

Article

A Pacific Blockade of Syria*

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INTRODUCTION

Syria, a country bordering Israel,¹ is in a state of armed conflict.² The Syrian government has massacred civilians,³ thereby committing war crimes in violation of jus cogens,⁴ the fundamental and non-derogable rules of international law.⁵ In

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1. *16 Dead, Dozens Injured as Violence Erupts Along Israel's Borders with Syria*, MAIL ONLINE (May 16, 2011), <http://www.dailymail.co.uk/news/article-1387322/Violence-Israels-borders-Syria-Nakba-Day-16-dead-dozens-injured.html> (noting that Israel borders Syria and describing violent outbursts occurring at that border).

2. James Hider, *Syria Has Descended into Civil War, Says Red Cross; Assad Regime Denies Using Helicopter Gunships*, TIMES (London), July 16, 2012, at 8.

3. Mona Mahmood et al., *Syria's Worst Massacre: Daraya Death Toll Reaches 400*, GUARDIAN (Aug. 28, 2012), <http://www.guardian.co.uk/world/2012/aug/28/syria-worst-massacre-daraya-death-toll-400> (reporting that "up to 400 bodies had been found in the [Syrian] town of Daraya").

4. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513–14 (4th ed. 1990) (defining jus cogens as certain indelible principles of customary international law that cannot be set aside but for forming a contrary customary rule; jus cogens is often concerned with basic rights of the human person, including the prohibition of genocide, use of force, and crimes against humanity); CNN Wire Staff, *U.N. Official Accuses Syria of Crimes Against Humanity*, CNN (June 7, 2012), <http://www.cnn.com/2012/06/07/world/meast/syria-unrest/index.html> (noting that the massacre and torture of Syrian citizens was sufficient to warrant accusing Syria of crimes against humanity).

5. BROWNLIE, *supra* note 4, at 513–15 (describing jus cogens as including preemptory norms of international law that cannot be derogated from or modified unless a subsequent international norm of a similar character is formed).

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response, the United States and its allies sought to obtain sanctions by the United Nations against Syria.⁶ China and Russia persistently vetoed these efforts.⁷ The U.S. is currently providing millions of dollars of non-lethal humanitarian relief to Syrian refugees.⁸ This article argues that the U.S. may also, consistent with well-established international law, impose a pacific blockade on Syria.

I. PACIFIC BLOCKADES: DEFINITION AND PRECONDITIONS

A. DEFINITION

A pacific blockade⁹ is the interposition of a state's navy to control what comes and goes from another state's ports.¹⁰ Purposes of pacific blockades include compelling the blockaded nation into a state of peace,¹¹ reprisal,¹² and suppressing civil disorder.¹³ A pacific blockade is peaceful.¹⁴ It is intended to

6. *Syria Sanctions Fact Sheet*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/our-work/crimes-against-humanity/syria/> (last visited Oct. 22, 2012).

7. Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES, July 20, 2012, at A8; see also JEANETTE GREENFIELD, CHINA AND THE LAW OF THE SEA, AIR, AND ENVIRONMENT 107, 115–16 (1979) (noting that China has taken no position on pacific blockade generally, but it did condemn the U.S. blockade of Cuba).

8. See Press Briefing, The White House, Briefing by National Security Advisor Tom Donilon and Deputy National Security Advisor Ben Rhodes on Libya and the Middle East (March 10, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/10/briefing-national-security-advisor-tom-donilon-and-deputy-national-security-advisor-ben-rhodes-on-libya-and-the-middle-east> (describing non-lethal humanitarian relief); *U.S. Aid to Syrian Refugees Reaches \$100M*, CBSNEWS (Sept. 5, 2012, 12:47 PM), [http://www.cbsnews.com/8301-202_162-57506573/u.s-aid-to-syrian-refugees-reaches-\\$100m/](http://www.cbsnews.com/8301-202_162-57506573/u.s-aid-to-syrian-refugees-reaches-$100m/).

9. The terms pacific blockade, peaceful blockade, and peaceable blockade are used interchangeably here due to differences in languages. The concept of a pacific blockade is referred to as *blocus pacifique* (French), *friedensblockade* (German), *bloqueo pacífico* (Spanish), and *Мирная блокада* (Russian).

10. See ALBERT E. HOGAN, PACIFIC BLOCKADE 40 (1908) (“The object of a pacific blockade is to force the blockaded state to comply with the requirements . . . of the blockading state. To effect its purpose the latter cuts off the commerce of the former by preventing its vessels from entering or leaving their home ports.”).

11. See, e.g., *id.* at 14 (describing the first use of pacific blockade in 1827, with Great Britain, France, and Russia combining to blockade the coasts of the kingdom of Greece to stop the war waged by the Turks).

12. See GREENFIELD, *supra* note 7, at 115 (noting that pacific blockade has long been used as a method of reprisal).

13. See HOGAN, *supra* 10, at 17.

compel peace through the use of non-violent constraint.¹⁵ “The great object of a blockade is not so much to compel the surrender by the blockaded nation as to force the enemy, by pressure upon his financial and commercial resources, to listen to reasonable proposals for peace.”¹⁶ A peaceful blockade is a measure short of war,¹⁷ and it is legal under international law.¹⁸

A peaceful blockade entails the search and seizure of the blockaded country’s ships, and even of neutral vessels, on the high seas.¹⁹ Materials controlled by a pacific blockade are war materials and contraband, such as munitions and weapons.²⁰ The ships and cargo of the blockaded nation are subject to seizure as prizes.²¹ Ordinary commercial cargo on the blockaded country’s ships may be seized, but such seizure may entail a responsibility to any third state that purchased and paid for such property.²² Neutral vessels may be stopped and searched for contraband, but the vessels are forfeited only if they are used to carry contraband.²³ In contrast, neutral shipping vessels coming from the blockaded state without contraband goods on board are not subject to seizure.²⁴ Moreover, while ships carrying contraband cargo and the cargo

14. See Edward D. Re, *The Quarantine of Cuba in International Law*, A.F. JAG BULL., Jan.–Feb. 1964, at 6 (“A *pacific blockade* is the prevention of maritime communication with a foreign port by the use of force without technically destroying peaceful relations.”).

15. See *id.*

16. Thomas Nichol, *On the Laws of Blockade: A Thesis* (Feb. 9, 1887) (unpublished thesis for the Degree of Doctor of Civil Law, McGill University) (on file with University of Alberta Libraries).

17. ERICH WIETHAUS, *DIE BLOCKADE* 34 (1908).

18. FRANZ VON LISZT, *DAS VÖLKERRECHT* 308–09 (1906).

19. See Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 INT’L L. STUD. 214, 332 (1955) (explaining that vessels and cargoes of neutral vessels have been historically subject to the law of blockade, contraband, and search and seizure visits, but the rightful extent of these practices is debated).

20. See HOGAN, *supra* note 10, at 53.

21. See INSTITUT DE DROIT INTERNATIONAL, *TABLEAU GÉNÉRALE DES RÉOLUTIONS (1873–1956)* 170 (Hans Wehberg ed., 1957) (explaining that ships ought to be returned to the targeted state at the conclusion of the blockade); WIETHAUS, *supra* note 17, at 43.

22. See Tucker, *supra* note 19, at 345–347 (describing claims for compensation stemming from unlawful seizure of neutral vessels; damages are rarely awarded but are available for flagrant abuse).

23. WIETHAUS, *supra* note 17.

24. ROBERT FREMONT, *DE LA SAISIE DES NAVIRES EN CAS DE BLOCUS* 4 (1899).

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itself may be seized,²⁵ the crewmembers of these ships are not to be treated as prisoners of war.²⁶ These crew members, because they are not members of the navy, are to be freed.²⁷ Captains and senior officers may be held for questioning, but even they are merely detained witnesses who may or may not be required to testify.²⁸

B. PRECONDITIONS TO LAWFUL PEACEABLE BLOCKADES

Blockades must be real,²⁹ effective,³⁰ and neither mere paper blockades nor pretexts.³¹ These requirements are to prevent predatory fake blockades intended only as an excuse for privateering. The blockade must be announced publically, meaning that other states must have notice of it.³² Blockading states sometimes have given a two week grace period for neutral shipping to leave the blockaded ports, possibly even with goods which were sold and loaded prior to the blockade's announcement.³³ Pacific blockades may be used as a reprisal, a form of intervention, or a form of suppression of human rights abuses.³⁴

Is the legal institution of pacific blockades still available to states after the U.N. Charter? If so, can the institution of a peaceful blockade help resolve the crisis in Syria? This article answers both questions in the affirmative.

25. F. PERELS, DAS INTERNATIONALE ÖFFENTLICHE SEERECHT DER GEGENWART 277 (2nd ed. 1903).

26. *Id.*

27. *Id.*

28. *Id.*

29. A. ADAM, LE BLOCUS MARITIME, LA CONTRABANDE DE GUERRE ET LA GUERRE MONDIALE 16–17 (1917).

30. *Id.*

31. ANTOINE ROUGIER, UNE NOUVELLE THEORIE SUR L'EFFECTIVITE DU BLOCUS MARITIME (1903).

32. VON LISZT, *supra* note 18, at 349.

33. See *The Cretan Blockade*, 22 PUBLIC OPINION: A COMPREHENSIVE SUMMARY OF THE PRESS THROUGHOUT THE WORLD 396 (1897); *British and German War Zone Decrees: Von Tirpitz Threatens Savage Submarine Warfare*, 9 THE LITERARY DIGEST: HISTORY OF THE WORLD WAR 242 (Francis Whiting Halsey ed., 1919).

34. See HOGAN, *supra* note 10, at 17.

II. PACIFIC BLOCKADES: HISTORY

A. PACIFIC BLOCKADES IN THE PRE-WORLD WAR I ERA

The international law of wartime blockades is only a few hundred years old, originating from a Dutch blockade in 1581.³⁵ The international law of pacific blockades is even younger, dating only from 1858.³⁶ The rights and duties of neutral states regarding peaceful blockades were central issues of pre-World War I legal scholarship, but the basic legality of pacific blockades was unquestioned.³⁷ Pre-war scholars' concerns centered on the risk to neutral shipping³⁸ of pretextual blockades,³⁹ blockades enacted only to seize goods and ships. Thus, the right of the blockading state to seize goods was limited to contraband.⁴⁰ Pre-war scholars were also concerned with neutral nations' rights to enjoy freedom of the seas.⁴¹ Freedom of the seas was a particular concern of the historically neutral and isolationist merchant traders of the U.S.,⁴² although the U.S. was neither a great advocate nor a great opponent of peaceful blockades.⁴³ In addition, pre-war scholars

35. А. Л. КОЛОДКИН, *МОРСКАЯ БЛОКАДА И СОВРЕМЕННОЕ МЕЖДУНАРОДНОЕ ПРАВО*, 4; СОВЕТСКОЕ ГОСУДАРСТВО И ПРАВО 92–93 (1963).

36. 2 L.B. HAUTEFEUILLE, *DES DROITS ET DES DEVOIRS DES NATIONS NEUTRES EN TEMPS DE GUERRE MARITIME* 286–87 (3rd ed. 1858) (invents and defines pacific blockade).

37. Canonical authors and works include HOGAN, *supra* 10, VON LISZT, *supra* note 18, and FREMONT, *supra* note 24.

38. FREMONT, *supra* note 24, at 1, 5.

39. ROUGIER, *supra* note 31, at 3–4.

40. See Tucker, *supra* note 19, at 214; See also HOGAN, *supra* 10, at 11 (describing what is allowed in a pacific blockade).

41. See Richard Zeigler, *Ubi Sumus? Quo Vadimus?: Charting the Course of Maritime Interception Operations*, 43 NAVAL L. REV. 1, 9 (1996) (implying a relationship between freedom of seas and blockades).

42. *Freedom of the Seas – Expanding the Freedom of the Seas: 1865–1914*, ENCYCLOPEDIA OF THE NEW AMERICAN NATION, <http://www.americanforeignrelations.com/E-N/Freedom-of-the-Seas-Expanding-the-freedom-of-the-seas-1865-1914.html> (last visited Oct. 28, 2012) (“From the end of the Civil War to the opening of World War I in 1914, the United States did not concern itself greatly with the freedom of the seas. It was a neutral . . .”).

43. NAVAL WAR COLLEGE, 1932 INTERNATIONAL LAW SITUATIONS WITH SOLUTIONS AND NOTES 104–09 (1934); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 44 (1989) (noting that Secretary of State John Hay announced that the U.S. did “not acquiesce in any *extension* of the doctrine of pacific blockade, which may adversely affect the rights of states not parties to the controversy, or discriminate against the commerce of neutral nations”) (emphasis added).

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favorably viewed the idea of pacific blockades as a rational and proportional means to limit the use of force.⁴⁴ However, they were also concerned with the problem of privatized violence in the form of letters of marque and prize seizures,⁴⁵ as well as with the rights of neutral nations.⁴⁶ The scholars, like their contemporary counterparts, tried to determine how to establish international laws that would prevent and attenuate inevitable human conflicts.⁴⁷

Positive law is surprisingly clear on the issue of pacific blockades. There has been a continual state practice, open and notorious, of pacific blockades. Pacific blockades are considered entirely legal.⁴⁸ Thus, states have a customary international right to undertake pacific blockades⁴⁹ to deter and correct states from breaching their obligations to other states or to the international system as a whole — obligations erga omnes and jus cogens.⁵⁰ Argentina,⁵¹ Venezuela,⁵² China,⁵³ Greece,⁵⁴ and East Africa⁵⁵ are just a few examples countries that have been

44. See, e.g., HOGAN, *supra* note 10, at 14, 56, 145 (stating that a pacific blockade is not an act of war as to the blockaded state; instead, a pacific blockade is intended to prevent war).

45. E.g., JOHN WESTLAKE, INTERNATIONAL LAW PART II: WAR AND FORCIBLE MEASURES SHORT OF WAR 8–14 (1907).

46. E.g., WIETHAUS, *supra* note 17.

47. See A. PEARCE HIGGINS, *Convention No. 2: The Limitation of the Employment of Force for the Recovery of Contract Debts*, in THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES 206, 206 (1909).

48. ADAM, *supra* note 29, at 17 (“L’usage du blocus pacifique semble définitivement consacré par la pratique internationale.”).

49. NICHOLAS M. POULANTZAS, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 43 (2002) (discussing pacific blockades as a customary rule of international law due to a history of actual state practice coupled with legal opinions that such practice was lawful or even legally compelled).

50. See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992).

51. JOSEPH GABRIEL STARKE & IVAN ANTHONY SHEARER, STARKE’S INTERNATIONAL LAW BUTTERWORTHS 476 (1994).

52. Eduardo José Cabrera Rodríguez, *El Bloqueo Pacífico y el Bloqueo Naval a Venezuela*, DERECHO INTERNACIONAL PUBLICO (July 10, 2011), <http://dinternacionalp.blogspot.de/2011/07/155-el-bloqueo-pacifico.html>.

53. L. Ducrocq, REPRESAILLES EN TEMPS DE PAIX: BLOCUS PACIFIQUE (AUVI D’UNE ETUDE SUR LES AFFAIRES DE CHINE 1900–1901) (1901).

54. PAO JIN HO, PACIFIC BLOCKADE WITH SPECIAL REFERENCE TO ITS USES AS A MEASURE OF REPRISAL 8 (1925).

55. See, e.g., VON LISZT, *supra* note 18, at 355 (noting that a peaceful blockade was used by Imperial Germany’s Second Reich in East Africa to combat the slave trade).

subject to pacific blockades. Pacific blockades have been used in many places across more than a dozen decades.⁵⁶ Wartime blockades, much deadlier affairs, have also been used.⁵⁷

B. PACIFIC BLOCKADES IN THE POST-WAR ERA

The practice of pacific blockades did not end with World War II and the creation of the U.N. Charter.

1. State Practice

The Soviet Union began a pacific blockade of Berlin in 1948.⁵⁸ The Berlin airlift ran the blockade.⁵⁹ The Suez debacle in 1956 and the Cuban Missile Crisis are additional post-World War II examples of pacific blockades.⁶⁰ Significantly, probably recalling its blockade of Berlin, the U.S.S.R. did not object to the pacific blockade of Cuba by the U.S.⁶¹ During the Falkland War, Britain established a maritime exclusion zone, another term for military blockade.⁶² Vietnam and Zimbabwe have also been objects of pacific blockades in the post-World War II era.⁶³ Most recently, Israel pacifically blockaded the Gaza Strip.⁶⁴ As these examples illustrate, there is actual state practice of unauthorized pacific blockades, and there is no sense of

56. See, e.g., Zeigler, *supra* note 41, at 12–13 (noting that Great Britain, France, and Russia conducted a blockade of Morea in 1827).

57. See, e.g., Michael S. Kirsch, *The Tax Code as Nationality Law*, 43 HARV. J. LEGIS. 375, 417 n.207 (referencing a U.S. wartime blockade of Cuba).

58. W.P. DAVISON, *POLITICAL BEHAVIOR IN A CRISIS: SOME OBSERVATIONS FROM THE BERLIN BLOCKADE* 1 (1956).

59. Roger Miller, *Global Supply and Maintenance for the Berlin Airlift, 1948–1949*, 22 A.F. J. LOGISTICS 35, 35 (1999).

60. Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 515–24 (1963).

61. William E. Butler, Book Review, *Peaceful Coexistence: International Law in the Building of Communism*, 83 HARV. L. REV. 483, 486 (1969) (noting that “during the Cuban missile crisis, for example, Soviet representatives in the United Nations Security Council did not raise legal objections to the United States quarantine of Cuba.”).

62. See Christopher Michaelson, *Maritime Exclusion Zones in Times of Armed Conflict at Sea*, 8 J. CONFLICT & SECURITY L. 363, 365 (2003) (explaining Britain’s use of the term and indicating that in the literature on naval exclusion zones, various terms have been used to describe blockades).

63. Lori Lyman Bruunm, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law* 17 MD. J. INT'L L. & TRADE 193, 223 (1993) (noting a pacific blockade as a remedy for violations of *jus cogens*).

64. Efthymios Papastavridis, *The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum Versus Mare Clausum Revisited*, 24 LEIDEN J. INT'L L. 45, 60 (2011).

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condemnation of such actions as illegal.

a. Article 42 of the U.N. Charter

Is the use of a pacific blockade a violation of the prohibition of the use of force outlined in Article 42 of the U.N. Charter so that U.N.S.C. approval is required for the imposition of a pacific blockade? This article answers that question in the negative. U.N.S.C. authorization is not required for a state to undertake a pacific blockade because peaceful blockage is not an act of war.⁶⁵ In fact, it is an act intended to avert war.

b. Police Powers on the High Seas and Jus Cogens

Any state may exercise police powers over the high seas in proportion to the threat to peace and security it seeks to deter or remedy.⁶⁶ Internationally, states often use their maritime

65. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 170 (1993) (arguing that pacific blockade is consistent with the U.N. Charter); James E. Toms, *The Decision to Exercise Power: A Perspective on Its Framework in International Law*, 37 MIL. L. REV. 1, 13 (1967) (arguing that the legality of pacific blockades without U.N. authorization can be implied from the absence of protest regarding unilateral pacific blockades before the U.N.); Robert E. Morabito, *Maritime Interdiction: The Evolution of a Strategy* 10–11 (Feb. 11, 1991) (unpublished paper) (on file with the Naval War College), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA236449> (noting that a pacific blockade is legal under principles of customary international law even without U.N. authorization). Both opinio juris and actual state practice support the conclusion that pacific blockades can be a justified self-help remedy even without U.N.S.C. authorization. For example, a pacific blockade was imposed on Haiti with no U.N. authorization. See THOMAS R. VAN DERVORT, *INTERNATIONAL LAW AND ORGANIZATION: AN INTRODUCTION* 409 (1998). Likewise, immediately after Iraq invaded Kuwait, the U.S. and other states unilaterally instituted a pacific blockade of Iraq without U.N.S.C. authorization. See Zeigler, *supra* note 41. From its definition of the term, it appears that the U.N. does not consider its authorization of a pacific blockade a necessary precondition for its legality. See Department of Peacekeeping Operations, *Glossary of U.N. Peacekeeping Terms: "Blockade"* (Sept. 1998), <http://www.un.org/en/peacekeeping/sites/glossary/b.htm> (defining "blockade" as a procedure whereby a nation prevents access to its enemy's coast for shipping of foodstuffs and war materials, and noting that in peacetime a blockade can be used as a means of pressure by one power against another).

66. See, e.g., United Nations Convention on the Law of the Sea art. 110, Dec. 10, 1982, 1833 U.N.T.S. 397 (allowing the right to visit on high seas to control violations of jus cogens norms and prescribing a duty of compensation for unjustified/disproportionate interference with innocent vessels). Although the U.S. is not yet a signatory, U.S. courts have considered the Convention an authoritative statement of customary international law directly applicable to domestic law. See, e.g., *Mayaguezanos por la Salud y el Ambiente v. United States*, 38 F. Supp. 2d 168, 175 n.3 (1st Cir. 1999) (arguing that the U.N.

forces to exercise their right of visit, that is their right to stop and search ships on the high seas, and to combat piracy, smuggling, and the slave trade.⁶⁷ This right is premised on the idea that there is no invasion of the sovereignty of a state when its ships are inspected by other countries' navies on the high seas.⁶⁸ Every state has an interest in assuring that no state's flag is abused by pirates.⁶⁹ The right of any state to enforce international law is especially evident where the state exercises its sovereign power to remedy and deter violations of jus cogens.

III. PACIFIC BLOCKADES IN CONTEMPORARY LAW

A. THE RUSSIAN VIEW OF PACIFIC BLOCKADES

A pacific blockade is a recognized legal concept in the Russian understanding of international law.⁷⁰ Russia's view of the legality of pacific blockades underwent several transformations from Tsarism, through Marxism–Leninism, to Putinism. Tsarist era writers, like their Western European and North American counterparts, thought pacific blockades were legal under international law.⁷¹ The Soviet view on the legality

Convention on the Law of the Sea reflects customary international law and the U.S. is bound by its norms).

67. See Papastavridis, *supra* note 64, at 45 (arguing that the right of visit on the high seas is considered “the most significant exception to the fundamental principle of the freedom of the high seas”).

68. For an example of a source of authority allowing one country to inspect the ships of another, see 14 U.S.C. § 89(a) (2011) (giving the Coast Guard broad powers to “make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters which the United States has jurisdiction, for the prevention, detection, and suppression of violations of the laws of the United States”).

69. See Louis Henkin, *The Constitution at Sea*, 36:201 ME. L. REV. 201, 207 (1984) (noting that countries are responsible to other states for their own flag vessels).

70. See Д.Н. УШАКОВ, ТОЛКОВЫЙ СЛОВАРЬ УШАКОВА [DICTIONARY USHAKOVA] (1935–1940), *available at* <http://dic.academic.ru/dic.nsf/ushakov/748506> (“БЛОКАДА [BLOCKADE] 2. Система мероприятий, имеющих целью изолировать какое-нибудь государство, лишить его возможности поддерживать общественно-политические, торговые, культурные отношения с другими государствами (полит., газет.). Экономическая блокада Моральная блокада. *Мирная блокада.*”) (“BLOCKADE, 2. System of measures having the goal to isolate a given state, to deprive it of the possibility of sustaining social, economic, cultural relations with other states (polit. gazet.). Economic blockade. Moral blockade. *Pacific blockade*”) (emphasis added).

71. Н. Коршунов, ЛЕКЦИИ, ЧИТАННЫЕ В ВОЕННО-ЮРИДИЧЕСКОЙ

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of peaceful blockades flip-flopped. Evgeny Pashukanis, an early leading Marxist legal theorist, thought the capitalist institution of peaceful blockade was a smokescreen for imperialism and the dictatorship of capital.⁷² After Pashukanis was executed pursuant to Stalin's anti-fascist purge and after the victory resulting from the death or imprisonment of the entire Russian Fifth Column, Stalin's U.S.S.R. returned to a favorable view of peaceful blockades,⁷³ probably in contemplation of potential rebellions in areas recently assimilated into the U.S.S.R.. Indeed, rebellions in Berlin and Hungary bore out that expectation.⁷⁴ At the time of the Cuban missile crisis, the Soviet view of pacific blockades returned to Pashukanis's viewpoint, and the Soviets opposed pacific blockades as just another weapon in the capitalist arsenal.⁷⁵ The rise of the Brezhnev doctrine, however, meant that the

АКАДЕМИИ: МЕЖДУНАРОДНОЕ ПРАВО §43 143 (1886); Александр Михайлович, ГЛАВНЕЙШИЕ СВЕДЕНИЯ ПО МОРСКОМУ МЕЖДУНАРОДНОМУ ПРАВУ 61–63 (1902).

72. Е. Пашуканис, *Мирная Блокада*, ЭНЦИКЛОПЕДИЯ ГОСУДАРСТВА И ПРАВА, 1002, 1003 (1925–26).

73. Академия наук СССР, Институт права МЕЖДУНАРОДНОЕ ПРАВО 480–81 (1947).

74. See generally UPRISING IN EAST GERMANY, 1953: THE COLD WAR, THE GERMAN QUESTION, AND THE FIRST MAJOR UPHEAVAL BEHIND THE IRON CURTAIN (Christian F. Ostermann ed., 2001); *The Berlin Blockade*, THE COLD WAR MUSEUM, http://www.coldwar.org/articles/40s/berlin_blockade.asp (last visited Nov. 26, 2012) (“The first heightening of Cold War tensions occurred in 1948 when the Soviets imposed a partial blockade of Berlin in April, and then a full blockade in June.”); *Berlin*, ORACLE THINKQUEST, <http://library.thinkquest.org/10826/berlin.htm> (last visited Nov. 26, 2012) (noting that the Soviet Union's 1948 blockade of shipments from Berlin to West Germany preceded the 1953 uprising in East Germany by just a few years); THE 1956 HUNGARIAN REVOLUTION: A HISTORY IN DOCUMENTS (Malcolm Byrne ed., 2002).

75. E.g., А. Л. Колодкин, Морская блокада и современное международное право, 4 СОВЕТСКОЕ ГОСУДАРСТВО И ПРАВО 92, 97 (1963), *available at* <http://www.law.edu.ru/article/article.asp?articleID=1170994> (“Вполне понятно, что подобная позиция не может заслуживать одобрения в свете прогрессивного развития современного международного права, отказа от применения вооруженной силы при разрешении споров, а также в свете борьбы миролюбивых сил во главе с СССР против незаконной практики установления блокады в мирных условиях, да еще с перенесением ее на суда третьих стран”) (“It is fully understandable, that such a position cannot be approved in the light of the progressive development of contemporary international law, the prohibition of the use of force in resolving disputes, and also in light of the struggle of the peace loving forces, led by the U.S.S.R. against the illegal practice of establishing blockades under peaceful conditions, and its application to the vessels of third countries.”).

socialist legal system returned to the view that pacific blockades might be socialist progress after all.⁷⁶

Contemporary Russian legal science, like that of Western Europe and North America, regards pacific blockades as a measure short of war⁷⁷ and a proper subject of Article 42 of the U.N. Charter.⁷⁸

B. THE U.S. VIEW OF PACIFIC BLOCKADES

The U.S., like Russia and its N.A.T.O. allies, regards peaceful blockade as a “forcible measure short of war,” and thus not subject to U.N.S.C. approval.⁷⁹ The U.S. regards pacific blockades as “justifiable” as a means to prevent war.⁸⁰ Legal justification is based on the idea that a potentially wrongful act is exonerated from any moral or legal opprobrium because it prevents an even greater harm from occurring.⁸¹ U.S. scholars have argued that pacific blockades are consistent with Article 42 and, moreover, authorized by Article 2(3) of the U.N. Charter.⁸² Article 2(3) of the U.N. Charter requires states to seek peaceful resolution of disputes.⁸³ A pacific blockade is one means to attain a peaceful resolution of disputes. It is lawful under international law, even without the approval of the U.N.S.C..⁸⁴

C. THE U.S. CAN LAWFULLY IMPOSE A PACIFIC BLOCKADE ON SYRIA

Although the U.S. could clearly lawfully establish a pacific

76. Виктор Иванович Менжинский, НЕПРИМЕНЕНИЕ СИЛЫ В МЕЖДУНАРОДНЫХ ОТНОШЕНИЯХ 11415 (1976).

77. К.О. Канонов, САНКЦИОННЫЕ РЕЗОЛЮЦИИ СОВЕТА БЕЗОПАСНОСТИ ООН И ИХ ИМПЛЕМЕНТАЦИЯ 80 (2010).

78. *Id.* at 81.

79. Brunson MacChesney, *Some Comments on the “Quarantine” of Cuba*, 57 AM. J. INT'L L. 592, 593 (1963).

80. *Id.*

81. For a more thorough examination of the doctrine of legal justification, see Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389 (2004).

82. Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 553 (1963).

83. U.N Charter art. 2, para. 3.

84. John King Gamble & Nicole Lee Dirling, *Mass Media Coverage of International Law: (Benign) Neglect? Distortion?*, 18 FLA. J. INT'L L. 211, 243 (2006) (“Pacific blockades’ are not ‘recognized’ in a strict sense, but are ‘accepted’ as acts against international delinquency . . . A ‘pacific blockade’ can be invoked without declaration of war.”).

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blockade of arms and munitions travelling to or from Syria, the question of whether the U.S. could also lawfully establish a pacific blockade of Syrian shipments of petroleum or of other goods to Syria is a difficult question. Historically, a pacific blockade could only seize contraband from neutral ships traveling to or from a blockaded state because of the humanitarian concerns of the effects of the blockade on the population and because of concern that the blockage was only a pretext for predation.⁸⁵ However, the U.S. is delivering millions of dollars' worth of goods to the Syrian people.⁸⁶ Thus, concerns about the pacific blockade hurting the people it is intended to help or it being a pretext are obviated by the provision of humanitarian relief and the fact that the U.S. is not seeking to prey on Syrian commerce.⁸⁷ While seizure of merchant goods on neutral shipping would be a violation of neutral third party rights,⁸⁸ seizing Syrian goods on Syrian ships would be lawful and justified by the systematic violations of jus cogens by the Syrian government.

D. EVEN IF A PACIFIC BLOCKADE OF SYRIA WERE ILLEGAL,
IT WOULD BE JUSTIFIED BY THE DOCTRINE OF NECESSITY

Even if imposing a pacific blockade was a violation of the prohibition of the use of force, the defense of justification would apply. One justification for the use of force is self-defense⁸⁹ or the defense of others.⁹⁰ Another is necessity.⁹¹ Yet another is the enforcement of jus cogens norms.⁹² Recall that jus cogens norms are universal rules which may be enforced by any state.⁹³ The Syrian government is committing war crimes in

85. SIR GEOFFREY BUTLER & SIMON MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* 298–99 (1928); FREMONT, *supra* note 24.

86. *See, e.g.*, David M. Robinson, *LiveAtState: U.S. Humanitarian Assistance to Syria*, U.S. DEPT. OF STATE (Aug. 21, 2012), available at <http://www.state.gov/r/pa/ime/196775.htm>.

87. *See id.*

88. *See generally* Stephen C. Neff, *Towards a Law of Unarmed Conflict: A Proposal for a New International Law of Hostility* 28 CORNELL INT'L L.J. 1, 13–14 (discussing third party rights and the use of force or hostility).

89. John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 731 (2004).

90. GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 81, 82 (2008).

91. *Id.*

92. *See* Paul B. Stephan, *Political Economy of Jus Cogens*, 44 VAND. J. TRANSNAT'L L. 1073, 1978 (2011).

93. Thomas M. Brown, *For the "Round and Top of Sovereignty": Boarding Foreign Vessels at Sea on Terror-Related Intelligence Tips*, 59 NAVAL L. REV.

violation of jus cogens, systematically violating the right to life.⁹⁴ It finances those crimes and purchases arms through the Syrian navy and merchant marine.⁹⁵ The use of pacific blockades to prevent such gross violations of universal human rights is therefore justified as a necessary and proportional countermeasure short of war to enforce jus cogens as a form of defense of the Syrian people from their own government.

CONCLUSION

A pacific blockade is as a measure short of war.⁹⁶ It is an exercise of police power, but it does not use force and therefore does not require U.N.S.C. approval.⁹⁷ States may justifiably invoke their customary international right to undertake a pacific blockade to enforce non-derogable peremptory rules of international law: jus cogens.⁹⁸ Moreover, a pacific blockade of Syria, even if it were otherwise wrongful, enjoys the defense of justification because a pacific blockade of Syria is necessary to prevent the massacre of Syrian civilians, a war crime. There seems to be no workable alternatives to a pacific blockade, due to the failure of the U.N.S.C. A pacific blockade of Syria would also meet the test of proportional countermeasures. In comparing the harm to be averted, mass killing of civilians, with the potential injury, simple stops and searches with potential seizures, the response is measured and proportional.

In Syria's case, every effort toward diplomacy, compromise, and non-violent resolution has failed.⁹⁹ There is a great harm occurring, and this harm can be alleviated. The U.S. may

63, 89 (2010).

94. See *Syria*, HUMAN RIGHTS WATCH, <http://www.hrw.org/middle-eastn-africa/syria> (last visited Oct. 23, 2012).

95. *Iranian Warships Enter Mediterranean Sea*, GLOBAL POST, February 18, 2012, <http://www.globalpost.com/dispatch/news/regions/middle-east/120218/iran-warships-enter-mediterranean-sea-syria> (reporting that "an Iranian destroyer and its supply ship sailed through the Suez Canal into the Mediterranean this morning, before reportedly docking in Syria"); *Turkey Intercepts Ship Suspected of Carrying Weapons Headed for Syria*, AL ARABIYA, April 18, 2012.

96. WIETHAUS, *supra* note 17, at 34.

97. See *id.*

98. POULANTZAS, *supra* note 49, at 43. See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992).

99. See, e.g., Gladstone, *supra* note 7; Joe Lauria, *Russia, China Veto Syria Resolution at U.N.*, WALL ST. J., July 19, 2012, <http://online.wsj.com/article/SB10000872396390444097904577536793560681930.html>.

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lawfully stop and search Syrian vessels on the high seas for contraband, particularly for arms and ammunition. It may even lawfully stop and search neutral vessels on the high seas for contraband. It may not seize Syrian goods on neutral vessels. It may, however, seize Syrian goods on Syrian vessels so long as it provides equivalent or greater amounts of humanitarian aid to the people of Syria.

The U.S. may impose sanctions on Syria and may enforce them via pacific blockades. Whether it does so is a question for the political process. Hopefully, the U.S. will proceed in a multilateral fashion so as to end the violence in Syria as quickly and peaceably as possible.