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LAW OF NAVAL WARFARE

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Today I am going to speak to you about a problem area which has been the subject of much discussion among publicists, that is, whether or not existing rules of naval warfare are sufficient to meet the needs of current naval operations. Stated in another way, do existing rules of international law have real relevance to present and foreseeable uses of naval force in situations often characterized as short of war? In dealing with this subject it is not my intent to offer solutions, but I do hope to stimulate your thinking on this subject, one I consider extremely important to the operation of contemporary naval forces.

Most traditional international law publicists have approached their subject by setting up two obvious categories within which to discuss international legal rules—the laws of "war" and the laws of "peace." The legitimacy of the use of naval power, as with other coercive measures, has been generally discussed in the context of these two extremes. Using this rationale, the specific use of force at sea in a given situation can be characterized as legal or illegal, depending upon the existence of a state of war. Such thinking has been criticized by many as obviously unsatisfactory, since, on the contemporary scene, states sometimes perceive a need to exercise some limited degree of force at sea which they find difficult to justify under a peacetime regime, but yet find themselves unwilling to declare a state of war. However, to simply say that current situations involving possible use of naval force may not fit neatly into one or the other of these traditional categories does not adequately set forth the true nature of the problem. Nor does it necessarily lead to the conclusion that new rules are required.

This, then, is the broad question which is to be examined here, i.e.,

whether there is a need for a new set of rules of naval warfare to apply in situations which are neither "war" nor "peace" in the classic sense.

I must add an aside at this point, primarily because I know that when one is first exposed to international law, and particularly to the "laws of war," questions arise along the following lines:

- Is not war simply a matter of the stronger or more operationally adept nation winning a victory through skillful application of force?
- If this is true, are there really any "laws of war" or is it just an academic exercise of lawyers and politicians?
- On the other side of the coin, if rational men now agree that war is a destructive force which must be abandoned as an instrument of national policy, why should rules for the conduct of war be formulated at all?

I will not attempt to deal specifically with these questions but will briefly comment on the necessity to formulate rules for the conduct of war.

There are two basic principles which guide any inquiry into the rules of warfare. These are the principles of military necessity and the principle of humanitarianism. The specific rules of warfare both on land and on the sea, which have been generally agreed upon for the past 100 years, have sought to bring these two concepts into balance. The essential thrust of these rules for warfare at sea has been to reserve for the belligerent, within the bounds of humanitarianism, the right to attack those objects which were recognized as *legitimate military objectives.* It also provided the belligerent with the right to use such force as may be necessary to attain his objective, while at the same time providing protection—as was physically possible under the circumstances—to noncombatants who may become involved and to survivors of the action. Also, it is generally agreed that the major *political* purpose of the traditional law of naval warfare was to attempt to limit the effects of combat at sea as much as possible both as to the area of the conflict and as to the participants; that is, to circumscribe the conflict so that it did not spill over to affect any more than necessary the rights of states who were not parties. It was in this context that the great body of law regarding belligerent and neutral rights and duties as we know it today arose.*

Neutrality is a concept in traditional international law which arises only when a state of war exists between two or more other states. Traditional law gave belligerent rights and obligations to the parties to a war. For those states not participating, the law provided corresponding neutral obligations and rights. The existence of a legal state of war brought these rights and obligations into existence.

Neutrality is defined under traditional international law as the nonparticipation of a state in a war between other states. The legal significance of such nonparticipation is that it brings into operation numerous rules whose purpose is the regulation of relations between neutrals and belligerents, providing certain rights and obligations for both parties.** The principle of impartiality holds that a neutral state is required to fulfill its obligations and enforce its rights in an equal manner toward all belligerents.

Although the rules of neutrality were violated on a large scale during both

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*NWIP 10-2, *The Law of Naval Warfare* is a generally accurate summary of the traditional rules of naval warfare. It is premised on the "war" and "peace" categorizations of classical writers. Basic to this traditional treatment are the concepts of belligerent and neutral rights which, in theory, neatly takes into account both participants and nonparticipants in a conflict.

**The bulk of these rules as they relate to maritime warfare are set forth in the Hague Convention on the Rights and Duties of Neutral Powers in Maritime War.

World War I and World War II, the 1907 Hague Conventions on the Rights and Duties of Neutral Powers in Land and Maritime Warfare, to which the United States and the U.S.S.R. are parties, still states the basic law of neutral-belligerent relationship. Generally these rules provide for:

- inviolability of neutral territory or territorial waters from hostilities;
- no use of neutral territory as a belligerent base of operations for fitting out of ships or other combatant forces or as a warship sanctuary for longer than a stated period;
- no use of neutral territory for the transshipment of belligerent troops or war supplies;
- a neutral is not bound, however, to prevent the export or transit for use of either belligerent or war material.

Up to and including WW II, it was customary on the outbreak of a state of war for nonparticipating states to issue proclamations of neutrality, although such is not required. In both WW I and WW II the United States did issue such declarations, and before WW II, in a series of neutrality acts from 1935 through 1939, we actually legislated our neutrality. Stringent adherence to the belligerent-neutral rights and duties method of establishing rules for warfare follows logically from the "war"-"peace" dichotomy upon which such rules are premised. Perhaps the best example of this is the set of rules applicable to naval blockade.

Traditional or close-in blockade had as its basis the belligerent right to embargo sea commerce to and from its enemy—to stop the flow of those goods, both inward and outward, which enhance the enemy's warmaking effort. Blockade was originally conceived and executed as the maritime counterpart of siege and sought the total prohibition of maritime communication with all or a designated portion of the enemy's coastline. Its focus was on ships, unlike the law of contraband where the focus was on cargo. Blockade, by its nature, involves not only interference on the high seas with vessels flying the enemy's flag, but also with vessels flying the flag of neutral states. One of the most fundamental considerations in blockade is that it applies to belligerent and neutral vessels alike; hence, one of its restrictions is on the otherwise legally unrestricted right of neutral states to trade with whomsoever they wish. In light of this fact, it is not surprising that neutral states insisted that the enforcement of a blockade must be in accordance with strict and clear rules. For the traditional close-in blockade to be lawful it must be:

- enforced by sufficient ships to be effective (i.e., to create a substantial risk of apprehension for any would-be blockade runner);
- enforced impartially against all ships, belligerent and neutral alike;
- commenced with proper notification; and
- it must not bar access to neutral ports or coastlines.

The last requirement has virtually precluded use of traditional blockade in modern warfare, since the deployment of the blockading force close in to the blockaded area is often impossible from an operational viewpoint, and geographical considerations make it difficult in many regions to blockade farther at sea and still not interfere with innocent neutral shipping or bar access to neutral ports.

Conversely, under traditional rules, establishment of a belligerent blockade would generate corresponding neutral rights and obligations for nonparticipants in the conflict. A neutral must:

- require ships flying its flag to respect the blockade;
- require its ships to navigate so as not to unreasonably interfere with the blockading force; and
- otherwise to freely navigate its ships in the area of the blockade.

Two major factors which characterized warfare over the first half of this century have rendered literal adherence to these detailed rules difficult, if not impossible, to achieve. First, the scope of objectives sought by states at war expanded dramatically over what it had been in the 19th century. And secondly, the dramatic advances in technology during these years geometrically increased each country's ability to pursue its national objectives. World Wars I and II illustrated beyond doubt, if ever there was a doubt, that the amount of force which a state will employ in warfare varies in direct proportion to the scope of the objective sought to be achieved.

It should have surprised no one that when the conflict objective reached the point of "unconditional surrender"—or, if you wish, of national survival—that the scales which seek to regulate conflict would be weighted most heavily on the side of military necessity. Considerations of humanitarianism, whether we like it or not, simply took a back seat. Thus, history would seem to suggest that states will accept fewer and fewer restraints in the form of law as their national objectives become more significant to them.

I think this can be illustrated quite well by the actions of all belligerents at sea during World Wars I and II, for in each of these conflicts both sides adopted a type of maritime interdiction which they felt was essential in a war of total dimensions, where not only the military but the economic base of the enemy became a legitimate military objective. These measures involved closing and patrolling large areas of the high seas, hundreds of miles from the enemy's coastline, with a view toward prohibiting all maritime intercourse with the enemy.

In practice the Germans even sank neutral ships, without warning, by the use of unrestricted submarine warfare. British, and later United States, blockades of Germany were enforced by large-scale war zones, through which transit by an enemy or a neutral ship was made extremely hazardous by the use of mines and submarines. These policies represented major departures from the traditional law in that they utilized extensive restriction of access to neutral ports and subjected ships attempting to breach the blockade to destruction without warning rather than to capture and condemnation in prize. In sum, the maritime interdiction practices during WW I and WW II meant almost total control of, instead of minimal interference with, neutral commerce.

The WW II experience illustrates that in a conflict situation where the objectives of the participants are very broad, the commitment to such objectives may force participants to recast traditional rules of naval warfare to allow the exercise of that degree of force deemed essential.

An excellent example of this point is the submarine. The impact of its capabilities should have been apparent during the First World War. After its early use against surface warships, Germany turned her submarines primarily against merchant shipping, sinking more than 11 million tons of Allied and neutral shipping. Yet efforts between the wars, aimed at establishing rules for the use of the submarine, ignored the technology of the new weapon. After unsuccessful attempts to ban use of the submarine entirely, rules were codified as "international law" with respect to the submarine in the London Naval Treaty of 1930 which provided:

> In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.
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> In particular, except in cases of persistent refusal to stop on being duly summoned, or of active resistance to visit and search, a warship, whether surface vessel or

submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew, and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea, and weather conditions, by the proximity of land or the presence of another vessel which is in a position to take them on board.

These provisions were reaffirmed verbatim in the London Protocol of 1936 and thereafter were acceded to by 48 states. All of the naval powers, including Germany, were bound by these rules at the outset of WW II. Clearly these provisions ignored the submarine's primary technological asset as a clandestine, surprise weapons system, and consequently they were bound to be ignored. Submarines were unable to comply with these rules without sacrificing their primary capabilities as a naval weapon. The all-encompassing constraints of these rules, drafted without consideration for the unique technological characteristics of the submarine and applied to a conflict situation which sought to forcefully obtain the broadest political objectives, virtually insured that they would not be followed. In point of fact, the probability of successfully obtaining adherence to other than the most general conflict rules in an environment of total war is almost nil.

Toward the close of WW II, however, a new factor was inserted into the equation with the development of atomic weapons. Total war, or the objective of reducing one's enemy to total submission, can well be a course of action which results in mutual annihilation. It appears to me that our technological achievements have placed some practical limit on the scope of objectives which can be sought through the use of force. Having more limited objectives permits the imposition and acceptance of more restraints. Hence, contemporary practice since WW II has tended to blur traditional concepts of belligerent and neutral rights and duties. States have not formally insisted on "belligerent" rights and, accordingly, those states not parties to conflicts have not had occasion to insist on "neutral" rights.

In contrast with the experiences of World Wars I and II and as an illustration of the type of conflict in which participants more readily accept restraints in the form of law, I think we can refer just briefly to the experience in Vietnam.

When contrasted to the experiences of World Wars I and II, the Vietnam affair provides some useful insights—in the form of law—of the restraints the participants will accept in today's conflict situations. Regardless of the classic definition of war accepted by international law, there is no doubt that Vietnam has been a conflict of major proportions. Yet the objectives have always been limited, and thus we have witnessed the exercise of significant restraint. Submarines have not been utilized, and no blockade or minefields have been established around either North or South Vietnam. In short, the Vietnam conflict has not resulted in the parties exercising those powers at sea which would be expected if the conflict were traditionally categorized as a war. Obviously, the situation in Vietnam has not been, and is not now, a time of peace. Yet that conflict has been fought in the maritime environment according to rules, primarily the peacetime rules set forth in the 1958 Geneva Conventions on the Law of the Sea.

Operation Market Time is an excellent example. The peacetime rule relating to the territorial sea holds that such waters are subject to the exclusive sovereignty of the coastal state. This has but one exception, and that is the right of foreign vessels to engage in innocent

passage through the territorial sea of a coastal state. The Geneva Convention on the Territorial Sea and the Contiguous Zone states that "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state." South Vietnam, in its 1965 decree on sea surveillance, served notice that its 3-mile territorial sea was going to be vigorously patrolled and that vessels of any country "not clearly engaged in innocent passage are subject to visit and search and may be subject to arrest and disposition . . . in conformity with accepted principles of international law." It thereafter listed the type of cargoes—war goods—which would be considered suspect. Therefore, within the 3-mile band of territorial waters, peacetime rules were found to be adequate to deal with the threat posed.

International law also, in the form of this same 1958 convention, provides for the exercise of some degree of control in the contiguous zone which can extend a total of 12 miles from the baseline from which the territorial sea is measured. Within this 9-mile band of waters contiguous to the South Vietnamese territorial sea, the peacetime rules provide that "the coastal state may exercise that degree of control necessary to prevent infringement of its customs, fiscal, immigration, or sanitation regulations committed within its territory or territorial sea." South Vietnam accordingly provided that all vessels within its contiguous zone were subject to visit and search, and arrest where appropriate, for violation of any of the above regulations. It further provided that the entry of any person or goods through other than recognized ports was forbidden by South Vietnamese customs and immigration regulations and that these regulations were going to be strictly enforced. Thus, through sole reliance on the peacetime convention on the territorial sea and the contiguous zone, South Vietnam has been able to control virtually all threats that occur within 12 miles of land.

One possible situation remains uncontrolled under the 1965 decree. That is the situation where a North Vietnamese vessel, which is known by the South Vietnamese to be a North Vietnamese vessel, is outside the 12-mile zone and obviously carrying weapons to be used by the Vietcong against the South Vietnamese Government. Neither the decree nor the 1958 Geneva Conventions cover this type of situation. There is precedent, however, in current international law for South Vietnam to act against such a vessel should it become necessary.

I refer to the basic right of every state to take such actions at sea as are reasonable and necessary to protect its security interest against the hostile acts of other states. The old case of the U.S.-flag ship *Virginius* is frequently cited in support of this proposition. This ship was seized by the Spanish authorities in 1873 while it was in the process of transporting arms to Cuban insurgents. The British ship *Deerhound* was seized by Spanish warships during the Spanish Civil War for the same reasons, and during the Algerian war, French warships stopped at least two ships—one a British and one a Yugoslav, both of which were suspected of the same offense. Although it has not been considered necessary, I believe that these cases could be used as precedent for South Vietnam to seize a foreign vessel on the high seas which immediately threatens their security during this period of instability.

I do not suppose one should discuss the rules relating to the use of force at sea in a situation short of war without mentioning briefly the Cuban quarantine of October/November 1962. Briefly, the quarantine action involved the declaration of certain areas of the high seas adjacent to Cuba in which all shipping suspected of being bound for Cuban ports and of carrying certain

designated contraband goods would be subjected to visit and search. Ships found to be carrying prohibited goods and bound for Cuba would be diverted from their intended port. A clearance certificate procedure was established under which a ship at its port of departure could be certified as innocent and thus would be permitted to pass through the quarantine zone uninterrupted.

The quarantine differed from a blockade in that it:

- sought to ban only certain items of contraband goods, rather than all maritime intercourse;
- used as methods of enforcement only visit, search, and diversion and did not employ destruction without warning;
- sought to avoid the consequences of a formal state of war.

The quarantine actually bore a very close relationship to the old law of contraband, under which belligerents claimed the right to prohibit the inflow of certain strategic goods into enemy ports.

There was obvious and clear interference with the peacetime rights of the Soviet Union and of Cuba to trade with whomsoever they pleased and to utilize the seas for this purpose. As I indicated earlier, we have seen this type of interference in modern times only in those cases where the objectives are of the highest order. Such was the case in Cuba, of course. The stationing of nuclear missiles a scant 90 miles from our shores was considered such a threat that we were willing to risk a broadening of our dispute with Cuba, even to the point of involving open conflict, if necessary, with the Soviet Union.

I think these two illustrations demonstrate rather clearly that the basic policy ingredients which underlay the traditional laws of naval warfare continue to be operative today. This is true even though we do not have the classic requirement of an actual state of war or belligerency.

The basic ingredient, as I have noted earlier, was a political need to limit the conflict both as to area and as to participants, and I think it is clear that the great bulk of the rules which we call rules of naval warfare really involve this limitation and with it the belligerent neutral relationship. The same considerations which gave rise to the traditional laws of neutrality, particularly as they relate to sea warfare, continue to be given heed by policymakers today in situations short of war.

The major political consideration in a 20th century limited war is the same as it was in the 17th and 18th centuries—the need to limit the conflict, to keep it from unnecessarily spilling over to affect nonparticipants. This has meant, in Vietnam for example, that we do not interfere with commerce into North Vietnam, even though that commerce has been essential to their conduct of hostilities.

We have not insisted on belligerent rights at sea because to do so would involve other major powers and broaden the scope of the conflict.

On the other hand, the Cuban situation illustrates that where the circumstances are right, a state will insist, even in a peacetime situation, to what was traditionally known as a belligerent right. The question today really is not a purely legal one, and it never really was.

The rules are merely a reflection of the political realities. Under the old law, if one wished to exercise belligerent rights at sea, particularly as these rights came to be exercised in World Wars I and II, one had to assume the risk of broadening the conflict, of making enemies out of neutrals. The same is true today. If a state wishes to utilize force at sea, other than directly against his adversary, he must run the risk of bringing others into the hostilities.

Except in cases like the 1962 missile crisis, where the national security is

threatened, the potential risk is just too great today for a state to claim belligerent rights.

Where does all this leave us? While at one time I was ready to criticize rather severely the war/peace dichotomy, my views of late have been influenced by what I see as a commendable stability in relations between states which that dichotomy forces upon us. The reason for this, of course, is the political realities which underlie that separation.

These questions have been the subject of considerable study for some time now. These efforts are aimed at trying to determine whether there should be a broad program for preparing additional guidelines for use by naval forces in situations short of war. So I will close by simply posing that question to you. Is the current war/peace dichotomy, and its rules for the regulation of conflict at sea, satisfactory for the contemporary environment? Or do naval commanders need something new to guide them in situations short of war? I suppose what I am really asking is, "Are our present peacetime rules adequate?"

Now that I have raised the question, perhaps some of you would like to suggest some answers which could be of assistance to us.

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