Naval War College Review

Volume 42
Number 2 *Spring*

Article 9

1989

In My View

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IN MY VIEW . . .

About Humiliation

Sir,

Lieutenant Keith Wixler describes the Falklands/Malvinas war as a "humiliating Argentine defeat" (*Naval War College Review*, Winter 1989, p. 97). A defeat? Yes, we were defeated, yet not humiliated. When you are fighting alone and without help for the integrity of your own territory, a defeat will never be "humiliating," particularly if you are fighting against a major power which is supported by a global one. If you are a light-weight, never fight against Muhammad Ali when Mike Tyson is in his corner.

I will not speculate about how the war would have ended if all the Argentine bombs and torpedoes which hit their targets had exploded. As it was, six Nato ships were sunk. I would say, thank God the "Brits" fought against the "Argies" and not, say, against the French (and this, yes, could be a nice speculation).

In 1987, I met the British task force commander, Admiral Woodward, here at the War College. He admitted that the war was "no picnic at all." Even though he was a typical British gentleman-sailor honoring a typical and emotional Argentine sailor, I think he was right. As a third party, I would never qualify the American defeat in Vietnam as "humiliating"—I try to be prudent. Of course, this is my own problem, and not Mr. Wixler's. This brings me to the last point. In analyzing professional issues, the use of adjectives or adverbial adjectives is always dangerous. At its best, they may be risking the author's objectivity. At its worst, his seriousness.

I am not saying this is the case. I try to be prudent.

JORGE LUIS COLOMBO
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Bumps in the Black Sea

Sir,

Professor Rubin (letter to the *Naval War College Review*, Autumn 1988, p. 110) argues that the passage of U.S. warships in the territorial seas of the Soviet Union leading to the bumping incident in the Black Sea earlier that year was illegal. Contrary to Professor Rubin's opinion there was no showing that the U.S. ships violated their right of innocent passage. The Soviet Union has filed no diplomatic protest to that end.

Turning first to the *Pueblo* case, the United States did not acknowledge, as Professor Rubin asserts, that a seizure of a U.S. naval vessel by North Korea in its territorial seas would be legal. The Department of State took the contrary position, fully supported under the 1958 Geneva Conventions relating to the territorial seas (Article 23), and by the United Nations Convention on the Law of the Sea (UNCLOS) (Article 30), that the *Pueblo* did not violate law, and the remedy for violations when shown is for the coastal state to order such vessels to leave its seas. The U.S. position included the following statement:

"Even if the *Pueblo* had been in the territorial waters of North Korea, its seizure would have been improper. On numerous occasions similar Soviet ships have intruded into United States territorial waters; we have warned them to leave and, when appropriate, have submitted protests through diplomatic channels. In the absence of immediate threat of armed attack (the *Pueblo* was armed with only two machine guns), escorting foreign naval vessels out of territorial waters is the strongest action a coastal state should take. The seizure of foreign warships or other attacks upon them are much too dangerous and provocative acts to be permitted under international law. This restriction on the use of force by a coastal state is set forth in Article 23 of the 1958 convention on the territorial sea, which authorizes, as the sole remedy, requiring a warship to leave the territorial sea." (Cited 62 Am.J.Int.L. 756, 756-7 (1968).)

The United States and other maritime nations have always taken the view that laws and regulations of coastal states regulating the exercise of the right of innocent passage under international law must be consistent with that right—that is, they cannot make that right unexercisable.

Article 23 of the Geneva Conventions declares that if any warship does not comply with regulations concerning passage through a territorial sea "the coastal State may require the warship to leave the territorial sea." The UNCLOS in Article 29 defines a warship in language that clearly applies to the ships that had been navigating in the Black Sea and its provision (Article 30) relating to the coastal state's right of action for noncompliance with its regulations is substantially the same as that of Article 23 of the Geneva Convention. Nowhere in these two conventions, or in customary international law, is there even an implication that passage by a warship is illegal per se, hostile, or otherwise improper.

Second, Professor Rubin correctly cites the UNCLOS, but misapplies it. It regulates innocent passage, and states that passage is not innocent if it includes "any act aimed at collecting information to the prejudice of the defence or security of

the coastal state." (Article 19 (c).) However, though it was a negotiating party, the United States has not ratified this Convention. The United States regards this provision as declaratory of customary international law and binding upon the United States. But, assuming that it is customary international law, the prescription in Article 19 (c) does not lend itself to contextual interpretation alone.

Professor Rubin intimates that the decision or appraisal that a ship in passage is collecting information and that such information is prejudicial to a state's security is a decision vested in the coastal state. However, such terms are ambiguous. No meaning can be established by simply referring to the text. The terms lack content and require future state practice to shape them into existence. But future decisions about what is prejudicial to security are not decisions that are exclusively those of the coastal state. Such decisions are introduced as claims among states and in that process are accepted or rejected.

Even if applicable, Article 19 (c) does not establish with finality whether the United States or any other state in transiting the territorial seas of another state could be engaged in violating the article itself. Nor, if the allegation of violation were made, is it clear by the language of this Article alone what kind of information collecting would be prejudicial to "the defense or security of the coastal state."

Professor Rubin's presupposition that the United States must have been receiving "useful defense information" is clearly a rewriting of the provision and introduces a new standard. Such an assnmption would make all passage by warships impermissible unless the flag states conclusively showed that they were not in violation of the Convention. Furthermore his assumption that the United States was "tracking Soviet reactions to the passage" does not introduce evideuce of any activity that would be inconsistent with innocent passage. Finally, it should be noted that the Soviets did not claim a violation of Article 19 (c).

Third, the opinion of the International Court of Justice in the *Corfu Channel* Case (1949 I.C.J. 4) concerning innocent passage in international straits, declares that "unless otherwise prescribed in an international convention, there is no right for a coastal state to prohibit such passage [innocent passage of warships] in time of peace." It is noteworthy that straits used for international navigation are now covered in separate articles in the UNCLOS (Articles 34 et seq.) and separately regulated by that convention in detail.

The prescription of sea lanes in the territorial waters differs from the regulation of innocent passage. Sea lanes in the territorial seas are regulated in the UNCLOS (bnt not in the 1958 Geneva Conventions) in Article 22. The language of Article 22 referring to sea lanes and traffic separation lanes in the territorial seas suggests that states that fail to comply with such regulations are not in violation of their rights of innocent passage. Instead, the Article establishes liability only in the event of accident or incident.

Article 21 supports this conclusion, indicating that the coastal states may regulate passage to ensure maritime safety, but this provision, too, relates to regulation of passage, not to wbether the right of innocent passage is available and may be claimed. This bears out tbe distinction between the right of innocent passage and the adoption of laws and regulations under Article 21 that the first is the broadly established right under international law, and the second is the delegation of authority to states

to regulate navigation, etc. Thus a warship that violates a state's navigation regulations may be exceeding its rights of innocent passage, if those navigation laws are read literally. But it is also possible that the ship might be compelled to violate such regulations to avoid an accident. This would not be a violation upon which the coastal state can demand the state in passage to leave its waters.

But the relevant provision in this matter is Article 30 of the UNCLOS under which the coastal state in peacetime must take diplomatic action before taking other actions. Under Article 30 it must warn warships that are violating innocent passage or compliance with laws and regulations relating to innocent passage to leave its waters. But if it intends to rely on such laws and regulations, it must make them known before they can be invoked. Those inconsistent with the overall right of innocent passage, or UNCLOS, are inapplicable. Relief for the coastal state where the diplomatic action or warning is not heeded is not covered by the Convention, and therefore the coastal state must pursue other measures consistent with customary international law. These may include the use of force, but the possibility of pursuing diplomatic sanctions or resolving the matter in diplomatic channels is open, and offers other possibilities short of force.

To advise the Soviet Union to interfere with the right of innocent passage, as Professor Rubin suggests (encumbering channels with fishing gear, laying mines, etc.) would indeed be contrary to the *Corfu Channel* Case, and customary international law. This advice would be improper. His suggestion, implying that the United States in making its innocent passage was seeking to collect useful intelligence in such an ad hoc pass, leads Professor Rubin to suggest that the Soviet Union might then be authorized to retaliate and penetrate the U.S. Air Defense Identification Zone.

Assertion of the right of innocent passage by warships is a policy expected to assure that the right is effective in peacetime. The response of the coastal state reflects its attitude toward the state in passage as well as to international law because opposition to that right would be hostile and inconsistent with the expectations shared under the law of the sea and the applicable conventions. While the state in passage asserts a claim to a right under international law, the coastal state, through diplomatic channels, can counterclaim as to how that right is being exercised, or as to its own right with respect to the laws and regulations it has enacted.

Much of the restraint on innocent passage under Article 19 of the UNCLOS requires and assumes self-restraint.

Prohibitions not only on collecting information "to the prejudice of the defense or security" of a coastal state, but also prohibitions on "propaganda" to the same effect, or even prohibitions on the "carrying out of any research or survey activities" applied by coastal states unreasonably are difficult to sustain under community standards. Language as vague as that used in this Article make the effective application of these provisions a probable source of contention among states.

But these provisions also lack effectiveness because they would require the kind of monitoring of compliance that states would simply not accept under current conditions and relations. It is possible that the future reach of territorial waters, now stretched by the lesser, but substantial, rights of coastal states in the exclusive economic zone, might encroach more substantially on the high seas freedoms. To

deter this jurisdictional reach, however, it is essential that maritime states exercise their rights reasonably, yet firmly, or they will be lost.

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The Treatment of the Wounded

Sir,

In the Spring 1988 issue of the *Naval War College Review*, Captain Arthur M. Smith, MC, U.S. Naval Reserve, comments on the treatment of war casualties during the Falklands (Malvinas) campaign.

Dr. Smith quotes a *Navy Times* newspaper report saying that the Larrey technique, long standard in military medicine, was ignored by Argentine doctors: "Inexperienced Argentine field medics clamped bullet wounds shut, relying on antibiotics to combat infection. Argentine casualties whose wounds were closed before all contaminated tissue had been removed often suffered from gas gangrene or tetanus by the time they reached Ajax Bay or the hospital ships where advanced medical care was available. Horrified doctors spent much of their time reopening and cleaning mishandled wounds. . . ."

My country may have some limitations on medical equipment, but our doctors have been taught in the study of the most advanced techniques now in use in all civilized countries.

Perhaps the newspaper article Dr. Smith quotes was written following publication of a story in the British press inspired more by patriotic euphoria than by impartial judgment. But impartial judgment is vital in this kind of article.

Let me correct some of the mistaken ideas about the supposed deficient medical preparation the Argentine doctors demonstrated during the Malvinas war.

On four different occasions Argentines have won the Nobel Prize—three of them in the field of medicine. In military medicine, records certify that the first to publish the method of war wound care known in the Anglo-Saxon world as the Method of ORR was an Argentine military doctor, Colonel Tomas Zwanck. This method is often credited to the Spanish surgeon, Trueta, who used it during the Spanish Civil War. It was used at the beginning of World War II and applied to many American soldiers who were evacuated for long voyages at sea, saving lots of precious lives.

To take care of the wounded in combat during the South Atlantic events, my country developed a medical evacuation plan that worked out satisfactorily. A surgical hospital worked in Puerto Argentino (Port Stanley). There were two small dispensaries, in Fox Bay and Port Howard, where only in exttemely urgent cases was surgery done.

Neither in the Puerto Argentino Hospital nor in the evacuation hospital in continental Argentina were any cases of gas gangrene or tetanus diagnosed.

Furthermore, no references to such diseases are found in the British Surgeons' report entitled "Relation of Argentine Personnel Assisted at the RNA 'Ajax Bay'."

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Merchants of Treason

Sir,

I wholehearredly concur with Captain E. D. Smith, at p. 126 in his review of Thomas Allen and Norman Polmar's *Merchants of Treason* (Autumn 1988), that yet *another* intelligence "agency" full of analysts indoors, bent over at desk work, is the *last* thing we need. We taxpayers are already providing a too-generous jobs program for bloated legions of consultants *and* "analysts." They have burdened library shelves with hundreds of fat studies of little or no value, even for the tiny readership for which they were intended.

Back in the early 1950s we *executed* a traitor or two which, I recall, atrracted the attention of even an eight-year-old boy, at the time. The boy learned a civics lesson about capital crime and how rhe United States should treat citizens who would share defense secrets with potential enemies.

If we believe the lives of our sailors and soldiers to be as precious as they really are, we will return to putting spies horizontal in cold graves. Then reporters can again use a death senrence to teach the public about the most serious of crimes.

Robert Fairchild
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Author's Request

For use in a biography being prepared on Rear Admiral William A. Moffett, any information about him or his aviator sons, George Hall, William Adger, Junior, or Charles Simonton.

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