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Awakening the Law of Contraband in the Russia-Ukraine Conflict

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. Introduction

On July 17, 2023, Russia withdrew from the Black Sea Grain Initiative. Consequently, there was no extension when the initiative expired that same day. Both belligerent States issued statements that focused on civilian vessels supporting the enemy following the collapse of the grain deal, and a flurry of incidents at sea initiated by Russia and Ukraine seemed to follow up their statements. While Russia commenced targeting grain storage and port facilities within Ukraine,[1] at sea the Russian-flagged tanker *Sig* received damage, according to public sources, by an attack by a Ukrainian drone.[2] Days later, the Palau-flagged vessel *Sukru Okan*, sailing out of the Strait of Bosporus into the Black Sea, was boarded by the Russian military for inspection.[3] In the meantime, vessels carrying grain managed to depart from Ukrainian ports. The Hong Kong-flagged vessel *Joseph Schulte* safely reached Romanian waters, proceeding to the Turkish Straits.[4]

At this stage, the facts on what, why, and how these incidents took place are unsettled. From an international law of armed conflict perspective, the collapse of the Black Sea Grain Initiative has possibly awoken the use of counter-contraband operations in this conflict. The law of contraband, which has been at the heart of the law of naval warfare for centuries, regulates economic warfare and governs these operations.[5] In recent decades, however, the law of contraband has not been practiced by belligerents to its fullest extent. Attendees of recent legal seminars on naval matters would have heard opinions that the rules on contraband, given today's complex maritime shipping system, seem out of date and probably impossible to enforce due to practical challenges. Whatever one might think of it, stirring this

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1. Robert Greenall, *Ukraine War: Russia Attacks Grain Stores at River Danube Ports,* BBC NEWS (July 24, 2023), https://www.bbc.com/news/world-europe-66289136.

2. Tim Lister, Victoria Butenko & Kostan Nechyporenko, *Ukraine Hits Russian Oil Tanker with Sea Drone Hours After Attacking Naval Base*, CNN (Aug. 5, 2023), https://edition.cnn.com/2023/08/05/europe/ukraine-sea-drone-attacks-intl/index.html.

3. Darya Tarasova, Gul Tuysuz & Lauren Kent, *Russia Fires Warning Shots and Boards Cargo Ship in Black Sea*, CNN (Aug. 14, 2023), https://edition.cnn.com/2023/08/13/europe/russia-warning-shots-black-sea-intl/index.html.

4. Pavel Polityuk, *Ukraine Reports New Attack on Grain Silos but Cargo Ship Sets Sail*, REUTERS (Aug. 16, 2023), https://www.reuters.com/world/europe/cargo-ship-leaves-ukrainian-port-despite-russian-threat-attack-2023-08-16/.

5. PHILIP DREW, THE LAW OF MARITIME BLOCKADE: PAST, PRESENT, AND FUTURE ch. 3 (2017).

sleeping beauty of the law of naval warfare will come with legal, practical, and political intricacies and questions in today's conflict. These questions are relevant not only for the belligerent parties, but for non-parties, especially given the current positions on neutrality and arms support to Ukraine.

This article considers the law of contraband in the context of the Russia-Ukraine conflict. It highlights three subjects. It will touch upon the immediate events after Russia's withdrawal from the Black Sea Grain Initiative, then discuss the law of contraband and some of its current challenges. Lastly, it will consider the law of contraband concerning the conflict, particularly its intersection with the concept of qualified neutrality.

II. Events Following the Collapse of the Black Sea Grain Initiative

As a result of an emerging worldwide grain crisis that developed during the first months after the outbreak of hostilities in February 2022, the United Nations, Türkiye, Ukraine, and the Russian Federation established the Black Sea Grain Initiative in July 2002. It aimed to allow for safe navigation for the export of grain and related foodstuffs and fertilizers through a maritime warzone. Professor Pete Pedrozo has dealt in much detail with the initiative in his article, *The Black Sea Grain Initiative: Russia's Strategic Blunder or Diplomatic Coup?*,[6] which I refer to for history and challenges. The initiative has been extended several times, but just before the latest extension would expire on July 17, 2023, Russia decided to withdraw from the initiative. "As a consequence," said Russia in its letter to the International Maritime Organization (IMO), "the guarantees for the safety of navigation issued by the Russian side will be revoked."[7] Concurrently, Ukraine issued to the IMO a scheme for a temporary alternative route closer to the Ukrainian coast that directs vessels to Romanian territorial waters.[8]

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6. Raul (Pete) Pedrozo, *The Black Sea Grain Initiative: Russia's Strategic Blunder or Diplomatic Coup*?, 100 INTERNATIONAL LAW STUDIES 421 (2023).

7. IMO, Circular Letter No. 4747, *Initiative on the Safe Transportation of Grain and Foodstuffs from Ukrainian Ports* (July 17, 2023), https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20Associate%20Members%20Communications/Circular%20Letter%20No.4747%20-%20Communication%20From%20The%20Government%20Of%.

8. IMO, Circular Letter No. 4748, *Communication from the Government of Ukraine* (July 19, 2023), https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Black%20Sea%20and%20Sea%20of%20Azov%20-%20Member%20States%20and%20

Put in broader perspective, the collapse of the Grain Initiative, with its tight inspection regime and control mechanisms allowing appointed vessels to sail into and out of Ukrainian ports,[9] draws the situation back into an issue of regaining sea control over maritime areas in the Black Sea. Elsewhere, I have noted that the agreements on the grain deal were explicitly shaped in the context of the safety of life at sea agreement and did not refer to any aspects of the law of naval warfare.[10] Its practical effect, however, is arguably the same as setting up a regime of contraband control. In that sense, it has functioned as a modern navicert system.[11] With the collapse of the initiative, there was also a collapse of the mechanism to control commercial shipping that, from a military perspective, would require addressing, for instance, through counter-contraband operations. Furthermore, the outcome of the Russia-Ukraine conflict may depend heavily on the amount and type of military equipment that both parties can bring to the battlefield. Depriving the enemy State of the material it needs to sustain its warfighting capabilities is of critical importance. Whereas the position of qualified neutrality opened possibilities for States to support Ukraine's warfighting capabilities through the delivery of military equipment, training, and financial support, from a Russian perspective it cannot risk leaving the maritime door open to Ukraine. These positions arguably call for new economic warfare strategies now that the grain deal system has fallen away. From a military viewpoint, it is, therefore, not just a collapse of an agreement to safely ship grain to other

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Associate%20Members%20Communications/Circular%20Letter%20No.4748%20-%20Communication%20From%20The%20Government%20Of%20Ukraine%20(Secretariat).pdf; Iulian Ernst, *Ukraine to Shift Black Sea Grain Shipping Corridor from International to Romanian, Bulgarian Waters*, ROMANIA INSIDER (July 20, 2023), https://www.romania-insider.com/ukraine-grain-shipping-romania-waters-2023. *See also* Andrew Higgins, *As Russia Threatens Ships in the Black Sea, a Romanian Route Provides a Lifeline*, NEW YORK TIMES (Aug. 16, 2023), https://www.nytimes.com/2023/08/16/world/europe/ukraine-romania-danube-shipping.html (describing Romanian efforts).

9. Odessa, Chornomorsk, and Pivdennyi.

10. Martin Fink, *Naval Blockade and the Russia-Ukraine Conflict*, 68 NETHERLANDS INTERNATIONAL LAW REVIEW 411 (2022).

11. A navicert system is a system for certifying vessel cargo. Certificates of noncontraband carriage are issued to vessels by designated officials, certifying that the vessel's cargo has been examined and does not contain contraband.

parts of the world intertwined with wider economic interests,[12] but operationally tied in with the question of sea control over the Black Sea and Russia's possibilities to control and discourage support to Ukraine via the sea.

On July 19, the Russian Ministry of Defence issued the following statement:

> In connection with the end of the Black Sea Grain Initiative and the cessation of functioning of the maritime humanitarian corridor, from 00.00 Moscow time on 20 July 2023, all vessels sailing in the waters of the Black Sea to Ukrainian ports will be regarded as potential carriers of military cargo.
>
> Accordingly, the countries of such vessels will be considered to be involved in the Ukrainian conflict on the side of the Kiev regime.
>
> In addition, a number of sea areas in the north-western and south-eastern parts of the international waters of the Black Sea have been declared temporarily dangerous for navigation. Corresponding information warnings on the withdrawal of safety guarantees to mariners have been issued in accordance with the established procedure.[13]

One day later, the Ukraine Ministry of Defence issued their own statement, which included the following statement:

> Ministry of Defence of Ukraine warns that from the 21st of July 2023 00:00 Kyiv Time, all vessels in the Black sea waters that head to the ports of the russian federation or to temporarily occupied ports of Ukraine, may be considered for risk assessment as vessels carrying a military cargo.
>
> Moreover, navigation in the North-East Black Sea region and the Kerch-Yenikal strait has been declared dangerous and prohibited as of the 20th of July 2023 05:00 Kyiv Time. Relevant information has been published to the attention of navigators.[14]

Obviously, both are political statements rather than legal positions. And, unsurprisingly, neither statement fits neatly into the norms of international law. By stating that all vessels in the Black Sea will be regarded as "potential

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12. U.S. Dept. of State, *Russia's War on Ukraine's Grain and Global Food Supply, in Five Myths* (Aug. 17 2023), https://www.state.gov/russias-war-on-ukraines-grain-and-global-food-supply-in-five-myths/.

13. Press Release, Ministry of Defence of the Russian Federation (July 19, 2023), https://eng.mil.ru/en/news_page/country/more.htm?id=12473368@egNews.

14. Press Release, Ministry of Defence of Ukraine (July 20, 2023), https://www.mil.gov.ua/en/news/2023/07/20/statement-by-the-ministry-of-defense-of-ukraine/.

carriers of military cargo," the Russian statement seems vaguely to imply the possible use of counter-contraband operations. Ukraine's statement is similarly vague, noting that vessels carrying military cargo may be considered at risk. Neither statement indicates whether the law of contraband, the law of targeting, or both, will be used. In the case of the Ukrainian statement it is left unclear what the consequences would be when such risks manifest themselves. The Russian statement seems partly of an informative nature, conveying a notification and partly a threat by considering countries of "such vessels" (presuming to mean vessels carrying military cargo) to become part of the conflict. Some opine that these statements should be seen in a targeting context and express a "willingness to potentially treat all vessels sailing to their adversary's ports as military objectives, rendering such vessels liable for diversion, capture, or destruction."[15] Although this is a fair opinion, the actual wording does not go as far as to consider all vessels to be military objectives. Nor have the belligerents declared a free fire zone against civilian vessels,[16] which is also prohibited.[17]

On August 4, 2023, a drone allegedly operated by Ukraine attacked and damaged the Russian flagged tanker *Sig* south of the Kerch Strait. The tanker is under U.S. sanctions for carrying jet fuel to Russian military forces in Syria[18] and is now purportedly carrying fuel for Russian troops. Russia stated that the tanker was empty, and nothing further is known from public

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15. Himanil Raina, *Merchant Shipping as Military Objective and Naval Economic Warfare*, ARTICLES OF WAR (Aug. 7, 2023), https://lieber.westpoint.edu/merchant-shipping-military-objectives-naval-economic-warfare/. *See also* Human Rights at Sea, *Russia in the Black Sea: The Law of Armed Conflict at Sea Needs Due Consideration Alongside UNCLOS* (July 25, 2023), https://www.humanrightsatsea.org/sites/default/files/media-files/2023-07/20230725_HRAS_LOAC_Article_Russian_maritime_actions_in_Black_Sea-FINAL_0.pdf.

16. *See also* David Letts, *The Sinking of the ARA General Belgrano*, *in* MARITIME OPERATIONAL LAW IN PRACTICE 191 (David Letts & Rob McLaughlin eds., 2023) (discussing war zones and the wording in which they were announced in the context of the Falkland/Malvinas conflict).

17. *See* SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA ¶¶ 105, 106 (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL].

18. Press Release, U.S. Dept. of Treasury, Treasury Targets Sanctions Evasion Scheme Facilitating Jet Fuel Shipments (Sept. 26, 2019), https://home.treasury.gov/news/press-releases/sm785; Olena Harmash, *Ukraine Hits Russian Tanker with Sea Drone Near Crimea Bridge*, REUTERS (Aug. 5, 2023), https://www.reuters.com/world/europe/crimea-residents-hear-blast-russia-installed-official-says-unrelated-bridge-2023-08-04/.

sources.[19] On August 13, the Palau-flagged cargo vessel *Sukru Okan* was boarded by the Russian warship *Vasily Bykov* when it sailed out of the Strait of Bosporus into the Black Sea. The Russian warship fired warning shots when the *Sukru Okan* failed to respond to its request to board.[20] After inspections, it was allowed to sail on.[21] Both incidents may color the political statements made by the belligerents in terms of what operational naval action may lie behind them. In the first week of September, the Russian and Turkish presidents met in Sochi to discuss whether it was possible to get the initiative back on line.[22] While attacks on land continue, no further incidents at sea that can be directly related to the consequences of the collapse of the grain deal have occurred.[23] In the meantime, although not carrying any grain, several vessels departed from ports in Ukraine unmolested, following the route closer to shore.[24]

III. THE LAW OF CONTRABAND

The law of contraband is part of the law of naval warfare. With the exception of some rules based on international agreements, such as the Paris Declaration of 1856 and the Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War of 1907, customary international law provides the basis of most rules on the law of contraband. Although the Declaration of London of 1909 contains detailed

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19. Eric Priante Martin, *Russia Complains to IMO Over Ukrainian "Terrorist" Attack on Tanker*, TRADEWINDS (Aug. 18, 2023), https://www.tradewindsnews.com/tankers/russia-complains-to-imo-over-ukrainian-terrorist-attack-on-tanker/2-1-1503507.

20. *Russian Forces Board Civilian Ship in Black Sea*, NEW YORK TIMES (Aug. 14, 2023), https://www.nytimes.com/live/2023/08/14/world/russia-ukraine-news/video-shows-russian-soldiers-on-commercial-vessel-in-black-sea?smid=url-share.

21. Darya Tarasova, Gul Tuysuz & Lauren Kent, *Russia Fires Warning Shots and Boards Cargo Ship in Black Sea*, CNN (Aug. 14, 2023), https://edition.cnn.com/2023/08/13/europe/russia-warning-shots-black-sea-intl/index.html.

22. Guy Faulconbridge et al., *Turkey's Erdogan Says Black Sea Grain Deal Can be Restored Soon*, REUTERS (Sept. 4, 2023), https://www.reuters.com/markets/commodities/with-grain-deal-focus-putin-meet-erdogan-russia-2023-09-04/.

23. As of September 15, 2023.

24. Amongst them the Marshall Islands flagged *Ocean Courtesy* and the Liberian flagged *Anna Theresa.*

provisions regulating contraband, it never entered into force. Next to military manuals of relevant sea power States,[25] the *San Remo Manual on International Law Applicable to Armed Conflict at Sea* is often referred to as a manual that carries significant legal weight on the subject. Part V of the *Manual*, entitled "Measures short of attack: interception, visit, search, diversion and capture," contains in paragraphs 112 through 158 the rules that are part of the law of contraband. Most recently, a number of experts have drafted the *Newport Manual on the Law of Naval Warfare*.[26] Considering the *San Remo Manual* "a product of its time,"[27] the *Newport Manual* aims to "restate the law of naval warfare as a purely *lex lata* exercise."[28] Regarding contraband, the *Newport Manual* is interesting because it notes some differences with the *San Remo Manual*.

Practice

Since the publication of the *San Remo Manual* in 1994, there haven't been many instances of practice in which the law of contraband has applied to its fullest extent. One instance would be the Iraq War of 2003, where, according to Commodore Neil Brown, the United States (unlike its UK and Australian coalition partners) prepared itself for the application of the law of contraband, including the publication of contraband lists. Special Warning No. 121, issued by the United States at the start of the conflict, states:

> Vessels operating in the Midde East, Eastern Mediterranean Sea, Red Sea, Gulf of Oman, Arabian Sea, and Arabian Gulf are subject to query, being stopped, boarded and search by US/coalition warships operating in support of operations against Iraq. Vessels found to be carrying contraband bound for Iraq or carrying and/or laying mines are subject to detention, seizure and destruction.[29]

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25. *See generally Military Legal Manuals*, U.S. NAVAL WAR COLLEGE STOCKTON E-PORTAL (last updated Aug. 15, 2023), https://usnwc.libguides.com/c.php?g=86619&p=557511 (providing copies of multiple military legal manuals).

26. James Kraska, et al., *The Newport Manual on the Law of Naval Warfare*, 101 INTERNATIONAL LAW STUDIES 1 (2023) (hereinafter *Newport Manual*).

27. James Kraska, *The Newport Manual on the Law of Naval Warfare Facilitates Interoperability*, JUST SECURITY (June 14, 2023), https://www.justsecurity.org/86854/the-newport-manual-on-the-law-of-naval-warfare-facilitates-interoperability/.

28. *See Newport Manual*, *supra* note 26.

29. United States, Special Warning No. 121: Persian Gulf, ¶ 3 (Mar. 20, 2003), *reprinted in* JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 95 (2013).

The warning, therefore, includes a clear reference to the willingness to use the law of contraband if needed. Brown, however, also notes that while coalition partners "could as a matter of law have exercised belligerent right of visit and search against enemy and . . . neutral vessels, this never occurred."[30]

During Operation Enduring Freedom (OEF), coalition partners had different views on the appropriate legal basis for maritime interception operations. As a result, they took different approaches in their boarding operations, including the belligerent right of visit and search. No discussion, however, seems to have taken place regarding the use of other elements of the law of contraband. Also, leadership interdiction operations (LIO) were not so much taken against goods as against persons trying to flee Afghanistan via the sea.[31] Some years before OEF started, in 1999, NATO member States were involved in Operation Allied Force against Serbia. While this operation mainly involved an air campaign and made no use of the law of contraband, naval forces were part of the military operations.[32] That the use of belligerent rights in general was part of the deliberations is reflected by James Ryan, who mentions that a discussion about establishing a belligerent blockade failed to reach consensus for political reasons. The specific dynamics of that conflict (humanitarian intervention) led, according to him, to an unwillingness to publicly acknowledge the existence of an international armed conflict and therefore also a reticence to use belligerent rights.[33] And lastly, during Operation Odyssey Dawn/Unified Protector in 2011, arguably an international armed conflict between NATO member States and the Libyan regime, the stopping and boarding of vessels to implement UN-mandated measures against Libya was based on Chapter VII UN Security Council Resolutions that explicitly authorized stopping certain material from flowing into Libya via the sea.[34]

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30. Neil Brown, *Legal Considerations in Relation to Maritime Operations Against Iraq*, 86 INTERNATIONAL LAW STUDIES 127, 133, (2010).

31. Sandra L. Hodgkinson et al., *Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap*, 22 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 583, 621–23 (2007).

32. Andrew L. Stigler, *Coalition Warfare Over Kosovo*, NAVAL COALITION WARFARE: FROM THE NAPOLEONIC WAR TO OPERATION IRAQI FREEDOM 183 (Bruce Elleman & Sally Paine eds., 2008).

33. James M. Ryan, Some Practical Advice for a Joint Force Commander Contemplating the Use of Blockade, Visit and Search, Maritime Interception Operations, Maritime Exclusion Zones and Maritime Warning Zones During Times of Armed Conflict (Feb. 8, 2000) (M.A. thesis, U.S. Naval War College), https://apps.dtic.mil/sti/pdfs/ADA378469.pdf.

34. *See* S.C. Res. 1970 (Feb. 26, 2011); S.C. Res. 1973 (Mar. 17, 2011).

IV. CHARACTER AND DESTINATION

The law of contraband is applied against neutral merchant vessels during an international armed conflict. Contraband are goods susceptible to use in armed conflict. The two key requirements for belligerent warships to exercise counter-contraband operations against neutral merchant vessels center around the character of the cargo and its destination. First, the cargo on board the vessel must be considered contraband. Second, the goods must ultimately be bound for an enemy destination.

A. Character of Goods

Which goods can be regarded as contraband has always been a matter of controversy. Whereas arms and ammunition or other typical military materiel are obvious contraband, categorization becomes more difficult with dual-use goods. For instance, raw materials, foodstuffs, or anything else that supports the warfighting effort can be difficult to classify. In the past, a distinction was made between absolute contraband, which are war materials that can be captured if destined for enemy-controlled territory, and conditional contraband, which are dual-use goods that can be captured when destined for enemy-controlled territory and which can be sufficiently proved that they will be used for war-like purposes. Literature on this subject, including the *San Remo Manual* and *Newport Manual*, reflecting on the practice during the two World Wars,[35] has questioned whether this distinction in contraband goods still makes sense.[36]

Clarification on which goods are considered contraband during an armed conflict can be done by publishing contraband lists. Whether belligerent States must publish contraband lists to make use of their belligerent rights is somewhat unsettled. The 1909 Declaration of London set up a system of lists clarifying what is considered absolute and conditional contraband or goods exempt from capture.[37] Having these lists already agreed upon in a treaty allowed for not giving any notice to neutral States when war would

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35. Roger Howell, *Contraband Lists in the Present War*, 4 VIRGINIA LAW REVIEW 371 (1917) (providing a very detailed survey of the development of contraband lists in relation to absolute and conditional contraband).

36. *See, e.g.*, DREW, *supra* note 5.

37. Declaration Concerning the Laws of Maritime War arts. 22–44, Feb. 26, 1909, 208 Consol. T.S. 338, *reprinted in* THE DECLARATION OF LONDON, FEBRUARY 26, 1909, at 112 (James B. Scott ed., 1919) [hereinafter DECLARATION OF LONDON].

break out.[38] Additions to the lists would have to be made by notification.[39] But this system never came into effect. The *San Remo Manual* clearly states that belligerents must have published contraband lists in order to exercise their right to capture contraband.[40] Some States follow this view,[41] while others have no position. The United States takes the view that "[t]hough 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."[42] As it mentions "may continue to require," the point of departure seems to be to publish contraband lists, but this is then watered down through the requirements in practical application by only listing what will not be considered as contraband. Although this view seems logical from an operational standpoint—because it gives a State maximum flexibility to apply the law of contraband and operational responsiveness to new situations at sea—it also impacts clarity on which goods are considered contraband. The *Newport Manual* only acknowledges that more views exist but does not take a position on the matter.[43]

If contraband is seized at sea, it has to be brought before a prize court for adjudication. A challenge that manifests itself in this judicial dimension is that it is questionable whether detailed rules concerning condemnation of goods and vessels still exist. The traditional doctrine of infection is a good example.[44] The doctrine stated that when a certain percentage of goods carried by a vessel are contraband, the rest of the goods will be considered "infected" and liable to capture even though they are not contraband. It is questionable whether this doctrine still bears any legal acceptance. One other example is that Article 40 of the Declaration of London states that a "vessel

38. *See id.* arts. 22, 24. *See also* NORMAN BENTWICH, THE DECLARATION OF LONDON 60 (1911).

39. DECLARATION OF LONDON, *supra* note 37, art. 23.

40. SAN REMO MANUAL, *supra* note 17, ¶ 149.

41. *See, e.g.*, UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004) [hereinafter UK MANUAL]; DANISH MINISTRY OF DEFENCE, MILITARY MANUAL ON INTERNATIONAL LAW RELEVANT TO DANISH ARMED FORCES IN INTERNATIONAL OPERATIONS ¶ 14.7 (2016) [hereinafter DENMARK MANUAL].

42. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 7.4.1 (2022) (hereinafter U.S. COMMANDER'S HANDBOOK).

43. *Newport Manual*, *supra* note 26, § 6.9.2.2.

44. Andrew Clapham, *Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law*, 97 INTERNATIONAL LAW STUDIES 1200, 1259 (2021); JAMES GARNER, PRIZE LAW DURING THE WORLD WAR 320 (1927).

carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo." Today, it is unclear whether such detailed rules in the law of contraband are accepted as law. In that sense, it may be that the "legal finish" of counter-contraband operations in prize courts may present more complex legal questions than the legal challenges coming from the operational dimension of contraband operations at sea.

B. *Enemy Destination: Continuous Voyage*

Along with its character, contraband must be destined for territory under the control of the enemy. Only contraband that satisfies this criterion can be seized. This means that vessels that have managed to deliver their contraband goods and are on their way back cannot be seized, even if it is known that the vessel has delivered such goods.[45] Also, *exporting* contraband from enemy territory is also excluded.[46] In present circumstances, this would mean that even if grain was considered contraband, it would not fulfil the criterion of enemy destination. Next to these limitations, the doctrine of "continuous voyage" broadens the scope of enemy destination. Under this doctrine, contraband goods that will ultimately be transported to enemy territory can be seized even if they will first be delivered to a port that is not under the control of the enemy. For example, in present circumstances, contraband on board a neutral merchant vessel bound for Rotterdam, which will then be transported overland to Ukraine, could be seized at sea. Applying this doctrine, therefore, entails a considerable expansion to the geographical area of the application of contraband law. Both the *San Remo Manual* and the *Newport Manual* accept that the application of this doctrine applies to the law of contraband.[47] The Declaration of London draws a distinction in the application of the doctrine between absolute and conditional contraband and only applies the doctrine to absolute contraband.[48] The unclearness on whether the

45. DECLARATION OF LONDON, *supra* note 37, art. 38.

46. SAN REMO MANUAL, *supra* note 17, ¶ 148.4.

47. *Id.* ¶ 148.1; *Newport Manual*, *supra* note 26, § 9.6.2.4.

48. *Compare* DECLARATION OF LONDON, *supra* note 37, art. 30 (regarding absolute contraband, "It is immaterial whether the carriage of the goods is direct or entails transhipment or a subsequent transport by land"), *with* art. 35 (conditional contraband "is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port").

distinction between absolute and conditional should be kept in place obviously also affects this issue.

V. THE BELLIGERENT RIGHT OF VISIT AND SEARCH

The law of contraband also contains procedural rules for belligerent warships to implement the law at sea. Most essential is the belligerent right of visit and search. As A.P. Higgins noted, "it is not a substantive and independent right, but a means justified by the end."[49] This right, which is wholly separate from the peacetime right of visit as codified in Article 110 of UNCLOS, allows belligerent warships to stop, board, and inspect foreign-flagged merchant vessels without the prior consent of the flag State. Failure to comply could lead to a vessel becoming a military objective.[50]

There is disagreement regarding the threshold for the use of the belligerent right of visit. The *San Remo Manual*,[51] the UK *Manual*,[52] and the Denmark *Manual*[53] opine that there needs to be a reasonable suspicion that a vessel is carrying contraband. Following the *Barber Perseus* incident during the Iran-Iraq War, the British government stated that Iran, in its inherent right of self-defense, was entitled to exercise the belligerent right of visit and search of neutral vessels "only if there are reasonable grounds for suspicion that they are carrying contraband goods. If there is no such reasonable grounds for suspicion the exercise of these rights would not be necessary or proportionate for the belligerent's self-defence."[54] In this view, *ius ad bellum* limitations seem to impact *ius in bello* rules. Other manuals (United States,[55] Canada,[56] and Germany[57]) do not mention the reasonable suspicion threshold. The *Newport Manual* opines that although State practice[58] suggests that

49. A.P. Higgins, *Visit, Search and Detention*, 7 BRITISH YEAR BOOK OF INTERNATIONAL LAW 43–53 (1926).

50. *See* SAN REMO MANUAL, *supra* note 17, ¶ 67 (providing the specific conditions).

51. *Id.* ¶ 118.

52. UK MANUAL, *supra* note 41, ¶ 13.91.

53. DENMARK MANUAL, *supra* note 41, ¶ 14.6.

54. Wolff Heintschel von Heinegg, *The Current State of International Law*, *in* INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT 5, 20 (Harry H.G. Post ed., 1994). *See also* ANDREW CLAPHAM, WAR 381 (2021).

55. U.S. COMMANDER'S HANDBOOK, *supra* note 42, ¶ 7.6.

56. CHIEF OF THE GENERAL STAFF (CANADA), B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS ¶¶ 6.46, 6.47 (2001).

57. FEDERAL MINISTRY OF DEFENCE (Germany), HUMANITARIAN LAW IN ARMED CONFLICTS MANUAL ¶ 1234 (1st ed. 2002).

58. Which practice is unfortunately not referred to.

there is no standard of reasonable suspicion "[g]iven operational constraints, however, visit and search of neutral merchant vessels and civil aircraft usually occurs if there is suspicion that they are engaged in an activity rendering them liable to capture."[59] In other words, it argues that the economy of military force makes a belligerent apply the standard of reasonable suspicion, for instance, through the warship's rules of engagement, rather than that it is required by law. Wolff Heintschel von Heinegg opines in several publications that the threshold of reasonable suspicion should exist[60] but appears not to have pushed the point as part of the *Newport Manual* writing team. In older treatises on the law of naval warfare, such as in the works of Robert Tucker[61] and Constantine Colombos,[62] there is no mention of a threshold. The London Declaration does not detail this procedural right for belligerents.

The tension in this matter lies in weighing the operational exigencies of a belligerent State—which may include seemingly random tactical decisions within a counter-contraband naval strategy in an area of operations—against the freedom of trade and navigation that continues to exist during wartime circumstances. Arguably, suspicion may be generalized on a more strategic level identifying likely routes being used for contraband smuggling instead of establishing suspicion in individual cases. Operationally, looking at the process as a whole, a belligerent warship conducts a verification by stopping, visiting, and searching neutral merchant vessels in order to determine their character and existence of contraband. This includes checking the paperwork on board to ascertain character, destination, nature of the cargo, etc., and could develop into searching the ship and cargo. If, after inspection, suspicion exists that the vessel is carrying contraband or has enemy character, the decision can be made to seize the vessel and bring it into port for adjudication by a prize court. It would make more sense to apply the reasonable suspicion threshold at that stage of the process because the decision to seize (or divert to a port for further inspection) will severely impact the freedom of trade and navigation.

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59. *Newport Manual*, *supra* note 26, § 9.9.

60. *See, e.g.*, Wolff Heintschel von Heinegg, *The Law of Military Operations at Sea*, *in* THE HANDBOOK OF INTERNATIONAL LAW OF MILITARY OPERATIONS 375, § 20.21 (Terry Gill & Dieter Fleck eds., 2015).

61. Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 INTERNATIONAL LAW STUDIES 1 (1955).

62. CONSTANTINE J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA (5th ed. 1962).

VI. QUALIFIED NEUTRALITY AND CONTRABAND

A number of States have taken a position of qualified neutrality regarding the Russian-Ukraine conflict.[63] The traditional rules on neutrality seek to ensure that States not party to the conflict abstain from supporting belligerents from either side. States must refrain from all acts that would help either one of the belligerents. The position of qualified neutrality takes a different approach. In short, this position has emerged regarding the Russia-Ukraine War because there is clear and broad agreement on who the aggressor State is, that the UN's collective security mechanism is failing, and that the aggressor State is breaching a *ius cogens* norm of international law.[64] Accepting the qualified neutrality position would, as Heintschel von Heinegg opines, mean that "the many States supplying Ukraine with military equipment . . . are not acting contrary to the law of neutrality, nor are they otherwise committing internationally wrongful acts or aiding and assisting such acts."[65] From a Russian perspective, however, shipping arms and arms-related materiel by neutral States to Ukraine would qualify as contraband. The question, therefore, is whether accepting the qualified neutrality position on the law of neutrality impacts the application of the law of contraband.

A. Does Qualified Neutrality Change the Character of the Goods?

Neutrality manifests itself in the maritime dimension of armed conflict, mostly through the rules on the use of neutral national waters. Although neutrality generally concerns the relationship between States and the law of contraband regulates the relationship between the belligerent States and private actors, the influence of neutrality also extends to the law of contraband. The general idea is that the rules on contraband take as a point of departure that States need to ensure they are not supporting either belligerent and that the belligerents are given a controlling mechanism that dissuades interfer-

63. Raul (Pete) Pedrozo, *Russia-Ukraine Conflict: The War at Sea*, 100 INTERNATIONAL LAW STUDIES 1, 52–56 (2023).

64. J.F.R. Boddens Hosang, *Militaire Steun aan Oekraine: Neutraliteit, Gekwalificeerde Neutraliteit en Co-belligerente Status in het Internationaal Recht*, 116 MILITAIR RECHTELIJK TIJDSCHRIJFT [NETHERLANDS MILITARY LAW REVIEW] 11 (2023). *See also* Pedrozo, *supra* note 63.

65. Wolff Heintschel von Heinegg, *Neutrality in the War Against Ukraine*, ARTICLES OF WAR (Mar. 1, 2022), https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/.

ence with the conflict. This is apparent through Article 6 of the Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War of 1907,[66] which results in the fact that the rules on contraband lack regulating cases where States are involved in transporting contraband. Article 6 of Hague Convention XIII explicitly forbids a neutral power to supply, directly or indirectly, warships, ammunition, or war material of any kind. Apart from the question of whether this provision is considered customary or only applies between the parties to the treaty, in the case of the Russia-Ukraine conflict and in light of the current interpretation of neutrality, this provision appears to have become moot. With regard to the application of the law of contraband in this context, there are two diverging views.

First, in line with the qualified neutrality position, one could argue that arms shipments undertaken by States that have adopted a qualified neutrality position should then also not be considered contraband because it is not prohibited to support a belligerent State under such circumstances. This position would then impact the law of contraband in the sense that goods normally considered contraband are now exempt from that definition. Second, one could argue that arms support to Ukraine does not breach a State's neutrality, but it does not alter the law of contraband. The belligerent parties can still continue trying to stop shipments from reaching their opponent. As said, the law of neutrality and the law of contraband are interconnected[67] in so far as the idea that, on the one hand, neutrals have to refrain from any support to the belligerents, while on the other hand, belligerents have rights to ensure that neutrals keep from interfering. At sea, this translates into taking the necessary steps to ascertain whether vessels are attempting to deliver contraband to the opponent State. In this context, one could question whether, under the traditional law of neutrality, breaching the neutral State's obligation not to ship arms to the belligerent would allow the belligerent State to use its authorities under contraband law at sea. Harold Pyke (in 1915) made a somewhat vague reference to this situation, where he stated that:

> Unlike similar conduct on the part of neutral traders in their private capacity, the failure of the neutral power in this duty would constitute . . . a breach of national neutrality for which the state as a whole would be liable

66. Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War art. 6, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545.

67. More specifically, however, both areas of the law must be considered separately. Breaching contraband rules by neutral merchant vessels does not mean that the flag State has lost its neutrality.

> to make reparation to the injured belligerent. *Whether the goods were actually captured or not*, the offence would be committed.[68]

Although this may possibly hint that these goods can be seized as contraband, an alternative conclusion is that if neutral State property cannot be condemned as prize in a prize court for reason of immunity[69] or limited competency,[70] it would logically follow that seizure of such property at sea would fall outside the scope of what can be seized. Seeking legal redress in such situations should be addressed as an issue of wrongful acts by States rather than through contraband law and a prize court.

B. Immunity Over Vessels and the Scope of the Belligerent Right of Visit

Even if Russia considers arms shipments by States that have adopted the qualified neutrality approach as contraband that can be seized at sea, the issue of immunity of vessels complicates the practical application of the belligerent right of visit and search. As mentioned, the law of contraband applies to neutral merchant vessels. The belligerent right of visit and search cannot be exercised against neutral State vessels that enjoy immunity, such as warships, auxiliary vessels, and State-owned or operated vessels used only on governmental non-commercial service. Questions, however, could be raised on whether the belligerent right of visit and search is also excluded from applying to neutral merchant vessels chartered by a State and performing non-commercial services. The law of naval warfare and the *San Remo Manual* are, quite logically, silent on the matter as the regime concerning contraband is conceptually based on the idea that States should not engage in such activities. Although the literature generally mentions that neutral merchant vessels are subject to capture, it does not take into account the law concerning immunity over vessels engaged in non-commercial service for a government.

The *Newport Manual* considers that such vessels are entitled to sovereign immunity but does not explicitly state that they are excluded from the bellig-

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68. HAROLD REASON PYKE, THE LAW OF CONTRABAND OF WAR 60 (1915) (emphasis added).

69. *See* G.A. Res. 59/38, United Nations Convention on Jurisdictional Immunities of States and Their Property art. 5 (Dec. 2, 2004). Conversely, enemy State property can be taken under the law of booty.

70. Garner mentions that the competence of prize courts during the First World War was limited to merchant vessels and cargo. Garner, *supra* note 44, at 75–96.

erent right of visit and search. The United States considers that "Other neutral vessels engaged in government non-commercial service may not be subjected to visit and search."[71] This is drawn from the principle that public activities of one State cannot be subjected to the powers of another State, which over time has developed into the view laid down in Article 96 of UNCLOS. This provision states that "Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State." Merchant vessels chartered by the government can be considered to be operated by the State. If the word "only" in Article 96 UNCLOS includes the situation of a merchant vessel that is temporarily (time-) chartered and is engaged only in government non-commercial service, immunity over such vessel would exist.

In this context, it's worth noting the operational guidance in the U.S. sovereign immune policy, which states:

> it is U.S. Navy policy to assert full sovereign immunity for all USNS, U.S. Government-owned vessels or those under bareboat-charter to the U.S. Government, commercially-owned U.S.-flagged vessels under charter to the U.S. Government for a period of time (time-chartered vessels).[72]

Consequently, "Masters shall not permit a ship or vessel under their command to be searched or inspected on any pretense whatsoever by foreign authorities or organizations, nor permit any of the personnel within the confines of their ship or vessel to be removed by foreign authorities."[73] It therefore excludes the belligerent right of visit and search. Of note is that the U.S. policy does not claim immunity over chartered foreign flagged vessels:

> The U.S. Navy does not claim sovereign immunity for foreign State-flagged chartered vessels. These vessels are in the same position as commercial vessels when interacting with foreign authorities except that U.S. Government cargo on such vessels should receive special consideration, protec-

71. U.S. COMMANDER'S HANDBOOK, *supra* note 42, ¶ 7.6.

72. CNO Washington DC message 041827Z AUG 21, NAVADMIN 165/21, Sovereign Immunity Policy ¶ 7(a), https://www.mynavyhr.navy.mil/Portals/55/Messages/NAVADMIN/NAV2021/NAV21165.txt?ver=EHzWAiORe_7avzdSafZm9g%3d%3d.

73. *Id.* ¶ 7(a)(1).

> tion, and treatment. Foreign authorities may search these vessels, but masters shall request these authorities refrain from inspecting or searching U.S. military cargo onboard their vessel.[74]

The probable reason is that a State cannot claim immunity over vessels that are not registered in their State and do not have the nationality of that State because it has no jurisdiction over such vessels without the consent of the flag State. Article 92 of UNCLOS does not allow a vessel to have multiple nationalities. As a consequence, if a State would, for some reason, charter a foreign-flagged vessel to ship governmental military cargo, it could not claim immunity against visit and search. Immunity over governmental property would still bar taking possession of governmental military cargo.

If one followed the U.S. position of immunity over merchant vessels, this would mean that, given the current view on neutrality, there is neither a possibility for the belligerent to stop such goods at sea nor a possibility for the belligerent party to claim at the State level that neutrality has been breached. Although the law of contraband could still be exercised against neutral merchant vessels carrying contraband that are not chartered by a State, it minimizes possibilities for belligerent States to stop governmental arms shipments.

VII. CONCLUSION

Whether the sleeping beauty of the law of contraband has actually been awakened or was only briefly disturbed, mumbling something that could not be understood, cannot be concluded in a definitive manner at the time of writing. Whereas the statements of the belligerents have left hints that the law of contraband may be used, no further evidence, such as the publication of a contraband list or a growing number of merchant vessels that have encountered counter-contraband operations has been found. That said, if a legal basis has to be attached to the use of force related to the boarding of the *Sukru Okan*, the law of contraband provides that basis. In this context, this article also pointed out several points of discussion on the law of contraband that would have to be dealt with when counter-contraband operations become part of Russia's maritime modus operandi in this conflict. These challenges of the application of the law of contraband lie, next to the unclearness of its detailed rules, also in other areas of law, such as the law of immunity.

74. *Id.* ¶ 7(b).

Finally, this article has touched upon the relationship between qualified neutrality and the law of contraband. It argued that the issue of qualified immunity can have a huge impact on the application of the law of contraband, leaving Russia with limited legal means to counter arms transport at sea.