

Contraband of War at Sea: Interference of Arms Support to the Enemy

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Abstract

A number of States support Ukraine in sustaining its warfighting capabilities through delivery of military equipment, training and financial support. Seen from a Russian perspective, however, the question is how to counter this support. In the maritime dimension of armed conflict, economic warfare has been a longstanding strategy to sever the enemy from its trade. Economic warfare aims to affect the State's capabilities to continue its warfighting efforts. At sea, interfering with vessels supplying the enemy via the sea is regulated by the law of naval warfare. In particular, the law of contraband regulates how neutral vessels can be stopped, searched and seized for carrying contraband: goods that may be susceptible for use in armed conflict. This chapter discusses the Russian challenges for using the instrument of the law of contraband in the Russia-Ukraine conflict.

Keywords: Contraband, Laws of naval warfare, Economic warfare

1. Introduction

The outcome of the Russia-Ukraine conflict, as is often opined, depends heavily on the amount and type of military equipment that both parties are able to bring onto the battlefield. Depriving the opponent State of material to sustain its warfighting capabilities, therefore, seems of significant importance. Since the outbreak of renewed hostilities in February 2022, a number of States, including the US, the UK and several EU member-states, have undertaken measures to support Ukraine in its war against Russia. Firstly, through severing economic ties with the Russian Federation by imposing economic sanctions. And secondly, by supporting Ukraine in sustaining its warfighting capabilities through the delivery of military equipment, training¹ and financial² support. Other States, such as Iran,³ are said to

¹ Kruyt, "Operatie Interflex," 131-135.

² *USAID Press release*, "The United States contributes \$4.5 billion to support the government of Ukraine."

³ *The Moscow Times*, "Iran delivered ammunition to Russia on Caspian Sea cargo ships – report."

support Russia in a similar manner. From a Russian perspective, the support given to Ukraine would call for an economic warfare strategy at sea supplementing its military warfighting strategy.

From a legal point of view, providing weapons, training and other support to belligerent parties can be viewed from two main perspectives of international law. The first is from the perspective of *ius ad bellum*, in which the question would be whether the support given by States is a use of force.⁴ The second view is from a *ius in bello* perspective, from which two sub-questions derive: whether the provision of weapons and training by neutral States would be a breach of the law of neutrality,⁵ and what legal possibilities exist for belligerents to counter support to opposing Parties. With regard to the latter question, the maritime dimension of the law of armed conflict (LOAC), the law of naval warfare, contains rules regulating economic warfare. Naval Strategist Julian Corbett, in his *Some Principles of Maritime Strategy* (1911), summarised the legal part of economic warfare at sea ('commerce prevention' in his terms) as follows: 'It is obvious that if the object and end of naval warfare is the control of communications, it must carry with it the right to forbid, if we can, the passage of both public and private property upon the sea. Such capture and destruction is the penalty which we impose upon our enemy for attempting to use communications of which he does not hold control.'⁶

In other words, control of lines of communications enables preventing the opponent upholding aspects of its trade and economic support and thereby its ability to sustain war. As long as economic warfare (which I will define as weakening the enemy through the deprivation of the opponent's means to sustain war by hampering its trade with neutral States) is an accepted method of naval warfare, rules should also exist to regulate these activities. Not in the least because of its impact on neutrals. In this regard, the law of naval warfare seeks balance and regulation between the rights and aims of both belligerents and neutrals, but also accepts certain loss of neutral rights in circumstances of international armed conflict. In particular, goods susceptible for use in armed conflict – known as contraband – on board neutral vessels can be captured by belligerent States.⁷

When the Black Sea Grain Initiative was still in place, Russia did not resort to the instrument of counter-contraband operations against the possible influx of weapons. But after the collapse of the grain deal on 17 July 2023, in its decision not to extend its participation in the deal, Russia hinted at the direction of using this instrument. In its

⁴ Green, "The provision of weapons and logistical support to Ukraine and the jus ad bellum," 3-16.

⁵ Boddens Hosang, "Militaire steun aan Oekraïne," 1-24.

⁶ Corbett, *Some Principles of Maritime Strategy*, 95.

⁷ The term 'neutral merchant vessel' is a legal term of art, meaning a vessel that is non-governmental in character. A cruise ship or a passenger liner, therefore, is also considered a merchant vessel.

statement Russia mentions that: ‘all vessels sailing in the waters of the Black Sea to Ukrainian ports will be regarded as potential carriers of military cargo.’⁸ Apart from the *Sukru Okan* incident that took place on August 13th, 2022, where a Palau-flagged merchant vessel was boarded and inspected by the Russian warship *Vasily Bykov* when it sailed out of the Strait of Bosphorus into the Black Sea, no further actions occurred indicating an operational translation of that political statement.⁹

If stopping arms from flowing to the opponent is of such strategic importance to the outcome of the conflict, why then is the instrument of counter contraband operations left unused? What challenges exist for Russia to be reticent in commencing counter-contraband operations? This chapter will touch upon this question, predominantly from a legal perspective. It will first briefly discuss the rules of the law of contraband and then touch upon political, operational and legal challenges of counter-contraband operations in relation to the Russia-Ukraine conflict.

2. The law of contraband

Although States can prohibit their subjects from trading with belligerent States, international law does not, in general, prohibit neutral States from trading with States that are parties to an armed conflict. The existence of an international armed conflict (as is the case in the Russia-Ukraine conflict), to which LOAC applies, does however provide belligerent States with means to interfere with such trade in as far as this trade is supporting the opponent in its war fighting efforts. With regard to the maritime dimension, the law of naval warfare provides belligerents rights to legally interfere with such trade. These rules on economic warfare centralise around the method of blockade and seizing contraband. The first focuses on closing *an enemy port or coast* from all inward and outward shipping. The second focuses on *the cargo on board* vessels at sea that may be considered as contraband bound for the enemy.

Contraband are goods susceptible to use in armed conflict. The law of contraband only applies during international armed conflict. With the exception of two rules codified in the *Paris Declaration* of 1856¹⁰ and the *Hague Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War* of 1907 (excluding postal correspondence and small coastal fishing

⁸ Statement of the Russian Defence Ministry, 19 July 2023.

⁹ As of 2 December 2023.

¹⁰ These rules are:

[2]. The neutral flag covers enemy goods, with the exception of contraband of war;

[3]. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy flag.

vessels from capture), most of the rules on the law of contraband are based on international customary law. Although the *London Declaration* of 1909 contains detailed provisions on regulating contraband,¹¹ this treaty has never entered into force. The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (hereinafter: San Remo Manual) is often referenced as a generally accepted compilation of rules regarding the law of naval warfare, including contraband rules. Because it is not the purpose of this chapter to extensively deal with all the intricacies of the law of contraband, a number of key points are mentioned that are helpful in understanding the scope and limits of seizing contraband.

First, the law of contraband applies to *neutral* merchant vessels.¹² It does not apply to neutral State vessels, such as warships and auxiliary fleets, that enjoy immunity. State vessels that perform non-commercial service are immune. Whether the belligerent right of visit and search is also excluded with regard to commercial vessels that are chartered by a State and performing non-commercial service is less clear. It is accepted, however, that these merchant vessels enjoy jurisdictional immunity for acts while on governmental duty.¹³ While the *San Remo Manual* is silent on the matter and only mentions that neutral merchant vessels are subject to visit and search, the US views quite clearly that ‘Neutral vessels engaged in government non-commercial service are also exempt from capture as prize and may not be subject to visit and search.’¹⁴

Second, it also matters whether contraband goods on board are private or public goods. Merchant neutral vessels carrying private contraband goods do not jeopardise the State’s neutrality, whereas public goods might have an effect on the neutrality position and diplomatic relations between the shipping (or chartering) State and the belligerent. In this context, Article 6 of the *Hague Convention XIII concerning the rights and duties of Neutral Powers in naval war* (1907) explicitly forbids a neutral power to supply, directly or indirectly, warships, ammunition or war material of any kind. Apart from the question whether this provision is considered customary or only applies between the Parties to the treaty,¹⁵ it appears that this provision in the case of the Russia-Ukraine conflict in light of the current

¹¹ See Articles 22 to 44 *London Declaration* 1909.

¹² As opposed to enemy merchant vessels, that can be captured.

¹³ See for a Dutch case *Hoge Raad* (Supreme Court of the Netherlands) ECLI:NL:HR:1999: AA3368. This case deals with the damage that occurred in the Eemshaven by an American merchant vessel while on governmental duty.

¹⁴ *The Commander’s Handbook*, para. 9.8.

¹⁵ See also Article 28 *Hague Convention XIII*.

interpretation of neutrality as qualified neutrality has become moot.¹⁶ As it stands now, States allow themselves to ship public goods in support of one of the belligerents.

Third, the belligerent rights based on the law of contraband can be exercised anywhere at sea where belligerent operations are allowed. This excludes neutral territorial and internal waters of neutral States.¹⁷ Although there is, in principle, no limitation as to where on the oceans this belligerent right of seizing contraband is exercised, proportionality considerations may limit use to the operational theatre, depending on the specific circumstances of the conflict.

Fourth, the law of contraband has two dimensions. A ‘wet’ operational dimension, in which belligerent warships can stop, search and seize goods on neutral merchant vessels, or divert these vessels for further inspection in port.¹⁸ Next to these policing rights at sea, there is a ‘dry’ judicial dimension where prize courts must adjudicate the seized property at sea. This dry dimension, based on the principle of *toute prise doit être jugée*,¹⁹ implies that implementing contraband measures involves not only the military, but also other, in this case judicial, State organs. While the relevance of prize courts is sometimes questioned,²⁰ the fact is that currently prize courts are still in use in the situation regarding the Gaza blockade.²¹

2.1 Requirements

In order for belligerent warships to exercise its rights under the law of contraband, there are at least two, and perhaps three requirements that need to be fulfilled:

- 1) The cargo must be considered as contraband.
- 2) the vessel is ultimately bound for an enemy destination, and (perhaps)
- 3) contraband lists should be published.

2.1.1 Character of the goods

One part of the definition of contraband is that they are goods that may be susceptible to use in armed conflict.²² Which goods can be regarded as such has always been a matter of controversy, and has raised many disputes between States in the past. Whereas arms and ammunition or other typical military materiel are

¹⁶ Heintschel von Heinegg, “Neutrality in the war against Ukraine.”

¹⁷ Section 15 SRM.

¹⁸ Section 121 SRM.

¹⁹ Fink, “Toute prise doit être jugée,” 211-219.

²⁰ Haines and Martin, “Prize Courts: their continuing relevance,” 267-282.

²¹ Katzir and Fikhman, “Prize law and the unique nature of the law of naval warfare,” 197-218.

²² Section 148 SRM.

obvious contraband, it becomes more difficult with dual use goods or, for instance, raw materials that can be used to construct either weapons or anything else that supports the warfighting effort. Even more difficult are items such as foodstuffs and medical goods. Are these goods serving the opponents' armed forces or meant for the population?

The traditional 'Grotian' law of contraband differentiates between absolute and conditional contraband. Absolute contraband are war materials that can be captured if destined for enemy controlled territory. Conditional contraband are basically dual use goods, which can be captured when destined for enemy controlled territory *and* of which it can be sufficiently proved that they will be used for warlike purposes.²³ The London Declaration also created a third category of free or exempt goods, which under no circumstances are subject to capture. With regard to exempt goods, the *San Remo Manual* lists religious objects, articles exclusively intended for the treatment of wounded and sick, items destined for prisoners of war and clothing and essential foodstuffs meant for the civilian population provided that there is no serious reason to believe that such goods will be diverted to other (military) purposes.²⁴ The Declaration also attached a difference between the types of contraband regarding the application of the doctrine of continuous voyage (see below). Since the First World War, however, differentiating between absolute and conditional has vanished in practice and in judgements in prize courts. The terms, however, are currently still in use.

2.1.2 Contraband lists

The London Declaration produced lists of absolute and conditional contraband, to which goods could be added to by declaration.²⁵ These lists had the purpose of clarifying what is considered contraband *without* giving any notice to neutral States if war would break out.²⁶ As this system did not come into effect, the idea of necessity remained that belligerent Parties should publish contraband lists. Practice also exists. But whether publishing contraband lists is a legal requirement to exercise a right to capture contraband seems somewhat unsettled. The *San Remo Manual* clearly states that belligerents must have published contraband lists in order to exercise their right of capture of contraband.²⁷ This view is, for instance,

²³ Smith, *The Law and Custom of the Sea*, 118.

²⁴ Section 150 SRM.

²⁵ Article 22-25 London Declaration 1909.

²⁶ Bentwich, *The Declaration of London*, 60.

²⁷ Section 149 SRM.

followed by the UK,²⁸ Denmark²⁹ and the Netherlands.³⁰ Other States, in their Manuals, such as France, state no position. The US takes the following (different) approach: 'Though there has been no conflict of similar scale and magnitude since World War II, post-World War II practice indicates, to the extent, international law may continue to require publication of contraband lists, the requirement may be satisfied by a listing of exempt goods.'³¹

This approach seems to follow the view that if a list must be published, neither absolute nor conditional contraband goods need to appear on the list but the requirement is satisfied by (only) listing exempt goods.³² Although from an operational standpoint this would give States and warships maximum flexibility to apply the law of contraband at sea, it firstly, diminishes clarity on what goods are considered contraband. And secondly, in a reciprocal sense, a State would also have to accept that its trade can be restricted based on the same terms. Also Germany appears to be less strict in the publishing of contraband lists as their Manual states that: 'The Parties to a conflict *may* notify the neutral States of lists of goods which they deem to be essential to the war.'³³

Even if lists are published, issues will remain. Firstly, because it can still be doubted whether certain items may actually appear on the list. And secondly, because the items on the list may not be described precisely enough so that it continues to be unclear whether certain items would fall under the list.³⁴ In practical terms, there is likely to be tension between the need for flexibility and the need to be as clear as possible. For that reason the *San Remo Manual* states that 'contraband lists shall be reasonably specific.'³⁵

²⁸ Paragraph 13.110 *The Manual of the Law of Armed Conflict*.

²⁹ *Danish Military Manual*, 604.

³⁰ The Dutch instruction on the application of the law of naval warfare, originating from the 1960s and, in fact, unclear as to whether this instruction is still applicable, mentions that goods that are susceptible to use in armed conflict will be published on a list by the Government.

³¹ *The Commander's Handbook*, para. 7.4.1.

³² The commentary of the *San Remo Manual* mentions that a view was put forward that munitions can be captured even without having published a list.

³³ *German Law of Armed Conflict Manual*, para. 1239.

³⁴ This challenge is also encountered in the context of UN mandated maritime embargo operation, in which the mandate for instance only notes that arms and arms related material can be stopped from entering the State under embargo.

³⁵ Section 149 SRM.

2.1.3 *Enemy destination: continuous voyage*

The other part of the requirement of contraband is that contraband must ultimately be destined for territory under the control of the enemy. This requirement contains both a limiting and an expanding factor. The limiting factor is that only goods bound 'for' an enemy destination can be captured, but not goods that exit enemy territory. Also, vessels that have actually managed to deliver their contraband cargo and are outbound or stopped on a later voyage, cannot be captured based on their earlier delivery of contraband.

The expanding factor relates to 'ultimate' destination, which ties in with applying the doctrine of continuous voyage to the law of contraband.³⁶ In this doctrine, contraband goods can also be captured when it is clear that goods will be delivered at a port that is not under control of the enemy and it is furthermore established that these goods will then be transported further to enemy territory. This doctrine, therefore, is a significant expansion to the geographical area of application of contraband law. Under this doctrine, contraband goods that arrive, for example, in the port of Rotterdam and are then shipped to Ukraine over land, could be captured at sea. A more detailed discussion exists on the level of whether the doctrine applies to both absolute and conditional contraband. Because practice has stopped making any distinction between absolute and conditional contraband, this discussion seems to have lost its significance.

3. The Russia-Ukraine conflict

Soon after Russia started hostilities in February 2022, the battle to gain command of the sea commenced with tactical manoeuvring of naval assets (for an elaborate sequence of events, I refer to the contribution of Captain Warnar elsewhere in this volume). Days later, Turkey closed the Turkish Straits, which is the main gate to the Black Sea. Turkey's position has since been that the Straits are closed to all military vessels from all States. This leaves the entry from the Danube river and the entry from the river that connects the Sea of Azov with the Caspian Sea as only possible entries into the Black Sea. The fact that the river entries are either completely controlled by Russia, or not completely navigable for warships and pass through States with different allegiance, makes them unsuitable for external support to Ukraine. Furthermore, the ports in the Sea of Azov are under occupational control of Russia. From the outset, Russia suspended navigation in the north-western part of the

³⁶ It must be noted here that the application of the doctrine to contraband law is separate to the discussion on whether this doctrine is also applied to blockade law.

Black Sea and in the Sea of Azov. Whether or not Russia legally established a naval blockade, remains subject to debate.³⁷ In any event, the sinking of the Russian warship *Moskwa* and battle over Snake Island challenged Russia's sea control. During the summer-period of 2022, through UN mediation, the grain crisis was dealt with and resulted in creating a maritime humanitarian corridor, through which under strict coordination and control, vessels can pass into and out of Ukrainian ports, to deliver grain in other places in the world. This Black Sea Grain Initiative lasted until 17 July 2023, when it collapsed after Russia decided to withdraw from the Initiative.

The situation at sea has made it unlikely that external arms support (or: contraband from Russia's perspective) by States will directly arrive in Ukrainian ports by means of the sea. Support is likely to arrive over land. As a matter of security, there is hardly any public information available to retrace how military equipment actually arrives in Ukraine. But it can be said that the sea is sometimes part of the route. In March 2022, one source mentioned that: 'Materiel that Ukraine needs is stored at U.S. bases throughout Europe. Once the weapons and equipment are pulled from these U.S. stocks, they'll be transported by air, truck or rail...'³⁸ Some months later, military equipment was also shipped to Europe by cargo vessels.³⁹ One media outlet mentions that 'the Pentagon has expanded its use of maritime shipping to deliver weapons for the war in Ukraine, U.S. defense officials said, after relying heavily on aircraft early in Russia's invasion to get arms to Kyiv as quickly as possible. While aircraft can reach Europe from the United States much more quickly, ships can haul vast quantities of cargo that could allow Ukraine to build up a larger arsenal for future campaigns in the war.'⁴⁰

The same media-outlet mentions: 'U.S. military officials declined to detail specific routes used to get weapons to Ukraine but said that some of the weapons coming from the continental United States find their way directly to the battlefield, while others are being used to replenish American stocks elsewhere in Europe from which U.S. military officials withdrew supplies to arm Ukraine.'

In January 2023, the Dutch port of Vlissingen received US military material. These shipments were said to be heightening the stocks of the US military forces in Europe.⁴¹ Other sources mention that also European States use vessels to transport arms support to Ukraine. Spain, for instance, used its naval vessels to ship arms material for Ukraine to Poland. Presumably, from there, it will be transported into Ukraine.

³⁷ Fink, "Naval blockade and the Russia-Ukraine conflict," 411-437.

³⁸ Castillo, "Logistics case study: How do weapons get to Ukraine?"

³⁹ Reuters, "Cargo vessel set to ship U.S. medical, defence supplies towards Ukraine."

⁴⁰ Lamothe, "Pentagon expands use of seas to send weapons to Ukraine."

⁴¹ Netherlands Ministry of Defence, "Permanent structured Cooperation (PESCO)."

4. Why not?

Apart from the action against the *Sukru Okan*, Russia appears not to have taken any further actions to commence counter-contraband operations. A number of reasons can be mentioned why Russia has not resorted to the use of such measures.

4.1 Politics: the political-strategic narrative and balancing neutrality

From a political perspective, two points can be underlined. First, the instrument does not fit Russia's political-strategic narrative. As mentioned, belligerent rights based on the law of contraband can only be used during an international armed conflict. Accepting this, for instance by publishing contraband lists or stopping neutral merchant vessels at sea, is not in line with the Russian narrative of conducting a 'special military operation.' In any case, and similar to the questions related to the Russian (de facto) blockade, Russia would not openly state it is using belligerent rights. While Russia probably had legal grounds to board the *Sukru Okan* and the incident received much indignation condemning it as a violation of international law, Russia did not defend itself by referring to its belligerent rights.

Second, while Russia disagrees with the qualified neutrality position allowing States to support Ukraine without breaching the law of neutrality, seizing neutral merchant vessels from supporting States or vessels that carry such support would increase tensions between non-belligerent States and Russia. Whereas merchant vessels that carry contraband do not automatically involve their flag States in the conflict in terms of losing neutrality; in this situation, we must keep in mind that the goods are public goods shipped by States themselves. Stopping public goods on merchant vessels chartered by a State would create direct State-to-State confrontation, as opposed to a case of merchant vessels shipping contraband that are not public goods. Commencing counter-contraband operations in order to stop State support of military material would raise tensions between Russia and non-belligerent States to a perhaps uncomfortably high level.

4.2 Operational: capabilities and inspection regimes

Several operational considerations can be mentioned. First, generally effectively implementing economic warfare through counter-contraband operations implies the need for sufficient naval assets to exercise such strategy. These assets would also need some sea control or at least an area without risk in order to conduct counter-contraband operations. It also requires intelligence to find possible contraband transiting the oceans. Otherwise, it might be a needle-in-a-haystack exercise if the operation is not information driven. Within the Black Sea this could arguably be

set-up, although Ukraine has shown that it can successfully attack Russian warships and naval bases. Within the Black Sea, the grain deal set up a system where vessels under strict inspection regime of the parties involved were allowed to sail into a number of Ukrainian ports and return with grain shipments. The regime also functioned as a door to keep possible contraband from sailing into Ukraine. During the period of a functioning grain deal, there was no need for an inspection regime in the Black Sea. In the wider maritime dimension, considering – while the doctrine of continuous voyage would allow for it – that goods are not sailed directly into Ukraine but use other foreign ports after which the goods get shipped over land, it would arguably be a bigger challenge of setting up a system with sufficient naval capabilities to effectively conduct counter contraband operations. Apart from the fact that the conflict increases in global dimensions, in this context and more practically it is often argued that it has become impossible to exercise the law of contraband at sea, considering the enormous size of today's container shipping. Depending on which maritime routes Russia would decide to search for contraband, it would probably have to rely on diversion ports for inspection. In other words, apart from possible ad hoc inspections based on individual suspicions at sea, setting up an effective system of counter-contraband operations in the wider maritime dimension beyond the Black Sea is cumbersome to the extent that it may not be efficient.

4.3 Law: immunity, prize law and new approaches to old law

Last, some legal complexities can be pointed out. First, one question relates to the status of the vessels that deliver the material. As mentioned above, Spain for instance, used its navy to transport arms material. Warships are immune to belligerent visit and search.⁴² The US has chartered merchant vessels. Whereas State vessels are not subject to belligerent visit and search, the discussion lies on the issue of vessels that are taken up from trade in order to transport governmental arms. Would they be considered as ships on non-commercial duty and therefore be immune to the belligerent right of visit and search? If that is indeed the case, transporting vessels are from a legal position quite easily protected against interference. Economic warfare through counter-contraband operations, seems therefore more opportune in terms of stopping dual use (conditional) goods that will more likely be private goods, rather than absolute contraband that, in the current case, are most likely public goods.⁴³

⁴² Militarnyi, "The Spanish Navy ship will transport military equipment to Ukraine"

⁴³ Interestingly, this position is somewhat difficult to align with the concept of convoy, where neutral warships can convoy neutral vessels, which will protect them, in principle, from visit and

Second, the OCSE report on ‘violations of international humanitarian law and human rights law, war crimes and crimes against humanity’ regarding this conflict mentions that the OCSE mission did not receive any information that Russia has published contraband lists.⁴⁴ Assuming that this indeed has not happened, the question arises whether this would legally bar Russian naval forces from exercising belligerent rights to seize contraband. As stated earlier, the answer seems to be somewhat unsettled. Russia’s view regarding the publication of contraband lists is unfortunately unknown.

Third, when adhered to in its fullest sense, the process of contraband law must also contain a ‘legal finish’ where prize courts adjudicate seizures at sea based on prize law regulations. It is unclear whether Russia has either set-up or already has a system of prize courts. In any case, with regard to the capture of the two Ukrainian flagged merchant vessels, *Princes Nicole* and *Afina*, or the *Apache*, no mention is made that they were brought before a prize court for adjudication.

And finally, which is interesting to note in terms of possible evolution of the law of contraband, Professor Andrew Clapham opined that: ‘a belligerent State should no longer be able to claim that international law authorizes it to capture and permanently confiscate through a prize court the neutral ships and aircraft found to have been carrying contraband or engaging in unneutral service.’⁴⁵ He argues that granting belligerent rights should be seen differently in today’s collective security construct. Aggressor States should not obtain them. He therefore connects the use belligerent rights to a sufficient legal basis to resort to armed force.⁴⁶ His view is a logical conclusion from the perspective that the UN Charter has codified the principle that interstate use of force is prohibited. ‘It makes no sense to say that you cannot resort to armed conflict against another State and yet, if you do, you can keep the old Belligerent Rights that belonged to those that went to War.’⁴⁷ If one would follow Clapham’s view, it would mean that Russia, as the aggressor with no sufficient legal basis for the attack on Ukraine, lacks a legal basis to exercise belligerent rights, such as the right to exercise counter contraband operations, against Ukraine and neutral States.

search. But even in cases of convoy, this is not absolute. A vessel can still be searched if the convoy commander is unwilling or unable to satisfy the intercepting warship.

⁴⁴ OCSE, *Report on Violations*, 44.

⁴⁵ Clapham, “Booty, bounty, blockade, and prize,” 1262.

⁴⁶ Furthermore, he considers that neutral merchant vessels by way of acting – by clearly resisting visit and search – should not be regarded as military objectives. Instead, such actions should fall within the paradigm of law enforcement activities.

⁴⁷ Clapham, “Booty, bounty, blockade, and prize,” 1268.

5. Conclusion

Certain elements in Russian actions with regard to the hostilities at sea – suspending navigation, occupying enemy ports, gaining sea control over the Sea of Azov and the North-Western part of the Black Sea, and (albeit ended) participation in the Black Sea Grain Initiative – indicate a geographically limited economic warfare within the Black Sea. A strategy at sea that includes actively seizing of arms and arms related material does not seem to be part of Russian strategy at sea at this stage of the conflict. While the Black Sea Grain Initiative was in place, Russia could fall back on the inspection regime which at least minimised the entry of possible contraband to Ukraine through the Black Sea. It has however not undertaken any action to counter goods that reach Ukraine in a more indirect manner. What can be concluded from this short chapter, is that although counter-contraband measures at sea may seem a useful instrument for a belligerent to control trade with the enemy, it has political, operational and legal challenges which makes its use less opportune than one might think. Especially in the current situation where neutrality has taken a different turn than envisioned by traditional neutrality law, counter contraband operations would lead to direct confrontation between Russia and non-belligerent States.

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