British Practice in Some Nineteenth Century Pacific Blockades

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Westlake says that [1])

> »any blockade established in time of peace is a Pacific Blockade in the etymological sense of the words, but in the technical sense the term signifies an institution of International Law permitting certain acts of force to be done without a declaration or the intent of war, and denying to any state affected by them the right to regard them as acts of war, although of course no state can be prevented from declaring war because of them if it regards them as politically unjustifiable«.

Such is an adequate enough statement of the classical view of Pacific Blockade. By the term is meant not a mere blockade in time of peace [2]) —

> »a blockade established in what may be called the random way in which acts of force have been and are still sometimes employed against diplomatic antagonists, leaving it to the development of events to determine their outcome and nature; as when between Great Britain and France there was fighting in America and India and prizes were taken at sea as early as 1754, though there was no declared war till 1756«.

On the other hand, a typical Pacific Blockade was that of the port of Rio in 1862, undertaken by Great Britain because of the refusal of the Brazilian Government to give any satisfaction in respect of the murder of the crew of the British barque »Prince of Wales«; the British squadron proceeded to sea and brought in five vessels seeking to enter the port; after seven days the Brazilian Government agreed to negotiate. For here the blockading government intended to avail itself of an institution of International Law and restricted its action to what it conceived to be the limits of that institution.

But this classical view is not wholly accepted for, according to Hogan, the author of the chief British monograph on the subject [3]), the question involves many problems which are still unanswered. It has first to be determined whether there can be such an operation as a pacific

1) Westlake, Collected Papers p. 572.
2) Ibid.
3) Hogan, Pacific Blockade. Oxford, 1908, esp. p. 15.

blockade at all, or whether the term is but a misnomer and a cloak for an illegal form of coercion. Further, there is the extremely important question whether the blockade may or may not extend to the ships of third powers, and, if so, under what conditions; and connected with this is the further question as to what may be done with the vessels seized. May they be confiscated or merely detained, and, if the latter, is the captor responsible for any damage caused by the detention? It is proposed to deal with some aspects of these problems in the light of British practice, first as a participant and then as a quasi-neutral.

It is inappropriate here to enter into a detailed discussion of the Positivist doctrines, but two remarks must be made by way of explanation of this reference to the practice of Great Britain.

Dean Pound has said [4])

> »A leading text on international law of the fore part of the (nineteenth) century, considering the role of text writing in that subject, set forth the development of its literature in biographical form. Thus a fashion was set of reviewing the text writing from Grotius to the date of the treatise in hand in connection with a brief biographical sketch of each author. It persisted into the present century but degenerated into a dry series of names, dates and countries, somewhat like one may see in a student's cram book of English literature.«

This fashion has spread to other parts of the text book also and it has been applied with peculiar thoroughness to the topic of Pacific Blockade. If one is doctrinaire one says that it was born at Navarino in 1827. And even more adventurous writers seek only to establish another place and date of birth. Thus Söderquist says [5])

> »Tous les auteurs qui ont traité jusqu'à présent l'histoire du blocus pacifique en datent l'origine de 1827. C'est là une erreur . . . Il faudra toujours remonter jusqu'à 1814. Cette année la Suède et l'Angleterre ont en effet bloqué pacifiquement les côtes de la Norvège«.

Likewise Smith and Sibley say [6])

> »It is very difficult, in view of the Order in Council of May, 1806, not to regard the blockade proclaimed in April as a pacific blockade . . . It is usual, however, to assign a far later date to the first instance of the usage«.

Thus writers who do not accept the classical view of Hogan that [7])

> »the first use of this new weapon in the international armoury occurred in 1827, when Great Britain, France and Russia combined to blockade the coasts of what is now the kingdom of Greece, to put an end to the savage war of desolation and extermination which was then being waged by the Turks«,

4) »Fashions in Juristic Thinking«, 1937, p. 12.

5) Le Blocus Maritime, p. 60.

6) International Law during the Russo-Japanese War: p. 390.

7) Op. cit. p. 14.

seek only for an earlier but no less specific date. The method yields such a variety of results that it would need a very careful examination of the history of the period of the French Revolutionary and Napoleonic wars to exhaust its possibilities as a means of discovering all the alleged »first« instances of Pacific Blockade.

When the birthday is established to the writer's satisfaction, the subsequent career of the new institution is detailed year by year. Thus Westlake permits it an irresponsible childhood when he says, of the Navarino incident [8])

> ». . . the blockading powers . . . said that they were not at war with Turkey. It was not likely, having regard to the political circumstances, that the quasi-neutrals should force them into a state of avowed war by refusing to endure an interference with their commerce on any other terms. But it would be an anachronism to impute to them any denial of the right of the quasi-neutrals to do so, or therefore to connect the incident in any way with Pacific Blockade as an institution.«

Pursuing the same method Hogan finds twenty-one instances of Pacific Blockade and Falcke, writing after the Great War, has twenty-five [9]).

As a means of analysis of a juridical concept this »Biographical Method«, as it may be called, is obviously unscientific and would not indeed be applicable but for the comparative rarity of examples of the employment of the usage. But it is not easy to depart from fashion, and this must be our justification for employing the popular method here.

In the second place we must justify, or at least excuse, our reference to British practice exclusively. It does not of course follow that what Great Britain thought, other nations thought as well. But it must be remembered that Great Britain was in the nineteenth century the foremost maritime state and that her views upon the subject would not, to put it at the very least, go unconsidered by other powers. What, then, is British practice? Strictly speaking it is what, in fact, her ships did. Thus Lord Grey of Fallodon, speaking of British practice in the Great War, says »The Navy acted and the Foreign Office had to find the argument to support the action. British action preceded British argument« [10]). But the arguments present in the minds of the actors are also important. »No one who searches for the evidence of the legal convictions of states is at liberty to disregard the pronouncements of their courts.« [11]) A fortiori — since a state can only speak with one voice in International Law — no one is at liberty to disregard the considerations present in the mind of the executive. It is possible to ascertain the legal convictions

[8]) Op. et loc. cit.

[9]) Falcke, »Le Blocus Pacifique«, Leipzig 1919.

[10]) »Twenty-five Years«, Vol. II, p. 106.

[11]) Lauterpacht, »Decisions of Municipal Courts as a Source of International Law«, 1929 British Yearbook of International Law, p. 65, 85.

of the British Government with regard to the incidents with which we propose to deal by reference to the peculiarly valuable series of Opinions, delivered by the Law Officers of the Crown to the Foreign Office. [12]). We are well aware of the objections to which these Opinions are open as formal sources of law, and no more is claimed for them than that they do give an inkling of what Great Britain — in the one mind which corresponds to the state's one voice — thought the law was.

If we were to attempt to guess in advance what the views of Great Britain were, we should be apt to expect that such a powerful naval Power would be greedy of maritime rights and would be all in favour of the assumption by a pacific blockader of the right of interfering with the vessels of third states. For what would be the result of the recognition as law of such a right? It would be to make Pacific Blockade into Belligerent Blockade bereft only of the element of belligerency — with all rights of capture for breach intact. We might expect a conception of the institution different from, and more advanced than, that entertained by Continental states. For Professor Lauterpacht, writing on »The So-Called Anglo-American and Continental Schools of Thought in International Law« says [13])

> »A more substantial reason for the current assumption of a difference between the Anglo-American and the Continental conceptions of International Law lies in the divergence of opinions and practice in regard to the rules of warfare. It must be admitted that in regard to the laws of war there existed before 1914 a marked divergence of theory and practice on a considerable number of points . . . Views differed as to the penalty for breach of blockade, as to the determination of contraband goods . . . and on many other matters«.

One might expect, therfore, a peculiar English doctrine of Pacific Blockade — one holding that its attributes were the same as those of belligerent blockade, in respect of which Great Britain already held »advanced« views.

Indeed, the view is widely held that a pacific blockader has the right to seize and detain the ships of states other than those blockaded or blockading, if they seek to cross the line of blockade. Hogan finds fourteen blockades where this right was assumed, and only seven where it was not [14]). Bluntschli, Lawrence, Holland, and Oppenheim deny the right, and their opinion is endorsed by the resolution of the Institute of International Law, dated 1887. But an equally authoritative body of

[12]) This series of Opinions will be familiar to readers of Professor H. A. Smith's two volumes on »Great Britain and the Law of Nations«, which are largely based upon them. The Opinions are contained in some two hundred folio volumes of manuscript, listed in the Public Record Office, London as »Series F.(oreign) O.(ffice) 83«.

[13]) British Yearbook of International Law, 1931, p. 31, 34.

[14]) Op. cit. p. 51.

text book writers are of the opposite view, among them Barés, Bulmerincq, Heffter, Perels, and Pillet [15]). But what, in fact, was the view of Great Britain?

In 1837 Great Britain blockaded the ports of New Granada because of the refusal of the government of that Republic to give any sort of satisfaction for the ill-treatment and arrest of the acting British Consul at Panama. During the twelve days of the blockade four vessels were stopped, of which one was a French barque. Hogan gives a full account of the facts but tells us that no protests were made [16]) but it appears from the opinion of Sir John Dodson, Queen's Advocate, dated 16/5/1837, that the French and Dutch Ministers at Bogota did in fact protest; he advised that no notice should be taken. Upon the question of the general legality of the blockade he reports [17])

> »I am of opinion that H. M. Government had a full right to make reprizals by capturing the vessels and goods of the citizens of New Granada, in consequence of the Government of that country having refused to make the Reparation demanded for the treatment of the Acting British Consul at Panama. I consider, however, . . . that a blockade by which the ingress and egress of foreign merchant vessels is prevented, can only be justified by a state of actual and open hostilities. The main question, therefore, is whether under existing circumstances H. M. Government has a right to consider itself at war with the Republic of New Granada, and I am humbly of opinion that after the notice given of the measures which would be pursued in case a just satisfaction was refused and the denial of the Grenadian ministry to grant such satisfaction, H. M. Government is entitled so to consider itself and to blockade the ports of that Republic, but I think all foreign and friendly vessels captured before notice of hostilities and the imposition of the blockade ought forthwith to be released.«

A fortnight later he writes [18])

> »In obedience to your Lordship's (Palmerston) commands I have prepared the draft of an Order in Council authorising the capture of and bringing to legal adjudication the ships, goods, and property belonging to the Government of New Granada and the inhabitants of its territories which I humbly submit for insertion in the Gazette«.

In 1842 Great Britain undertook a blockade of the port of San Juan de Nicaragua to obtain redress for the injury suffered by nationals in various revolutionary disturbances. There was published in the London Gazette a notification of the receipt by the Admiralty of a declaration by the Admiral on the West India Station in these terms [19])

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15) Cit. in Hogan, op. cit., p. 53.
16) Op. cit. p. 83—84.
17) P(ublic) R(ecord) (Office) F. O. 83—2254: 14th. March, 1837.
18) Ibid . . . 27th. March, 1837.
19) Cit. in Hogan, p. 161—2.

»I hereby give public notice of (the blockade) to all whom it may concern; and that all ships and vessels, under whatever flag they may be, will be turned away and prevented from entering the said port of San Juan de Nicaragua: and if, after any ship or vessel has been warned not to enter the said port, then and in that case, any such ship or vessel that may attempt to break the blockade, will be seized and will be dealt with according to the rules established for the breach of a de facto blockade«.

Of this blockade, which lasted for six months, being raised on the settlement in full of the British claim, Hogan says that there can be little doubt that it may be rightly regarded as pacific, and the reason that he gives for this appears to be that »no resistance to the blockade appeared to have been offered by the Nicaraguan Government«[20]). This raises an interesting question. For it seems tolerably clear that Great Britain intended a belligerent blockade. Sir John Dodson reports, at the same time that he forwards to the Foreign Office the notice to be inserted in the Gazette, that[21])

». . . it is to be observed that the notification is of less importance since by the terms of Sir Charles Adams' (the Admiral on the West India Station) declaration every vessel is entitled to be warned off and will not be liable to capture unless she should persist in her endeavour to break the blockade, notwithstanding the warning«.

This, and Admiral Adams' reference to a »de facto blockade«, are to be read in conjunction with a report of Dodson's of the year 1855, when he is asked the difference in effect between a notified and a de facto blockade. He says[22])

»that the effect of a Notified Blockade differs from that of a mere 'de facto' (not notified) blockade chiefly in the species of notice required in order to condemn neutral ships and cargoes which may be captured in the attempt to break the blockade . . . In (cases where there is notification to a Neutral Government) it is not necessary for the captor to prove that the Master was personally cognizant of the fact that the particular port was blockaded; the mere act of sailing after notification with the design to enter a blockaded port will be sufficient to ensure the condemnation of the offending vessel. On the other hand in case of a mere 'de facto' blockade the individual neutral master must be proved in each case to have personally had notice of its existence, as for instance, by warning from a blockading ship, and to have persisted in the attempt . . .«.

There is nothing here that is not good doctrine in relation to belligerent blockade. The remark in Dodson's earlier report[23])

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[20]) Op. cit., p. 94.

[21]) P. R. O., F. O. 83—2242; 18th August, 1842.

[22]) P. R. O., F. O. 83—2280; 25th May, 1855.

[23]) Of the 18th August 1842, cit supra.

»I think it right to add that Sir Ch. Adams is incorrect in supposing [24]) that the Vice-Admiralty Court in Jamaica is at liberty to condemn vessels for a breach of the blockade of San Juan de Nicaragua unless some special authority shall be given to it for the purpose«

is in no way capable of being construed as an indication that this was not a belligerent blockade, for a Commission of Prize must be issued at the beginning of every war for the Prize Court to be able to sit [25]). There would be no reason at all to consider this a Pacific Blockade but for the fact that Nicaragua offered no resistance. Oppenheim, however, holds that war is a contention and that unilateral acts of force are not war in themselves [26]). It is indeed difficult to see how, in the light of this, the blockade can have been belligerent. But, on the other hand, as has been pointed out before, the mere fact that a blockade does not take place in time of war does not make it a pacific blockade in the technical sense if there is no intention on the part of the blockading government to avail itself of that particular institution. Thus even if this instance is not one of belligerent blockade it is certainly not, in view of the animus belligerendi of Great Britain, a Pacific Blockade. Moreover, if Sir John Dodson's own view, expressed in a Report of the year 1846, that »War may be defined to be that state in which a nation prosecutes its Right, real or supposed, by Force« [27]) be accepted, this is an authentic case of belligerent blockade.

In 1845 Great Britain joined with France in a blockade of Buenos Ayres to prevent General Oribe, aided by Rosas, from destroying the independence of Uruguay. Hogan cites Lord Palmerston as saying [28])

»The real truth is, though we had better keep it to ourselves, that the French and English blockade of the Plate has been from first to last illegal. Peel and Aberdeen have always declared that we have not been at war with Rosas; but blockade is a belligerent right, and unless you are at war with a state you have no right to prevent ships of other states from communicating with the ports of that state — no, you cannot prevent your own merchant ships from doing so«.

Upon this Hogan comments [29])

»It will be noticed that Lord Palmerston bases his conclusion that the blockade of La Plata was an act of war on the ground of the impossibility of a pacific blockade, stating that blockade only occurs in time of war. This fact weakens, of course, the remainder of his argument.«

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24) Cf. Hogan, op. cit., p. 165.

25) Peace Higgins, »Ships of War as Prize«, Brit. Yearbook of International Law, 1925, p. 103, 107.

26) International Law, 5th ed., (Vol. II), p. 173.

27) P. R. O., F. O. 83—2227; 25th July, 1846.

28) Letter to Lord Normanby, cit. in Hogan, p. 104.

29) Op. cit., loc. cit.

The remainder of Palmerston's argument — that a state cannot prevent its own merchant ships from communicating with the ports of another country in time of peace — certainly is weak; but it is difficult to see that this weakness is due to a conviction of the legal impossibility of Pacific Blockade; in the exercise of its sovereign — as distinct from its belligerent — rights a state could certainly prevent such communication by ships of its own flag. But the chief argument of Palmerston — that the blockade was illegal — may usefully be compared with the report of the Queen's Advocate upon the same blockade, where he held [30])

> »that it is an ancient and firmly established principle of the Law of Nations that a Belligerent has a right to impose a Blockade on the ports of his Enemy, however inconvenient the effect of such Blockade may be to the Commerce of other countries; but I apprehend that this right pertains to a state of war only, and, consequently that if Great Britain and France are to be considered as in a state of Amity and Peace with Buenos Ayres, they are not justified in establishing a Blockade of the ports and rivers of Buenos Ayrean territory«.

Again in this case there is difficulty about regarding the incident as a case of war because there was again no »contest«, and it was in this context that Dodson, as we have already seen, defined war as the prosecution of right, real or supposed, by force. And even according to this definition there was no war. For the Queen's Advocate recites in his Report that the Foreign Office official who requested it [31])

> ». . . was directed to state to me that Great Britain and France do not consider themselves at war with Buenos Ayres, though they have established a Blockade of the ports and rivers of Buenos Ayrean territory in order to compel the Government of Buenos Ayres to make peace with Monte Video, upon such terms as Great Britain and France thought fitting and proper. But that neither Great Britain nor France had sustained any injury from Buenos Ayres for which redress had been demanded and refused.«

Neither Power was prosecuting its right, real or supposed. But again it does not follow that, because this was not a belligerent Blockade, that it was a Pacific Blockade for there is no evidence that Great Britain or France intended to avail herself of that particular institution of the Law of Nations. Rather is there an admission on the part of Great Britain — to herself at least — that this was an illegal act.

Some confusion is observable in the various opinions of writers as to the exact significance of the decisions of the French Conseil d'Etat, arising out of this same blockade. Le Comte de Thomar [32]) was a case where a Brazilian vessel was seized by the French squadron for breach of the blockade and taken in for condemnation. Because there had been

[30]) P. R. O., F. O. 83—2227; 25th July, 1846.

[31]) Cit. supra, p. 678.

[32]) Pistoye et Duverdy, Traité de Prises Maritimes, p. 383ff.

no special notification of the blockade to the vessel itself French practice precluded condemnation on that ground. The captors demanded condemnation on the alternative ground of the nature of the cargo — powder and lead, which in case of war would be contraband. But the Conseil d'Etat refused to condemn, on the ground that seizure of contraband is a belligerent right. Hogan bases his view that this was a Pacific Blockade — an insecure basis as we have seen — on this decision and goes on to deduce that [33])

> »the plain inference of the court's decision is that there is no war existing between France and the Argentine, and presumably, therefore, also no war existing between Great Britain and the Argentine«.

He quite omits to notice that this was expressly recited in the judgement, which reads [34])

> ». . . considérant qu'il résulte de la lettre du ministre des affaires étrangères que, nonobstant le blocus des côtes de la république argentine, le gouvernement français n'était pas en état de guerre avec ladite république«.

Moreover there are two reported decisions of the Conseil d'Etat upholding the condemnation by inferior tribunals of two vessels — L'Independencia Americana and The Aurora — for breach of this very blockade[35]). Upon the strength of these decisions Fauchille concludes that »La jurisprudence française est favorable aux blocus pacifiques« [36]), but comes to the conclusion that a Pacific Blockade is a hostile act [37]). Pistoye and Duverdy say that such is a case of belligerency »sans faire la grande guerre« [38]). Sir John Dodson, as has already been pointed out, likewise regards this as a case of undeclared war. Besides giving this as his opinion in express terms, he does so impliedly by his referring the owner of the Aurora to the Paris Conseil des Prises to give his claim of property before seeking redress by diplomatic means [39]). At all times the Queen's Advocate is emphatic in his assertion that what was being done by Great Britain could not legally be done except on the basis of a state of war [40]), though he says »I do not mean that there must of necessity have been a formal and solemn declaration of war« [41]).

We have now dealt exhaustively with three incidents which are generally said to be instances of the employment of the institution of

33) Op. cit., p. 105.
34) Pistoye et Duverdy, op. cit., p. 386.
35) Pistoye et Duverdy, op. cit., p. 384.
36) Le Blocus Maritime, p. 43.
37) Ibid., p. 48.
38) Op. cit., p. 386.
39) P. R. O., F. O. 83—2227, 1st April, 1847.
40) eg.: Ibid, 31st December, 1846.
41) Ibid, 25th July, 1846.

pacific blockade by Great Britain. Before going any further it will be well, for the sake of clarity, to summarise our conclusions. Hogan says that they are all three authentic pacific blockades, although he is less certain about the last case. In all three of them the right to capture the ships of third states was claimed and actually exercised. Our conclusion, based on a re-examination of the evidence available, is a bald one: that there is not the least ground for asserting that there was no condition of war in any of the three cases. Further, even if it were to be held that there was no war in any or all of the cases, there is certainly no reason for asserting that Great Britain intended to make use of any such legal institution as pacific blockade. The Queen's Advocate constantly insisted that blockade is exclusively a belligerent right. It may very well be that in the case of the blockade of Buenos Ayres Great Britain — and France for the matter of that — intended to assume in time of peace the powers which that right confers; but that implies no subscription to the doctrine of pacific blockade — merely a conscious abuse of legal right.

When other examples of Great Britain's practice as a blockader are examined the same thing will be seen — either the alleged condition of peace does not exist or the act in question is a blockade in time of peace as distinct from a pacific blockade, an act the juridical consequences of which it is left to time to determine, there being no resort to an institution of the law.

The attitude of this country has been exactly the same in the cases which we have examined in which she has not participated. Great Britain, as a quasi-neutral, has not been willing to concede to other states rights which she has never claimed herself to possess under the Law of Nations. Thus, during the alleged pacific blockade of Portugal by France in 1831, the Queen's Advocate advises that the Ambassador in Lisbon should be instructed that French cruisers would not be justified in visiting and detaining vessels under the British flag, there being no war between France and Portugal [42]). Likewise the Brazilian blockade of Buenos Ayres in 1826, which is not mentioned by Hogan, is dealt with by Sir Christopher Robinson strictly on the basis that there was a state of war in existence [43]). And the objections to the French blockade of Mexico of 1838 are based solely on the ground that the numerous exceptions endangered its effectiveness; there was no question of doubting the existence of a state of war [44]).

The belligerent character of the French blockade of Buenos Ayres of the same year was similarly never in doubt as Admiral Leblanc's Order

[42]) P. R. O., F. O. 83, 2322, 17/6/31.
[43]) P. R. O., F. O. 83, 2227, 16/1/26.
[44]) P. R. O., F. O. 83, 2302, 11/6/38.

of the Day beginning »Nous commençons les hostilités« [45]) goes to show. Moreover, the Argentine Government issued letters of marque, as appears from the decision of the French Conseil d'Etat in the case of Le Caïman [46]).

This examination of these alleged instances of pacific blockade shows that in the first half of the 19th. century Great Britain never exercised any jurisdiction over the ships of third states for breach of blockade in time of peace as of right. In the cases we have examined there was either a state of war, real though undeclared, or a frankly illegal proceeding. Thus use of the »biographical method« leads us to the conclusion that there was no such thing as pacific blockade in the sense of belligerent blockade bereft of belligerency in the time which later writers imagined to be the lusty childhood of the institution.

But neither Hogan nor Oppenheim claim for a pacific blockader so-called »belligerent rights«, i. e. jurisdiction over »neutral« shipping. And we freely admit that there is ample evidence of so-called blockades where only the shipping of the blockading and the blockaded states was affected — of an institution akin to Reprisals. A report by Sir John Dodson of the year 1855 puts the British attitude to the whole question with admirable clarity. When asked to comment on the instructions which it was proposed to send to the Naval Commander in the West Indies in regard to the measures he should take in the event of a refusal by the New Grenadian Government to satisfy the demands of Great Britain for a settlement of the claim of a Mr. Mackintosh, he observes that they entitle the Admiral to do nothing except to declare a blockade. Then he says [47])

> ». . . The right of imposing and enforcing a blockade is a belligerent right, founded upon and incident to the 'status inter gentes' of belligerents. Its exercise can in my opinion only be well founded upon, or rendered internationally legal or safe by, the actual existence of war. If therefore Great Britain and New Granada should not be at war when it is imposed (as they are not in fact at present) then the legality and validity of the blockade cannot strictly be maintained. . . . I would venture to suggest that the object in view might be legally and safely accomplished by the Admiral's taking proceedings in the nature of 'Reprizals' limited in the first instance to the national property of the Republic, as for instance taking possession of such property as . . . national vessels or stores afloat or on shore . . . If this should not procure redress all New Grenadian merchant vessels might be 'embargoed' in British ports and detained at sea . . .«

Today this is considered to be the whole content of pacific blockade. It is no more than a special form of reprisals. And it may well be that

45) P. R. O., F. O. 6. 63, No. 24.
46) Pistoye et Duverdy, loc. cit.
47) P. R. O., F. O., 83, 2255 etc.

in this form it does exist as a special institution of the law of nations. But it is submitted that there is no logical reason for this. There are, however, historical considerations which at least explain how this came about — through the drawing of false analogies from belligerent blockade.

There are several reasons for the application of these analogies. For in both cases ships were the instruments of force used. Winfield in Lawrence tells us that »the law of blockade presupposes ships as marriage presupposes a bride«. There was therefore a constant temptation to suppose that what a ship could do in one case it could do in another. When the line between peace and war was even thinner than it is now it was perfectly possible that there should occur in both states instances of the use of blockade — that instinctive method of harming an adversary the roots of which Fauchille finds in the practice of wild beasts to wait at the foot of the tree until hunger drives the marooned traveller to descend. When there was no recognition of the condition of neutrality blockade naturally extended to the ships of all nations.

At the beginning of the 19th. Century the concept of neutrality was more or less developed, and the pretensions of belligerents to prohibit all commerce with the enemy were circumscribed. The conflict between the right of a neutral to carry on his trade and that of the belligerent to carry on his war resulted in compromise; it was recognised that it was the duty of the belligerent not to suppress all intercourse between neutrals and the enemy; and, as Jessup and Deàk tell us, in the face of neutral protests, and the growing strength of the law of neutral rights in general, the belligerents receded from their insistence on total prohibition by two types of compromise or concession, one geographical and the other categorical; geographically, the ban, instead of extending to the entire country of the enemy, was confined to certain ports which were besieged or blocked up; categorically the ban was limited to certain categories of goods such as arms and ammunition which came to be known as contraband of war [48]). Blockade thus came to be an institution with definite limits and distinct rights.

Nevertheless the rules were not so clearly laid down as they later came to be. The principle of effectiveness was not formally embodied into the law until the Declaration of Paris. Before that there were two schools of thought; some considered that a blockade had to be completely effective to be valid; others thought that it was not illegal even if ships of certain categories were permitted to pass without hindrance. We believe that it was this uncertainty about rules of effectiveness that led to the development of the »doctrine« of pacific blockade: it was considered that a proceeding was a blockade even if the shipping of third

[48]) Jessup and Deàk, Neutrality, its history, economics and law, Vol. 1, p. 105.

states went unmolested. It was not realised that in such a case what was sacrificed was not the doubtful principle of effectiveness but the essential nature of blockade — the exercise of belligerent rights. This confusion of thought appears in the Report of Sir John Dodson already cited [49]). He says

> ». . . in order to be valid, it is essential that a Blockade should be uniform and universal in its application — neither British nor neutral commerce can be exempted from its operation«.

The exemption of the whole of neutral commerce from the operation of a blockade would seem to us to negative the existence of blockade, not merely to detract from the principle of effectiveness. The decision of Lord Stowell, then Sir W. Scott, in The Success [50]) laid down the rule that the blockader could not exempt his own commerce from the prohibition of intercourse involved by the declaration of a blockade. This was the case of a ship under the Swedish flag and pass taken on a voyage from Gothenburg to Malmo and proceeded against for a breach of the Order in Council of the 7th of January 1807, by which intercourse with all ports from which British ships were excluded was prohibited. A moiety of the ship belonged to British subjects and upon their claims Lord Stowell said [51])

> »The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as of neutral ships; for it would be a gross violation of neutral rights, to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded. It would be a shameful abuse of a belligerent right thus to convert the blockade into a mere instrument of commercial monopoly . . . These considerations, it appears to me, dispose of the case as far as British interests are concerned.«

Another cause of confusion was the uncertainty as to what could begin a war. The absolute requirement of a declaration of war is the fruit of this century. But in the early part of the last it was the almost invariable practice of states to make such declaration. Thus when a war began without it was often not apparent that there was any war. More especially was this the case when the state beginning war restricted its belligerent activities to a blockade, as it might well do to preserve its commerce and to escape being put upon its mettle to make a spectacular victory in order to impress the world. It came to be considered that a blockade was not an act beginning war — that it could exist in time of peace. This argument was used by Guizot in 1841 in connection with the blockade of Buenos Ayres. He said: »Nous faisions un blocus, ce qui

49) Supr. p. 682.

50) Dodson's Reports p. 131. 165. English Reports p. 1258.

51) At p. 134—5. Engl. Rep. p. 1259.

n'est pas la guerre complète, la guerre déclarée .. « As Pistoye and Duverdy point out, in saying this he confutes himself; war was not declared, but it was nevertheless made [52]). Pistoye and Duverdy themselves draw a distinction between la grande guerre and le blocus simple. Sir John Dodson also calls attention to this distinction when he says [53])

> »In the prosecution of its right a nation is at liberty to employ all the means allowed by the Laws of War, or it may limit its exertion to some, or even to one particular mode of attack, for instance, to a Blockade of the Enemy's ports; but to render a blockade legal there must be a state of war, whether founded on justicative motives or otherwise. I do not mean that there must of necessity have been a formal and solemn Declaration of War.«

Thus many incidents came to be considered as pacific blockades because the act which initiated the state of war which actually existed was the blockade itself.

There is another complicating factor introduced by the uncertainty of the definition of war. It is urged that it takes two to make a quarrel — that if the blockaded state makes no resistance to the warlike acts of the blockader the blockade is pacific, notwithstanding the exercise of belligerent rights. Thus Hogan tells us that the only real test (of the nature of a blockade) is the attitude of the state whose coast is blockaded [54]). . . . . the position (it) which takes up is a matter for itself alone, and on its action depends whether a state of war is or is not set up [55]).

It may again be pointed out that this was not the view present in the mind of Great Britain as Dodson had, in this connection, defined war as the prosecution by a State of its Right, real or supposed, by Force [56]).

These various elements so confused the distinction between peace and war that gradually there grew to be a »doctrine« of pacific blockade — the creation of publicists rather than the product of the practice of states. It is well to remember that Great Britain, and Sir John Dodson in particular, would have been very surprised to hear the expression »pacific blockade«. The term is the invention of Hautefeuille and first appears in 1848 in his treatise on the rights and duties of neutral nations [57]).

Pacific blockade, then, is an historical accident, arising from the application to one form of Reprisals of injudicious analogies from the Law of War. The use of the term, and the treatment of that which it

52) Op. cit. p. 375.

53) P. R. O., F. O. 83, 2227, 25/7/46.

54) Op. cit., p. 90.

55) Ib., p. 18.

56) Supr., p. 678.

57) »Des Droits et des Devoirs des Nations Neutres en temps de Guerre Maritime«, Paris 1848—9, tome 3, p. 176.

connotes as a special and distinct legal institution is to be regretted. For application to neutral shipping is of the essence of blockade properly so-called; pacific blockade cannot be legally so applied and the term therefore is a misnomer.

There is another aspect of pacific blockade which may usefully be considered here. After the Great War, when the League of Nations was still in the making it was supposed by many writers that the chief weapon of the new organisation would be pacific blockade. A report on its potentialities was indeed laid before the Council [58]) and it was suggested as recently as last year that it would provide an ideal solution of the Spanish Question — if such we may call it [59]). There are historical reasons for this almost automatic association of the institution with the League. For there has always been some connection between pacific blockade and the Concert of Europe. The classical school find their first instance of the use of pacific blockade in the Navarino affair, which was a direct result of the assumption by the incipient Concert of a control of the Eastern Question. It has therefore been regarded by some as a species of corollary to the guardianship of the Turkish Empire. Thus Hogan says [60])

> ». . . a somewhat wider latitude might well be conceded in the case of a pacific blockade instituted by the Great Powers or even by some of them as 'a measure of police' to guard the peace of Europe, than in one which is entered upon by a single power. Thus a difference might be made in the treatment of the vessels of third states, their seizure being allowed when several powers are blockading, but not otherwise.«

Several objections may be raised to this argument: Firstly there is the difficulty which arises from the circumstance that the blockader has no effective quarrel with the blockaded state; thus in 1827 the Powers had no quarrel with the Greeks — rather sympathy — but with the approaching fleet of Ibrahim Pasha; the position would be much the same if the Powers were today to blockade Spain to enforce the Non-Intervention Agreement. Sir John Dodson would have denied a state the right to declare a blockade except in order to redress a grievance of its own — as he denied the right of Great Britain and France to blockade Buenos Ayres in order to prevent Rosas destroying the independence of Uruguay [61]). One cannot blockade a territory unless one has a quarrel with its rulers, for blockade is tantamount to war. One is forced to seek another juristic basis for the assumption of jurisdiction over the shipping of third states in such cases of »insulation of territory« from its invaders

58) Official Journal II, p. 1116.

59) Sir H. Richmond, »Naval Police in the Spanish War«, New Commonwealth Quarterly, March 1937.

60) Op. cit., p. 19—20.

61) Supr., p. 678.

by blockade. For there are several instances of action of this kind, in particular the so-called blockade of Crete by the Great Powers in 1897, and that of Zanzibar by Great Britain and Germany, in 1889. The first of these was undertaken to prevent the annexation of Crete — Turkish territory — by Greece, and the latter to prevent the import of arms and export of slaves by the rebellious subjects of the Sultan. The juridical basis of the right claimed — to prevent all communication with the shore — is to be found in the sovereign authority of the unhappy owner of the territory invaded or otherwise troubled. Thus in the first case it must be taken that the Powers had assumed the power which the Sultan undoubtedly possessed to exclude all ships, Turkish or Greek or foreign, from his territorial waters of Crete. That this was the basis of the authority assumed in the Zanzibar incident appears from the Sultan's Proclamation to his subjects, which reads [62])

»... The Governments of Great Britain and Germany have now arranged, with our consent, to establish a naval blockade on our coast ... in order to break the power of the insurgents and restore our authority. Be it known to all men that the blockade is done with our full consent, and that it will be directed against vessels carrying flags of all nations ...«.

It must be observed that a blockade thus based on the assumption of territorial sovereignty could only be exercised within the limits of territorial jurisdiction upon the sea. This to our mind is an overwhelming objection against calling such operations blockades. Surely the essence of the law of blockade is that it is the result of compromise between belligerent and neutral claims; that it imports belligerent rights over neutral shipping, which are essentially different from such rights as territorial sovereignty gives.

But it is of course arguable that this resort to the fiction of territorial sovereignty is but a cloak for the activities of the Concert, which has in reality created a new legal institution — pacific blockade — connoting a right to interfere with the shipping of third states. And in a sense this is true. Turkey was continually forced into an attitude of passivity by the Powers, so that there was no effective enlistment of European aid or surrender of sovereign rights.

This argument is closely connected with our second objection to Hogan's finding of the origin of pacific blockade in the activities of the Concert. Hogan himself forsees this objection only to dispose of it, when he says [63])

[62]) British and Foreign State Papers (Hertslet), Vol. 81, p. 94.

[63]) Op. cit., p. 20.

»To draw . . . a distinction (between a blockade by a single Power and one by the Concert) would, of course, be a departure from the view of Grotius and other jurists as to the equality of states . . .«

Upon this point Dickinson says [64])

»Publicists have admitted that all this is inconsistent with equality, although many explain it as a matter of fact or policy which does not affect equality in law. Others admit that it violates equality and denounce it accordingly, while many of the ablest publicists have regarded concerted action as the incipient manifestation of super-national organisation in which political equality must be limited in the interests of a more stable international order.«

The view that the Concert had more to do with policy than with law, seems to be supported by Westlake in a passage which we have quoted once before [65]).

[64]) The Equality of States, p. 309.

[65]) Supra p. 672.