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Guest Post: “Global Blockades and Unlimited Contraband Lists under the Law of Naval Warfare”

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*The war with Iran has raised a number of issues in the law of naval warfare (see e.g., **here**). Today, we add the perspective of a new contributor to **Lawfire®**, **Himanil Raina**. He grapples with the rather complicated law on naval blockades and wartime contraband. I found the interpretations he offers both interesting and provocative, so I encourage you to read his essay and decide for yourself.*

Global Blockades and Unlimited Contraband Lists under the Law of Naval Warfare

by Himanil Raina

On April 12th, the President of the United States – Donald Trump stated that, “*Effective immediately, the United States Navy, will begin the process of BLOCKADING any and all Ships trying to enter, or leave, the Strait of Hormuz*…”. On April 13th, CENTCOM started implementing a blockade of all maritime traffic entering and exiting Iranian ports at 10 a.m. ET.

Concurrently, on April 16th, the U.S.A also invoked the law of contraband and asserted the right to visit and search neutral vessels anywhere in the world in order to determine the presence of such contraband. Finally, on April 24th, the U.S. Secretary of War Pete Hegseth announced that the U.S. blockade has gone “*global*.”

While the initial social media post was overly broad, CENTCOM’s requirements are significantly narrower and more precise. Notwithstanding this precision, the U.S.A is now in utterly uncharted territory, insofar as it is asserting the ‘right’ to enforce a blockade whilst simultaneously observing a ceasefire (which may have been broken again as of this post going live). Multiple commentators have already noted that there is no basis to use domestic sanctions as a trigger for either a belligerent boarding authority or an enforcement jurisdiction over vessels on the high seas.

In contributing to this ongoing debate, this post specifically draws attention to the distinction between the law governing blockades and contraband under the Law of Naval Warfare (LNW). Two arguments are advanced herein. First, the LNW does not sanction blockades that are 'global' in nature. Second, the law of contraband does not permit targeting an adversary's exports. Also, while it permits the application of the principle of continuous voyage to absolute contraband, extending this principle to conditional contraband is a much more unclear issue.

Distinguishing Blockades and Contraband

The single most important divergence between the Law of Naval Warfare (LNW) and the Law of Land Warfare (LLW) lies in the acceptability of resorting to forcible economic warfare under the LNW. This reflects the fact that the LNW is not (pp. 7-9 and 57-61) characterized by a complete adherence to the 1868 St. Petersburg Declaration's dictum that, "*the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.*"

Blockades and the law governing contraband are the two quintessential examples of this tendency within the LNW. A blockade is a method of warfare whereby a belligerent state prevents the entry or exit of all vessels or aircraft (belligerent, non-belligerent or neutral) to or from specified enemy coastal areas (see San Remo Manual, pp. 175-176, henceforth referred to as SRM).

The purpose of a blockade may be related to considerations of sea control or (as in the case of the current example), to interfere with an enemy's exports or imports (see the Newport Manual, p.131, henceforth referred to as NM).

Contraband refers to certain goods which are destined for one of the parties to a conflict and are susceptible to use in the armed conflict. Traditionally, a distinction was made between absolute contraband, conditional contraband and free goods.

Blockades and contraband chiefly differ in four crucial ways. First, blockades target both imports and exports. However, the regime of contraband only applies to imports and not exports.

Second, enforcement actions under a blockade can be undertaken only at or near the line of the blockade. In contrast, contraband enforcement suffers from no such restriction. Third, a blockade must be maintained continuously in order to remain effective and hence valid. However, contraband enforcement can be discontinuous.

The fourth difference concerns the rule of continuous voyage, which permits the seizure of goods whose immediate destination is not a port under enemy control, so long as their ultimate destination is enemy-controlled territory. Traditionally, the rule of

continuous voyage was inapplicable to blockades and conditional contraband. It was considered applicable only in relation to absolute contraband (See pp.465-466 and 467).

Can a Blockade be enforced globally?

On April 24th, the Secretary of War Pete Hegseth announced that the U.S blockade has now gone "*global*." If this is an assertion that blockade enforcement may now occur anywhere in the world, then as will be demonstrated in this sub-section, such an assertion is patently illegal. However, if this statement was a reference to global contraband enforcement, then such an assertion may rest on a much firmer footing.

The oldest and only treaty law regulation of the law governing blockades is found in the 1856 Declaration of Paris, clause 4 of which states that, "*Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy*." Notably, the details of what is connoted by a force sufficient to prevent access to the enemy's coast is not specified.

Similarly, the declaration is silent on the questions of continuity, notification, impartiality, geographical precision, humanitarian limitations, and the distinction between close versus distant blockade. The 1909 Declaration concerning the Laws of Naval War, (the London Declaration) represented the single most consequential effort to provide an answer to the questions that were opened or left unanswered by the 1856 Paris Declaration.

Legal experts (12:59-13:34) have noted that, thus far, the U.S.A's actions mark the first time in 117 years that a state has followed the stipulations of the London Declaration so very closely while implementing a blockade. The particulars of declaration and notification to all states (belligerent and third states) and specifications relating to the commencement, duration, location and extent and providing a grace period for neutral state vessels to leave the blockaded coastline have been adhered to in the instant case.

The enforcement of the U.S blockade in Iran's territorial seas and international waters (11:50) has (as of May 29) resulted in 115 ships having been redirected after having been warned to turn around or be boarded (even as dozens of other ships have bypassed the blockade). 26 vessels supporting humanitarian aid have been allowed to pass, and 4 ships have been attacked for trying to breach the blockade line.

On April 19th, the USS Spruance subjected M/T Touska to disabling fire in the north Arabian Sea, following which it was seized by U.S Marines from the 31st MEU. On May 6th, a U.S. Navy F/A-18 fired at and disabled the M/T Hasna's rudder as it transited international waters to an Iranian port.

Finally, on May 8th a U.S. Navy F/A-18 disabled the M/T Sea Star III and M/T Sevda as they attempted to pull into an Iranian port. Most recently, on May 20th, Marines from the 31st MEU boarded the tanker M/T Celestial Sea as it attempted to breach the blockade.


U.S. Navy ships intercepting TouskaSource: Wikipedia

Peter Hegseth's remarks on a global blockade gives rise to the question whether a blockade can only be enforced in the vicinity of the blockaded area or can it be enforced anywhere in the world? Should the U.S.A. act on the latter premise, this would represent a dramatic and manifest departure from its thus-far close adherence to the provisions of the London Declaration.

Historically, the notion that a blockade could only be enforced in the vicinity of the blockaded area represented the restrictive European approach and the latter – the intention doctrine, reflected the Anglo-American approach.

The 1909 London Declaration represented the victory (p.266) of the European approach, with Article 17 stating that, "*Neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective*."

Similarly, Article 19 established that it is the true destination of the vessel which must be considered when a breach of blockade is in question, and not the ulterior destination of the cargo – a clear refutation of the principle of continuous voyage in relation to blockades.

Admittedly under modern conditions, the requirement of effectiveness is not understood to require the physical presence of warships immediately off the blockaded coastline (SRM, p.177). This is reflected in the San Remo manual which notes that, "*The force maintaining the blockade may be stationed at a distance determined by military requirements*." Likewise, the Newport manual (7.4.3, p. 133) asserts that, so long as there is a sufficient of capture, the distance of the blockading force from the coast is utterly irrelevant.

However, the latter formulation is one which strays too far from the London Declaration. To quote from the General report on London Declaration (pp. 103-104), "*The area of operations of a blockading naval force may be rather wide, but… will never reach distant seas where merchant vessels sail which are, perhaps, making for the blockaded ports, but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage….it…saves neutrals from exposure to the drawbacks of blockade at a great distance, while it leaves them*

free to run the risk which they knowingly incur by approaching points to which access is forbidden by the belligerent."

The Law of Contraband, Enemy Destination and the War-Sustaining Economy

When the U.S.A issued a contraband list on April 16, it expressly distinguished between both absolute and conditional contraband. It stated that vessels suspected of carrying contraband are subject to visit, board, search, and seizure, "*regardless of location"* and that contraband items are subject to capture at any place beyond neutral territory, "*if their destination is the territory belonging to, or occupied by, Iran***.**"

Its list of conditional contraband includes petroleum, oil and lubricants specifically owing to the role played by them in "*military operations*" and "*their contribution to Iran's war-sustaining economy*." Similarly, the inclusion of energy and power generation equipment in the list of conditional contraband, and the justification for their capture, is justified when such equipment is "*destined for use to support Iran's war-sustaining economy*" or "*military infrastructure*."

Also included in conditional contraband are metals and raw materials; machinery, mechanical appliances; manufacturing equipment and dual-use electronics and components and Information technology and communications equipment. Vessels carrying such goods have been declared as being liable to capture when circumstances indicate an "*intended military end-use*" for them. In the case of metals and raw materials, the justification for capture also arises if such goods are destined for "*Iran's defense industrial base*".

Chemicals and chemical precursors are liable for capture if circumstances indicate intended use in "*weapons production, military explosives, or rocket propellants*." Finally, Vehicles and transportation equipment is liable to capture if circumstances indicate "*intended military end-use or support to military logistics*."

That the law of contraband allows for global enforcement actions is undisputed. However, two aspects of the U.S. invocation raise more difficult questions under the LNW. First, is the extension of the rule of continuous voyage to conditional contraband permissible, given the traditional restriction of the rule to absolute contraband? Second, is the expansion of conditional contraband beyond military end-use to the war-sustaining economy logic valid?

At the time of the drafting of the London Declaration, the distinction between absolute and conditional contraband was considered consistent with the existing law. Article 30 of the London Declaration recognizes the application of the continuous voyage rule to absolute contraband. Absolute contraband is always liable to capture if it is destined

to enemy territory or enemy armed forces. This is quite irrespective of whether the carriage of goods is direct or indirect.

In sharp contrast, conditional contraband was considered liable to capture only if it was destined for use by the armed forces or a government department of the enemy state (Articles 33 and 35 of the declaration). The presumption that the goods are destined for the armed forces or a government department arises in three instances.

First, if the goods are consigned to enemy authorities. Second, if they are consigned to a contractor who supplies such articles to the enemy. Third, if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy (Article 34). The element of military or governmental use is indispensable (p.235) – mere proof that the import of such goods will free up other commercially available resources for military use is insufficient.

Notwithstanding these provisions of the London Declaration, existing expert restatements (SRM, p.215-216 and NM p.187) and interpretations (p.274) maintain that state practice (particularly that of the two world wars), has wiped out the distinction between absolute and conditional contraband.

They also maintain that state practice has favoured the application of the rule of continuous voyage to conditional contraband as well. This stance is heavily informed by state practice during the two world wars, in which the belligerents relied principally on the doctrine of reprisals and a sophisticated form of contraband control, which was supervised in ports rather than on the high seas.

The degree to which such practice could be considered as having replaced the traditional law was considered quite unsettled (p270) even in the wake of the world wars (pp.287 and 307). The reasoning underpinning a departure from established law was the presumption that the belligerents were neither able nor willing to make a clear distinction between combatant forces and the civilian population.

In arriving at this presumption, the belligerents asserted (pp. 268-269) that a large section of the enemy population took active part in the military effort and pointed to the strict control exercised over all imports through requisitioning and rationing.

Addressing whether such a factual matrix applies to the ongoing conflict is beyond the scope of this post. However, it bears noting that even in the pre-Charter era, when the law governing contraband was widely expanded, the carriage of contraband was never prohibited by international law (SRM, p.201 and NM, p.185).

This was a reflection of Article 7 of Hague Convention XIII per which a neutral state was not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet. Consequently, in a clash of a neutral merchantman's right with a belligerent's right of contraband control, while a neutral vessel was under no duty to refrain from such an activity, it assumed the consequences of carrying contraband at its own peril (Rule 67(a), SRM).

Insofar as U.S. contraband control measures are restricted to targeting cargoes with military end-uses, they may be defensible. However, the assertion in the U.S contraband lists that vessels become liable to capture owing to the carriage of goods contributing to Iran's war-sustaining economy is manifestly unlawful. It is manifestly unlawful for two reasons. First, it is well-settled law that the promulgation of contraband lists is permissible only for the regulation of certain potential imports and not exports from the enemy's territory (SRM, pp.160-161 and p.215).

Second, during the drafting of the SRM a draft rule had been proposed to render a merchant vessel a valid military objective if it was integrated into the enemy's war-sustaining effort. However, following an analysis of state practice during the World Wars, the Iran-Iraq conflict, and the Falklands War, two conclusions were reached: One, that no such rule existed in customary international law (SRM, pp.147-150 and p.157 and 160).

Second, the acceptance of such a rule would have had the effect of jeopardizing the standards set in place by Additional Protocol I – an instrument whose definition of a military objective is also replicated in the LNW (SRM, Rule 40).

There have been suggestions that the Russo-Ukrainian armed conflict marks the acceptance of this isolated U.S position by a wider number of states. This is very doubtful for two reasons. First, states bear no obligation to react to each individual strike in an armed conflict. State inaction counts as relevant practice only in certain carefully defined circumstances, which are not satisfied herein.

Second, what is unlawful for an aggressor, cannot become lawful for the aggrieved merely because its cause is just. The ICC has standing arrest warrants against both Russian and Israeli leadership for conduct involving allegedly directing attacks against civilian objects and for causing excessive incidental civilian harm.

Even more recently, the German Federal Court of Justice rendered its judgment in the criminal case against several Ukrainians for the sabotage of the Nord Stream pipelines. This judgment also specifically rejected (para 49, pp. 23-24) the war-sustaining conception of military objectives.

These conclusions are further reinforced by the fact that, today, interference with a neutral carries the additional risk of violating the prohibition on the use of force against the state of which the neutral ship bears nationality. This is because Article 3(d) of the UNGA Resolution 3314 (XXIX) confirms that an attack on the "*marine fleets of another state*" can qualify as an act of aggression.

Admittedly, there exists legitimate ambiguity on the question of what is the precise threshold where attacks can be considered as having been directed against "marine fleets" (pp.204-207) as opposed to individual ships. However, the fact that it does exist is uncontested.

The U.S.A has clarified that its pursuit of Iranian-flagged vessels or any other vessel attempting to provide material support to Iran is not limited to the immediate theater of war (remarks of Air Force Gen. Dan Caine, chairman of the Joint Chiefs of Staff at 11:50-12:19).

Thus far, its seizures have been limited to three ships. Two very large crude tankers (VLCC), the Tifani and the Majestic X, were interdicted in the Indian Ocean on April 20th and 22nd. The third oil tanker – Skywave was seized around or prior to May 19th. However, given reports of false flags, statelessness, and the involvement of the Department of Justice and law enforcement elements, there does exist some confusion as to the exact legal basis for these seizures.

It remains to be seen whether operations that interfere with neutral-state vessels that rely specifically on the law of contraband will be conducted. Notably, it has been 7 weeks since the contraband lists were published and yet not a single vessel has been seized specifically under this authority.

Conclusion

The waging of forcible economic warfare pursuant to the LNW remains an area of the law fraught with complex interpretive issues and unresolved questions of how to reconcile widely divergent state practice with the applicable legal framework. What makes this a particularly difficult area of the law is the fact that (p.433) "*it is impossible to separate the jus ad bellum and jus in bello aspects of the law of neutrality when it comes to naval warfare*."

This has been acknowledged by the San Remo Manual as well (p.68 and pp.195-196). The right of visit and search is a central pillar for the control and enforcement of blockades and contraband. However, international law recognizes no such unrestricted right. The assessment of whether or not a resort to such measures is arbitrary hinges on considerations.

This is because the availability and exercise of belligerent rights – particularly those which affect neutral shipping and the economic interests of neutral states (like blockade and contraband) are affected by the restraints of the law of self-defence.

This pushback has been manifested through the severe international backlashes which have accompanied every single instance of a state resorting to forcible economic warfare in recent memory – from the 2006 Israeli-Lebanon armed conflict (paras 268–275), the blockade of Gaza (para 22) from 2009 onwards (paras 53-54 and 63), the Saudi Arabian led intervention (paras 3-4, p. 29) in Yemen since 2015, the still ongoing Russo-Ukrainian armed conflict, the maritime restrictions imposed by the U.S.A during the Venezuela incidents, on Cuba and Iranian restrictions in the Strait of Hormuz.

Specifically, the imposition of a blockade raises the question of how a blockading state can use force against a neutral state without breaching its charter obligations. Second, how can a LOAC regime that rejects the targeting of civilian objects sustaining the war effort, simultaneously be held to permit blockades and expansive contraband regimes, whose purpose is to strangle economic life and suppress war-sustaining trade? A third and final (p.62) question is whether an aggressor state may validly exercise belligerent “rights” such as blockade or contraband control at all.

Ultimately, the U.S.’s attempt to operationalize the full architecture of the LNW has resurfaced the tension between an expansive pre-Charter conception of violence and a contemporary legal order governed by the Charter’s restraints on force, Additional Protocol I’s protection of civilians, and the Law of the Sea Convention’s protection of navigational freedoms.

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