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at first glance between the treacherous operations of a submerged submarine and a small warship navigating in fog. On the other hand, modern technology has reduced the primary importance of visibility at sea; both in air and maritime navigation, reliance is instead placed on radar.

When a submarine surreptitiously enters foreign waters, that fact will affect the choice of remedies available to the offended state. The vessel and its crew may be immune from jurisdiction. That certainly does not mean that the coastal state has no remedies for intrusion.

VII. REMEDIES

The offended territorial state disposes of a range of nonjurisdictional remedies under classical international law, some of which fall under the right of self-defense.¹⁰⁹ That right exists even if there is no "armed attack"¹¹⁰ and even if the intrusion of the foreign warship does not amount to "aggression";¹¹¹ and one may argue that it is then merely a question of a right to terminate acts of trespass. Yet, because of the nature of the operations of a warship, considerations of self-defense are more pertinent.

The normal rules of self-defense require that measures be "necessary," a condition that appears *prima facie* to be fulfilled when a warship penetrates internal waters near a naval base. The territorial state may resort to armed force against the foreign warship and take any "necessary" measures that are "proportional" to the offense.¹¹²

It may not always be easy to establish the *motive* of espionage of a foreign submarine. However, the further a submarine has penetrated without permission and without being detected by radar, the less likely it is that the coastal state will accept that the warship deviated from its course because of genuine error or navigational difficulties.

The proportionality of permissible force will be affected by whether the submarine is in internal or territorial waters. It will also be affected, in a substantial

¹⁰⁹ Some claim that the right of self-defense preempts the question of immunity: if a warship commits illicit acts, the coastal state is no longer concerned with jurisdiction but with self-defense. 1 C. CALVO, *supra* note 17, at 576. In this context, one could point to practical difficulties connected with a denial of immunity to warships that commit illicit acts. How could Albania, without a navy, have arrested the commanders and crew involved in the second mine-sweeping operations in the Corfu Straits to implead them in Albanian courts? On the Corfu Channel Case (UK v. Alb.), see 1949 ICJ REP. 4 (Judgment of April 9).

¹¹⁰ See on this point discussion on Article 34 of the draft on state responsibility, in particular comments by Reuter, in [1980] 1 Y.B. INT'L L. COMM'N 235, UN Doc. A/CN.4/SER.A/1980. But note Article 51 of the UN Charter, which refers to the right of individual self-defense in the case of "armed attack." See also *The Caroline* (1906), 2 J. MOORE, *supra* note 14, at 412, on self-defense outside a state's territory.

¹¹¹ There has been considerable discussion about at what stage intrusions amount to "aggression." The USSR failed to obtain a sufficient majority for a UN resolution condemning the U-2 flight as "aggression." See 15 UN SCOR (880th-883d mtgs.), UN Docs. S/PV.880-883 (1960). Aggression probably involves "armed attack," a purpose that the U-2 plane did not have.

¹¹² On the general rule of proportionality, see *The I'm Alone*, 3 R. Int'l Arb. Awards 1609 (1929); and the Case concerning the Air Services Agreement of 27 March 1946, Arbitral Award of 9 December 1978, 54 ILR 304 (1979).

manner, by whether the ship entered openly and visibly or clandestinely and submerged, avoiding radar detection.¹¹³ Far more force would be allowed against a submerged submarine. Although it is well accepted that the territorial sovereign may take all acts necessary to prevent further illicit acts,¹¹⁴ the nature of those acts will depend on the particular case. Thus, a destroyer from a "friendly" state that has "strayed" into the territorial waters of another state will be treated far differently from a submerged submarine that has penetrated deep into internal waters. The submarine must be asked to surface and to explain its presence, in the farfetched case of distress.

If the submarine does not surface, the coastal state may drop depth charges to force it to do so. However, it may seem inadequate to rely only on the conventional method¹¹⁵ of "requiring" the warship to leave when it has failed to comply with the laws and regulations of the coastal state. Such requests are designed for much milder cases of violations of local laws, not for the violation of territorial integrity by illicit spy ships.

I therefore suggest that the coastal state may be entitled to sink the submarine if it refuses to surface, if it refuses to leave and if it gives no reason for its noncompliance. To avoid a claim by the sending state that excessive force has been used, the coastal state must first verify that the vessel is not in distress. The coastal state may choose to warn the sending state that the *next* intruding submarine will be sunk. But for such grave violations of its independence, there must be some ultimate forceful measure on which the coastal state can rely, if only to attach as a condition guiding future conduct.

There has been some concern that by sinking a nuclear-powered submarine carrying nuclear weapons, the coastal state would actually be exposing itself to the risk of radiation. However, nuclear missiles or other weapons could not explode, as the warheads are carried separately on board the submarine; there would only be a possibility of slight radiation of little danger to the coastal state. It belongs to politicians, guided by expert technical advice, to consider such decisions. However, it belongs to international lawyers to emphasize that any proportional use of force is permissible. If drastic force may be permissible to counter a territorial intrusion, *less* force is naturally also permissible. The submarine may be escorted into port or in other ways detained. A new Swedish law provides that any intruding submarine that is proceeding underwater may be forced to surface and identify itself, and may be taken into port "for further action," if necessary by military force.¹¹⁶ Revised wording has already been proposed that would allow for such military force without previous warning.¹¹⁷

Any holding action naturally comes close to an impounding order by a court,

¹¹³ See on radar and other methods to detect submarines, D. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 74 *et seq.* (1975).

¹¹⁴ I L. OPPENHEIM, *supra* note 10, paras. 447, 450.

¹¹⁵ See Article 23 of the Geneva Convention on the Territorial Sea of 1958, 516 UNTS 205, 15 UST 1606, TIAS No. 5639, and Article 30 of the new Law of the Sea Convention, *supra* note 19. This is the only method available to coastal states under the Conventions in the case of violations of their laws by foreign warships.

¹¹⁶ IFKN 1982:756, which entered into force July 1, 1983.

¹¹⁷ UBÅTSSKYDDSKOMMISSIONENS YTTRANDE, April 1983.