nature of the cargo, including cargo consisting of arms and explosives. In the latter case, the cargo was confiscated unless it was determined that the arms and/or explosives were not to be used in a manner that constituted a danger to French forces in Algeria.²⁸ In most instances, the ships were released. The French measures that met sharp protests of the affected flag States were justified by reference to the rights of self-defense and self-preservation.²⁹

D. Sri Lanka

The armed conflict in Sri Lanka (1983–2009) was characterized by a considerable naval element. The “Sea Tigers”—the naval wing, which was established in 1984, of the Tamil Tigers—proved to be a serious threat to government forces. According to unconfirmed reports, the Sea Tigers deployed small suicide boats and fast patrol boats that sank twenty-nine government fast patrol boats and attacked naval bases of the Sri Lankan Navy. The Sea Tigers did not limit their operations to enemy forces, but also interfered with innocent shipping in the Indian Ocean. As a result, on May 14, 2007, the Indian Navy announced that it would increase its presence in the Palk Strait and deploy unmanned aerial vehicles in the region.³⁰

In December 2004, demands were made in India to neutralize the Sea Tigers because they had become a “credible third naval force in the southern part of South Asia.”³¹ In 1984 and again in 2009, the Sri Lankan government forces were alleged to have established naval blockades against parts of the coastline controlled by the Tamil Tigers. However, those references to naval blockade are misleading. The measures taken by the government forces in 1984 were indeed aimed at preventing entry and exit to and from the coastal area, but their main purpose was to prevent the Tamil Tigers from receiving both training and equipment from the southern Indian state of Tamil Nadu. Additionally, the maritime interdiction operations occurred within the Sri Lankan territorial sea and contiguous zone, and were directed

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against vessels suspected of being engaged in smuggling weapons or supplies to the Tamil Tigers. The Sri Lankan government did not assert the right to interfere with all neutral vessels encountered in high seas areas.³² The so-called “blockade” of the Mullaitivu coast in 2009 was part of a major military operation against the headquarters of the Sea Tigers that eventually resulted in its neutralization. Again, the Sri Lankan armed forces did not claim any right to interfere with neutral shipping.

E. Gaza

On August 13, 2008, the Shipping Authority at the Israeli Ministry of Transport published a Notice to Mariners calling upon shipping to refrain from entering the territorial waters off the Gaza coast.³³ That measure was considered inadequate, and was followed on January 3, 2009 by a Minister of Defense–ordered naval blockade of the coast of the Gaza Strip that extended to a maximum distance of twenty nautical miles from the coast. The Notice to Mariners advising of the establishment of the blockade provided: “All mariners are advised that as of 03 January 2009, 1700 UTC, Gaza maritime area is closed to all maritime traffic and is under blockade imposed by Israeli Navy until further notice. Maritime Gaza area is enclosed by the following coordinates. . . .”³⁴ The notice was published on the websites of the Israel Defense Force, the Shipping and Ports Authority and the Ministry of Transport, and on several standard international channels, such as NAVTEX, an international satellite network that collects and distributes notices to vessels worldwide. Moreover, this notice was broadcast twice a day on the emergency channel for maritime communications to vessels that sailed within three hundred kilometers of the Israeli coast. On May 31, 2010, the so-called “Gaza flotilla,” including the *Mavi Marmara*, was intercepted.³⁵

F. Libya

The 2011 conflict in Libya was a “mixed” conflict. On one hand, it was a non-international armed conflict between the government forces loyal to Gaddafi and the rebels. On the other hand, it was an international armed conflict between Libya and the international alliance that exercised certain belligerent rights on the basis of UN Security Council Resolution 1973.³⁶ For the purposes of this article, it is irrelevant whether the measures taken by the alliance were in compliance with the terms of the resolution. During the conflict, NATO warships intercepted several boats operated by Gaddafi forces that were laying anti-shipping mines outside the harbor of Misurata, a city that was dependent for much of its food and supplies on the sea link with the rebel capital Benghazi. British Brigadier Rob Weighill, director of NATO operations in Libya, condemned the minelaying by stating: “We have just seen Gaddafi forces floating anti-ship mines outside Misurata harbour

today. It again shows his complete disregard for international law and his willingness to attack humanitarian delivery efforts.”³⁷

Part II. Region of Operations

A. Internal Waters and Territorial Sea

As non-international armed conflicts occur *within* a State,³⁸ the parties to the conflict are not prohibited from conducting hostilities in that State’s internal waters and territorial sea, as those are defined by the law of the sea. As long as the parties to the conflict do not interfere with the navigation of other States, they may apply methods and means of naval warfare against their adversary in those sea areas.

At the same time, however, other States continue to enjoy the right of innocent passage. There is no indication in either treaty law or State practice that the right of innocent passage is automatically suspended at the commencement of a non-international armed conflict. Rather, the general rules continue to apply. The coastal State, under Article 25(3) of the 1982 United Nations Convention on the Law of the Sea (LOS Convention),³⁹ may in certain circumstances temporarily suspend innocent passage in specified parts of its territorial sea. To be effective, the suspension must be “duly published.”

The reference to “weapons exercises” in Article 25(3) as a basis for suspending the right of innocent passage is not the exclusive circumstance in which suspension may occur. The article goes on to indicate that suspension may occur when “essential for the protection of its [the coastal State’s] security.” In determining whether such suspension is essential, the coastal State enjoys a wide margin of discretion.⁴⁰ The existence of a non-international armed conflict certainly constitutes a threat to the coastal State’s security; hence, the authorities of the coastal State are entitled to suspend the right of innocent passage in order to prevent foreign shipping from navigating in close vicinity to the conflict area. In view of a lack of conclusive State practice, it is unclear whether innocent passage may be suspended in the entire territorial sea. While suspension in a State’s entire territorial sea would appear to be inconsistent with Article 25(3)’s “in specified areas,” the circumstances of a given non-international armed conflict may be such that the government considers it necessary to close the entire territorial sea to foreign navigation. If, however, the armed hostilities are limited to a certain region, it would be difficult for the government to justify a suspension of the right of innocent passage in coastal sea areas remote from the area of operations.

The non-State party to a non-international armed conflict is not entitled to suspend or otherwise interfere with the right of innocent passage. This clearly follows from the wording of Article 25(3) (“The *coastal State* may . . .”).⁴¹ If the non-State

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party nevertheless takes measures affecting foreign shipping, the authorities of the coastal State under Article 24(2) must “give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.”⁴² The government is not obligated to actively take measures with a view to protecting foreign navigation against interference by the non-State party to the conflict.

B. International Straits and Archipelagic Sea Lanes

Neither the government nor, *a fortiori*, the non-State party to a non-international armed conflict is entitled to interfere with the rights of transit passage and of archipelagic sea lanes passage within international straits and archipelagic waters. Even during an international armed conflict the belligerents are obliged to preserve those passage rights.⁴³ There is no indication in State practice that the existence of a non-international armed conflict would entitle the government to adopt laws and regulations relating to passage that are in excess of that permissible under the law of the sea. In particular, there may be no suspension of transit passage even if the exercise of navigation or overflight were dangerous to the transiting vessel or aircraft. As is the case with dangers to navigation within the territorial sea, the authorities of the States bordering an international strait and the archipelagic State are obliged to give “appropriate publicity to any danger to navigation or overflight.”⁴⁴ And, again, the government is not obliged to take active measures against the non-State party to the conflict in order to protect international navigation and aviation.

C. Sea Areas beyond the Territorial Sea

The government of the State concerned is entitled to exercise maritime interdiction/interception operations within its contiguous zone if the conditions of Article 33⁴⁵ of the LOS Convention are met. Hence, the “special naval surveillance zone” established and enforced by Sri Lankan government forces in 1984 and the measures taken against foreign vessels that were engaged in smuggling weapons and supplies to the Tamil Tigers were “justified under ordinary customs and policing powers available within 24 nautical miles of Sri Lanka’s baselines.”⁴⁶

State practice seems to provide sufficient evidence that there is no rule of customary international law prohibiting the parties to a non-international armed conflict from engaging in hostilities against each other in high seas areas. As in an international armed conflict, there is, however, a positive obligation to pay due regard for the rights enjoyed by other States.⁴⁷ Moreover, the parties are prohibited from damaging submarine cables and pipelines that do not exclusively serve either party to the conflict.⁴⁸

Hostile actions taken within the exclusive economic zone or on the continental shelf of another State during a non-international conflict are more questionable.

While the law of international armed conflict contains no prohibition on conducting hostilities in those areas,⁴⁹ it is doubtful whether this also holds true for non-international armed conflicts. In view of a lack of conclusive practice, it is not possible to reach a clear conclusion on that issue. It is, however, safe to state that measures taken by a non-State party to a non-international armed conflict within the exclusive economic zone or on the continental shelf of another State will, in all likelihood, not be tolerated by that State. This certainly will be the case if either party to the conflict decides to lay naval mines in those areas. If such minelaying occurs, the coastal State is entitled to remove or otherwise neutralize the mines.

Part III. Conduct of Naval Hostilities

This section addresses only relations between the parties to a non-international armed conflict, and not their relations with non-parties. Its object is to determine which rules of the law of naval warfare are applicable in a non-international armed conflict by focusing on the rules and principles applicable to the methods and means of naval warfare.

A. Entitlement

Under the law of international armed conflict, only warships are entitled to exercise belligerent rights.⁵⁰ This rule goes back to the prohibition of privateering under the 1856 Paris Declaration.⁵¹ Warships are those vessels that meet the criteria set forth in Articles 2–5 of the 1907 Hague Convention VII,⁵² Article 8(2) of the 1958 High Seas Convention⁵³ and Article 29 of the LOS Convention.⁵⁴ Limitations on the exercise of belligerent rights are most important with regard to interference with neutral navigation and aviation; thus, neutral vessels and aircraft must accede to such interference only if the measures are taken by warships.

No such limitation applies to non-international armed conflicts vis-à-vis the parties.⁵⁵ It follows from the object and purpose of the rule limiting the exercise of belligerent rights under the law of naval warfare—i.e., the transparent entitlement of the warship—that the non-State actor will obviously not have ships that meet the criteria for classification as a warship since one of the criteria is that it be a State vessel. The government forces may make use of any vessel or aircraft, including, for example, those used for law enforcement and customs enforcement, in the conduct of hostilities. This may not be the case, however, if the government takes measures against foreign shipping. I will return to that issue.⁵⁶

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B. Lawful Targets

Under the international law of non-international armed conflict, members of the regular armed forces, dissident armed forces and an organized armed group formed by the non-State party to a non-international armed conflict are lawful targets.⁵⁷ The International Committee of the Red Cross's (ICRC's) *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* provides that members of organized armed groups "consist only of individuals whose continuous function is to take a direct part in hostilities ('continuous combat function')." ⁵⁸ The *Interpretive Guidance* provides that "continuous combat function" "requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict."⁵⁹ Persons that accompany or support an organized armed group but "who assume exclusively political, administrative or other non-combat functions" are civilians who have "protection against direct attack unless and for such time as they directly participate in hostilities."⁶⁰ Members of the regular armed forces, however, regardless of the function they serve⁶¹ are not considered to be civilians and are subject to direct attack. This introduction of a double standard is not practicable in the context of armed conflicts. It would have been preferable had the *Interpretive Guidance* accepted the conclusion of the ICRC's *Customary International Humanitarian Law* study which rightly states, "Such imbalance would not exist if members of organized armed groups were, due to their membership, either considered to be continuously taking a direct part in the hostilities or not considered to be civilians."⁶²

In the context of the Libyan conflict, the Libyan rebels were lawful targets at that point when the rebellion against the Gaddafi government passed the threshold to become a non-international armed conflict. They were not protected under Security Council Resolution 1973, which afforded protection to civilians, but not to members of organized armed groups. Civilians, more generally under the law of non-international armed conflict, are not subject to direct attack unless (and for such time as) they take a direct part in hostilities.⁶³ Thus, civilians, who would otherwise have been entitled to protection, who directly participated in the hostilities by attacking either the Gaddafi or the rebel forces became lawful targets during their period of participation as well.

When it comes to objects—which are, of course, the focus of naval operations—it is generally agreed that the definition set forth in Article 52(2) of Additional Protocol I is customary in character and thus applies to both international and non-international armed conflicts.⁶⁴ All objects that have an "intrinsic military significance" are to be considered lawful military objectives "by nature."⁶⁵ Hence, the military equipment, such as fast patrol boats and ammunition depots, or military headquarters of either party may be attacked at all times. For instance, the vessels

used by the Sea Tigers for naval operations, as well as their stronghold in Mullaitivu, were lawful targets. The same holds true for the military equipment of the Sri Lankan government forces.⁶⁶ All other objects, although of a civilian nature, may become lawful military objectives by either their use, purpose or location.

It follows from the foregoing that civilians and civilian objects may not be directly attacked.⁶⁷ Moreover, the parties to a non-international armed conflict are obliged to always distinguish between members of armed forces or organized armed groups and civilians, and between military objectives and civilian objects.⁶⁸ Civilians are those who are neither members of an organized armed group nor directly participating in the hostilities.⁶⁹ Civilian objects are objects that do not constitute a military objective under the customary international law definition.⁷⁰

In a non-international armed conflict, it may be difficult to clearly establish whether an individual is a member of an organized armed group or a civilian or whether an object constitutes a military objective or a civilian object. For instance, the parties are under no obligation to use vehicles that are marked or otherwise clearly identifiable as military in nature. This does not render the rules on lawful targets and the principle of distinction obsolete; it simply increases the difficulty in applying them.

C. Use of Naval Mines

As was seen in the Libyan conflict, the use of naval mines by the forces loyal to Gaddafi was condemned as being in “complete disregard for international law.”⁷¹ That statement, however, referred to interference with “humanitarian delivery efforts”; Resolution 1973 required Libyan authorities to “take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance.”⁷² In the absence of Resolution 1973, it would have been difficult to condemn the laying of naval mines as a violation of international law or of the law of non-international armed conflict had Libyan authorities publicized their employment. The mines were laid within the Libyan territorial sea and their purpose seems to have been to prevent supplies from reaching Misurata via the sea. Such conduct does not violate the law applicable to non-international armed conflict. Moreover, it would be difficult to conclude that the laying of naval mines violated the prohibition of indiscriminate attacks or any specific prohibition under the law applicable to such weapons or their use.

The fact that the mines were laid within the Libyan territorial sea is not alone sufficient to determine that the establishment of the minefield accorded with the applicable international law, however. A minefield certainly impedes upon the right of innocent passage. As was seen earlier, any suspension of the right of innocent passage requires prior notification, e.g., by issuing a Notice to Mariners.⁷³

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Libyan authorities neither publicly announced the laying of mines nor issued a warning to international shipping. Even if the mines were not directed against the effort to deliver humanitarian supplies, but were employed merely as a method of naval warfare applied against the rebels, the minelaying was still unlawful because it was conducted in disregard of the right of innocent passage of other States.

The law of non-international armed conflict does not prohibit the laying of naval mines in the internal waters or in the territorial sea of the State. The law recognizes that naval mines serve legitimate purposes, to include area denial, coastal defense and maintaining and enforcing a blockade.⁷⁴ Of course, indiscriminate attacks, i.e., “attacks that are not specifically directed” against lawful targets,⁷⁵ the use of weapons that are indiscriminate by nature⁷⁶ and the indiscriminate use of weapons⁷⁷ are prohibited both in international and in non-international armed conflict. The fact that naval mines may equally hazard military objectives and civilian objects is not sufficient in itself to conclude that the laying of mines is in violation of any of these prohibitions. Moreover, the law of naval mine warfare contains a specific rule on indiscriminate attacks, by explicitly prohibiting the use of “free-floating mines, unless they are directed against a military objective and they become harmless within an hour after loss of control over them.”⁷⁸

If Misurata had constituted a rebel stronghold, it would have been lawful to cut it off from outside resupply. However, the laying of naval mines by the Gaddafi forces was illegal because it occurred in disregard of the obligation to take all feasible precautions for the safety of peaceful shipping⁷⁹ (the failure to provide notification to the international community) and of the obligation to provide for humanitarian relief consignments. With regard to relief consignments, the parties to an armed conflict are obliged to provide for their free passage if the civilian population is “inadequately provided with food and other objects essential for its survival.”⁸⁰ While this obligation originated in the law of blockade it is, I would assert, customary in character as a specification of the principle of humanity.

In conclusion, the use of naval mines in non-international armed conflict neither is expressly prohibited nor *ab initio* violates the principle of distinction or the rules of the law of non-international armed conflict prohibiting indiscriminate attacks. It must be borne in mind, however, that this is true only if naval mines are laid within the internal waters or, subject to prior notification, the territorial sea of the State. In sea areas beyond the outer limit of the territorial sea, naval mines may be used by the parties to a non-international armed conflict only if they are directed against a military objective.

D. The Natural Environment

The *Customary International Humanitarian Law* study states that “[i]t can be argued that the obligation to pay due regard to the environment [in international armed conflicts] also applies in non-international armed conflict if there are effects in another State.”⁸¹ Although the arguments are based on the law of peace, i.e., international environmental law, this may be a correct statement of the law because there is no rule of general international law that would absolve a State of its obligations vis-à-vis other States under either general international law or international environmental law merely because that State has become a party to a non-international armed conflict.

Unfortunately, the study fails to be sufficiently clear as to who is bound by the obligation to pay due regard. The commentary only refers to obligations of States; it does not clarify whether non-State actors are also bound by it. The failure to indicate that non-State actors are bound may be correct, because there are good reasons to assume that the obligations under international environmental law exclusively apply to States as subjects of international law.

Far more interesting than the reference to the obligation to pay due regard to the natural environment beyond the territory of the State is the following conclusion by the ICRC:

[T]here are indications that this customary rule [i.e., the duty to pay due regard] may also apply to parties’ behaviour within the State where the armed conflict is taking place. Some support for drafting a treaty rule for this purpose existed during the negotiation of Additional Protocol II. It was not adopted then, but the general acceptance of the applicability of international humanitarian law to non-international armed conflicts has considerably strengthened since 1977. In addition, many environmental law treaties apply to a State’s behaviour within its own territory. There is also a certain amount of State practice indicating the obligation to protect the environment that applies also to non-international armed conflicts, including military manuals, official statements and the many submissions by States to the International Court of Justice in the *Nuclear Weapons* case to the effect that the environment must be protected for the benefit of all.⁸²

It is to be noted that this statement is characterized by cautious formulations—“indications,” “may also apply,” “some support,” “certain amount of State practice”—that indicate that the authors of the study are less than convinced of the correctness of their assumptions. In any event, those formulations do not distract from the suggestion that the authors were guided by their political and ecological aspirations, rather than by a sound analysis of State practice. State practice during non-international armed conflicts does not provide sufficient evidence to

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determine that the parties to the conflict are obliged to take into consideration—or to pay due regard to—the natural environment of the State in which the conflict is occurring.

It should also be noted that there still is no generally accepted definition of the term “natural environment.”⁸³ But even if there were agreement that, for example, certain sea areas or marine living resources constitute “natural environment,” this would not have an impact on the lawfulness of naval operations during a non-international armed conflict that have, or may have, detrimental effects on the marine environment of the State concerned.

Part IV. Interference with the Navigation of Other States

The law of non-international armed conflict contains no prohibitions going beyond those applying to land or air operations with regard to naval operations of the parties that occur within the internal waters and the territorial sea of the State party to the conflict so long as they do not interfere with the navigation of other States.

State practice during the Spanish Civil War and the Algerian conflict seems to provide convincing evidence that the parties to a non-international armed conflict are not allowed to interfere with the navigation of other States in sea areas beyond the outer limit of the territorial sea (unless such measures are lawful under the law of the sea or general international law). This finding is certainly correct as concerns measures taken by non-State actors. As regards interference by government forces one author has taken the position that

the right of states to implement measures against neutral vessels in NIACs is thus at best an unsettled question. The most one can say is that in higher-intensity conflicts states have sometimes acknowledged or acquiesced in blockades targeting non-state actors However, in equally violent conflicts such a right has sometimes not been recognised and attempts to assert rights of blockade or similar measures have been protested (for instance, the Spanish Civil War and the Algerian rebellion). Where such measures are protested as contrary to international law those protests must weigh against the conclusion that there is *opinio juris* supporting the rule of custom invoked. On the basis of relevant state practice one can at most hazard a suggestion that irrespective of the precise classification of a conflict, states are likely to tolerate the assertion of a blockade only in cases of higher-intensity conflicts on a par with the traditional understanding of war.⁸⁴

A. Neutral Vessels and Aircraft as Lawful Targets

It must be emphasized that the doubts expressed with regard to the authority of the State party to a non-international armed conflict to interfere with neutral vessels

and aircraft have only concerned measures short of attack, i.e., visit, search and capture, and blockade. To date there has been no study addressing the question of whether foreign vessels and aircraft may qualify as lawful targets under the law of non-international armed conflict.

If the definition of lawful military objectives in an international armed conflict also applies in non-international armed conflict,⁸⁵ there is no convincing reason that would justify its limitation to vessels and aircraft of the nationality of the State concerned. Accordingly, any vessel, regardless of the flag it is flying, and any aircraft, wherever registered, used by an organized armed group in the course of a non-international armed conflict for military purposes constitute lawful military objectives by either their nature or use. If, for instance, another State comes to the assistance of the government forces, the warships and military aircraft deployed by that State will qualify as lawful military objectives by their nature. If the government of the State party makes use of vessels operated by a private military/security company that flies the flag of another State, that vessel will be a lawful target by reason of its use. In such cases, it does not make a difference whether the vessel or aircraft is encountered in the territorial sea or national airspace or in sea areas beyond the outer limit of the territorial sea or in international airspace. It is unimaginable that the parties to a non-international armed conflict will refrain from attacking such vessels or aircraft simply because they have departed the territorial sea or national airspace. It is equally unimaginable that other States will protest attacks on such vessels and aircraft on the sole basis of the attacks' occurring on the high seas or in international airspace.

The correctness of these findings cannot be questioned even in view of the practice of States during the Spanish Civil War, during which the parties to the 1937 Nyon agreement were not prepared to recognize a right of the parties to that armed conflict "to exercise belligerent rights or to interfere with merchant ships on the high sea even if the laws of warfare at sea are observed."⁸⁶ The fact that those States were not prepared to recognize the exercise of belligerent rights, including attacks on neutral merchant vessels qualifying as lawful targets, does not mean that the law of non-international armed conflict is the same today. While the law as it stood in 1937 may have contained a prohibition preventing the parties to a non-international armed conflict from exercising belligerent rights on the high seas, this is no longer the case under the contemporary law of non-international armed conflict. The customary definition of lawful military objectives contains no exceptions for objects that have the nationality of foreign States.

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B. Visit, Search and Capture

The interceptions of foreign vessels conducted by the French Navy during the Algerian conflict met strong resistance from affected flag States. France, however, was less than impressed and continued to intercept foreign merchant vessels for years. O'Connell rightly observes that since the nineteenth century there had not

been such an extensive invasion—for security reasons—of the principle of the freedom of the seas as in the case of the Algerian operation. The large number of ships affected, and the large number of countries which became diplomatically involved, would have led one to imagine that more attention would have been paid to this situation. Since only a few ships had their cargoes removed, and those ships were clearly engaged in the smuggling of arms into Algeria, the operation did not seriously affect the navigation of the high sea, and this, together with the political situation prevailing, would seem to explain the reticence on the part of flag States of the ships affected with respect to demands of the French government. The fact that France was able for so long and in so extensive a manner to exercise naval power on the high seas on the ground of self-defence causes one to ponder on the extent to which a conservative appreciation of international law has a role in defence planning.⁸⁷

There is also the question of the Israeli blockade of Gaza. As will be discussed in Part IV.C, it is the view of this author that the conflict should be classified as an international armed conflict. However, it is also useful to consider what the legal position would have been if it were considered to be non-international in nature, as it is by some scholars.

Beginning in 2008, and continuing until the establishment of the blockade of the Gaza Strip on January 3, 2009, Israel exercised the right of visit and search in order to prevent the flow of arms into the Gaza Strip. The few measures taken against foreign vessels that were suspected, upon reasonable grounds, of being engaged in the transportation of arms destined for Hamas did not give rise to strong protests. Either the flag States implicitly recognized Israel's security interests or they simply did not want to admit that ships flying their flags had been engaged in the smuggling of arms and ammunition. Whatever the rationale, there is a clear parallel to the Algerian operation insofar as security interests and the right of self-defence may serve as a justification for interference with foreign shipping by the State party to a non-international armed conflict.

Both the Algerian and Gaza conflicts seem to justify the conclusion that the State party to a non-international armed conflict—not the non-State actor—is entitled to intercept foreign vessels on the high seas if the following conditions are met:

- (1) vital security interests of the State are at stake;

- (2) there are reasonable grounds for believing that the foreign vessels are engaged in activities jeopardizing those security interests (e.g., by supplying the non-State party with arms); and
- (3) the measures are undertaken in close proximity to the conflict area.

It must be emphasized that the recognition of the right of interception (visit, search and capture) does not imply recognition of the right to exercise measures short of attack under prize law. Prize law *stricto sensu* only applies in international armed conflicts. Rather, the legal basis is found in the right of self-defense or in the customary right of self-preservation in order to protect the territorial and political integrity of the State. This right is equally exercisable in an international or non-international armed conflict. The finding by the International Court of Justice in the *Wall* advisory opinion that the right of self-defense does not apply if there is no trans-border element⁸⁸ has no basis in State practice.

C. Blockade: The Gaza Case

1. General Considerations

Unaddressed thus far is the question of whether the parties to a non-international armed conflict are entitled to establish and enforce a naval or aerial blockade.

Blockades are, by necessity, established in international waters or international airspace, apply to all vessels or aircraft regardless of their nationality,⁸⁹ and are distinguished from more limited actions such as measures undertaken with the objective of preventing exit from or entry into a given part of the coast or a port controlled by the other party to a non-international armed conflict. These latter measures do not qualify as a blockade under the law of armed conflict as long as they are limited to the territorial sea of the State, or are not applied against foreign vessels or aircraft.

As noted previously in the context of the American Civil War, it may be the declaration of a blockade by the government as an implicit recognition of belligerency of the non-State party to the conflict that triggers the applicability of the law of international armed conflict and, thus, of the law of naval warfare.⁹⁰

If, however, the declaration of blockade cannot be understood as an implicit recognition of belligerency—either because the concept is no longer recognized as being part of the *lex lata* or because the circumstances surrounding the declaration do not justify a conclusion to that effect—it is doubtful whether the State party to a non-international armed conflict is entitled to establish and enforce a blockade. One author who classifies the conflict between Israel and Hamas as a

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non-international armed conflict has come to the conclusion that in view of the sporadic, on-again, off-again nature of the hostilities, "Israel had no right to impose a blockade on the Gaza Strip and its enforcement of that unlawful blockade against the flotilla . . . was an act incurring state responsibility."⁹¹ According to that author's view, "there is no consistent state practice and *opinio juris* suggesting blockade is available outside an [international armed conflict]."⁹² While that writer's opinion of the legality of the Israeli blockade is not shared by this author, it is a correct statement of the contemporary law that, absent recognition of belligerency, the parties to a non-international armed conflict are not entitled to establish and enforce a naval or aerial blockade against foreign vessels or aircraft.

2. The Gaza Case

The legal classification of the Gaza conflict is a contested issue. Those international lawyers who deal with the subject in a serious manner⁹³ and hold that Israel's blockade of the Gaza Strip is illegal arrive at that conclusion because they characterize the conflict as a non-international armed conflict.⁹⁴ Even if that characterization is correct, their finding that the blockade is therefore unlawful does not necessarily follow, because recognition of belligerency continues to be a valid concept. The mere fact that a given rule or concept of international law has not been made use of for an extended period does not mean that the rule or concept has become void by reason of desuetude.⁹⁵ There is no evidence that States, by refraining from recognizing a status of belligerency, have abolished that concept for good. Rather, States are unwilling to bring into operation the legal consequences that flow from a recognition of belligerency, but by the very study of the consequences they acknowledge that the concept is alive and well.

However, while this author accepts that others have reached a contrary position, the Gaza conflict cannot be classified as a non-international armed conflict. There are convincing reasons to conclude that it is an international armed conflict in view of the continuing belligerent occupation.⁹⁶ The Supreme Court of Israel does not share this opinion, because, according to the Court, Israel, since the 2005 disengagement, no longer exercises effective control over the Gaza Strip.⁹⁷ The Court, however, takes the position that international humanitarian law applies to an armed conflict between Israel and terrorist organizations not merely in an area that is subject to occupation, but "in any case of an armed conflict of an international character—in other words, one that crosses the borders of the state—whether or not the place in which the armed conflict occurs is subject to a belligerent occupation."⁹⁸ Thus the Court reaches the same conclusion, albeit by a different route than belligerent occupation.

The Turkel Commission, which was established by the Israeli government to examine the circumstances surrounding the boarding of the *Mavi Marmara* on May 31, 2010, concurred with the Supreme Court that the conflict in the Gaza Strip is “international in character.”⁹⁹ Additionally, the Commission took into consideration (1) the degree of de facto control that Hamas exercises over the Gaza Strip, (2) the significant security threat that Hamas presents, and (3) Hamas’s attempts to import weapons, ammunition and other military supplies by sea. The Commission then concluded that it “would have considered applying the rules governing the imposition and enforcement of a naval blockade even if the conflict between Israel and the Gaza Strip had been classified as a non-international armed conflict.”¹⁰⁰

The Palmer Report, which was prepared by the panel appointed by the UN Secretary-General to examine the boarding of the *Mavi Marmara*, also concluded that the conflict was international in nature, stating:

The Panel considers the conflict should be treated as an international one for the purposes of the law of blockade. This takes foremost into account Israel’s right to self-defence against armed attacks from outside its territory. In this context, the debate on Gaza’s status, in particular its relationship to Israel, should not obscure the realities. The law does not operate in a political vacuum, and it is implausible to deny that the nature of the armed violence between Israel and Hamas goes beyond purely domestic matters. In fact, it has all the trappings of an international armed conflict.¹⁰¹

The findings of the Turkel Commission and the Secretary-General’s panel lend further support to the government of Israel’s determination that it was entitled to establish the naval blockade.

A naval blockade is a lawful method of naval warfare.¹⁰² As such, it overrides the peacetime right of all States to freely navigate in the high seas areas covered by the blockade.¹⁰³ The blockading power is not only entitled to prevent vessels from either entering or leaving the blockaded area, but, in fact, has an obligation to achieve that goal by ensuring the blockade is effective.¹⁰⁴ The blockading power must use whatever means it has available to prevent entry and exit of all vessels; if it fails to do so the blockade becomes ineffective and legally void. In other words, if the blockading power permits some vessels to cross the blockade, while denying that ability to other vessels, it is not effectively enforcing the blockade. In the absence of an effective blockade, any interference with the navigational rights of vessels would be unlawful. Hence, if the Israeli government wishes to maintain the naval blockade of Gaza, it has no choice but to prevent all vessels from either entering or leaving the blockaded area.

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Under the international law of naval blockade, all vessels, irrespective of the flag they fly, must be prevented from entering or leaving the blockaded area. In this instance, if they breach the blockade by crossing the blockade line twenty nautical miles off the Gaza coastline, or if they attempt to breach the blockade, they are liable to capture or to any other measure taken by blockading units to prevent a continuation of their voyage.¹⁰⁵

On some occasions it may be difficult to establish an attempt to breach the blockade. That is not the case with the “Gaza flotilla.” The organizers had expressly stated their intent to breach the blockade and the vessels’ approach to the blockaded area constituted an attempted breach of blockade. Given the expressed intent and the approach of the vessels, the Israeli Defense Force units did not need to wait to act until the vessels were either close to the blockade line or crossing it. Rather, they were entitled to take the necessary measures at a considerable distance because the attempt to breach the blockade was obvious.¹⁰⁶

Vessels either breaching or attempting to breach a naval blockade must comply with all legitimate orders by the blockading power. If summoned to stop they may not continue their voyage nor attempt to escape. They are obligated to let a boarding team on the vessel and to allow the team to take control of the ship. Any act of escape or resistance may be overcome by the use of proportionate force, including, if necessary, the use of deadly force.¹⁰⁷

Humanitarian considerations play a role in determining the lawfulness of a blockade. A naval blockade is unlawful if “the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.”¹⁰⁸ “Excessive” does not mean “extensive.” Applied to the blockade of the Gaza Strip, there can be no doubt that it has resulted in inconveniences for the civilian population, but certainly not in excessive damage. In this context it is important to note that the military advantage gained, i.e., the prevention of the flow of arms and the entry of terrorists, is quite substantial.

Moreover, the blockading power is obliged to provide for relief consignments if the civilian population of the blockaded area is no longer adequately provided with goods essential for its survival, i.e., with food, water and medical supplies.¹⁰⁹ The “Gaza flotilla” was allegedly on a purely humanitarian mission to provide the civilian population in Gaza with such essential goods. It is immaterial whether this was true, whether the cargoes indeed consisted of essential goods only or whether the flotilla was only pursuing political and provocative goals. Even if the flotilla had been on a purely humanitarian mission it would have had no right to approach the Gaza coastline. Rather, the blockading power could prescribe “the technical arrangements, including search, under which the relief consignments are

permitted.”¹¹⁰ It is important to note that, in 2010, the Israeli government was prepared to allow the shipment of the flotilla’s cargo to Gaza under the condition that it was unloaded in an Israeli port and its distribution entrusted to the United Nations. That proposal was well in accordance with the applicable law. The mere claim of pursuing humanitarian goals or to be a humanitarian organization does not give rise to a right to breach a blockade. Any refusal to accept reasonable technical arrangements offered by the blockading power and any continuation of the voyage without complying with the legitimate orders of the blockading power will entitle the latter to take appropriate and proportionate measures, including the use of force, to prevent the vessels from entering the blockaded area.

Conclusion

It has been shown that the parties to a non-international armed conflict are not obliged to confine the armed hostilities to the land territory of the State and that they may make use of recognized methods and means of naval warfare. As long as the measures they take against each other have no detrimental impact on international navigation and aviation there are no considerable legal obstacles.

While there seems to be widespread agreement that neither party to a non-international armed conflict is entitled to interfere with foreign shipping and aviation in sea areas beyond the outer limit of the territorial sea, the State party to a non-international armed conflict continues to enjoy the right to enforce its domestic law under the law of the sea. Moreover, it would be difficult to maintain that the definition of lawful military objectives that undoubtedly applies in non-international armed conflicts ceases to be valid merely by reason of the geographical position of the target. Hence, foreign vessels and aircraft that contribute to the enemy’s military action by, for example, providing targeting data are lawful targets even if they are located on the high seas or in international airspace.

As regards measures short of attack, i.e., visit, search and capture, States seem to be prepared to tolerate such measures if taken by the State party to a non-international armed conflict, if vital security interests are at stake and if the interception measures are taken in the vicinity of the coast. Similar considerations may apply if the State party decides to establish and enforce a naval blockade.

Notes

1. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 73 (Louise Doswald-Beck ed., 1995) (“although the provisions of this Manual are primarily meant to apply to international armed conflicts at sea, this has intentionally not been expressly

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indicated . . . in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations”).

2. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 26–28 (2d ed. 2010). For the latter aspect, see *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter *Tadić*].

3. For an analysis of such “amorphous situations,” see DINSTEIN, *supra* note 2, at 26.

4. See, e.g., NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 103 (2010); Douglas Guilfoyle, *The Mavi Marmara Incident and Blockade in Armed Conflict*, 81 BRITISH YEARBOOK OF INTERNATIONAL LAW 171, 186–87 (2011).

5. *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02, Judgment (Dec. 13, 2006), 46 INTERNATIONAL LEGAL MATERIALS 373 (2007), available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf [hereinafter *Public Committee against Torture*].

6. This position is taken by Cassese, who maintains that “an armed conflict which takes place between an Occupying Power and rebel or insurgent groups . . . in an occupied territory amounts to an international armed conflict.” ANTONIO CASSESE, *INTERNATIONAL LAW* 420 (2d ed. 2005).

7. This is the position taken in the German military manual. FEDERAL MINISTRY OF DEFENCE (Germany), *HUMANITARIAN LAW IN ARMED CONFLICTS MANUAL* (1992). However, in the forthcoming edition of the manual, there will be a separate section dealing with the law of non-international armed conflict.

8. See, e.g., Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Doc. No. CCW/CONF/II/2 (Dec. 21, 2001).

9. See Rome Statute of the International Criminal Court art. 8(2)(c), July 17, 1998, 2187 U.N.T.S. 90. Additionally, in 1993 the International Committee of the Red Cross stated that “according to humanitarian law as it stands today, the notion of war crimes is limited to situations of international armed conflict.” Some Preliminary Remarks by the International Committee of the Red Cross on the Setting up of an International Tribunal (Feb. 22, 1993), reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 391, 392 (1995).

10. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

11. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

12. DINSTEIN, *supra* note 2, at 27.

13. *Tadić*, *supra* note 2.

14. DINSTEIN, *supra* note 2, at 28.

15. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

16. *Tadić*, *supra* note 2. See also MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, *THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH*

COMMENTARY ¶ 1.1.1 (2006) [hereinafter NIAC MANUAL] (“Non-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government.”).

17. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 343 n.1 (2000).

18. *Id.*

19. Admittedly, scholars disagree on whether recognition of belligerency is still a valid legal concept. For an analysis, see Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 *MILITARY LAW REVIEW* 109 (2000).

20. Norman J. Padelford, *International Law and the Spanish Civil War*, 31 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 226 (1937); George A. Finch, *Piracy in the Mediterranean*, 31 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 659 (1937).

21. Nyon Arrangement, Sept. 14, 1937, 181 L.N.T.S. 135; Agreement Supplementary to the Nyon Arrangement, Sept. 17, 1937, 181 L.N.T.S. 149. For the text of the agreements and an analysis by L.F.E. Goldie, see 1937 *Geneva Agreement Supplementary to the Nyon Arrangement*, in *THE LAW OF NAVAL WARFARE* 487–502 (Natalino Ronzitti ed., 1988).

22. Guilfoyle, *supra* note 4, at 192.

23. Décret 56/274, *Journal Officiel* (Mar. 17, 1956), at 2665.

24. The exact figures are unclear. Some report that 4,775 ships were searched in the first year alone. See ROBIN R. CHURCHILL & ALAN V. LOWE, *THE LAW OF THE SEA* 217 (3d ed. 1999).

25. Laurent Lucchini, *Actes de Contrainte Exercés par la France en Haute Mer au Cours des Opérations en Algérie*, 1966 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* 803. See also D.P. O’Connell, *International Law and Contemporary Naval Operations*, 44 *BRITISH YEARBOOK OF INTERNATIONAL LAW* 19, 36–39 (1970).

26. Note that the distance was 50 kilometers, not 50 nautical miles.

27. The German *Bilbao* and the Bulgarian *Chipka* were visited in the English Channel, the German *Las Palmas* twenty-two nautical miles south of Cape Vicent and the German *Archsum* fifty-four nautical miles east of Gibraltar.

28. See ROLF OTTMÜLLER, *DIE ANWENDUNG VON SEEKRIEGSRECHT IN MILITÄRISCHEN KONFLIKTEN SEIT 1945*, at 137 (1978).

29. O’Connell, *supra* note 25, at 37–39.

30. *Wary of Sea Tigers, India tightens security*, REDIFF INDIA ABROAD (May 14, 2007), <http://www.rediff.com/news/2007/may/14lte.htm>.

31. *India Must Neutralise Sea Tigers*, THE HINDU (Dec. 12, 2004), <http://www.hindu.com/2004/12/12/stories/2004121206020400.htm>.

32. Guilfoyle, *supra* note 4, at 193.

33. Notice to Mariners No. 6/2008 (Aug. 13, 2008), http://en.mot.gov.il/index.php?option=com_content&view=article&id=74:no62008&catid=17:noticetomariners&Itemid=12.

34. Notice to Mariners No. 1/2009 Blockade of Gaza Strip (Jan. 6, 2009), http://199.203.58.11/EN/index.php?option=com_content&view=article&id=124:no12009&catid=17:noticetomariners&Itemid=12.

35. For the facts of what has become known as the “flotilla incident,” see U.N. Secretary-General’s Panel of Inquiry, *Report on the 31 May 2010 Flotilla Incident*, ¶¶ 83–93 (July 2011) (Geoffrey Palmer et al.), available at http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf [hereinafter Palmer Report].

36. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

37. *Libya: Nato intercepts boats laying mines outside Misurata*, THE TELEGRAPH (United Kingdom) (Apr. 29, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8483805/Libya-Nato-intercepts-boats-laying-mines-outside-Misurata.html>.

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38. See *supra* note 16 and text accompanying notes 12, 16.
39. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention].
40. CHURCHILL & LOWE, *supra* note 24, at 87–88, 90.
41. Emphasis added.
42. CHURCHILL & LOWE, *supra* note 24, at 100.
43. SAN REMO MANUAL, *supra* note 1, ¶ 27. See also U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, The Commander's Handbook on the Law of Naval Operations ¶ 9.2.3, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A (2007), available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)) [hereinafter Commander's Handbook].
44. LOS Convention, *supra* note 39, arts. 44, 54.
45. To “prevent infringement of customs, fiscal, immigration or sanitary laws within its territory or territorial seas” or to “punish infringement of . . . [those] laws and regulations committed within its territory or territorial seas.”
46. Guilfoyle, *supra* note 4, at 193.
47. SAN REMO MANUAL, *supra* note 1, ¶ 36.
48. *Id.*, ¶ 37.
49. *Id.*, ¶¶ 34, 35.
50. *Id.*, ¶ 13.21.
51. Declaration Respecting Maritime Law, Apr. 16, 1856, 115 C.T.S. 1, reprinted in THE LAWS OF ARMED CONFLICTS 1056 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).
52. Convention Relating to the Conversion of Merchant Ships into War-Ships, Oct. 18, 1907, 205 Consol. T.S. 319, reprinted in *id.* at 1066.
53. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.
54. See Commander's Handbook, *supra* note 43, ¶ 2.2.2.
55. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAWS APPLICABLE TO AIR AND MISSILE WARFARE ¶ 17(a) (2009), available at <http://ihlresearch.org/amw/HPCR%20Manual.pdf> (“Only military aircraft, including UCAVs, are entitled to engage in attacks.”). The commentary indicates, “Rule 17 (a) does not apply in non-international armed conflict. States are more likely to employ law-enforcement and other State aircraft during these conflicts. It is not in contravention with the law of international armed if such aircraft conduct combat functions.” *Id.* at 101.
- There is a very limited exception in those instances when the States parties to a non-international armed conflict are undertaking prize measures against enemy merchant vessels or civilian aircraft. In those cases, only warships may exercise belligerent rights.
56. See *infra* Part IV.
57. See NIAC MANUAL, *supra* note 16, ¶¶ 1.1.2, 2.1.1. Although members of the State's armed forces are lawful targets under the law of non-international armed conflict, members of the dissident armed forces or an organized armed group who target them do not have combatant immunity and are subject to prosecution under the State's domestic criminal law.
58. NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 27 (2009).
59. *Id.* at 34.
60. *Id.*
61. Except for medical and religious personnel, who may not be targeted unless they take an active part in hostilities. NIAC MANUAL, *supra* note 16, ¶ 1.1.2.

62. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 21 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL].
63. NIAC MANUAL, *supra* note 16, ¶¶ 2.1.1.1, 2.1.1.2.
64. *Id.*, ¶ 1.1.4. See also CIHL, *supra* note 62, at 30–31.
65. See NIAC MANUAL, *supra* note 16, ¶ 1.1.4.3.
66. Such attacks are lawful under the international law of non-international armed conflict, but, as with attacks on members of the armed forces, those who carry out the attacks are subject to prosecution under the State's domestic law. See *supra* note 57.
67. NIAC MANUAL, *supra* note 16, ¶ 2.1.1.1; CIHL, *supra* note 62, at 5–8, 32–34.
68. See NIAC MANUAL, *supra* note 16, ¶ 1.2.2.
69. *Id.*, ¶ 1.1.3; CIHL, *supra* note 62, at 19.
70. See NIAC MANUAL, *supra* note 16, ¶ 1.1.5.
71. See *supra* Part I.F.
72. S.C. Res. 1973, *supra* note 36, ¶ 6.
73. LOS Convention, *supra* note 39, art. 25(3).
74. See Commander's Handbook, *supra* note 43, ¶ 9.2. See also HOWARD S. LEVIE, MINE WARFARE AT SEA (1992); Wolff Heintschel von Heinegg, *The International Law of Mine Warfare at Sea*, 23 ISRAEL YEARBOOK ON HUMAN RIGHTS 53 (1993).
75. See NIAC MANUAL, *supra* note 16, ¶ 2.1.1.3.
76. *Id.*, ¶ 2.2.1.1.
77. *Id.*, ¶ 2.2.1.2.
78. SAN REMO MANUAL, *supra* note 1, ¶ 82.
79. See Heintschel von Heinegg, *supra* note 74, at 62.
80. SAN REMO MANUAL, *supra* note 1, ¶ 103. See also Guilfoyle, *supra* note 4, at 198–200.
81. CIHL, *supra* note 62, at 148.
82. *Id.* at 149.
83. Some prefer a comprehensive approach and tend to equate the natural environment with an "ecosystem." Accordingly, components of the natural environment, such as flora, fauna, the lithosphere or the atmosphere, would only be covered by the term if they interact in a way that they may be considered part of an interdependent and mutually influencing system of diverse components of the natural environment. In contrast, others are prepared to consider components of the natural environment to be specially protected by the law of armed conflict, irrespective of their interdependence with other components. The only common denominator is that the term "natural environment" does not cover man-made components of the environment.
84. Guilfoyle, *supra* note 4, at 193–94.
85. See *supra* text accompanying notes 64–66.
86. Nyon Arrangement, *supra* note 21, pmb.
87. O'Connell, *supra* note 25, at 38–39.
88. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) ("The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that . . . the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001) Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.").

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89. See Wolff Heintschel von Heinegg, *Blockade*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2010), http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e252&recno=3&author=Heintschel von Heinegg Wolff.

90. See *supra* Part I.A.

91. Guilfoyle, *supra* note 4, at 217.

92. *Id.*

93. It is interesting to note that a 2009 report submitted to the Human Rights Council does not contain a legal analysis under the law of naval blockade. See U.N. Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) (Richard Goldstone).

94. Guilfoyle, *supra* note 4, at 178–91.

95. For the concept of desuetude, see, e.g., Michael J. Glennon, *How International Law Dies*, 93 GEORGETOWN LAW JOURNAL 939 (2005).

96. See YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 276–83 (2009).

97. See HCJ 9132/07 Al-Bassiouni v. Prime Minister ¶ 12 [Jan. 30, 2008] (unpublished), available at <http://www.mfa.gov.il/NR/rdonlyres/938CCD2E-89C7-4E77-B071-56772DFF79CC/0/HCGazaelectricity.pdf>.

98. *Public Committee against Torture*, *supra* note 5.

99. Jacob Turkel et al., 1 The Public Commission to Examine the Maritime Incident of 31 May 2010, ¶ 41 (2011), available at <http://turkel-committee.gov.il/files/wordocs/8707200211english.pdf>.

100. *Id.*, ¶ 44.

101. Palmer Report, *supra* note 35, ¶ 73.

102. SAN REMO MANUAL, *supra* note 1, ¶¶ 93–104; Commander's Handbook, *supra* note 43, ¶ 7.7.

103. For the relationship between the law of the sea and the law of naval warfare, see Wolff Heintschel von Heinegg, *The United Nations Convention on the Law of the Sea and Maritime Security Operations*, 48 GERMAN YEARBOOK OF INTERNATIONAL LAW 151 (2005).

104. Declaration Respecting Maritime Law, *supra* note 51, ¶ 4; Declaration Concerning the Laws of Naval War art. 2, Feb. 26, 1909, 208 Consol. T.S. 338, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 51, at 1113 (never in force); SAN REMO MANUAL, *supra* note 1, ¶ 95; Commander's Handbook, *supra* note 43, ¶ 7.7.2.3.

105. SAN REMO MANUAL, *supra* note 1, ¶¶ 67(a), 98, 146(f). See also Declaration Concerning the Laws of Naval War, *supra* note 105, art. 20; Heintschel von Heinegg, *supra* note 89, ¶¶ 41–48.

106. The boarding of the *Mavi Marmara* and the other vessels in the flotilla occurred approximately 72 nautical miles at sea. Palmer Report, *supra* note 35, ¶ 1.

107. SAN REMO MANUAL, *supra* note 1, ¶¶ 67(a), 146(f); Commander's Handbook, *supra* note 43, ¶ 7.10.

108. SAN REMO MANUAL, *supra* note 1, ¶ 102(b).

109. *Id.*, ¶ 103; Heintschel von Heinegg, *supra* note 89, ¶¶ 49–52.

110. SAN REMO MANUAL, *supra* note 1, ¶ 103(b); Heintschel von Heinegg, *supra* note 90, ¶¶ 50–51.