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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

The use of force against neutral ships outside territorial waters

Sondre Torp Helmersen

UiT The Arctic University of Norway, PO Box 6050 Langnes, N-9037 Tromsø, Norway
Email: sondre.t.helmersen@uit.no

Abstract

This article examines when states are allowed to use force against neutral merchant ships outside territorial waters. This is regulated by both international humanitarian law and the prohibition of the use of force, which apply concurrently to naval warfare. The prohibition of the use of force imposes narrower limits than international humanitarian law, in the sense that certain actions that have traditionally been permitted under international humanitarian law are contrary to the prohibition of the use of force. The prohibition of the use of force exempts uses of force based on UN Security Council resolutions, consent and self-defence. Where there is no UN Security Council resolution or consent, self-defence remains the only option, and self-defence does not give a right to direct the use of force towards third states or their ships. Therefore, the right to self-defence does not permit blockades outside territorial waters or visit and search operations that are not founded on specific suspicions against individual ships, even though such operations may be permitted under international humanitarian law. These conclusions are supported by an examination of state practice and *opinio juris*, where the few relevant instances that do exist have met with widespread protests from other states.

Keywords: blockades; high seas; neutrality; use of force; visit and search

1. Introduction

This article examines when the prohibition of the use of force allows states to use force against neutral ships outside territorial waters. It presents the argument that the prohibition of the use of force forbids certain practices that have been permitted under traditional international humanitarian law. This affects the legality of blockades and visit and search operations against neutral ships outside territorial waters. The prohibition of the use of force prohibits operations that do not discriminate between ships that contribute to the enemy war effort and those that do not. Therefore, visit and search operations can only be based on specific suspicions against individual ships. Blockades, which are by definition indiscriminate, cannot be enforced outside territorial waters. This view is supported by the logic and structure of the prohibition of the use of force as well as the available state practice and *opinio juris*.

In his Second Report on State Responsibility, Special Rapporteur James Crawford noted that it was 'controversial' to what extent 'the traditional law of neutrality has survived unchanged in the Charter period'.[1] This article aims to resolve a significant aspect of that controversy.

[1]International Law Commission, *Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur, Addendum* (1999), at 36. This controversy is also noted by, e.g., D. P. O'Connell, *The Influence of Law on Sea Power* (1985), at 160; E. Papastravidis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (2013), at 43; A de Guttry and N. Ronzitti, *The Iran-Iraq War and the Law of Naval Warfare* (1993), at 13.

Some statements about the legality of using force against neutral ships outside territorial waters seem to be based only on the traditional rules of international humanitarian law. For example, Guilfoyle writes that a 'blockade may be enforced against … neutrals' on the high seas.[2] Von Heinegg also argues that blockades can be established 'on the high seas'.[3] This article uses a different approach, where the prohibition of the use of force is considered as well.

The article focuses on areas outside territorial waters. Territorial waters extend up to 12 nautical miles from a state's coastline under UNCLOS[4] Article 3 and are subject to the full sovereignty of the coastal state under UNCLOS Article 2(1). If a state can legally use force on another state's territory, it should also be allowed to use force in its territorial waters. There is a potential conflict with the right of innocent passage,[5] but that is outside the scope of this article.[6] Maritime areas outside territorial waters are either exclusive economic zones, where the coastal state does not have a right to use force, or high seas.

The article moreover focuses on neutral ships. These are ships whose flag state is a third state to a conflict,[7] and are neither the state that is using force nor one that the use of force is directed against. The status of stateless ships is not at issue in this article.[8]

Outside territorial waters, neutral ships are subject to the 'exclusive jurisdiction' of their flag state under UNCLOS Articles 92 and 58. UNCLOS and certain other treaties contain some limited exceptions that allow for the use of force in specific cases,[9] but these do not cover the operations discussed in this article. Using force beyond those exceptions is *prima facie* a violation of the flag state's exclusive jurisdiction. However, in this case the right to interfere with shipping under international humanitarian law must prevail over the law of sea as *lex specialis*. The prohibition against the use of force is found in the UN Charter[10] (Article 2(4)) and its customary international law equivalent.[11] The UN Charter prevails over other treaties, such as UNCLOS, under UN Charter Article 103. The customary law prohibition is *jus cogens* and thus prevails over other international law.[12]

The article focuses on the rules governing merchant ships. Warships are subject to different rules in various situations.[13]

Section 2 examines when international humanitarian law permits the use of force against neutral ships outside territorial waters. Such ships can be targeted in certain situations, as shown in Section 2.1 They can also be subjected to blockades, visit and search operations, and exclusion zones, which are defined and examined in Sections 2.2 to 2.4. Section 3 covers the relationship between international humanitarian law and the prohibition of the use of force, establishing three important premises for the argument presented in this article: The prohibition of the use of force applies to ships (Section 3.1), the prohibition of the use of force applies alongside international

[2]D. Guilfoyle, 'The Mavi Marmara Incident and Blockade in Armed Conflict', (2011) 81 *British Yearbook of International Law* 171, at 178.

[3]W. H. von Heinegg, 'Blockades and Interdictions', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), 925, at 927.

[4]1982 United Nations Convention on the Law of the Sea, 1833 UNTS 397.

[5]See UNCLOS Article 17.

[6]The potential conflict is discussed by W. H. von Heinegg, 'The UNCLOS and Maritime Security Operations', (2006) 48 *German Yearbook of International Law* 151, 179.

[7]Under UNCLOS Article 92, 'Ships shall sail under the flag of one State only'.

[8]It is discussed, e.g., by D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2009), at 17–18.

[9]Y. Tanaka, *The International Law of the Sea* (2019), 207–9.

[10]Charter of the United Nations (1945), 1 UNTS XVI.

[11]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, [1986] ICJ Rep. 14, paras. 99–102.

[12]S. T. Helmersen, 'The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations', (2014) 61 *Netherlands International Law Review* 167.

[13]See generally W. H. von Heinegg, 'Warships', (2015) *Max Planck Encyclopedia of Public International Law*.

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humanitarian law (Section 3.2), and the right to self-defence does not give a right to use force directed at third states (Section 3.3). Therefore, some of the actions that have been permitted under international humanitarian law should not be permitted under the prohibition of the use of force. Section 4 examines what state practice and *opinio juris* can say about the use against neutral ships outside territorial waters in self-defence. There is little relevant practice, as self-defence is often not invoked (Section 4.1), and operations are often limited to territorial waters (Section 4.2). The few attempts that have been made to establish and enforce blockades or indiscriminate visit and search operations outside territorial waters have been met with protests by other states. The conclusion in Section 5 is therefore that the prohibition of the use of the force is more restrictive than international humanitarian law when it comes to using force against neutral ships outside territorial waters.

2. Relevant rules of humanitarian law

2.1 Targeting

International humanitarian law generally permits the use of force against objects that 'make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage', according to Paragraph 40 of the San Remo Manual[14]. Paragraph 67 specifically concerns '[m]erchant vessels flying the flag of neutral States' and lists a variety of instances where they can be targeted. This includes situations where ships 'are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture', or where ships 'otherwise make an effective contribution to the enemy's military action'. These rules have no geographical limitation and apply in all maritime areas.

The International Law Association's Helsinki Principles on the Law of Maritime Neutrality (1998) regulate the same question in Paragraph 5.1.2, which largely overlaps with the provisions of the San Remo Manual. Subparagraph 3 allows attacking of neutral ships that 'are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search, capture or diversion'. Subparagraph 4 lists specific situations where neutral merchant ships can be attacked, all of which focus on their connection to the enemy.

The San Remo Manual is a non-binding document which was adopted by the International Institute of Humanitarian Law, an Italian non-profit organization, in 1994. The Manual was written by diplomats and academics, although 'States were not officially represented'.[15] It has been said to have 'had a tremendous influence on the development of the law of armed conflict at sea'.[16] The Helsinki Principles have been said to be 'widely accepted as being declaratory of the present law'.[17] In conclusion it seems safe to assume that international humanitarian law give states a right to use force against neutral merchant ships outside territorial waters in the situations listed in the San Remo Manual or the Helsinki Principles.

[14]International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994).

[15]S. Haines, 'War at Sea: Nineteenth-Century Laws for Twenty-First Century Wars?', (2016) 98 *International Review of the Red Cross* 419, at 435.

[16]S. Sivakumaran, 'Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice', (2016) 92 *International Law Studies* 153, at 192. See also L. C. Green, *The Contemporary Law of Armed Conflict* (2008), 45; von Heinegg, *supra* note 6, at 155.

[17]von Heinegg, ibid.

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2.2 Blockades

The San Remo Manual and the Helsinki Principles both contain provisions that permit the use of force against neutral ships that are 'believed on reasonable grounds to be ... breaching a blockade'. Blockades are 'a belligerent operation to prevent vessels and/or aircraft of all nations ... from entering or exiting specified ports, airports, or coastal areas belonging to, occupied by, or under the control of an enemy nation'.[18] Blockades are indiscriminate, in that they must be 'enforced against every vessel of every nation'.[19]

The term 'blockade' is sometimes used in relation to actions that are not covered by this definition, such as the 2017 decision of Bahrain, the United Arab Emirates, and Yemen to close their own borders with Qatar. These states were not blocking Qatar's maritime territories from ships and aircraft from third states, and the action was therefore not a blockade under international law, even though Qatar used that term in diplomatic correspondence.[20]

The Paris Declaration Respecting Maritime Law was adopted by 55 states in 1856. While it was called a 'declaration', according to its wording it was 'binding' on the states parties. The Declaration mentions blockades in Section 4, and states that they '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'. This means that the states that were parties to declaration recognized blockades as legal but at the same time subject to an effectiveness requirement.

The London Declaration concerning the Laws of Naval War was signed by ten states in 1909 but never came into force. Chapter I (Article 1-21) deals with blockades. It includes a variety of conditions for the legality of a blockade. Articles 14 and 17 mention 'neutral' vessels, thus envisaging that a blockade may be enforced against them. Article 1 says that '[a] blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy', which seems to mean that blockades could not be enforced as far off the coast as in exclusive economic zones or on the high seas.

Paragraphs 93–104 of the San Remo Manual cover blockades. The San Remo Manual does not explicitly say that blockades can be established and enforced outside territorial waters, but Paragraph 96 says that '[t]he force maintaining the blockade may be stationed at a distance determined by military requirements'.

The Helsinki Principles also attempt to sum up the law of blockades. Section 5.2.10 says that blockades are 'a legitimate method of naval warfare' and that '[n]eutral vessels believed on reasonable and probable grounds to be breaching a blockade may be stopped and captured'. The Helsinki Principles do not say anything about where, i.e., in which maritime areas, blockades may be established.

In short, under international humanitarian law, states seem to be permitted to establish and enforce blockades against neutral ships, probably outside territorial waters.[21] During the period when the Paris and London declarations were drafted and the law of blockade was developed, the generally agreed limit for the territorial sea was 3 nautical miles rather than the 12-mile limit found in UNCLOS.[22] A discussion of the current law of blockade must be based on the current extent of the relevant maritime zones.

[18]W. H. von Heinegg, 'Blockade', (2015) *Max Planck Encyclopedia of Public International Law*, para. 1.

[19]M. D. Fink, 'Contemporary Views on the Lawfulness of Naval Blockades', (2011) 1 *Aegean Rev Law Sea* 191, at 197. See also T. D. Jones, 'The International Law of Maritime Blockade: A Measure of Naval Economic Interdiction', (1983) 26 *Howard Law Journal* 759, at 763.

[20]W. Ali, 'Qatar crisis: Why is it boycott not blockade', *Egypt Today*, 12 August 2017, available at egypttoday.com/Article/1/16946/Qatar-crisis-Why-is-it-boycott-not-blockade.

[21]E.g., Guilfoyle, *supra* note 2, at 197.

[22]S. Wolf, 'Territorial Sea', (2013) *Max Planck Encyclopedia of Public International Law*, para. 4.

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2.3 Visit and search

The right to visit and search is a 'right to warships of belligerent States to visit and search foreign merchant ships in order to ensure that they are not carrying contraband to the enemy'.[23] This right is 'generally recognised as reflecting customary international law'.[24]

This right is covered by the San Remo Manual, which says that 'neutral ships' can be subjected to visit and search outside 'neutral waters' if 'there are reasonable grounds for suspecting that they are subject to capture' (paragraph 118).[25] Paragraph 14 of the San Remo Manual defines 'neutral waters' as 'the internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States', which means that the rule in paragraph 118 applies to exclusive economic zones and the high seas.

Paragraph 146 says when such ships are 'subject to capture'. It refers back to Paragraph 67, meaning that a ship that can be targeted can also be captured. Paragraph 146 adds some additional situations, where neutral ships make a variety of contributions to the enemy's war effort. The grounds for capture are 'carrying contraband', ferrying enemy armed forces, being controlled by the enemy, falsifying or tampering with documents, 'violating regulations established by a belligerent within the immediate area of naval operations', and 'breaching or attempting to breach a blockade'. Except for the law of blockades, which is a separate question (discussed in Section 2.2 above), and the regulation of 'the immediate area of naval operations', these grounds are linked to helping the enemy or being suspected of doing so. Thus, according to the San Remo Manual, exercising the right to visit and search outside the immediate area of naval action will usually require a specific suspicion of a link between the neutral ship and the enemy.

The right to visit and search is also found in the Helsinki Principles. Paragraph 5.2.1 says that 'belligerent warships have a right to visit and search vis-a-vis neutral commercial ships in order to ascertain the character and destination of their cargo'. Unlike in the San Remo Manual, this is not predicated on any suspicion against the specific ship.

The conclusion is that international humanitarian law contains a right to visit and search. The content of this right is not entirely certain. The San Remo Manuel is the most authoritative source, and it makes the right dependant on a suspicion that a specific ship has some link to the enemy. In the rest of this article, visit and search operations predicated on a specific suspicion against an individual ship will be called 'discriminate', while the opposite will be called 'indiscriminate'.

2.4 Exclusion zones

states may declare that neutral ships will be liable to attack if they enter a designed maritime zone. The establishment of such a zone may be seen as a threat of force,[26] while its enforcement will generally involve the use of force. The legality of such 'exclusion zones' has been debated throughout the history of modern humanitarian law.[27] Paragraph 105 of the San Remo Manual states that '[a] belligerent cannot be absolved of its duties under international humanitarian law by establishing zones'. Moreover, according to Paragraph 106(a), 'the same body of law applies both inside and outside the zone'. Thus, the regular rules of humanitarian law apply regardless of whether a state establishes an exclusion zone.[28] This also means that 'international law does not legitimize attack upon a vessel solely as function of that vessel having entered a predesignated exclusion

[23]V. Lowe and A. Tzanakopoulos, 'Ships, Visit and Search', (2013) *Max Planck Encyclopedia of Public International Law*, para. 1.

[24]Papastavridis, *supra* note 1, at 44.

[25]Ibid., at 47, calls this 'noteworthy'.

[26]N. Stürchler, *The Threat of Force in International Law* (2009), at 262.

[27]Sivakumaran, *supra* note 16, at 156–92.

[28]Sivakumaran, ibid., at 194 notes that humanitarian law neither prohibits nor expressly permits exclusion zones.

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zone'.[29] state military manuals have followed the San Remo Manual's lead.[30] Older attempts at codification have had varying rules,[31] but they have become less relevant with the adoption of the San Remo Manual.

In short, under international humanitarian law, exclusion zones do not by themselves give any right to use force against neutral ships outside territorial waters. Such rights must instead be found in other parts of humanitarian law, including the right to visit and search or to enforce a blockade.

3. The role of the prohibition of the use of force

3.1 The prohibition of the use of force applies to ships

The previous sections have shown that international humanitarian law permits the use of force against neutral ships outside territorial waters in certain situations. The argument in the following sections is that the prohibition of the use of force applies to ships and applies concurrently with international humanitarian law. An action must comply with both sets of rules in order to be legal. The prohibition of the use of force has an exception for self-defence, but the right to self-defence does not give a right to direct the use of force against third states. This represents a challenge to the legality of blockades outside territorial waters and indiscriminate visit and search operations.

The first premise of the argument is that the prohibition of the use of force applies to ships. This means that ships are protected from the use of force by foreign states. The wording of the UN Charter (Article 2(4)) does not specify whether it applies to ships. Article 42 is an exception from Article 2(4). Read in conjunction with Article 41, Article 42 must be rest on the assumption that a 'blockade' can be a measure 'involving the use of armed force'. That must build on an assumption that Article 2(4) applies to ships.[32]

UNCLOS Article 88 says that 'the high seas shall be reserved for peaceful purposes', and this is usually taken to mean that the general international law rules on the use of force apply at sea.[33] UNCLOS Article 301 obliges states to respect the prohibition of the use of force when 'exercising their rights and performing their duties under' UNCLOS, which also seems to build on an assumption that the prohibition applies to ships in the first place.[34]

The UN General Assembly's *Definition of Aggression* (1974) includes 'blockade' in Article 3(c) and attacks 'sea or air forces, or marine and air fleets' in Article 3(d) as forms of 'aggression'.[35] The North Atlantic Treaty (Article 6(1)) includes civilian vessels as potential targets of armed attacks.[36] The ICJ applied the prohibition of the use of force to oil platforms in the *Oil Platforms* case, and

[29]F. V. Russo, 'Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law', (1988) 19 *Ocean Development and International Law* 381, at 390. F. C. Leiner, 'Maritime Security Zones', (1984) 24 *Virginia Journal of International Law* 967, at 991 takes this further, and concludes that 'war zones against neutrals constitute a violation of international law'.

[30]Sivakumaran, *supra* note 16, at 202; for an example see UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2005), para. 13.106

[31]G. P. Politakis, 'Waging War at Sea: the Legality of War Zones', (1991) 38 *Netherlands International Law Review* 125, at 154–7.

[32]R. A. Müllerson, 'The Principle of the Non-Threat and Non-Use of Force in the Modern World', in W. E. Butler (ed.), *The Non-Use of Force in International Law* (1989), 29, at 30 thus classifies 'blockade' as a 'violation' of the prohibition of the use of force.

[33]E.g., M. H. Nordquist, S. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea* (1982), (available at referenceworks.brillonline.com/browse/united-nations-convention-on-the-law-of-the-sea), at 91, with further references; N. Klein, *Maritime Security and the Law of the Sea* (2011), at 260; Guilfoyle, *supra* note 2, at 176.

[34]R. J. Dupuy and D. Vignes, *A Handbook on the New Law of the Sea 2* (1991), at 1239; F. Francioni, 'The Use of Force and the New Law of the Sea', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986) 361, at 375; Klein, *supra* note 33, at 261.

[35]United Nations General Assembly Resolution 3314 (XXIX), 14 December 1974.

[36]T. Ruys, *'Armed Attack' and Article 51 of the UN Charter* (2013), at 206.

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was open to applying it to an individual ship.[37] The arbitral tribunal in *Guyana* v. *Suriname* applied the prohibition of the threat of force to an oil platform and a ship.[38] Judge Gao wrote in his individual opinion in the ITLOS' *Ukrainian naval vessels* cases that 'the firing of target shots against a naval vessel is therefore tantamount to use of force against the sovereignty of the State whose flag that vessel flies'.[39] All this supports the view that the prohibition of the use of force is not limited to land territory.

Writers generally agree that the prohibition of the use of force applies to ships.[40] The flag state will be the target of the use of force.[41] Guilfoyle states simply that 'an interdiction not otherwise authorized by international law would be prohibited as involving a threat or use of force'.[42] Guilfoyle rightly rejects the alternative view that 'boarding and seizing a vessel does not violate the prohibition on the use of force in Article 2(4) of the UN Charter, as the vessel is not relevantly part of the flag State's territory'.[43] In *Oil Platforms* the ICJ stated that an attack on a vessel was 'not in itself to be equated with an attack on' the flag state because the ship was not flying the relevant flag.[44] The implication is that if it *had* been flying the flag, there would have been attack on the flag state.

Some uses of force may involve a coastal state as well as a flag state. If a state uses force against a neutral merchant ship in another state's exclusive economic zone, this does not constitute a use of force against the coastal state, only against the ship's flag state. By contrast, a use of force against a ship in a foreign state's territorial waters is a use of force against that state regardless of the ship's flag,[45] but that is not at issue in this article.

Some naval actions constitute law enforcement and fall outside UN Charter Article 2(4).[46] For example, the arbitral tribunal in *Guyana* v. *Suriname* stated that 'in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary'.[47] The ICJ's decision in the *Fisheries Jurisdiction* case between Spain and Canada may be taken to support the same point. Spain had argued that Canada's actions when 'arresting' a Spanish ship and 'harassing' others 'contravenes the provisions of the Charter'.[48] The Court held that Canada's actions 'falls within the ambit of what is commonly understood as enforcement of conservation and management measures', without mentioning Article 2(4).[49] This may have

[37] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, [2003] ICJ Rep. 161, at 195: 'The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence"'.

[38] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award of 17 September 2007, XXX RIAA 1, para. 445.

[39] *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, Request for the prescription of provisional measures, Order, 25 May 2019, Separate Opinion of Judge Gao, para. 33.

[40] E.g., Papastravidis, *supra* note 1, at 45, 149–54, 157; S. T. Helmersen, 'The Sui Generis Nature of Flag State Jurisdiction', (2015) 58 *Japanese Yearbook of International Law* 319, at 329; P. J. Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award', (2008) 13 *Journal of Conflict and Security Law* 49, at 58–9.

[41] O. Dörr and A. Randelzhofer, 'Article 2 (4)', in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary, Volume I* (2012), 200, at 215.

[42] Guilfoyle, *supra* note 8, at 273.

[43] D. Guilfoyle, 'Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the use of Force', (2007) 56 *International & Comparative Law Quarterly* 69, at 79.

[44] *Oil Platforms*, *supra* note 37, at 191.

[45] O. Dörr and A. Randelzhofer, 'Article 2 (4)', in Simma et al., *supra* note 41, at 215. A practical example is found in *Nicaragua*, *supra* note 11, at para. 188.

[46] Kwast, *supra* note 40, at 72–90.

[47] *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, *supra* note 38.

[48] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, [1998] ICJ Rep. 432, at 438, 465.

[49] Ibid., at 466.

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implied that some measure of force may be used against ships without being subject to Article 2(4),[50] but the Court is not clear on this point. The ITLOS, in *M/V Saiga*, stated that:

> international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.[51]

The Tribunal did not mention UN Charter Articles 2(4) and 51, which may mean that the tribunal applied a separate rule. A Guinean patrol boat had opened fire on and boarded a Saint Vincent and the Grenadines tanker ship, damaging the ship and injuring two crew members.[52] The Tribunal concluded that this constituted 'excessive force' and was contrary to 'international law'.[53] The ICJ, in *Corfu Channel*, denounced the United Kingdom's minesweeping operation in Albanian waters 'as the manifestation of a policy of force', but without mentioning the prohibition of the use of force or UN Charter Article 2(4).[54] The failure to mention these rules could mean that the Court did not believe that the United Kingdom's actions violated the prohibition, but the judgment is not clear on this point.[55]

Whether a state's actions within its own maritime area is considered law enforcement or a use of force should depend on 'a case-by-case assessment'.[56] Relevant factors include 'political context' (especially the 'reaction of the victim state'), 'intensity', recurrence, the involvement of either police or military, and 'the level of decision making'.[57] The tribunal in *Guyana* v. *Suriname* concluded that Suriname's actions, where warships ordered an oil rig and drill ship to leave a disputed maritime area within 12 hours and followed them during the departure, 'seemed more akin to a threat of military action rather than a mere law enforcement activity'.[58] This suggests a relatively low threshold for classifying naval actions as use of force rather than law enforcement.[59]

Outside a state's own maritime areas, UNCLOS provides a number of grounds for law enforcement. When there is no 'possible nexus' to any of these grounds, the interception of merchant ships should 'normally' be seen as a use of force.[60]

In any case, even if a specific visit and search operation or a search conducted as part of a blockade is seen merely as law enforcement, these actions must be backed up by the threat or use of proper force if the target resists.[61] This will bring Article 2(4) into play eventually.[62] The interceptions of neutral merchant ships covered by this article will therefore be illegal unless they can be justified by one of the exceptions to the prohibition of the use of force, which are examined further in Section 3.3.

[50]D. H. Anderson, 'Some Aspects of the Use of Force in Maritime Law Enforcement', in N. Boschiero et al. (eds.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (2013), 233, at 236–7.

[51]*The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, at 61–2.

[52]Ibid., at 62–3.

[53]Ibid., at 63.

[54]*Corfu Channel* case, Judgment of April 9th, 1949, [1949] ICJ Rep. 4, at 35.

[55]E.g., C. Kreß, 'The International Court of Justice and the "Principle of Non-Use of Force"', in Weller, *supra* note 3, at 575.

[56]T. Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?', (2014) 108 *American Journal of International Law* 159, at 207.

[57]Ibid. A somewhat similar set of factors is suggested by Kwast, *supra* note 40, at 72–89.

[58]*Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, *supra* note 38.

[59]Ruys, *supra* note 56, at 205.

[60]Ibid., at 208.

[61]Lowe and Tzanakopoulos, *supra* note 23, para. 10.

[62]J. Upcher, *Neutrality in Contemporary International Law* (2020), at 169.

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3.2 The prohibition of the use of force and humanitarian law apply concurrently

This section presents the argument that the prohibition of the use of force applies to ships concurrently with international humanitarian law. Blockades were mentioned in the Paris Declaration and the London Declaration, as noted in Section 2.2, but these were drafted before the adoption of the UN Charter. The Charter's prohibition of the use of force outlawed many practices that had previously been seen as a normal exercise of power in international politics. That a certain practice was legal under international humanitarian law before the adoption of the prohibition of the use of force is not in itself an argument in favour of its post-UN Charter legality.

International humanitarian law and the prohibition of the use force are distinct areas of international law, and they must be distinguished when assessing the legality of naval blockades and other military actions. An action that complies with the prohibition of the use of force may nonetheless violate international humanitarian law, and vice versa. The two sets of rules are aimed at somewhat different facts. The prohibition of the use of force covers mainly the initiation of military conflict, while international humanitarian law governs each individual military action taken as part of a military conflict. However, the prohibition of the use of force applies to limited military operations as well as large-scale ones. Therefore, the two sets of rules overlap, in the sense that they apply concurrently to some of the same actions. An illustration is the 1998 US bombing of the Al-Shifa pharmaceutical factory in Sudan. This violated the prohibition of the use of force, since there had been no 'armed attack' by Sudan against the US, the UN Security Council had not authorized the bombing, and Sudan did not consent to it. The bombing probably also violated international humanitarian law, since civilians were killed and injured, and the factory turned out not to have any military function. If there had been, for example, a foregoing 'armed attack' from Sudan, the bombing may not have violated the prohibition of the use of force (but it could still have violated international humanitarian law). If the factory had been a military production facility, the bombing may not have violated international humanitarian law (but it could still have violated the prohibition of the use of force). If the US had instead launched a full-scale invasion of Sudan, the invasion as such would have to be judged according to the prohibition of the use of force, while the specific military actions that made up the invasion would have to be judged according to international humanitarian law. While the two sets of rules may in this sense overlap and interact, they do not merge.

When discussing the relationship between the prohibition of the use of force and international humanitarian law, the San Remo Manual (1994) and the Helsinki Principles (1998) are more interesting than the Paris Declaration and London Declaration by virtue of having been drafted after 1945.

The substantive provisions of the San Remo Manual and the Helsinki Principles concern humanitarian law. The San Remo Manual seems to assume that its provisions are subject to limitations imposed by the prohibition of the use of force. It states that a 'majority of participants' thought that 'the rights of belligerents are affected by the restraints of the law of self-defence and that this will affect the rights of belligerents to make full use of all the methods of naval warfare that the traditional law automatically allowed'.[63] This supports the argument that the two sets of rules apply concurrently and must be analysed separately.[64] The provisions of the San Remo Manual does not help determine what is legal under the prohibition of the use of force.

[63]International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, *Explanation* (1994), at 68.

[64]L. Doswald-Beck, 'The San Remo Manual of International Law Applicable to Armed Conflicts at Sea', (1995) 89 *American Journal of International Law* 192, at 196–7 writes that 'the law applies equally to all belligerents irrespective of which one is guilty of aggression'. M. Bothe, 'The Law of Neutrality', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2013), 549, at 559 makes the same point. The point in this article is that the opposite is also true, in that the prohibition of the use of force (or aggression) can be violated by a party that complies with international humanitarian law.

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A similar recognition is found in the UK Military Manual, which states that 'the conduct of armed conflict at sea is subject to the limitations imposed by the UN Charter on all use of force'.[65]

The Helsinki Principles Section 1.2 say that the Principles shall not 'be construed as implying any limitation upon the powers of the Security Council' or 'as denying the inherent right of individual or collective self-defence' in the UN Charter. In other words, the Principles are not meant to limit any of the rules in the UN Charter, but this article is concerned with the opposite question, whether the UN Charter limits the humanitarian law rights codified in the Principles. The Principles are silent on this point.

The state practice referred to in Section 4.3 below shows states protesting against uses of force against neutral ships outside territorial waters. That is consistent with the view that the prohibition of the use of force applies at sea concurrently with international humanitarian law.

Some writers have presented arguments that in effect mean that the prohibition of the use of force does not apply alongside international humanitarian law outside territorial waters. Sanger argues that '[i]f the Gaza blockade is unlawful, the interception of the Gaza Freedom Flotilla vessels ... may also amount to an unlawful use of force, prohibited by Article 2(4) of the UN Charter'.[66] The better view is that a blockade may violate the UN Charter regardless of whether it is 'lawful' under international humanitarian law. Drew writes that 'many conflicts are conducted outside of the ambit of the Charter, without direction or involvement of the Security Council' and that '[i]n these cases, the traditional jus in bello, of which the law of neutrality is a part, applies'.[67] However, no conflict involving the use of force is 'outside the ambit' of the prohibition of the use of force, regardless of *jus in bello*. The UN Security Council may use its powers under Chapter VII of the UN Charter to override certain aspects of international humanitarian law,[68] but that is a separate question.

Churchill and Lowe present two alternative views on the use of force at sea.[69] One 'is that force may be lawfully used only with the authorization of the United Nations Security Council or alternatively in the exercise of the inherent right of self defence preserved by Article 51', while the other is that 'when force is used on a large scale it is regulated by the Laws of War and the law of neutrality'.[70] However, these views do not have to be alternatives. The application of international humanitarian law and the prohibition of the use of force are not mutually exclusive on land, nor should they be at sea.

von Heinegg makes two apparently contradictory statements in one article. He states that 'the illegality or legality under jus ad bellum has no impact on the illegality or legality under the jus in bello',[71] which must be correct. However, he also writes that 'efforts to limit the in bello legality in the light of the jus ad bellum have been futile' and that if 'a blockade is in compliance with the rules and principles of the law of air or naval warfare, its legality may not be doubted'.[72] These statements do not comport with the view presented in this article. von Heinegg refers to the 'general consensus of states', but Section 4.3 below shows that state practice instead favours the view that the use of force against ships may violate the prohibition of the use of force regardless of its compliance with international humanitarian law.

[65]United Kingdom Ministry of Defence, *Joint service manual of the law of armed conflict* (2004), para. 13.3.

[66]A. Sanger, 'The Contemporary Law of Blockade and the Gaza Freedom Flotilla', (2013) 13 *Yearbook of International Humanitarian Law* 397, at 441.

[67]P. Drew, *The Law of Maritime Blockade: Past, Present, and Future* (2017), at 23.

[68]Klein, *supra* note 33, at 288.

[69]A similar dichotomy is presented by Lowe and Tzanakopoulos, *supra* note 23, para. 18.

[70]R. Churchill and V. Lowe, *International Law of the Sea* (1999), at 422–3. Guilfoyle, *supra* note 2, at 177 adds that the latter 'is preferred by almost all international humanitarian law scholars, as well as in military manuals and the case-law of international criminal tribunals'.

[71]von Heinegg, *supra* note 3, at 928.

[72]Ibid., at 928–9.

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On the other hand, other writers discuss whether or how the use of force on the high seas can be legal as a form of self-defence.[73] This constitutes a recognition that the two sets of rules apply concurrently, otherwise it would only have been necessary to discuss international humanitarian law.[74] Moreover, some writers have claimed that specific threats or uses of force have been illegal precisely because they have been targeted against neutral ships outside territorial waters. Some writers have claimed this regarding the United Kingdom's 1982 exclusion zone in the Falkland Islands,[75] and others regarding Israel's 2010 interception of neutral ships as part of its blockade of Gaza.[76] Both of these situations are examined further in Section 4.3 below.

The legality of blockades has been discussed by the Prosecutor of the International Criminal Court. This came up in a report on the *Situation on Registered Vessels of Comoros, Greece and Cambodia*, which grew out of Israel's aforementioned Gaza blockade enforcement. The Prosecutor's conclusion was that although there was 'a reasonable basis to believe that war crimes under the Court's jurisdiction have been committed', she would not bring the case before the Court, because 'the situation would not be of sufficient gravity to justify further action'.[77] When establishing whether war crimes had been committed, the Prosecutor claimed that a 'blockading power may intercept and capture neutral vessels believed on reasonable grounds to be breaching the blockade', with reference to the San Remo Manual.[78] War crimes are defined by Article 8(2) of the ICC's Rome Statute as 'grave' or 'serious' violations of international humanitarian law. Thus, the Prosecutor used the San Remo Manual to establish the content of international humanitarian law. The prohibition of the use of force was not involved, as it could have been if the prosecutor had discussed the crime of aggression. Therefore, the Prosecutor's report cannot give any guidance on the relationship between the prohibition of the use of force and international humanitarian law.

In conclusion, the prohibition of the use of force applies to ships alongside international humanitarian law. states must comply with both sets of rules for a military action to be legal.

3.3 Self-defence against third states

As the prohibition of the use of force applies to ships alongside international humanitarian law, the use of force against neutral ships outside territorial waters must be justified by one of the three exceptions to the prohibition.[79] The exceptions are self-defence, authorization from the UN Security Council, and consent from a host state.

The UN Security Council can authorize the use of force at sea as part of its powers under Chapter VII of the UN Charter.[80] The states enforcing a Security Council resolution can target ships whose flag states are members of the UN. The Security Council cannot authorize the use of

[73]R. C. F. Reuland, 'Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction', (1989) 22 *Vanderbilt Journal of Transnational Law* 1161, at 1209; M. Byers, 'Policing the High Seas: The Proliferation Security Initiative', (2004) 98 *American Journal of International Law* 526, at 540–2; I. P. Barry, 'The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation of Security Initiative', (2004) 33 *Hofstra Law Review* 299, at 317; Tanaka, *supra* note 9, at 209–10.

[74]Upcher, *supra* note 62, at 178 states outright that 'belligerent interference with neutral commerce must meet a double test to be lawful—justified under both the jus ad bellum as well as the law of neutrality'.

[75]These are summarized by E. Henry, 'The Falklands/Malvinas War–1982', in Ruys, Corten and Hofer, *supra* note 75, at 361, 377.

[76]E.g., NPR, 'Condemnation Follows Israeli Raid On Gaza Flotilla', 31 May 2010, available at npr.org/templates/story/story.php?storyId=127286256; R. Falk, 'Deep flaws in the UN's Mavi Marmara report', *Aljazeera*, 9 September 2011, available at aljazeera.com/opinions/2011/9/9/deep-flaws-in-the-uns-mavi-marmara-report.

[77]*Situation on Registered Vessels of Comoros, Greece and Cambodia*, Article 53(1) Report, 6 November 2014, at 60.

[78]Ibid., at 19.

[79]M. Frostad, 'Naval Blockade', (2018) 9 *Arctic Review on Law and Politics* 195, at 201; Upcher, *supra* note 62, at 212.

[80]E.g., Klein, *supra* note 33, at 294.

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force against states that are not UN members,[81] but that has little practical relevance since all but a very few states have joined the UN.

The use of force against a ship can also be legal through consent from the flag state of a given ship.[82] However, as mentioned in Sections 2.2 and 2.4, the point of a blockade or exclusion zone is usually to stop all ships, so it is not practically possible for these measures to depend on consent. Visit and search operations can, by contrast, rely on consent from individual flag states.

What remains is the use of force in self-defence. Article 51 of the UN Charter recognizes a right to self-defence in the event of an 'armed attack'. This is a higher threshold than 'use of force' in Article 2(4).[83] The state that is using force on the high seas must have been the target of an 'armed attack' that can justify a defensive action. If so, the defensive action may involve the use of force at sea as well as on land.[84]

The ICJ has repeatedly stated that self-defence must be 'necessary' and 'proportional'.[85] The 'necessary' requirement means that the measures must be 'necessary to respond to' the armed attack.[86] In some situations it could be 'necessary' to block naval access to an enemy territory as part of stopping an ongoing attack or to prevent a future follow-up attack, or it may be necessary to intercept and search specific ships. The proportionality requirement means that 'self-defence would warrant only measures which are proportional' to the armed attack.[87] This must be assessed in each individual case. von Heinegg believes that '[i]ndiscriminate [maritime interdiction operations] exercised in vast sea areas would be disproportionate'.[88] The conclusion in each case should depend on how 'vast' the area in question is and as well on other relevant circumstances. The graver the armed attack, the more extensive the response may be.

A civilian ship could engage in acts connected to a use of force or an 'armed attack', such as disrupting or destroying submarine cables or pipelines, wilfully causing large scale highly toxic pollution, landing saboteurs, deliberately ramming coastal state vessels, or supplying or supporting other vessels engaged in a use of force. The threshold for when such actions give a right to self-defence may be relatively low.[89] The ICJ in *Oil Platforms* did 'not exclude the possibility that the mining of a single military vessel' could give a right to self-defence.[90]

Flag states generally have a right to use force to protect their own merchant ships 'from unlawful attacks' outside territorial waters.[91] This may be legal even if the merchant ships are subject to force below the threshold of an 'armed attack'. In *Nicaragua* the ICJ entertained the possibility that a state may 'use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force', but deliberately left the question unanswered.[92] In its earlier *Corfu Channel* decision, the Court rejected the United Kingdom's argument that its mine sweeping operation could be classified as 'self-protection or self-help'.[93] However, as noted in Section 3.1 it is not clear whether the prohibition of the use of force was part of the Court's reasoning. Judge Simma took a clear stance in his separate opinion in *Oil Platforms*, finding a right to take

[81]Helmersen, *supra* note 12, at 183–4.

[82]M. Papastavridis, 'EUNAVFOR *Operation Sophia* and the International Law of the Sea', (2016) 2 *Maritime Safety and Security Law Journal* 57, at 61–2.

[83]*Nicaragua*, *supra* note 11, at 101.

[84]C. Moore, *Freedom of Navigation and the Law of the Sea: Warship, States and the Use of Force* (2021), at 33.

[85]E.g., *Nicaragua*, *supra* note 11, at 94.

[86]Ibid., at 74.

[87]Ibid.

[88]von Heinegg, *supra* note 6, at 170.

[89]D. Raab, '"Armed attack" after the *Oil Platforms* case', (2004) 17 *Leiden Journal of International Law* 719, at 725; W. H. Taft IV, 'Self-defence and the *Oil Platforms* decision', (2004) 29 *Yale Journal of International Law* 295, at 302.

[90]*Oil Platforms*, *supra* note 37, at 195.

[91]E.g., Guilfoyle, *supra* note 8, at 273–4; Ruys, *supra* note 36, at 209.

[92]*Nicaragua*, *supra* note 11, at 110.

[93]*Corfu Channel*, *supra* note 54, at 35.

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'proportionate defensive measures' against 'hostile action ... below the level of Article 51'.[94] Ruys concludes that the ICJ's practice leaves it unclear whether 'forcible counter-measures against less grave uses of force' are permitted.[95] A possible legal basis for a right to retaliate against attacks that do not constitute 'armed attacks' is unit self-defence.[96] This is a right for individual military units to 'use force under international law to defend themselves against attacks or threatened attacks', as opposed to states doing so.[97] This may be 'an independent right recognized in customary international law',[98] with a different, usually lower, threshold in terms of gravity than UN Charter Article 51.[99] Warships have the same right to unit self-defence as other military units.[100] Unit self-defence may become increasingly relevant with the rise of 'grey zone operations' at sea, where it is difficult to say for sure whether an armed conflict exists or who is involved.[101]

In short, if a neutral merchant ship were to engage in hostile acts against a warship, the warship would be allowed to defend itself by forcible measures, even outside territorial waters. However, the typical blockade or indiscriminate visit and search operation will mostly, if not exclusively cover ships that are not engaging in any hostile acts against the state or the ship conducting the operation. The state will instead be responding to an armed attack by another state. For the purposes of self-defence, the flag state of a neutral ship will be a third state.

The core of the right to self-defence is a right to use force against an attacking state. This should encompass the attacking state's territory, including territorial waters, and armed forces, and others who participate in or contribute to the armed attack. Actions taken in self-defence may also affect third states.[102] The International Law Commission (ILC) recognized this when its commentaries to the *Responsibility of States for Internationally Wrongful Acts* Article 21 stated that 'there may be effects vis-à-vis third States in certain circumstances'.[103] Article 51 of the UN Charter does not say that measures taken in self-defence can only affect the attacking state.[104]

The commentaries to an earlier 1996 draft of the ILC's text spoke of 'indirect injury that might be suffered by a third State in connection with a measure of self-defence'.[105] This was a comment to Article 34, which obliges states to pay full reparation for injuries caused by internationally wrongful acts. The comment pointed out that this did 'preclude any wrongfulness' of injury to third states. Thouvenin uses a similar terminology when speaking about 'collateral breaches' towards third states.[106]

In his Second Report on State Responsibility, Special Rapporteur James Crawford noted that states acting in self-defence have 'certain belligerent rights, even as against neutrals'.[107] The ILC's

[94]*Oil Platforms*, *supra* note 37, Separate Opinion of Judge Simma, at 332. Ruys, *supra* note 56, at 142 'strongly' doubts that Simma's view 'was widely shared by his honourable colleagues'.

[95]Ruys, ibid., at 143.

[96]Moore, *supra* note 84, at 33.

[97]C. P. Trumbull IV, 'The Basis of Unit Self-Defense and Implications for the Use of Force', (2012) 23 *Duke Journal of Comparative & International Law* 121, at 122.

[98]Ibid., at 147; Moore, *supra* note 84 at 32–3.

[99]Ibid., Moore, ibid., at 38.

[100]Moore, ibid., at 33.

[101]For a discussion of the concept of 'grey zones' in international law see, e.g., D. Cantwell, 'Hybrid Warfare: Aggression and Coercion in the Gray Zone', *ASIL Insight*, 29 November 2017, available at asil.org/insights/volume/21/issue/14/hybrid-warfare-aggression-and-coercion-gray-zone.

[102]Upcher, *supra* note 62, at 171.

[103]International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), at 75.

[104]J.-M. Thouvenin, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Self-Defence', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (2010), 455, at 464.

[105]International Law Commission, *Draft articles on state responsibility with commentaries thereto/adopted by the International Law Commission on 1st reading* (1997), at 267.

[106]Thouvenin, *supra* note 104, at 464.

[107]International Law Commission, *supra* note 1, at 36.

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work was not intended to 'enter into' the controversy that is at the heart of this article,[108] i.e., whether 'the traditional law of neutrality has survived unchanged in the Charter period'.[109] Thus the commentaries to the final version of Article 21 explains that this question was meant to be left 'open'.[110] Ultimately, the question of what a state acting in self-defence can do towards third states must be resolved without a clear answer from the ILC.

It may in practice be difficult to completely avoid 'indirect injury' or 'collateral breaches' towards neutrals as part of a self-defence measure directed at an attacking state. However, this is different from measures that are directed towards neutrals, such as blockades and indiscriminate visit and search operations. It is far less clear that the latter is permitted under the UN Charter.

Some guidance can be found in an analogy to the debate over the use of force against non-state actors on foreign soil. This debate centres on whether there is a right to self-defence against non-state actors operating on the territory of third states who are 'unable or unwilling' to prevent an 'armed attack' from the non-state actors.[111] There is no consensus among states that such a right exists. A strong argument against such a right is that it would violate the territorial integrity of a third state. By contrast, the individual ships subject to blockades or indiscriminate visit and search operations are not committing or contributing to an armed attack, nor are their flag states facilitating it. Thus, there should be even less reason to recognize a right to use force against them in neutral waters than to attack non-state actors on foreign soil.

As a consequence, the logic and structure of the prohibition of the use of force suggest that force can only be used in self-defence against neutral ships that somehow engage in hostile acts against another state or its ships. If so, other ships can only be affected indirectly through collateral damage. A blockade or exclusion zone will by its nature cover every ship that the enforcing state is able to detect. That a ship does not voluntarily submit to inspection is not sufficient to believe it probable that the ship is engaging in hostile acts. Visit and search operations may, in contrast to blockades and exclusion zones, be limited to specific ships that are suspected of engaging in hostile acts.

However, broader rights to use force in self-defence against neutral ships outside territorial waters may be accepted if they are supported by state practice and *opinio juris*.[112] Article 51 of the UN Charter is to be interpreted in line with the principles codified in the Vienna Convention on the Law of Treaties Article 31(3)(b), which says 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' is to be 'taken into account' when interpreting treaties.[113] The prohibition of the use of force is also customary international law and *jus cogens*, as noted in Section 1. That it is *jus cogens* means that it is less liable to change than regular rules of customary international law.[114] An argument may be made that using force against neutral ships is not a case of *change* in the law, since the law of blockades existed before the UN Charter. Interference with neutral ships was sometimes justified on the basis of self-defence even before the adoption of the UN Charter.[115] The next sections examine relevant state practice, where states have attempted to use of force against neutral ships

[108]International Law Commission, *supra* note 103, at 76.

[109]Ibid.

[110]Ibid., at 75.

[111]E.g., M. E. O'Connell, C. J. Tams and D. Tladi, *Self-Defence against Non-State Actors* (2019).

[112]O'Connell, *supra* note 1, at 160 thus maintains that 'naval blockades of a sort continue to be mounted'.

[113]This convention is newer than the UN Charter and not retroactive (Art. 4) and is not ratified by all parties to the UN Charter, but its rules on interpretation reflect customary international law.

[114]M. E. O'Connell, 'The Crisis in Ukraine–2014', in Ruys, Corten and Hofer, *supra* note 75, at 860.

[115]S. Neff 'Prerogatives of Violence: In Search of the Conceptual Foundations of Belligerents' Rights', (1997) 38 *German Yearbook of International Law* 41, at 48; Upcher, *supra* note 62, at 172, referring to *The Le Louis case*, (1817) 2 Dodson 210, 243–5.

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outside territorial waters. The overall picture is that states have not accepted the indiscriminate use of force against neutral ships outside territorial waters in the post-UN Charter world.

4. State practice and *opinio juris*

4.1 Self-defence is sometimes not invoked

The following section examines state practice and *opinio juris* regarding the use of force against neutral ships outside territorial waters. This article focuses on the relationship between international humanitarian law and the prohibition of the use of force. The prohibition of the use of force was established in 1945, through the UN Charter. The following sections are therefore limited to post-1945 practice. Earlier practice is not relevant to the argument in this article.[116]

Some threats or uses of force have been justified by reference to other legal rules than the right to self-defence in UN Charter Article 51.

The Security Council has authorized naval blockades, for example against Iraq (1990),[117] Yugoslavia (1992),[118] and Libya (2011).[119] These were enforced outside territorial waters. Their legal basis was UN Charter Article 42, not Article 51. This shows that if states believe it necessary to be able to use force against (ships from) *any* state, they have the option of going through the Security Council instead of trying to rely on the right to self-defence.

During the Cuban Missile Crisis of 1962, the United States established a blockade around Cuba with the aim of preventing the Soviet Union from stationing nuclear missiles on the island.[120] An official declaration by President Kennedy stated that ships that 'may be proceeding towards Cuba' would be intercepted, presumably in any maritime zone.[121] A reasonable interpretation of the President's declaration is that it constituted a standing threat of the use of force against neutral ships outside territorial waters.[122] Eventually the US intercepted only a single third-state ship, flying a Lebanese flag, and it is not clear exactly where this occurred.[123] For the purposes of this article it is notable that the US did not invoke a right to self-defence against the Soviet Union or Cuba.[124] The use of force was instead justified with reference to UN Charter Article 53, which mentions 'regional arrangements or agencies for enforcement action', and Article 6 of the Rio Treaty,[125] covering 'an aggression which is not an armed attack'.[126] This legal strategy has not been accepted or repeated by later international lawyers. At the time third states generally did not comment on the legality of the declaration.[127] The US could not legally use of force in self-defence, since there was no armed attack.[128] In any case, since the US did not invoke

[116]Bothe, *supra* note 64, at 571; W. H. von Heinegg, 'Visit, Search, Diversion, and Capture in Naval Warfare. Part 1. The Traditional Law', (1991) 29 *Canadian Yearbook of International Law* 283, at 328 both discuss practice during World War Two.

[117]United Nations Security Council Resolution 661, 6 August 1990; United Nations Security Council Resolution 665, 25 August 1990; Upcher, *supra* note 62, at 180.

[118]United Nations Security Council Resolution 787, 16 November 1992.

[119]United Nations Security Council Resolution 1973, 17 March 2011.

[120]A. Orakhelashvili, 'The Cuban Missile Crisis–1962', in Ruys, Corten and Hofer, *supra* note 75, at 98, 101.

[121]'President John F. Kennedy's Speech Announcing the Quarantine Against Cuba', 22 October 1962, available at mtholyoke.edu/acad/intrel/kencuba.htm.

[122]L. C. Meeker, 'Defensive Quarantine and the Law', (1963) 57 *American Journal of International Law* 515, at 523.

[123]Summary Record of the Sixth Meeting of the Executive Committee of the National Security Council, 26 October 1962, available at avalon.law.yale.edu/20th_century/msc_cuba079.asp.

[124]Orakhelashvili, *supra* note 120, at 99.

[125]Inter-American Treaty of Reciprocal Assistance, 2 September 1947, 21 UNTS 77.

[126]A. Chayes, 'Legal Casse for US Action on Cuba', (1962) 47 *Department of State Bulletin* 757, at 764.

[127]Orakhelashvili, *supra* note 120, at 99; L. Henkin et al. (eds.), *Right v Might: International Law and the Use of Force* (1991), at 45.

[128]Churchill and Lowe, *supra* note 70, at 426.

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self-defence, the incident has little if any precedential value for the argument in this article. Some US scholars have claimed that the Cuban Missile Crisis had 'the greatest influence on the further development of doctrine concerning maritime interdiction',[129] but that does not apply to the points taken up in this article.

Maritime interdiction has also been used in post-2001 antiterrorism campaigns such as Operation Active Endeavour and Operation Enduring Freedom. The US-led invasion of Afghanistan was justified as self-defence against the terrorist attacks of 11 September 2001.[130] However, many of the naval operations were instead based on 'flag State consent'.[131] NATO operations against FR Yugoslavia during the Kosovo War (1999) involved a 'voluntary visit and search regime'.[132]

4.2 Acceptance of operations limited to territorial waters

In practice the use of force against neutral ships is often limited to territorial waters.[133] This means that there is little state practice that can support a right to use force in self-defence against neutral ships outside territorial waters. Moreover, while states may protest the legality of operations within territorial waters, they generally do not claim that such operations by themselves violate the prohibition of the use of force. This is in contrast with how states react to the use of force outside territorial waters, as shown in the sections below.

The relative frequency of operations limited to territorial waters also shows that naval operations may be militarily effective even though the enforcing state does not use force outside territorial waters. This weakens the potential argument that the use of force outside territorial waters should be permitted because it will often be necessary in order to achieve a military aim.

As part of the Korean War (1950–1953), the UN established a blockade of North Korea in order to 'deny unauthorized ingress and egress from the Korean coast [and] suppress seaborne traffic to and from North Korea and to prevent movement by sea of forces and supplies for use in operations against South Korea'.[134] The operation was ordered by President Truman of the United States and authorized by the UN Security Council.[135] The legal basis for the UN operations against North Korea were either collective self-defence or authorization by the UN Security Council.[136] Drew reports that 'in 1950 UN vessels sank some 213 junks and sampans and damaged 147 more, while capturing nine'.[137] However, the operations were enforced around Korean ports, not outside territorial waters.[138]

[129]H. B. Robertson, 'Interdiction of Iraqi Maritime Commerce', (1991) 22 *Ocean Development & International Law* 289, 290–1. See also R. E. Morabito, 'Maritime Interdiction: Evolution of a Strategy', (1991) 22 *Ocean Development & International Law* 301, at 305.

[130]M. Byers, 'The Intervention in Afghanistan–2001-', in Ruys, Corten and Hofer, *supra* note 75, at 628.

[131]Lowe and Tzanakopoulos, *supra* note 23, para. 22.

[132]Upcher, *supra* note 62, at 183.

[133]As Fenrick observed in 1986, '[r]elatively few of the armed conflicts occurring since 1945 have involved ... interference with neutral shipping outside of the territorial waters of the participants': W. J. Fenrick, 'The Exclusion Zone Device In Naval Warfare', (1986) 24 *Canadian Yearbook of International Law* 91, at 109. The same point is made by Upcher, *supra* note 62, at 206; D. P. O'Connell, *The International Law of the Sea* (1982), at 1154. This trend could be linked to broader societal developments, as Haines, *supra* note 15, at 440 notes that '[t]he law that provides for visit and search operations has been rendered unsuitable by the containerization of a substantial proportion of trade', a development that is also touched on by Upcher, *supra* note 62, at 198.

[134]Drew, *supra* note 67, at 53.

[135]Ibid., at 54.

[136]N. D. White, 'The Korean War–1950-53', in Ruys, Corten and Hofer, *supra* note 75, at 31–2.

[137]Drew, *supra* note 67, at 53.

[138]E.g., L. E. Fielding, 'Maritime Interception: Centerpiece of Economic Sanctions in the New World Order', (1992–1993) 53 *Louisiana Law Review* 1191, at 1207–8 calls it 'a traditional close blockade'; Jones, *supra* note 19, at 769 calls it 'similar to the close-in blockades of the Napoleonic Wars'.

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India blockaded Bangladesh's (then known as East Pakistan) coast in the Bangladesh War (1971).[139] von Heinegg reports that 'six merchant ships and numerous small boats were captured' and that '[v]essels that did not comply with the orders by the warships' commanders were attacked and sunk.[140] India invoked self-defence under UN Charter Article 51.[141] The blockade was 'generally not enforced on high seas',[142] but there was 'one Liberian ship sunk 26.5 miles off coast'.[143] The legality of the latter operation was not publicly discussed by the parties.[144]

As part of the Vietnam War (1955–1975), the United States mined the city of Hai Phong in 1972. A speech by US president Nixon explained that '[a]ll entrances to North Vietnamese ports will be mined' and threatened 'appropriate measures within the internal and claimed territorial waters of North Vietnam'.[145] In the end '[n]o foreign merchant vessels were sunk by the minefields',[146] and the operation 'did not involve action on the high seas'.[147] The legality of many aspects of the United States' actions in Vietnam were controversial,[148] but the potential harm to neutral ships does not seem to have been singled out for criticism.

The 2006 Lebanon War included a blockade of Lebanon by the Israel.[149] A report by the UN Human Rights Council noted that this was 'a comprehensive blockade of Lebanese ports and harbours'.[150] Israel's official justification was that '[t]he ports and harbours of Lebanon are used to transfer terrorists and weapons', which means that the official justification was limited to ports and harbours and did not apply to areas outside territorial waters.[151] Israel invoked self-defence under UN Charter Article 51,[152] but other states were divided on whether this was correct.[153] The states did not specifically comment on the effects of neutral shipping.

4.3 Protests against operations outside territorial waters

Section 4.2 above showed that various states have used force against neutral ships inside territorial waters, and that other states have not specifically protested against this. This section will show that some states have used force against neutral ships outside territorial waters, but that this often has been met by protests from other states.[154]

[139]Jones, ibid., at 769.

[140]von Heinegg, *supra* note 13, para. 17; see also Jones, ibid., at 769.

[141]D. Kritsiosis, 'The Indian Intervention into (East) Pakistan–1971', in Ruys, Corten and Hofer, *supra* note 75, at 181.

[142]O'Connell, *supra* note 1, at 130.

[143]Ibid., at 87, 129.

[144]Ibid., at 130.

[145]Richard M. Nixon, 'Address to the Nation on the Situation in Southeast Asia', 8 May 1972, available at millercenter.org/the-presidency/presidential-speeches/may-8-1972-address-nation-situation-southeast-asia.

[146]D. Mundis, *The Law of Naval Exclusion Zones* (2008) 78; see also Fenrick, *supra* note 133, at 109.

[147]Upcher, *supra* note 62, at 200.

[148]E.g., R. A. Falk, 'International Law and the United States Role in the Viet Nam War', (1966) 75 *Yale Law Journal* 1122; N. D. Hopt-Nguyen, 'Vietnam', in *Max Planck Encyclopedia of Public International Law* (2009)

[149]von Heinegg, *supra* note 13, para. 20.

[150]Human Rights Council, *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1* (2006), at 62.

[151]Ibid.

[152]*Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council*, 12 July 2006, UN Doc. A/60/937–S/2006/515.

[153]C. J. Tams and W. Brückner, 'The Israeli Intervention in Lebanon–2006', in Ruys, Corten and Hofer, *supra* note 75, 673, at 677.

[154]M. G. Fraunces, 'The International Law of Blockade: New Guiding Principles in Contemporary State Practice', (1992) 101 *Yale Law Journal* 893, at 907.

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During the Algerian War (1954–1962), France searched neutral ships in order 'to stem the flow of arms and munitions into Algeria'.[155] In all, 'thousands of ships' were stopped and searched.[156] The operations mainly took place within a zone that extended 'twenty to fifty kilometres from the coast of Algeria',[157] well beyond the territorial waters of French Algeria, and searches were conducted as far away as the English Channel.[158] O'Connell reports that '[t]he ships of thirteen European countries were interfered with on the high seas'.[159] France's actions were 'vigorously opposed by many of the States whose ships were affected'.[160] France 'became involved in more or less serious diplomatic difficulties',[161] as well as legal actions in French courts.[162] The protests focused on the 'unlawful interference with the freedom of navigation' as well as the extensive operations being 'disproportionate to the threat posed'.[163]

The United Kingdom established a 200 nautical mile 'total exclusion zone' around the Falkland Islands during the Falklands War (1982). Within this zone any ship, including those of third states, would be liable to attack if their presence was not authorized by the UK government.[164] The UK measure was prompted by Argentina's 1982 invasion of the Falkland Islands, which violated UN Charter 2(4) and gave the UK a right to self-defence under Article 51.[165] states' reactions to the UK's measure were split along familiar Cold War lines. Argentina, its Latin American allies, and communist states condemned it, while the UK's NATO allies voiced support.[166] There is little doubt that enforcing the exclusion zone towards neutral ships by targeting them would have violated international humanitarian law.[167] For the purposes of this article it is notable that some states objected to the mere *threat* of targeting neutral ships outside territorial waters.[168]

During the Iran-Iraq War (1980–1988), both parties established what were in effect exclusion zones.[169] Iran's zone ran along the Iranian coast along the length of the Persian Gulf,[170] but Iran searched and visited a significant number of neutral ships outside territorial waters.[171] From 1982, Iraq's zone extended up to 65 km from Kharg Island, and from 1986 it reached 'close to Kuwaiti territorial waters'.[172] Iraq's zones thus reached well beyond the warring states' territorial waters. As the conflict dragged on, the two states' visit and search operations morphed into large-scale unprovoked attacks on neutral ships outside territorial waters.[173] Both states invoked self-defence under UN Charter Article 51.[174]

[155]Reuland, *supra* note 73, at 1218.

[156]Byers, *supra* note 73, at 533. See also O'Connell, *supra* note 1, at 123.

[157]D. P. O'Connell, 'International Law and Contemporary Naval Operations', (1970) 44 *British Yearbook of International Law* 19, at 36.

[158]Ibid.

[159]O'Connell, *supra* note 1, at 123.

[160]Churchill and Lowe, *supra* note 70, at 217. See also Byers, *supra* note 73, at 533; Reuland, *supra* note 73, at 1218; Lowe and Tzanakopoulos, *supra* note 23, para. 20.

[161]O'Connell, *supra* note 1, at 123. See also O'Connell, *supra* note 157, at 36.

[162]Papastavridis, *supra* note 1, at 85.

[163]Klein, *supra* note 33, at 275. Barry, *supra* note 73, at 327 agrees that the actions were disproportional.

[164]Letter dated 28 April 1982 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (28 April 1982) UN Doc. S/15006.

[165]Henry, *supra* note 75, at 373.

[166]Ibid., at 369–70; Upcher, *supra* note 62, at 209; Leiner, *supra* note 29, 990.

[167]von Heinegg, 'The UNCLOS and Maritime Security Operations', (2006) 48 *German Yearbook of International Law* 151, 164.

[168]Henry, *supra* note 75, at 370.

[169]Upcher, *supra* note 62, at 208; Sivakumaran, *supra* note 16, at 185.

[170]Upcher, ibid., at 208.

[171]R. Leckow, 'The Iran-Iraq Conflict in the Gulf: The Law of War Zones', (1988) 37 *International and Comparative Law Quarterly* 629, at 638; Robertson, *supra* note 129, at 293.

[172]Guttry and Ronzitti, *supra* note 1, at 72–3.

[173]Politakis, *supra* note 31, at 125, 150; Russo, *supra* note 29, at 381; Robertson, *supra* note 129, at 293.

[174]A. de Gutty, 'The Iran-Iraq War–1980-88', in Ruys, Corten and Hofer, *supra* note 75, 315, at 319.

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The outright attacks on neutral ships were rightly condemned by other states and by the UN Security Council.[175] Reactions to the visit and search and operations were more nuanced. Some states 'acknowledged the belligerent right of visit and search',[176] while others opposed it.[177] The UK position is particularly interesting. The UK 'refus[ed] to accept the idea that "belligerent rights" continued to exist after the adoption of the UN Charter'.[178] The UK official position referred to 'Article 51' and acknowledged that a state is:

> entitled in exercise of its inherent right of self defence to stop and search a foreign merchant vessel on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict.[179]

The official position adds that the 'right would not extend to the imposition of a maritime blockade or other forms of economic warfare'.[180] The UK's position is in line with the argument presented in this article, in that rights under international humanitarian law must be exercised in compliance with the UN Charter, and that indiscriminate visit and search operations or blockades against neutral ships outside territorial waters cannot be reconciled with the prohibition of the use of force.

Israel has imposed a naval blockade on Gaza since 2007. A particularly contentious consequence of the blockade was the Israeli Navy's forcible boarding of a 'Gaza flotilla' in May 2010. The ships flew the flags of various third states: The Comoros, USA, Turkey, Greece, and Kiribati. Israel's actions took place 72 nautical miles off the coast of Israel, which is in Israel's exclusive economic zone and well outside its territorial waters. Whether Israel has a right to self-defence against Gaza or Palestine at all is debated.[181] It is also debated whether Israel's blockade of Gaza generally or the flotilla raid specifically complied with international humanitarian law.[182]

Israel's actions were widely criticized by other states and international organizations.[183] Many of the statements point specifically to use of force against neutral ships on the high seas as a problem. For example Turkey's foreign minister held that 'freedom of navigation, was one of the oldest forms of international law; no vessel could be stopped or boarded without the consent of the captain or flag State'.[184] The President of the European Parliament stated that the 'interception of the convoy in international waters' was 'a clear and unacceptable breach of international law'.[185] The event was discussed in the UN Security Council, where Mexico's representative on the UN Security Council stated 'condemned in the strongest terms the armed attack by Israeli forces in international waters against the civilian flotilla'.[186] The representatives of Brazil, Austria,

[175]Leckow, *supra* note 171, at 640; Sivakumaran, *supra* note 16, at 185; Upcher, *supra* note 62, at 208; Guttry and Ronzitti, *supra* note 1, at 71–2.

[176]Papastavridis, *supra* note 1, at 85; Russo, *supra* note 29, at 385.

[177]Robertson, *supra* note 129, at 293; Leckow, *supra* note 171, at 638.

[178]Robertson, ibid., at 293–4.

[179]House of Commons Foreign Affairs Select Committee, 'Minutes of Evidence', HC 279 ii, 118, at 120; discussed further by C. Gray, 'The British Position with Regard to the Gulf Conflict (Iran-Iraq): Part 2', (1991) 40 *International and Comparative Law Quarterly* 464, 467.

[180]House of Commons Foreign Affairs Select Committee, *supra* note 179, at 120.

[181]E.g., D. Akande, 'Is Israel's Use of Force in Gaza Covered by the Jus Ad Bellum?', *EJIL:Talk!*, 22 August 2014, available at ejiltalk.org/is-israels-use-of-force-in-gaza-covered-by-the-jus-ad-bellum.

[182]Guilfoyle, *supra* note 2.

[183]E.g., ibid., at 212.

[184]UN Security Council, *6325th & 6326th Meetings*, 31 May 2010. The same concern was highlighted in statements by representatives of the European People's Party and the European United Left–Nordic Green Left in the European Parliament: European Union, *Reactions on Israel's Military Intervention on Humanitarian Aid Convoy to Gaza* (31 May–1 June 2010), at 21, 28.

[185]European Union, *supra* note 184, at 2.

[186]UN Security Council, *supra* note 184.

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Lebanon, and Palestine also specifically highlighted that the attack took place in international waters,[187] as did a statement by the UN Special Coordinator for the Middle East Peace Process and Commissioner-General of the UN Relief and Works Agency.[188] The intense criticism of Israel's action and the repeated emphasis on the target being a neutral ship outside territorial waters supports the view that Israel's actions violated the prohibition of the use of force even though international humanitarian law recognizes a right to blockade.

The incident was the subject of several official reports. The UN Secretary General appointed a panel that investigated the incident and produced the so-called Palmer Report. The panel's terms of reference did not cover the legal aspects of the incident,[189] but an annex dealing with legal questions stated that using force against a foreign flagged ship is legal if 'used in self-defence, in line with Articles 2(4) and 51 of the U.N. Charter'.[190] That is correct, but the report does not delve deeper into what connection there was between the neutral ships and a possible 'armed attack' against Israel.

A commission appointed by the UN Human Rights Council produced the 'Goldstone Report', but it did not discuss with the legality of using force against foreign-flagged ships.[191]

The Human Rights Council produced another report that dealt with the legality of Israel's actions. The Report invoked 'the San Remo Manual and a number of military manuals' and concludes that 'a right to visit, inspect and control the destinations of neutral vessels on the high seas' exists only 'upon reasonable suspicion that a vessel is engaged in activities which support the enemy'.[192] However, the Report also stated that 'if there is no lawful blockade', intercepting a vessel is legal if it 'was making an effective contribution to the opposing forces' or if it is done in self self-defence.[193] This seems to build on an assumption that the prohibition of the use of force and humanitarian law are alternative legal regimes at sea, and that they do not apply concurrently to neutral ships. However, as explained in Section 3.2, the use of force against neutral ships must be justified under the prohibition of the use of force, regardless of whether they comply with international humanitarian law.

An official Turkish report on the same incident stated that Israel's actions amounted to 'unlawful use of force'.[194] Israel's official Turkel Commission Report did not discuss the use of force under the UN Charter.[195]

In the aftermath of the operation and the resulting criticism, Israel seemed to change its approach. In July 2010, Israel held off intercepting a Libyan ship until it reached Gaza's territorial waters.[196] If Israel has a right to use self-defence against Gaza, it has a right to use of force on the territory and in the territorial waters of Gaza. Israel's altered practice is in line with the argument presented in this article.

[187]Ibid.

[188]*Joint Statement of Robert Serry, UN Special Coordinator for the Middle East Peace Process and Filippo Grandi, Commissioner-General of the UN Relief and Works Agency*, *unwra*, 31 May 2010, available at unrwa.org/newsroom/official-statements/united-nations-joint-statement.

[189]*Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* (2011), at 7.

[190]Ibid., at 39.

[191]UN Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict* (2009, UN Doc. A/HRC/12/48).

[192]UN Human Rights Council, *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance* (27 September 2010), at 14. Even though the Report mentions 'a number of military manuals', its relevant footnote cites only the UK Military Manual.

[193]Ibid.

[194]Turkish National Commission of Inquiry, *Report on the Israeli Attack on The Humanitarian Aid Convoy to Gaza on 31 May 2010* (2011), at 86.

[195]UN Charter Art. 51 is mentioned, but only to be disregarded: The Public Commission to Examine the Maritime Incident of 31 May 2010, *Second Report – The Turkel Commission* (2013), at 245.

[196]Upcher, *supra* note 62, at 206.

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5. Conclusion

This article has shown that the prohibition of the use of force applies to ships and that it applies to ships alongside international humanitarian law. Actions that comply with the traditional rights to visit and search or establish blockades under humanitarian law are only legal if they also comply with the prohibition of the use of force. The right to self-defence does not seem to give a right to indiscriminately target neutral states or their ships, a conclusion that is confirmed by a review of state practice. There are few instances where neutral ships have been intercepted outside territorial waters and self-defence has been invoked, and these instances have met with protests from other states. The conclusion to the controversy noted at the outset of this article is that the adoption of the UN Charter limited some of the traditional rights under international humanitarian law.[197]

These conclusions lead to different results for different rights under international humanitarian law. International humanitarian law permits the outright targeting of neutral ships only in situations where there is a real or suspected link between the ship and the enemy. That is consistent with the prohibition of the use of force. The prohibition of the use of force bars indiscriminate visit and search operations, while permitting operations that are based on a specific suspicion against an individual ship. Blockades must generally be limited to territorial waters if they are to comply with the prohibition of the use of force.[198] Exclusion zones do not give any additional rights under international humanitarian law, which means that they create no special problems with regard to the prohibition of the use of force.[199] Apart from these cases neutral ships 'will rarely present an imminent threat to a belligerent'.[200] Therefore, according to the UN Charter viewed in light of the relevant state practice, they should not be subject to interception or attack outside territorial waters. The San Remo Manual is being updated.[201] The 1994 edition already rules out indiscriminate visit and search operations. The updated version should retain this, and also state that blockades cannot be enforced outside territorial waters.

[197]Upcher, ibid., at 212; Politakis, *supra* note 31, at 171.

[198]Upcher, ibid., at 207 draws a similar conclusion, finding that the enforcement of blockades is permitted 'in the region of naval action', where neutral ships can generally be targeted if they do not comply with the combatants' regulations (see Section 2.1).

[199]Fenrick, *supra* note 133, at 125.

[200]Lowe and Tzanakopoulos, *supra* note 23, para. 19.

[201]The Maritime Executive, 'Standard for International Law of Naval Warfare is Set for an Update', 1 March 2020, available at maritime-executive.com/editorials/standard-for-international-law-of-naval-warfare-is-set-for-an-update.

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