Chapter 21


Nilufer Oral

The United Nations Law of the Sea Convention (LOSC)\(^1\) when adopted in 1982 was heralded as the “constitution for the oceans.” The preamble with the words “[p]rompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea…” conveyed its seemingly far-reaching ambit of application (Emphasis added). The Convention further expressed its direct relationship to the United Nations Charter stating,

Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations . . . in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.

The Convention did not, however, expressly limit its application to time of peace or indicate its status in time of war or armed conflict at sea. The only hint is found in the last paragraph of the preamble affirming that, “matters not regulated by this Convention continue to be governed by the principles of general international law.” Despite the silence of the Convention, the general view is that the law of armed conflicts at sea is implicitly excluded by the language ‘matters not regulated’ by the Convention, and would presumably continue to be regulated by other sources of international law, such as the United Nations Charter, the Geneva Conventions and their protocols as well as customary rules of international law.\(^2\)

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The need for a clear understanding of when application of the law of the sea applies, under customary international law and as codified in the 1982 LOSC is especially vital for preservation of freedom of navigation in the high seas and the long-standing customary international rule of the exclusive jurisdiction of the flag State on the high seas, long-standing norms of international law, codified in both the 1958 Geneva Convention on the High Seas and 1982 United Nations Convention on the Law of the Sea. Exceptions have been narrowly enumerated in both instruments and not expanded upon by state practice. The right of freedom of navigation on the high seas without interference by third states is a preememptory norm of international law and exceptions must be well grounded in international law. For example, according to customary international law high seas interdiction for enforcement of a naval blockade, a method of inter-state warfare and an exercise of the right of self-defense under article 51 of the Charter of the United Nations is permitted. Even though such exception is not expressly enumerated as an exception to high seas freedoms in the 1982 LOSC, naval blockades can be enforced against merchant vessels under specific circumstances. However, as will be shown in this Chapter, state practice has not expanded naval warfare methods, such a blockades, to be used in non-interstate conflict or those involving non-state actors.

The current legal framework for naval warfare rests upon rules of customary international law as reflected the San Remo Manual, a non-binding document prepared by international law experts. The need for greater legal certainty in clarifying the relations between the application of the rules of peace time as reflected in the law of the sea and those of armed conflict was illustrated on the 31 May 2010 when Israeli military forces interdicted six passenger vessels carrying a total of 600 civilian activists and 10,000 tons of humanitarian assistance to the Gaza Strip, which was under both a naval and land blockade imposed by Israel. (Hereinafter “Gaza Flotilla incident”). The Israeli Defense Force (IDF) interdicted the vessels with the use of force in the high seas of the eastern Mediterranean Sea some 72 nautical miles from the nearest coast, and 64 nautical miles from the blockade zone declared by Israel. All six vessels were diverted to the Israeli port of Ashdod where six hundred passengers were

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3 Geneva, 29 April 1958, 450 UNTS 12.
4 Montego Bay, 10 December 1982, 1833 UNTS 3.
5 The San Remo Manual on International Law Applicable to Armed Conflict at Sea (ICRC, 1994).
6 The naval blockade was declared in 2009 to prevent delivery of goods that could be used by Hamas against Israel. See Notice to Mariners No. 1/2009. Available at http://asp.mot.gov.il/en/shipping/notice2mariners/547-no12009.