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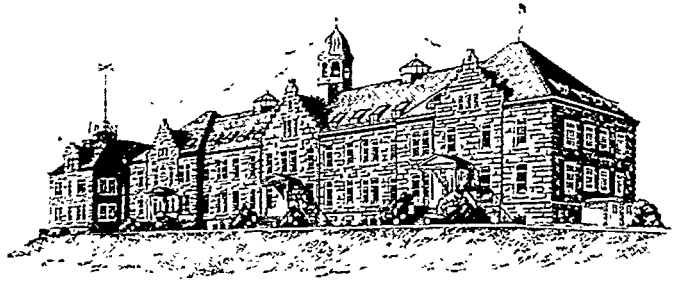
# INTERNATIONAL LAW STUDIES

Volume 74

# The Tanker War, 1980–88: Law and Policy

George K. Walker



Naval War College
Newport, Rhode Island
2000

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# FOREWORD

The International Law Studies "Blue Book" series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. This, the seventy-fourth volume of the series, publishes *The Tanker War 1980-88: Law and Policy*, written by George K. Walker, Professor of Law, Wake Forest University School of Law. Professor Walker has served as the Charles H. Stockton Professor of International Law at the Naval War College (1992-93) and is a retired Captain in the U.S. Naval Reserve.

This volume provides an in-depth analysis of the legal issues surrounding the "Tanker War" between Iran and Iraq, with a focus on law of the sea, the law of armed conflict, the UN Charter, and environmental issues. In addition to discussing the legal aspects of the conflict, there is a summary of the factual record of the Tanker War and a general prologue of the history of the Arabian Gulf. Professor Walker's work is a significant contribution to the literature on this subject. His meticulous and thorough research ensures it will be a standard reference for its study. While the positions and opinions expressed in this volume are those of the author and are not necessarily those of the United States Navy or the Naval War College, the work provides valuable insights into international law developments experienced in the Iran-Iraq War.

*The Tanker War* was brought to publication with the assistance of the Naval War College's Oceans Law and Policy Department. Professor Emeritus Jack Grunawalt provided invaluable service by volunteering his time as editor. On behalf of the Secretary of the Navy and the Chief of Naval Operations, I extend to Professor Walker and the others who participated in the development of this publication my gratitude and thanks.

A. K. CEBROWSKI
Vice Admiral, U.S. Navy
President, Naval War College

# PREFACE

*The Tanker War 1980-88: Law and Policy*, written by George K. Walker, Professor of Law, Wake Forest University School of Law, is the culmination of a process that began over ten years ago. Professor Walker conducted research and wrote the book while maintaining a schedule as a full-time law professor, in addition to his many other personal and professional obligations. He brings an extensive international law background to this subject. Besides his teaching responsibilities in the field of international law and admiralty at Wake Forest, he served as the Charles H. Stockton Professor of International Law at the Naval War College during the 1992-93 academic year. He also was a participant in the development of the *San Remo Manual*, a contemporary restatement of the law applicable to armed conflicts at sea. The Oceans Law and Policy Department of the Center for Naval Warfare Studies, Naval War College is indebted to Professor Walker for the superb scholarship exhibited in this volume.

The International Law Studies "Blue Book" series is published by the Naval War College and distributed throughout the world to academic institutions, libraries, and both U.S. and foreign military commands. *The Tanker War* will greatly enhance the series by presenting an insightful work on a topic previously not fully addressed.

Thank you again to Professor Walker and the others who assisted in the development and publication of this volume. We also extend our sincere thank you to Dr. Alberto Coll, the Dean of the Center for Naval Warfare Studies, for his support of the "Blue Book" series.

Dennis Mandsager
Professor of Law
Chairman, Oceans Law
and Policy Department

# Chapter I

# INTRODUCTION

This book has taken better than a decade to research and write. Soon after the Iran-Iraq conflict began in 1980, I began to study the war. That conflict ended in 1988, and it was succeeded by the Gulf War, whose active hostilities began in August 1990 and ended in early 1991, although final resolution of that war, like the 1980-88 conflict, may be decades in coming.

Factual accounts of the Iran-Iraq war, and its maritime component, the Tanker War, were scattered among many sources. Unlike wars in which the United States or other States that are open societies are belligerents, access to primary accounts from either Iran or Iraq were difficult to find. The large number of participants—ranging from the UN Security Council and Secretary-General through multinational organizations to individual countries and nongovernmental organizations, whose pronouncements, although critical, were often difficult to find—also made building a solid factual foundation difficult. It was only with publication of *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare*[1] and *The Tanker Wars*[2] that I could be sure that a relatively complete factual record could be consulted. Media reports[3] and summaries[4] appeared soon after events, but these books and the first round of analysis required a cross-check for accuracy and completeness.[5]

The law itself was also in transition. Protocol I to the 1949 Geneva Conventions[6] was signed in 1977, and today it is virtually universally applicable as treaty law, although the United States has not ratified it.[7] In 1980 the Conventional Weapons Convention and its Protocols were signed, and today have many States as parties, including the United States for all but one of its Protocols.[8] These treaties for the most part do not apply to war at sea,[9] but they restate principles—*e.g.*, discrimination, proportionality, necessity—applying to all warfare.[10] In 1982 the UN Convention on the Law of the Sea (LOS)[11] was signed, and today it is moving toward universal acceptance, with an amending protocol, to replace the 1958 LOS Conventions; thus far the United States has not ratified it.[12] However, many countries, including the United States, accept the LOS Convention navigational articles as restatements of customary law.[13]

Important secondary sources also matured during the war and are now generally available. In 1987 the *Restatement (Third), Foreign Relations* was published, and it may have influence like its predecessor *Restatement (Second).*[14] In 1987 Naval Warfare Publication (NWP) 9 was also published;[15] it was the first complete revision of the US Navy's law of war manual since NWIP 10-2, first published in 1955. Capping nearly a decade of conferences, the *San Remo Manual,* the first of its kind

since the *1913 Oxford Manual* on the law of naval warfare,[16] was published in 1995. Besides these sources, the new treaties generated commentaries[17] comparable to Pictet's respected series[18] on the 1949 Geneva Conventions.

It is therefore hoped that a combination of a more complete factual record and, at least for the time being, a more stable format of international law will make this book useful for general and academic readers.

I began research on the war in 1980, continued it through a semester of academic leave and as I could while carrying a full academic schedule at Wake Forest University and coping with post-Vietnam War tumult in academia, which had ripple effects for a decade. I completed most of the basic research and writing during and after service as Charles H. Stockton Professor of International Law at the Naval War College, Newport, R.I., truly an outstanding experience, for which I remain grateful.[19]

Chapter II B summarizes the factual record of the Tanker War; a general prologue of the history of the Persian Gulf precedes it in Chapter II A. Chapter III applies the law of the UN Charter to the conflict; a short summary of other factors that may govern during war, *e.g.*, the impact of armed conflict on treaties, is in Chapter III D. Chapter IV focuses on LOS issues that applied during the war, *e.g.*, straits passage. Chapter V examines law of armed conflict (LOAC) issues in the Tanker War. Chapter VI explores issues affecting the Persian Gulf environment during the war. A general summary and conclusion follows in Chapter VII.

Parts of this book have appeared in other publications. In some cases the prior text has been published, and in most situations references are given to prior publications.[20]

## Part A. Acknowledgments

There are many who have helped with the thinking, research and writing of *The Tanker War 1980-88: Law and Policy*. John Donne rightly wrote that no one is an island,[21] and this applies to this book's preparation.

My first and greatest debt is owed my wife, Phyllis, and our children, Charles and Mary Neel, who endured many times when I was engrossed in thinking, research and writing during graduate study and absences at libraries, carrels, offices and elsewhere. Part of the personal experience for preparing *The Tanker War* was duty with the US Navy, with which I was privileged to serve with Atlantic Fleet destroyer forces (1959-62) and in the Naval Reserve (1957-59, 1962-89). From 1966 until retirement in 1989, my family supported absences for Naval Reserve duty as a line officer that took me away at least two weeks a year and more weekends and other times than they or I would like to remember.

My father, J. Henry Walker, never saw active military service. He held an Army commission for a time after World War I and before World War II. He was too young for the First World War and too senior for the Second World War. In the

family tradition, he was active in Civil Defense during World War II and taught physics to Army Air Force cadets while teaching premedical studies at the University of Alabama. He had been prevailed upon by the President of the University to stay on and teach future doctors for that war. He encouraged my brother, Lieutenant Commander Rufus H. Walker, USNR, and me to seek naval commissions and was never more proud of his sons than when my brother chose a naval career and I remained in the active reserves through the Cold War. I remain grateful for his insights that grew more meaningful as I matured[22] and for his supporting my decision to enter academic life. Cancer claimed my brother in mid-career, but his sea service stories added to thoughts for this book.

At the University of Alabama several great teachers quickened my interest in the larger world, its history, politics and diplomacy, and unconsciously directed me toward an eventual career in the law. These included John F. Ramsey, one of the truly great teachers and mentors for many at the University and for whom an annual student award is given to this day; Captain Hubert E. Mate, USNR, professor and College of Arts and Sciences assistant dean, an academic and Navy mentor; Commander John S. Pancake, USNR, professor of history and another Navy mentor who introduced me to diplomatic history; and Walter H. Bennett, a demanding member of the political science department, who immersed me in political theory.

At Duke University Harold T. Parker, who with William Newton supervised my history master's thesis on the Franklin Roosevelt - Winston Churchill correspondence, 1939-41, taught me how history moves and insisted on the highest academic standards in researching the thesis. Many years later, another Duke faculty member encouraged my study of the law of naval warfare. Rear Admiral Horace B. Robertson, Judge Advocate General's Corps, USN and Judge Advocate General of the Navy, later a Duke law faculty member and vice dean, has my special thanks.

From my Vanderbilt University law school experience, I remember the excellent grounding that Professor and Dean John W. Wade gave me. My teacher and now colleague and friend Harold G. Maier encouraged my study of international law there and has supported my academic career since then. I also mention Vanderbilt's great teacher of conflict of laws, Elliott E. Cheatham, who knew my grandfather when he practiced law in Georgia and my grandfather was a superintendent of schools. He opened my eyes to thinking factorially in ways reflected in this book, particularly Chapter VI.

Service as US District Court law clerk to John D. Butzner, Jr., now Senior US Circuit Judge for the US Court of Appeals for the Fourth Circuit, and as a trial lawyer with what is today the law firm of Hunton & Williams in Richmond, Virginia, was probably the best postgraduate education I could have asked for. George C. Freeman, Jr., who had active naval service on *U.S.S. Wasp*; Lewis F. Powell, Jr., who saw distinguished World War II service and was later an Associate Justice of the Supreme Court of the United States; H. Merrill Pasco, General of the Army

George C. Marshall's aide; Lewis T. Booker, later promoted Brigadier; and Robert F. Brooks, were among the outstanding lawyers with and for whom I worked. With that kind of leadership by example, excellence was the expected norm.[23]

A decision and commitment to legal education led me to the University of Virginia School of Law, and I am grateful for the wonderful intellectual growth experience the Master of Laws program gave me. I express thanks to great teachers and research supervisors, all of whom became good friends and colleagues: A.E. Dick Howard, White Burkett Professor of Law and Public Affairs; Richard B. Lillich, late Howard W. Smith Professor and a Stockton Professor of International Law at the Naval War College; and John Norton Moore, director of the graduate program and Walter L. Brown Professor. The Virginia law library supported my masters in law and later research, and I remain grateful to the late Frances Farmer and her staff for support they gave.

At the Yale Law School while on sabbatical I came to know W. Michael Reisman. Michael, then Wesley N. Hohfeld Professor of Jurisprudence, and today Myres S. McDougal Professor of International Law, has supported my work through the years. I also remain grateful for the comments and support of Myres S. McDougal, Sterling Professor of Law Emeritus, and for a particular insight that Eugene F. Rostow, Emeritus Dean and Sterling Professor of Law, gave me. My uncle, Rufus C. Harris, later a law dean and university president, always reflected the broad base of J.S.D. work he did at Yale after returning as a wounded World War I veteran, and his experience and example were reasons I wanted to research there. Lastly, I remain grateful for the facilities of the Yale Law and Sterling Libraries and their support.

To recount names of those within the sea services who influenced my thinking during 32 years of enlisted and commissioned service would fill a volume. Often I learned great truths from, or was inspired by, those with whom I served, who led me, or whom I was privileged to lead. Two must be mentioned. Captain J. Ashley Roach, Judge Advocate General's Corps, US Navy (Ret.), and I met just after my time at Yale. He suggested the developing Middle East situation would be interesting research, and so it was. During my 1992-93 appointment as Charles H. Stockton Professor of International Law at the Naval War College, I gained Richard J. Grunawalt, Captain, Judge Advocate General's Corps, US Navy, (Ret.), and now Emeritus Professor and former Director of the Oceans Law and Policy Department of the College's Center for Naval Warfare Studies (CNWS), as a great colleague and friend. I remain grateful for his positive leadership, encouragement and insistence on the highest standards of scholarship. Jack was principal editor of this volume.[24] He was ably assisted by Lieutenant Colonel James E. Meyen, U.S. Marine Corps.

Three Naval War College Presidents are owed a special debt of thanks. Rear Admiral Joseph C. Strasser, US Navy, was President during my Stockton year.

Admiral Strasser solidly supported my teaching and research at the College; he cared about people as he led the College. His leadership will not be forgotten. Rear Admiral James R. Stark, US Navy, who succeeded Admiral Strasser as President, has also supported the College's law program. Vice Admiral Arthur K. Cebrowski, US Navy, succeeded Admiral Stark and wrote the Foreword for this book. Within the College, I remain grateful for comments, insights, research suggestions and corrections of Professors Grunawalt and Dennis Mandsager, current Oceans Law and Policy Department Chairman, and his staff. Dr. Robert S. Wood, former Dean of the CNWS, has my thanks for his research suggestions, comments and insights. I also express thanks to Hugh Lynch, Captain USN (Ret.), of the CNWS faculty, for reading Chapter II for factual accuracy. The Nation remains in good hands, due in part to the administrative, academic, military and moral leadership of these dedicated people.

Wake Forest University generously gave me leave to attend Yale, to accept the Stockton appointment, and for research. I express special thanks to a good friend and colleague, Edwin G. Wilson, Emeritus Provost and Professor of English, like me a Reserve destroyer officer (but separated by a few years in time of service, although shipboard experiences we shared were remarkably alike). I remain grateful for the support and counsel of Dean and Professor J. Donald Scarlett, who laid the foundation of the reputation the law school enjoys.

Other libraries besides those at Yale helped with research. At Wake Forest University, Professor Thomas M. Steele and the staff of the Worrell Professional Center Library that houses the law library deserve thanks for support and unfailing help in obtaining unusual sources that were so important. I am also grateful for the resources of the University's Reynolds and Army ROTC Libraries. At the Naval War College Robert E. Schnare, Director of its Library, and his staff deserve equal thanks. Dean Wood helped me obtain a carrel for research summers after the Stockton appointment, which enabled me to continue my studies. The Redwood Library, Newport, and the Winston-Salem - Forsyth County libraries lent books.

Behind every academic there is a wonderful secretary. Peggy W. Brookshire has been my mainstay for so many years and so many projects that we have given up counting. Besides voluminous correspondence, work with me on editing several books, public service projects with bar associations, appellate briefs, class assignments, and similar papers, she prepared sheafs of correspondence, fitness reports and other documents when I commanded Naval Reserve units. She typed many drafts and helped prepare the manuscript for this book. As the sea service signal has it, "Bravo Zulu."[25] I also express thanks to the secretarial staff at the Naval War College who helped with my research manuscripts there, particularly Virginia Lautieri and Lucy Dunlea.

Truly, no academic is an island.[26]

## Part B. A Note on Sources

US Senator Hiram Johnson said in 1917 that the first casualty of a war is truth.[27] Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, said that a word is the skin of a living thought,[28] and that a page of history is worth a volume of logic.[29] My good friend, the late Myres McDougal, emphasized that a writer's observational standpoint must be taken into account.[30] These truths are important in this book. Recent history is difficult to research and write. Only after a decade has separated the end of the war have more complete and relatively balanced accounts begun to appear. Many contemporary reports appear to be misdated, misstated, or sometimes wrong, and this at times applies to government sources. Another problem is the language and availability of sources. I am not versed in Farsi or Arabic, and many sources may be only in those languages. Many critical sources lie hidden in government archives, to be revealed only after several decades, if at all. Even when fundamental documents, *e.g.,* treaties, will be published is less than clear, owing to publication lags and national security.[31] The same can be said for deducing custom and objections to claims.[32] More has been written from Iran and Western sources; whether the archives of Iraq and the former USSR will ever be available is less than certain. Even readily available and reliable sources, *e.g.,* the *Foreign Relations of the United States* (FRUS), appear only after decades to protect national security, and they are necessarily selective.[33] The same can be said for the digests; the 1980-88 *Digest* of the Reagan Administration is only in its third volume.

The factual account, and the history of foreign and domestic policies, are therefore necessarily less than absolutely complete or accurate. I have tried to distill out rhetoric and bias but may not have always succeeded. My own intellectual bias as an academic lawyer, my cultural bias as an American, my prior experiences, *e.g.,* as a serving line officer in the US Navy and later as a Naval Reservist,[34] may have affected the story of the war in Chapter II and succeeding chapters of legal analysis.[35]

Nevertheless, I hope that this analysis will be helpful.

## Part C. Citation Format: Recurring Citations, Abbreviations, Acronyms

Although this volume conforms generally to another "bluebook,"[36] short form citations, abbreviations and acronyms replace full citations for recurring references (*e.g.,* LOS for law of the sea; LOAC for law of armed conflict); institutions (CMI, Comite Maritime Internationale); States, *e.g.,* the United Kingdom (UK) or the United States (US); international organizations, *e.g.,* the United Nations (abbreviated to UN); or, occasionally, agencies, *e.g.,* the International Committee of the Red Cross (acronymed ICRC). For short form citations listed below, references to published sources have been omitted; to conserve space, periods have been omitted from commonly used citations. For example, a "bluebook" citation,

United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 311(1), U.N. Doc. A/CONF.62/122 (1982), 1833 UNTS 3, *reprinted in* 21 I.L.M. 1261, 1327 (1982), appears as LOS Convention, art. 311(1). A treaty not listed below might be cited as, *e.g.*, Treaty on Protection of Artistic & Scientific Institutions & Historic Monuments, Apr. 15, 1935, arts. 1-3, 49 Stat. 3267, 3268-70, 167 LNTS 289, 290 (Roerich Pact). Acronyms and abbreviations are parenthetically defined when first used, unless meaning is obvious. Acronyms and abbreviations in quotations, or words in quotations that would otherwise be subject to acronyming or abbreviation, have not been changed, except to include an explanatory parenthetical where meaning is not obvious.

Certain citation formalities have been shortened. Most treaties not listed below are referenced to the article or other material cited, preceded by a note where they first appear, rather than repetitive citation of, *e.g.*, "UST at . . . ," or "UNTS at. . . .". Letters, *e.g.*, do not follow the "from . . . to" rubric,[37] "letter" follows the writer or the writer's title. Government officials' titles have been abbreviated; *e.g.*, the United States Permanent Representative to the United Nations is cited as "US UN Permanent Representative." Treaty titles omit superfluous articles and substitute "&" for "and."[38]

Reference signals, *supra, infra* and *hereinafter,* have been eliminated insofar as possible.[39] Material cited to a reprint source is designated as "*in*" instead of "*reprinted in.*"[40] When cited within the same chapter, notes to previous or future material are cited, as, *e.g.*, "n. 2 or Part B". If cited from another chapter, a reference will read, *e.g.*, "n. II.2," meaning the second note in Chapter II. Similarly, a Part cited from Chapter II will read, *e.g.*, "Part II B". More than one note is abbreviated to "nn." The word "at," interposed between note numbers and page numbers, has been deleted except where needed for clarity. Book titles and authors are printed in large and small caps. Article titles and like material are printed in *italics.*[41] The objective is to combine information with brevity, any style manual's goal.

## Part D. Short Form Citation

| Abbreviation or Acronym | Full Citation |
|---|---|
| ADIZ | Air Defense Identification Zone. |
| AFP 110-31 | United States Department of the Air Force, International Law—The Conduct of Armed Conflict and Air Operations: AFP 110-31 (1976). |
| AGL | Above ground level. |
| AJIL | American Journal of International Law. |

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| AJIL Supp. | American Journal of International Law, Supplement. |
| ALEXANDROV | STANIMAR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW (1996). |
| AMC | American Maritime Cases. |
| American Foreign Policy | American Foreign Policy: Current Documents (year follows abbreviated citation). |
| ASIL Proc. | Proceedings of the Annual Meeting of the American Society of International Law; year of annual meeting precedes citations; publication dates omitted. |
| AWACS | Airborne Warning and Control System. |
| BENEDICT | BENEDICT ON ADMIRALTY (7th ed. rev., Frank L. Wiswall, Jr., ed. 1999), volumes 6-6F. |
| BEVANS | CHARLES I. BEVANS, Treaties and Other International Agreements of the United States of America 1776–1949 (13 v. 1968-76). |
| BFSP | British Foreign & State Papers. |
| BIRNIE & BOYLE | PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT (1994). |
| BOTHE *et al.* | MICHAEL BOTHE *et al.*, NEW RULES FOR VICTIMS OF ARMED CONFLICT (1982). |
| BOWETT, SELF-DEFENCE | D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (1958). |
| BOWMAN & HARRIS | M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS (1984; 11th Cum. Supp. 1995). |
| BRIERLY | J.B. BRIERLY, THE LAW OF NATIONS (Humphrey Waldock ed., 6th ed. 1963). |
| BROWN | E.D. BROWN, THE INTERNATIONAL LAW OF THE SEA (2 v. 1994). Volume 1 supplies analysis; volume 2 reprints documents; unless otherwise indicated, citation to BROWN refers to volume 1. |

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| BROWNLIE, INTERNATIONAL LAW | IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990). |
| BROWNLIE, USE OF FORCE | IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963). |
| BSFHV | Bochumer Schriften zur Friedenssicherung und zum Humanitaren Volkerrecht. |
| Bulletin | Department of State Bulletin. |
| BYBIL | BRITISH YEARBOOK OF INTERNATIONAL LAW. |
| CABLE | JAMES CABLE, GUNBOAT DIPLOMACY 1919-1991 (3d ed. 1994). |
| CENTCOM | US Central Command. |
| CFR | Code of Federal Regulations. |
| CHUBIN & TRIPP | SHAHRAM CHUBIN & CHARLES TRIPP, IRAN AND IRAQ AT WAR (1988). |
| 1969 Civil Liability Convention | Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 UNTS 3, supplemented by Protocol, Nov. 19, 1976, *in* 16 ILM 617 (1977). |
| COLL & AREND | ALBERTO R. COLL & ANTHONY C. AREND, THE FALKLANDS WAR: LESSONS FOR STRATEGY, DIPLOMACY AND INTERNATIONAL LAW (1988). |
| COLOMBOS | C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA (6th rev. ed. 1967). |
| COLREGS | Collision Regulations, the short form of rules of the nautical road found in treaties like, *e.g.,* Regulations for Preventing Collisions at Sea, July 15, 1972, 28 UST 3459, 1050 UNTS 16. |
| Continental Shelf Convention | Convention on the Continental Shelf. Apr. 29, 1958, 15 UST 471, 499 UNTS 311. |
| Convention on Maritime Neutrality | Convention on Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, 135 LNTS 187. |
| Conventional Weapons Convention | Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed Excessivily Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, TIAS ——, 1342 UNTS 137. |

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| 2 CORDESMAN & WAGNER | 2 ANTHONY H. CORDESMAN & ABRAHAM R. WAGNER, THE LESSONS OF MODERN WAR (1990). |
| 3 CORDESMAN & WAGNER | 3 ANTHONY H. CORDESMAN & ABRAHAM R. WAGNER, THE LESSONS OF MODERN WAR (1990). |
| Covenant on Civil & Political Rights | International Covenant on Civil & Political Rights, Dec. 16, 1966, TIAS ——, 999 UNTS 1. |
| Covenant on Economic, Social & Cultural Rights | International Covenant on Economic, Social & Cultural Rights, Dec. 16, 1966, 993 UNTS 3. |
| CTS | Consolidated Treaty Series, publishing treaties between 1648 and 1920, the start of LNTS. |
| Cultural Property Convention | Convention for Protection of Cultural Property in Event of Armed Conflict & Protocol, May 14, 1954, 249 UNTS 215. |
| CYBIL | CANADIAN YEARBOOK OF INTERNATIONAL LAW. |
| DE GUTTRY & RONZITTI | ANDREA DE GUTTRY & NATALINO RONZITTI, THE IRAN-IRAQ WAR (1980-1988) AND THE LAW OF NAVAL WARFARE (1993). |
| Definition of Aggression | Definition of Aggression, G.A. Res. 3314, UN GAOR, 29th Sess., UN Doc. A/Res/3314 (1974). Because of a reprint error in the Resolution, art.3(d), 69 AJIL 480, 482, reprint citation is to the draft version in UN General Assembly Special Committee on the Question of Defining Aggression, *Report of the Working Group*, UN Doc. A/AC.134/L.46 (1974), *in* 13 ILM 710 (1974). |
| DEKKER & POST | IGE F. DEKKER & HARRY H.G. POST, THE GULF WAR OF 1980-88 (1992). |
| DIGEST | DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW; published since the annual volume for 1973; successor to WHITEMAN. Year covered precedes citation. The rule for citing this digest has not been followed with particularity.[42] |

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| DINSTEIN | YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (2d ed. 1988). |
| Dispatch | US Department of State Dispatch. |
| 1972 Dumping Convention | Convention on Prevention of Marine Pollution by Dumping of Wastes & Other Matter, Dec. 29, 1972, 26 UST 2403, 1046 UNTS 120. |
| ENMOD Convention | Convention on Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 UST 333, 1108 UNTS 152. |
| ENVIRONMENTAL PROTECTION | GLEN PLANT, ENVIRONMENTAL PROTECTION AND THE LAW OF WAR: A "FIFTH" GENEVA CONVENTION ON THE PROTECTION OF THE ENVIRONMENT IN TIME OF ARMED CONFLICT (1992). |
| First Convention | Convention for the Amelioration of the Condition of Wounded & Sick in Armed Forces in the Field, Aug.12, 1949, 6 UST 3114, 75 UNTS 31. |
| Fishery Convention | Convention on Fishing & Conservation of Living Resources of the High Seas, Apr. 29, 1958, 17 UST 138, 559 UNTS 285. |
| FON | Freedom of navigation, an acronym used in naval operations. |
| Fourth Convention | Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287. |
| Fragments Protocol | Protocol on Non-detectable Fragments (Protocol I), Oct. 10, 1980, TIAS ——, 1342 UNTS 168. |
| FRANKLIN | CARL M. FRANKLIN, THE LAW OF THE SEA: SOME RECENT DEVELOPMENTS (NAV. WAR C. INT'L L. STUD., v. 53, 1961). |
| FRG | Federal Republic of Germany, now part of Germany; *see* Walker, *Integration and Disintegration* 8-9. |

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| Friendly Relations Declaration | Declaration on Principles of International Law Concerning Friendly Relations & Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28 , UN Doc. A/8028 (1970), *in* 9 ILM 1292 (1970). |
| FRUS | FOREIGN RELATIONS OF THE UNITED STATES (preceded by year number and volume number bracketed if more than one was issued for that year; publication dates omitted). |
| 1971 Fund Convention | Convention on Establishment of an International Fund for Compensation for Oil Pollution Damage, 1110 UNTS 57. |
| G.A. Res. | UN General Assembly Resolution, for which UN Document numbers have been generally omitted. Resolutions have been cross-referenced to reprint sources, *e.g.*, ILM. |
| GCC | Gulf Cooperation Council, formed in 1981 by Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE. |
| Geneva Gas Protocol | Protocol for Prohibition of Use in War of Asphyxiating, Poisonous or Other Gases, & of Bacteriological Methods of Warfare, June 17, 1925, 94 LNTS 65, with US no-first-use reservation, Dec. 16, 1974, 26 UST 571-72. |
| GILMORE & BLACK | GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY (2d ed. 1975). |
| GOODRICH *et al.* | LELAND F. GOODRICH *et al.*, CHARTER OF THE UNITED NATIONS (3d ed. 1969). |
| GREEN | L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (1993). |
| Grunawalt | TARGETING ENEMY MERCHANT SHIPPING (NAV.WAR C. INT'L L. STUD., v. 65, Richard J. Grunawalt ed. 1993). |
| HACKWORTH | GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW (7 v. 1940-43). The rule for citing digests has not been followed with particularity.[43] |

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| 1899 Hague II | Hague Convention (II) with Respect to Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803. |
| 1899 Hague III | Hague Convention (III) for Adaptation to Maritime Warfare of Principles of the Geneva Convention of 22 August 1864, 32 Stat. 1827. |
| Hague II | Hague Convention (II) Respecting Limitation of Employment of Force for Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241. |
| Hague III | Hague Convention (III) Relative to Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259. |
| Hague IV | Hague Convention (IV) Respecting Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227. |
| Hague V | Hague Convention (V) Respecting Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310. |
| Hague VI | Hague Convention (VI) Relating to Status of Enemy Merchant Ships at Outbreak of Hostilities, Oct. 18, 1907, 205 CTS 305, SCHINDLER & TOMAN 791. |
| Hague VII | Hague Convention (VII) Relating to Conversion of Merchant Ships into War-Ships, Oct. 18, 1907, 205 CTS 319, SCHINDLER & TOMAN 797. |
| Hague VIII | Hague Convention (VIII) Relative to Laying Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332. |
| Hague IX | Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351. |
| Hague X | Hague Convention (X) for Adaptation to Maritime Warfare of Principles of the Geneva Convention, 36 Stat. 2371. |
| Hague XI | Hague Convention (XI) Relative to Certain Restrictions with Regard to Exercise of the Right of Capture in Naval War, Oct. 18 1907, 36 Stat. 2396. |

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| Hague XIII | Hague Convention (XIII) Concerning Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415. |
| Hague Air Rules | Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare, Hague Rules for Air Warfare, Feb. 19,1923, *in* SCHINDLER & TOMAN 207. |
| Hague Radio Rules | Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare, Hague Rules for Control of Radio in Time of War, Feb. 19, 1923, *in* LAW OF NAVAL WARFARE 367. |
| Harvard Draft Convention on Agression | Harvard Draft Convention on Rights & Duties of States in Case of Aggression, 1939, 33 AJIL 819 (Supp. 1939). |
| Harvard Draft Convention on Naval & Aerial War | Harvard Draft Convention on Rights and Duties of Neutral States in Naval & Aerial War, 1939, 33 AJIL 16 (Supp. 1939). |
| 1 von Heinegg | Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law*, 29 CYBIL 283 (1991). |
| 2 von Heinegg | Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part II, Developments Since 1945*, 30 CYBIL 89 (1992). |
| Helsinki Accords | Conference on Security & Co-Operation in Europe, Final Act, Aug. 1, 1975, *in* 14 ILM 1292 (1975). |
| Helsinki Principles | International Law Association Committee on Maritime Neutrality, *Final Report: Helsinki Principles on Maritime Neutrality, in* International Law Association, Report of the Sixty-Eighth Conference Held at Taipei, Taiwan, Republic of China 24-30 May 1998, at 496 (1998). |
| High Seas Convention | Convention on the High Seas, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82. |
| HIRO | DILIP HIRO, THE LONGEST WAR: THE IRAN-IRAQ MILITARY CONFLICT (1991). |

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| HYDE | 1-3 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (3d ed. 1945-47). |
| ICAO Convention | Convention on International Civil Aviation (Chicago Convention), Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295; *see also* Protocol on Authentic Trilingual Text of Convention on International Civil Aviation with Annex, Sept. 24, 1968, 19 UST 7693, 740 UNTS 21;Proces-verbal of Rectification to Protocol, 20 *id.* 718; there are numerous amendments and protocols to the ICAO Convention, most of which are not relevant to this analysis, and many of which are not in force for some or all States. *See* BOWMAN & HARRIS 110-11; *id.* 168 (Cum. Supp. 1995); TIF 380-81. |
| ICJ | International Court of Justice (the "World Court," successor to the PCIJ in 1945); abbreviation for reports of its decisions. |
| ICLQ | International & Comparative Law Quarterly. |
| ICO | Islamic Conference Organization, created by Charter of the Islamic Conference Organization, Feb. 28, 1973, 914 UNTS 111. |
| ICRC | International Committee of the Red Cross. |
| ILA | International Law Association |
| ILM | International Legal Materials. |
| ILR | International Law Reports. |
| IMCO | International Maritime Consultative Organization, later renamed International Maritime Organization (IMO). |
| IMO | International Maritime Organization, formerly International Maritime Consultative Organization (IMCO). |
| Incendiary Weapons Protocol | Protocol on Prohibitions or Restrictions on Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, 1342 UNTS 171. |

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| INCSEA | Acronym for agreements between States to regulate navigation and other behavior of their warships, State aircraft and other platforms. *See, e.g.*, INCSEA Agreement & INCSEA Protocol. |
| INCSEA Agreement | Agreement on Prevention of Incidents On and Over the High Seas, May 25, 1972, USSR-US, 23 UST 1168, 852 UNTS 151. |
| INCSEA Protocol | Protocol to Agreement of May 25, 1972 on Prevention of Incidents On and Over the High Seas, May 22, 1973, USSR-US, 24 UST 1063. |
| 1917 Instructions | US Department of the Navy, Instructions Governing Maritime Warfare: June 1917 (1918). |
| 1969 Intervention Convention | Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 UST 765, 970 UNTS 211. |
| Intervention Protocol | Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil, Nov. 2, 1973, TIAS 10561, 13 ILM 605 (1974). |
| Joyner | THE PERSIAN GULF WAR: LESSONS FOR STRATEGY, LAW, AND DIPLOMACY (Christopher C. Joyner ed. 1990). |
| KARSH | EFRAIM KARSH, THE IRAN-IRAQ WAR: IMPACT AND IMPLICATIONS (1989). |
| KEESING | KEESING'S CONTEMPORARY ARCHIVES. |
| KEY RESOLUTIONS | DIETRICH RAUSCHNING *et al.*, KEY RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY 1946-1996 (1997). |
| LAW OF NAVAL WARFARE | NATALINO RONZITTI, THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES (1987). |
| LEVIE, CODE | 1-2 HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT (1986). |
| LIBER AMICORUM | THE LAW OF MILITARY OPERATIONS: LIBER AMICORUM PROFESSOR JACK GRUNAWALT (NAV. WAR C. INT'L L. STUD., v. 72, Michael N. Schmitt ed. 1998). |

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| Lieber Code | United States, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863), *in* SCHINDLER & TOMAN 3. |
| LNTS | League of Nations Treaty Series. |
| LOAC | Law of armed conflict, synonymous with law of war (LOW). |
| London Declaration | Declaration Concerning Laws of Naval War, Feb. 26, 1909, 208 CTS 338, *in* SCHINDLER & TOMAN 843, 3 AJIL SUPP. 179 (1909). |
| 1930 London Naval Treaty | Treaty for Limitation and Reduction of Naval Armaments, Apr. 22, 1930, 46 Stat. 2858, 112 LNTS 65. |
| 1936 London Naval Treaty | Treaty on Limitation of Naval Armaments, Mar. 25, 1936, 50 Stat. 1363, 184 LNTS 115. |
| London Protocol | Proces-Verbal Relating to Rules of Submarine Warfare Set Forth in Part IV of Treaty of London of 22 April 1930 [arts. 22-23, 46 Stat. 2858, 2881-82, 112 LNTS 65, 88], Nov. 6, 1936, 3 BEVANS 298, 173 LNTS 353. |
| LONW | Law of naval warfare, a component of the LOAC or LOW. |
| LOS | Law of the Sea. |
| 1958 LOS Conventions | Territorial Sea Convention; Continental Shelf Convention; High Seas Convention; Fishery Convention. |
| LOS Convention | UN Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 3, 397. |
| LOW | Law of war, synonymous with law of armed conflict (LOAC). |
| MACCHESNEY | BRUNSON MACCHESNEY, SITUATION, DOCUMENTS AND COMMENTARIES ON RECENT DEVELOPMENTS IN THE LAW OF THE SEA (NAV. WAR. C. INT'L STUD., v. 51 1957). |

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| MACDONALD | CHARLES G. MACDONALD, IRAN, SAUDI ARABIA AND THE LAW OF THE SEA: POLITICAL INTERACTION AND LEGAL DEVELOPMENT IN THE PERSIAN GULF (1980). |
| MALLISON | W. THOMAS MALLISON, SUBMARINES IN GENERAL AND LIMITED WARS (NAV. WAR C. INT'L L. STUD., v. 58, 1968). |
| MARPOL 73/78 | Protocol of 1978 Relating to Convention for Prevention of Pollution from Ships, 1973, Feb. 17, 1978, 2 WALLACE 1916, TIAS incorporating by reference Convention for Prevention of Pollution from Ships, Nov. 2, 1973, *id.* 1834, 12 ILM 1319 (1973). |
| Matheson, *Remarks* | Michael J. Matheson, *Remarks,* in *Session One: The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the Geneva Conventions,* in Symposium, *The Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions,* 2 Am. U.J. Int'l L. 419 (1987). |
| MCDOUGAL & BURKE | MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA (1962). |
| MCDOUGAL & FELICIANO | MYRES S. MCDOUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961). |
| MCDOUGAL, LASSWELL & CHEN | MYRES S. MCDOUGAL, HAROLD LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND MINIMUM WORLD PUBLIC ORDER (1980). |
| MCNAIR | LORD MCNAIR, THE LAW OF TREATIES (2d ed. 1961). |
| MCRM | US Department of Defense, Maritime Claims Reference Manual: DOD Publication 2005.1M (1987). |

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| Mine Protocol | Protocol on Prohibitions or Restrictions on Use of Mines, Booby Traps & Other Devices (Protocol II), Oct. 10, 1980, TIAS ——, 1342 UNTS 168, as amended, May 3, 1995, 35 ILM 1206 (1996). |
| MOORE | JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW (8 v. 1906). The rule for citing digests has not been followed with particularity.[44] |
| MOORE, ARBITRATIONS | JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, TOGETHER WITH APPENDICES CONTAINING THE TREATIES RELATING TO SUCH ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES (6 v. 1898). |
| Naff, GULF SECURITY | GULF SECURITY AND THE IRAN-IRAQ WAR (Thomas Naff ed. 1985). |
| NAFF, THE IRAN-IRAQ WAR | THOMAS NAFF, THE IRAN-IRAQ WAR: IMPLICATIONS FOR US POLICY (1985). |
| NATO | North Atlantic Treaty Organization. |
| 1900 Naval War Code | US Naval War Code of 1900, *in* NAVAL WAR COLLEGE, INTERNATIONAL LAW DISCUSSIONS, 1903 (1904). |
| NAVIS & HOOTEN | MARTIN S. NAVIS & E.R. HOOTEN, TANKER WARS: THE ASSAULT ON MERCHANT SHIPPING DURING THE IRAN-IRAQ CRISIS, 1980-1988 (1996). |
| Nicaragua Case | Military & Paramilitary Activities in & Against Nicaragua (Nicar. v. US), 1986 ICJ 14. |
| nm or NM | Nautical mile(s). |
| Nordquist | This multivolume series, edited by Myron H. Nordquist, has different authors or editors; volume numbers precede abbreviated citations:<br><br>1 Myron H. Nordquist, United Nations Convention on the Law of the Sea 1982: A Commentary (1985). |

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| | 2 Myron H. Nordquist, United Nations Convention on the Law of the Sea 1982: A Commentary (Satya N. Nandan *et al.* ed. 1993). |
| | 3 Satya N. Nandan & Shabtai Rosenne, United Nations Convention on the Law of the Sea 1982: A Commentary (Myron H. Nordquist ed. 1995). |
| | 4 Myron H. Nordquist *et al.*, United Nations Convention on the Law of the Sea: A Commentary (1991). |
| | 5 Myron H. Nordquist, United Nations Convention on the Law of the Sea: A Commentary (Shabtai Rosenne & Louis B. Sohn eds. 1989). |
| NOTAM | Notice to Airmen. |
| NOTMAR | Notice to Mariners. |
| NWC REV. | NAVAL WAR COLLEGE REVIEW. Review articles analyzing international law issues have been reprinted in READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1947-1977 (NAV. WAR C. INT'L L. STUD., v. 61 & 62, Richard B. Lillich & John Norton Moore ed. 1980) and READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1978-1994 (NAV. WAR C. INT'L L. STUD., v. 68, John Norton Moore & Robert F. Turner ed. 1994). Parallel citations to these volumes have not been added in chapters that follow. Articles on international law published after 1994 and articles dealing with other topics, *e.g.*, military operations, are not included in the INTERNATIONAL LAW STUDIES reprints, and resort to the Review is necessary. |
| NWIP | Naval Warfare Information Publication. |
| NWIP 10-2 | US Department of the Navy, Law of Naval Warfare: NWIP 10-2 (1955 through Change 6, 1974). |
| NWP | Naval Warfare Publication. |

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| NWP 1-14M | US Department of the Navy, The Commander's Handbook on the Law of Naval Operations: NWP 1-14M/MCWP 5-2.1/COMDT PUB P5800.1 (1995). |
| NWP 1-14M Annotated | Naval War College Oceans Law and Policy Department, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations: NWP 1-14M/MCWP 5-2.1/COMDT PUB P5800.1 (1997). |
| NWP 9 | US Department of the Navy, The Commander's Handbook on the Law of Naval Operations, NWP 9 (1987). |
| NWP 9A Annotated | US Department of the Navy, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations: NWP 9 (Rev. A)/FMFM 1-10 (1989). |
| Nyon Arrangement | Nyon Arrangement, Sept. 14, 1937, 181 LNTS 137. |
| Nyon Supplementary Agreement | Agreement Supplementary to the Nyon Arrangement, Sept. 17, 1937, 181 LNTS 151. |
| OAU | Organization of African Unity, created by Charter of Organization of African Unity, May 25, 1963, 479 UNTS 39. |
| O'CONNELL, INFLUENCE OF LAW | D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER (1975). |
| O'CONNELL, LAW OF THE SEA | D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA (Ivan A. Shearer ed.; v. 1, 1982; v. 2, 1984). |
| ODIL | Ocean Development & International Law. |
| 1954 Oil Pollution Convention | Convention for Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 UST 2989, 327 UNTS 3; amendments, Apr. 11, 1962, 17 *id.* 1523, 600 UNTS 332; Oct. 21, 1969, 28 *id.* 1205. |
| 1962 Oil Pollution Convention Amendments | 1962 Amendments to 1954 Convention for Prevention of Pollution of the Sea by Oil, Apr. 11, 1962, 17 UST 1523, 600 UNTS 332. |
| OPEC | Organization of Petroleum Exporting Countries. |

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| OPPENHEIM | This multivolume series has different editors; volume numbers precede abbreviated citations: |
| | 1 OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 8th ed. 1992). |
| | 2 LASSA OPPENHEIM, INTERNATIONAL LAW (Hersch Lauterpacht ed., 7th ed. 1952). |
| 1 OPPENHEIM (1955) | 1 LASSA OPPENHEIM, INTERNATIONAL LAW (Hersch Lauterpacht ed. 1955). |
| 1880 OXFORD MANUAL | INSTITUTE OF INTERNATIONAL LAW, THE LAWS OF WAR ON LAND (1880), *in* SCHINDLER & TOMAN 35. |
| OXFORD NAVAL MANUAL | INSTITUTE OF INTERNATIONAL LAW, THE LAWS OF NAVAL WAR GOVERNING THE RELATIONS BETWEEN BELLIGERENTS: OXFORD MANUAL ON NAVAL WARFARE (Aug. 9, 1913), *in* SCHINDLER & TOMAN 857. |
| Paris Declaration | Declaration Respecting Maritime Law, Apr. 16, 1856, 115 CTS 1. |
| PCIJ | Permanent Court of International Justice (the "World Court," 1920-45, succeeded by the ICJ). |
| PICTET | 1-4 JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1952-60). |
| PILLOUD, COMMENTARY | CLAUD PILLOUD, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yvez Sandoz *et al.* ed. 1987). |
| 1973 Pollution Convention | Convention for Prevention of Pollution from Ships, 1973, 12 ILM 1319 (1973). |
| PRC | People's Republic of China. |
| PROCEEDINGS | U.S. NAVAL INSTITUTE PROCEEDINGS. |
| PROTECTION OF THE ENVIRONMENT | PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT (NAV. WAR C. INT'L L. STUD., v. 69, Richard J. Grunawalt, *et al.* ed. 1996). |

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| Protocol I | Protocol Additional to Geneva Conventions of 12 August 1949, & Relating to Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3. |
| Protocol II | Protocol Additional to Geneva Conventions of 12 August 1949, & Relating to Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 UNTS 609. |
| Public Papers | Public Papers of the Presidents of the United States (volume number precedes, and president's surname and document year follow, abbreviated citation). |
| Rajaee, IRANIAN PERSPECTIVES | IRANIAN PERSPECTIVES ON THE IRAN-IRAQ WAR (Farhang Rajaee ed. 1997). |
| Rajaee, IRAN-IRAQ WAR | THE IRAN-IRAQ WAR: THE POLITICS OF AGGRESSION (Farhang Rajaee ed. 1993). |
| RCADI | Academie de Droit International De La Haye, Recueil des Cours. |
| RDJTF | Rapid Deployment Joint Task Force, later folded into CENTCOM.[45] |
| RESTATEMENT (SECOND) | RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965). |
| RESTATEMENT (THIRD) | RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). |
| ROACH & SMITH | J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996). |
| Robertson | THE LAW OF NAVAL OPERATIONS (NAV. WAR C. INT'L L. STUD., v. 64, Horace B. Robertson, Jr. ed. 1991). |
| Robertson, New LOS | Horace B. Robertson, Jr., "The New" Law of the Sea and the Law of Armed Conflict at Sea (Nav. War C. Newport Paper No. 3, Oct.1992), *in* READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1978-1994, ch. 19 (NAV. WAR C. INT'L L. STUD., v. 68, John Norton Moore & Robert F. Turner eds. |

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| | 1995). Page citations refer to the INTERNATIONAL LAW STUDIES version. |
| ROE | Rules of Engagement. |
| Roerich Pact | Treaty on Protection of Artistic & Scientific Institutions & Historical Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 LNTS 289. |
| Ronzitti, *The Crisis* | Natalino Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for its Revision, in* LAW OF NAVAL WARFARE 1. |
| S.C. Res | UN Security Council Resolution, for which UN Document numbers have been omitted. For recent resolutions, document numbers have been S/RES/[Resolution number], followed by date. Resolutions have been cross-referenced to ILM or WELLENS where published there. |
| SAN REMO MANUAL | GROUP OF INTERNATIONAL LAWYERS & NAVAL EXPERTS, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed. 1995). |
| SCHINDLER & TOMAN | DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (3d ed. 1988). |
| SCHOENBAUM | THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW (2d ed. 1994). |
| SCHWARZENBERGER | 1 & 2 GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW (5th ed. 1967). |
| Seabed Arms Control Treaty | Treaty on Prohibition of Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 UST 701, 955 UNTS 115. |
| Second Convention | Convention for Amelioration of Wounded, Sick & Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85. |

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| Second Protocol | Second Protocol to Hague Convention of 1954 for Protection of Cultural Property in Event of Armed Conflict, Mar. 26, 1999, 38 ILM 769 (1999). |
| Second Report | UK Foreign Affairs Committee, Second Report: Current UK Policy Towards the Iran/Iraq Conflict, June 1988, *in* DE GUTTRY & RONZITTI 291. |
| SIMMA | BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (1994). |
| SINCLAIR | IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2d ed.1984). |
| SOLAS | Safety of Life at Sea, the short form for safety regulations published in treaties like, *e.g.*, Convention for Safety of Life at Sea, Nov. 1, 1974, 32 UST 47. |
| 1960 SOLAS | Convention for Safety of Life at Sea, June 17, 1960, 16 UST 185, 536 UNTS 27. |
| 1974 SOLAS | Convention for Safety of Life at Sea, Nov. 1, 1974, 32 UST 47. |
| Stockholm Declaration | Stockholm Declaration Regarding Similar Rules of Neutrality, May 27, 1938, 188 LNTS 294, a series of rules among Denmark, Finland, Iceland, Norway and Sweden restating principles of maritime neutrality as they applied to these States. In most cases the five agreements are identical and will be cited as one. If there are significant differences among them, this will be noted in the analysis. |
| STONE | JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT (1959). |
| SWARZTRAUBER | SAYRE A. SWARZTRAUBER, THE THREE-MILE LIMIT OF TERRITORIAL SEAS (1972). |
| Symposium, *State Succession* | Symposium, *State Succession in the Former Soviet Union and in Eastern Europe,* 33 VJIL 253 (1993). |
| 1941 Tentative Instructions | US Department of the Navy, Tentative Instructions Governing Maritime and Aerial Warfare (May 1941). |

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| 1943 Tentative Instructions | US Department of the Navy, Tentative Instructions Governing Maritime and Aerial Warfare (May 1944); *id.*, cover, n.1 indicates US Secretary of the Navy correspondence modified some provisions of 1941 Tentative Instructions in 1942 and 1943, hence the abbreviated title. |
| Territorial Sea Convention | Convention on the Territorial Sea & Contiguous Zone, Apr. 29, 1958, 15 UST 1606, 516 UNTS 205. |
| Third Convention | Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135. |
| TIAS | Treaties and other International Agreements Series of the United States, followed by number; cited when UST citation is not available; TIAS followed by a blank space indicates that the TIAS number has not been published but that the United States is a party to the treaty. |
| TIF | US Department of State, Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1998 (1998). Other volumes are cited as, *e.g.*,1990 TIF. |
| TOMAN | JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (1996). |
| Transit Trade Convention | Convention on Transit Trade of Land-Locked States, July 8, 1965, 19 UST 7383, 597 UNTS 42. |
| TUCKER | ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA (NAV. WAR C. INT'L L. STUD., v. 50, 1955). |
| TWC | 1-15 Tr. War Crim. Before Nuremberg Milit. Trib. Under Control Council L. No. 10: Nuremberg, Oct. 1946 - Apr. 1949 (1949-53). |
| UAE | United Arab Emirates. |
| UFP Resolution | Uniting for Peace Resolution, G.A. Res. 377, UN GAOR, 5th Sess., UN Doc. A/1471 (1950), *in* 45 AJIL Supp. 1 (1951). |

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| UN | United Nations, when appearing as an adjective. |
| 1999 UN Treaties | United Nations, Multilateral Treaties Deposited with the Secretary-General, Status as at 30 April 1999, UN Doc. ST/LEG/SER.E/17, UN Sales No. E.99.V.5 (1999). |
| UNCIO | United Nations Conference on International Organization, Documents (22 v. 1945). |
| UNCLOS III | Third United Nations Conference on the Law of the Sea. |
| UNTS | United Nations Treaty Series. |
| US | United States, when appearing as an adjective. |
| USC | United States Code. |
| UST | United States Treaties and Other International Agreements. UST preceded and followed by blank spaces indicates the treaty has not been published in UST, but that the United States is a party. |
| Vienna Convention | Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331. |
| VJIL | VIRGINIA JOURNAL OF INTERNATIONAL LAW. |
| Walker, *Crisis Over Kuwait* | George K. Walker, *The Crisis Over Kuwait, August 1990-February 1991,* 1991 DUKE J. COMP. & INT'L L. 25. |
| Walker, *Integration and Disintegration* | George K. Walker, *Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent,* 6 TRANSNAT'L LAW. 1 (1993). |
| Walker, *Interface* | George K. Walker, *The Interface of Criminal Jurisdiction and Actions under the United Nations Charter with Admiralty Law,* 20 TULANE MAR. L.J. 217 (1996). |
| Walker, *Oceans Law* | George K. Walker, *Oceans Law, the Maritime Environment and the Law of Naval Warfare, in* PROTECTION OF THE ENVIRONMENT at 185-221. |

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| Walker, *Sources* | George K. Walker, *The Sources of International Law and the Restatement (Third), Foreign Relations Law of the United States*, 37 NAV. L. REV. 1 (1988). |
| Walker, *State Practice* | George K. Walker, *State Practice following World War II: 1945-1990, in* Grunawalt 121. |
| WALLACE | 1-3 RICHARD L. WALLACE, THE MARINE MAMMAL COMMISSION COMPENDIUM OF SELECTED TREATIES, INTERNATIONAL AGREEMENTS, AND OTHER RELEVANT DOCUMENTS ON MARINE RESOURCES, WILDLIFE, AND THE ENVIRONMENT (1994). |
| Washington Naval Treaty | Treaty Relating to Use of Submarines and Noxious Gases inWarfare, Feb. 6, 1922, *in* SCHINDLER & TOMAN 877. |
| WELLENS | KAREL C. WELLENS, RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY COUNCIL (1946-1992): A THEMATIC GUIDE (2d ed.1993). |
| WEU | Western European Union. |
| WHITEMAN | MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW (15 v. 1963-73). The rule for citing digests has not been followed with particularity.[46] |
| WIKTOR | CHRISTIAN L. WIKTOR, UNPERFECTED TREATIES TO WHICH THE UNITED STATES IS PARTY ( 9 v. 1976-94). |

## Part E. A Note for Readers and Reviewers

As stated in the *Foreword,* this book represents the views of the author and does not necessarily represent the position of the Naval War College, the Department of the Navy, the Department of Defense, or any other department of the US Government.

Comments, correspondence and reviews are welcome. If the book is the subject of a published review, or if those who comment desire to do so, copies of comments or correspondence may be sent to:

Chairman, Oceans Law and Policy Department
Center for Naval Warfare Studies
Naval War College
686 Cushing Road
Newport, R.I. 02841-1207 U.S.A.

Facsimile correspondence may be sent to 401-841-3989, and E-mail may be sent to (lautierv@nwc.navy.mil). Another copy of published reviews, comments or correspondence should be sent to the author, whose current facsimile number is 336-758-4496, or by mail.

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## NOTES

1. Cited in this book as DE GUTTRY & RONZITTI; *see* Part D.

2. Cited in this book as NAVIS & HOOTEN; *see* Part D.

3. Although occasional media articles are cited, primary reliance has been placed on digests such as FACTS ON FILE AND KEESING'S CONTEMPORARY ARCHIVES.

4. *E.g.*, the *America and the World* section of FOREIGN AFFAIRS. *See* n. II.2.

5. HIRO (1991) is among the earlier accounts; *see also e.g.*, 2 & 3 CORDESMAN & WAGNER; DEKKER & POST; KARSH; NAFF, GULF SECURITY.

6. *I.e.*, First-Fourth Conventions. *See* Part D.

7. *See* n. III.622 and accompanying text.

8. *See* n. III.627 and accompanying text.

9. *See* nn. VI.403, 541-42 and accompanying text.

10. *See* Part V.A.

11. Cited in this book as LOS Convention; *see* Part D.

12. *See* n. IV.3 and accompanying text.

13. *Id.*

14. Cited as RESTATEMENT (THIRD) and RESTATEMENT (SECOND) respectively; *see* Part D.

15. Cited in this book as NWP 9; *see* Part D.

16. *See also* n. VI.595 and accompanying text.

17. *E.g.*, BOTHE *et al.*, analyzing Protocol I.

18. 1-4 PICTET; *see also* Part D.

19. *See* Part A.

20. These include: Walker, *Crisis Over Kuwait;* Walker, *Integration and Disintegration;* Walker, *Interface;* Walker, *Maritime Neutrality;* Walker, *Oceans Law;* Walker, *Sources;* Walker, *State Practice;* and Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations,* 29 WAKE FOREST L. REV. 435 (1994).

21. JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS, No. 17 (1624) (*"no man is an island, entire of itself; every man is a piece of the continent, a part of the main."*)

22. Mark Twain is reported to have said that when he was a boy of 14, his father was so ignorant he could hardly stand to have the old man around. But when he got to be 21, he was astonished at how much the old man had learned in seven years. *See also* Jerry Romansky, *Search for Twain Books on Adventure,* DUBUQUE TELEGRAPH HERALD, Dec. 19, 1999, at E13.

23. ANNE FREEMAN, THE STYLE OF A LAW FIRM: EIGHT GENTLEMEN FROM VIRGINIA 144-90 (1989) ably tells the story of what Hunton, Williams, Gay, Powell & Gibson was like in those days. The firm name changed with death of partners and appointment of Lewis F. Powell, Jr. as Associate Justice of the Supreme Court of the United States. My first memorandum as an associate in the firm was written to him.

24. Jack has been justly honored by publication of LIBER AMICORUM, volume 72 in the International Law Studies series.

25. The universal maritime flag code (BZ) for "well done."

26. *See* n. 21 and accompanying text.

27. PHILLIP KNIGHTLEY, THE FIRST CASUALTY—FROM THE CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST, AND MYTH MAKER 17 (1975)

28. Towne v. Eisner, 245 US 418, 425 (1918).

29. New York Trust Co. v. Eisner, 256 US 345, 349 (1921).

30. *E.g.*, MCDOUGAL, LASSWELL & CHEN 167-84, 368-74. One example from the Gulf War is Reza Ra'iss Tousi, *Containment and Animosity: the United States and the War, in* RAJAEE, IRANIAN PERSPECTIVES 49: "... I contend that the United States followed a conscious policy to contain or destroy the [Islamic] revolution [in Iran], encouraging Iraq to impose a war on the newly formed revolutionary government." It is highly doubtful if this is true as to all US actions during the 1980-88 Iran-Iraq war. Unfortunately, not all sources that report, comment upon, or analyze facts, history, policies or law applicable to this war are as candid. While I do not agree with Tousi on his thesis, I commend his candor.

31. RESTATEMENT (THIRD) § 312 r.n.5.

32. I refer to the principle of the persistent objector. *See generally* BROWNLIE, INTERNATIONAL LAW 10; 1 OPPENHEIM § 10, at 29; RESTATEMENT (THIRD) § 102 cmts. b, d; Michael Akehurst, *Custom as a Source of Law*, BYBIL 1, 23-27 (1974); C.H.M. Waldock, *General Course on Public International Law*, 106 RCADI 1, 49-53 (1962); *but see* Jonathan Charney, *Universal International Law*, 87 AJIL 529, 538-41 (1993) (existence of persistent objector rule open to serious doubt). ROACH & SMITH'S exhaustive study of US objections to LOS claims indicates that the persistent objector rule is alive and well, at least for LOS issues. Undoubtedly there are thousands of protests filed annually on many issues in chancelleries, few if any of which are published. It cannot therefore be assumed, as some commentators do, that the rule of the persistent objector is in desuetude.

33. This is a familiar problem for US lawyers. Since their beginning the FEDERAL RULES DECISIONS and FEDERAL SUPPLEMENT series have selectively published US District Court cases, relying on judges or counsel to submit what they consider more important opinions. Recently the FEDERAL REPORTER and reports of state appellate courts have published only the more significant opinions, usually determined by the courts pursuant to their rules. It is therefore always hazardous to declare what is custom, based on a nose count of nations and what may be said in the national digests, even as it has become ever more difficult to determine the "majority rule" among courts. That is probably a reason why international law has traditionally relied on factorial approaches, *e.g.*, ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03.

34. *Cf.* Alfred, Lord Tennyson, *Ulysses, in* G. ROBERT STANGE, THE POETICAL WORKS OF TENNYSON 88 (1974) ("I am part of all that I have met; Yet all experience is an arch wherethro' Gleams that untravell'd world whose margin fades For ever and for ever when I move.").

35. I again acknowledge my intellectual debt to the law-science-policy (LSP) comprehensive analysis, although this book follows a more conventional approach. For discussion of LSP, *see, e.g.*, Myres S. McDougal *et al.*, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VJIL 188 (1968); John Norton Moore, *Prolegomenon to the Jurisprudence of Myres S. McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968); Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUD. WORLD PUB. ORD. 1 (1974); George K. Walker, *Sea Power and the Law of the Sea: The Need for a Contextual Approach*, 7 ODIL 299 (1979).

36. Editors of COLUMBIA LAW REVIEW *et al.*, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (16th ed. 1996).

37. *See id.*, Rule 17.1.3.

38. *See id.*, Rules 20.1(a), 20.4.

39. *Cf. id.*, Rule 4.2.

40. *See id.*, Rule 1.6(b).

41. *See id.*, Rule 2.1.
42. *Id.*, Rule 20.10.
43. *Id.*, Rule 20.10.
44. *Id.*, Rule 20.10.
45. *See* nn. II.77 & 78 and accompanying text.
46. *Id.*, Rule 20.10.

# Chapter II

## THE TANKER WAR, 1980-88[1]

With Iran's willingness,[2] as of late 1988 and early 1989, to negotiate a ceasefire on the basis of UN Security Council Resolution 598,[3] an initial conclusion might be that the end of hostilities in the 1980-88 Iran-Iraq war also ended US and European security interests in the Persian Gulf. France withdrew the aircraft carrier *Clemenceau* and other naval units in September 1988. The United States adopted a more wait-and-see attitude but also began to reduce its naval commitment by stopping convoying while remaining in the Gulf to provide a "zone defense."[4] Kuwaiti tankers' "deflagging" began in early 1989,[5] and in March 1990 the last US Navy minesweepers were brought home. "[R]eturn of the wooden ships was in response to a reduced mine threat and will not affect continuing... operations by US naval vessels aimed at maintaining freedom of navigation and the free flow of oil through the Persian Gulf," a press release said in May 1990.[6]

Despite these encouraging trends, that war's end did not terminate security interests in the Gulf, particularly for the United States, Western Europe and Japan. The war was but a warmer chapter in the struggle of national security interests for control or influence in Southwest Asia and petroleum, that region's vital resource. The Gulf area has a very large proportion of world oil reserves, about 54-60 percent.[7] Two years later, the 1990-91 Gulf War between Iraq and the Coalition again demonstrated the relationship between oil and national security interests.[8]

This Chapter begins with an historical overview, followed by analysis of great-power involvement, particularly that of the United States, in the Iran-Iraq war at policy and strategic levels.

This work cannot consider in depth other aspects of the war's impact on other national security interests—*e.g.*, the USSR incursion into Afghanistan,[9] which Iraq condemned;[10] a Soviet port arrangement with Syria in 1988; Iran-US bilateral relations from the Shah's fall in 1979 through the embassy hostage crisis, which Iraq also condemned,[11] to claims in the Iran-Contra Affair;[12] the rise of Islamic fundamentalism, particularly in Iran;[13] OPEC as an influence; the land war, with renewed use of poison gas and missile attacks on cities,[14] despite international law to the contrary;[15] or even an apparent shift in Soviet foreign relations at the time[16]—all of which (and more) impacted the war and security interests in the Gulf. These additional factors are recited, without extended analysis, to confirm the point that national security interests in one vital area cannot be seen in a vacuum.

## Part A. Prologue

There have been many actors[17] in the Persian Gulf: France, introduced to the Middle East in 1916 after the Sykes-Picot agreement, when Syria became a French mandate;[18] Great Britain, whose influence dates from the early nineteenth century; Iraq, independent since 1932 after time as a British mandate and free of British influence since 1954, having been part of the Ottoman Empire before World War I;[19] Iran, formerly Persia and more or less independent during the last two centuries;[20] the United States, whose oil companies have had interests there during this century and which assumed the mantle of providing naval security when British forces withdrew in 1971; and countries that formed the Gulf Cooperation Council (GCC) in 1981,[21] *i.e.,* Bahrain,[22] Kuwait,[23] Oman,[24] Qatar,[25] Saudi Arabia[26] and the United Arab Emirates (UAE). The UAE is a federation of the former Trucial States—Abu Dhabi, Ajman, Dubai, Fujairah, Ras-al-Khaimah, Sharjah, Umm-al-Qawain—and came into existence December 1, 1971, when Britain left the Gulf.[27] Before World War I the Ottoman Empire was sovereign over some territories that became the GCC States, *e.g.,* Saudi Arabia, while Britain was protector of others, *e.g.,* Kuwait and the Trucial States.

### *1. The United Kingdom and France; UK Interventions and Reactions.*

Britain's strategic interests evolved around oil and air routes to India; it dictated defense and foreign relations policy to Iraq and western shore Gulf States, later GCC members, except Saudi Arabia, which with Iran were always outside the UK orbit. Britain exercised considerable influence over Iran, however.[28] In July 1946, for example, *H.M.S. Norfolk* and *Wild Goose* were ordered to Basra, Iraq, after the USSR-backed Tudeh Party fomented rioting at the UK-owned oil refinery at Abadan, Iran. In August 1946 UK troops landed in Basra. Although intervention in Iran was not necessary, the "eventual outcome was satisfactory to British interests and entailed a setback to the growth of Soviet influence" in Iran.[29] On June 26, 1951 several Royal Navy warships were ordered to Abadan, Iran, to protect British subjects during a UK dispute with Iran over nationalization of an oil refinery; these ships conducted an evacuation October 3, 1951.[30] In 1961 Britain landed Royal Marines and troops, with a naval concentration offshore, to help deter an Iraqi invasion of newly independent Kuwait. Arab League troops later replaced UK ground forces. Still later Iraq recognized Kuwaiti independence.[31] For a century and a half, the Gulf had been a "British lake," but times were changing.[32] France continued to have close ties with Iraq, however.[33]

Evidence of the rise of other forces in the area was demonstrated in 1969 when Iranian warships successfully escorted an Iranian merchantman from Khorramshahr in the Shatt al-Arab to the Gulf, defying Iraqi threats to stop any Iran-flagged vessel from sailing through Iraq-claimed waters. In 1961 Iran had bowed to a similar

threat, but naval action now secured her purposes.[34] As Iran perceived the Soviet threat diminishing to her north, she began to focus on her security interests in the Gulf.[35] Iran began to assert offshore rights to areas where oil reservoirs were known to exist and pushed territorial sea claims outward into the Gulf. Eventually agreements were reached, except in the upper Gulf, where Irani, Iraqi and Kuwaiti claims remained unresolved until 1975.[36] After diplomatic interventions in London and a plebiscite in Bahrain overwhelmingly rejecting union with Iran, Iran dropped sovereignty claims to Bahrain.[37] Saudi Arabia has asserted territorial claims to parts of Abu Dhabi, a UAE member, and Dhofar, part of Oman, and the Khufu strip, disputed with Qatar. Occasionally these disputes would spill over into adjacent Gulf waters, *e.g.*, in 1968 when an Iranian gunboat approached and detained an Arabian-American Oil Company (ARAMCO) crew on an oil rig claimed to be on the Iranian side of waters said to be Iran's for oil exploitation under a Iran-Saudi tentative agreement.[38]

*2. The United States; Preliminary Gambits in the Gulf.*

US interests began with oil investments in the area, particularly an exclusive concession in Saudi Arabia, later shared with the Saudis, that became ARAMCO. After World War II US and others' investments gave returns in billions of US dollars annually; US Gulf area concessions stood at half the total of arrangements there.[39] In the 1970s, however, Saudi Arabia nationalized ARAMCO and other foreign holdings. Following on World War II cooperative arrangements, the United States built an airfield at Dhahran (1945-62) and homeported its minuscule Middle East Force,[40] under US Central Command (CENTCOM) during the Tanker War, in Bahrain.[41] Britain's 1971 withdrawal, while minimal in terms of UK security forces and interests, had a profound impact on western Gulf States:

> [UK] withdrawal from the Gulf was more substantial in political terms since it necessitated the formulation of an independent political framework for the small emirates along the Arab littoral, but the real impact was... psychological. Britain had served as judge, arbiter, administrator, and... protector of this littoral for well over a century. Departure in 1971 was tantamount to removal of the safety net. . . . [C]urrents of nationalist and modernist sentiments and ideas had begun to circulate along the shores of the Gulf even before the influx of oil revenues.[42]

Some local rulers did not favor UK withdrawal,[43] for the obvious reason of losing support,[44] and perhaps to fend off neighbors.[45]

The United States did not rush into power the vacuum. Reeling from Vietnam and responding to a USSR-Iraq friendship treaty,[46] the Nixon Administration developed the Twin Pillars policy of military assistance to Saudi Arabia and Iran[47] to protect common regional security interests as part of the Nixon Doctrine. The United States would no longer assume direct responsibility for preserving

worldwide security but would strengthen regional actors to play a primary role in assuring stability. "Benign inaction" characterized US policy, 1971-79.[48] The United Kingdom saw the Iraq-USSR treaty as more apparent than real, although France adhered to a view closer to that of the United States.[49]

In the northern Gulf, there was no benign inaction. Iran-Iraq relations were strained, 1970-75, but in 1975 treaties to confirm land and water boundaries seemed to patch up differences.[50] Thus matters stood until Iran's Shah fell in 1979. Perhaps an omen for the future had occurred in 1971, the day of British withdrawal, when Iran occupied Greater and Lesser Tunb islands belonging to the UAE's Ras Al Khaimah principality. That same day, pursuant to treaty, part of Abu Musa island, belonging to the UAE's Sharjah principality, was given to Iran for a military base in return for a grant to the Sharjah ruler. Sharjah and Iran would share oil concession revenues. All three islands lie at the mouth of the Gulf, near the Strait of Hormuz. Iraq retaliated against Iranian interests, and Libya retaliated against Britain, which did not intervene as in 1961.[51]

*3. The Soviet Union.*

The USSR was seen as "eager to exploit the opportunities created by the . . . [1980-88] war [when it came] and the perception of faltering US interest to insert themselves into the Gulf—a region in which their presence [had] traditionally been limited and marginal."[52] A Soviet naval flotilla had been on permanent station in the Gulf since March 1968, two months after the UK's notice that it was quitting the area.[53] The USSR and Iraq had signed a Treaty of Friendship & Co-Operation in April 1972, but Soviet relations with Iraq, 1972-80, have been characterized as "cordial but far from a patron-client arrangement."[54]

*4. Worldwide Dependence on Persian Gulf Oil and Foreign-Flag Shipping.*

This shift in political balances was accompanied by increasing worldwide dependence on Gulf oil and, for the United States at least, relying on lift of oil in ships flying other nations' flags. At the beginning of the Gulf War Europe imported about half of its oil (France, 70 percent; Italy, 60 percent; and other States smaller percentages).[55] While US 1973-85 Gulf oil import percentages fell through efficiencies, domestic oil production peaked, and by 1985 US oil companies saw the United States in a dangerously vulnerable position vis-a-vis OPEC oil. Western Europe received 20-40 percent, and Japan about 60 percent, of its oil from the Gulf.[56] By 1987 US dependence on Gulf oil had doubled from 1985, Western Europe's consumption of Gulf oil was about 33 percent of its total, Greece's was 50 percent, and Turkey's and Japan's nearly 66 percent. US domestic oil production continued to decline. Gulf States, particularly Saudi Arabia, had tremendous advantages in oil reserves and surplus production capacity.[57] Saudi oil supplied half of France's needs, and other European States had large investments in the

country. When the war began Iraq supplied considerably more oil to Britain, France, Germany and Italy than Iran.[58] Even at war's end, when oil-dependent countries had begun to tap other sources, the Gulf supplied a fourth of petroleum moving in international commerce. Thirty percent of Western Europe's, and 65 percent of Japan's, oil came from the Gulf. The United States was 50 percent dependent on foreign oil sources, but only 18 percent of that or 9 percent of total consumption, came from the Gulf.[59]

By 1986, US-flag foreign trade tankers were almost nonexistent; their role had been taken by other nations' vessels, particularly those flying flags of convenience but often beneficially owned by US business interests. The US foreign trade outlook was then also poor.[60] Contrasted with the US-flag fleet's steady demise and growth of flags of convenience, the State-run USSR merchant fleet continued to rise. In 1985 its tonnage was well ahead of that of the United States. With Soviet satellites and clients counted, the USSR was third in world shipping tonnage (25 million), behind Liberia, Panama and Greece and ahead of the United Kingdom.[61] The Suez Canal closure during the Arab-Israeli wars prompted building ever larger tankers, which could be operated more cheaply than smaller ones, but which might have greater economic consequences and effects for the environment, if a ship were damaged or sunk in a grounding or collision, or in a storm. The same result would obtain if these huge ships were damaged during armed conflict.

*5. The Environment.*

The environment became another important factor. The UN Environment Programme, developed after the 1972 Stockholm Conference on the Human Environment,[62] resulted in many regional treaties, among them the Kuwait Regional Convention and Protocol (1978).[63] By 1981 it was in force for eight Gulf States, Iran and Iraq among them.[64] The UN LOS Convention, negotiated during the decade before signature in 1982, restated many principles of the 1958 Geneva Conventions on the Law of the Sea, added new terms and published maritime environmental standards. The Gulf is particularly environmentally sensitive because of heavy tanker traffic and offshore petroleum production activity. The Gulf's currents are slow, there is only a gradual exchange of water, and therefore little purgation of pollution once it happens.[65]

*6. Geography of the Persian Gulf.*

The Persian Gulf, known as the Arabian Gulf to Gulf coastal States, is a shallow extension of the Indian Ocean between the Arabian Peninsula to the west and Iran to the east. It extends northeast 614 miles from the Gulf of Oman in the Indian Ocean, through the Strait of Hormuz to the Shatt al-Arab in the north. Iran borders it on the northeastern shore; Iran, Iraq (which has only a 10-mile coastline) and Kuwait are on its northwest shores, and the island State of Bahrain, Kuwait,

Qatar, Saudi Arabia and the UAE border the Gulf on its southwestern shore and around Oman's Musandam Peninsula to the Gulf of Oman and the Indian Ocean. The Gulf is 24 nautical miles wide at its narrowest point in the Strait and about 200 miles across at its widest point. Like the Baltic and Black Seas the Gulf is shallow with an average depth of 130-260 feet, with greatest depths of 700 feet within Omani territorial waters in the Strait of Hormuz. There is no deep seabed in the Gulf, whether considered from a geographic or law of the sea analysis. The shallowest areas, less than 120 feet, are along the UAE, where vessels over 5000 tons displacement, *i.e.*, nearly all of today's tankers,[66] can safely sail no closer than five miles offshore. The Strait, only about 24 miles wide at its narrowest point, is relatively deep (210-270 feet) in its navigational channels. However, the Strait is dotted with islands claimed by littoral countries, Qeshen (Iran), Larak (Iran) and Quoin Islands (Oman) at its narrowest point, and Abu Musa, Greater and Lesser Tunbs, occupied by Iran.[67] Bahrain is an island nation, and there are other offshore islands around the Gulf, *e.g.*, Bubiyan (Kuwait) and Kharg (Iran). Several Gulf States, *e.g.*, Iran, Kuwait, Saudi Arabia and the UAE, have numerous offshore oil rigs or pumping stations. At the head of the Gulf, the Shatt al-Arab (formed by confluence of the Tigris and Euphrates Rivers) flows through a marshy delta into the Gulf. There are also shallow estuaries elsewhere along the Gulf, where a pearl industry flourished for centuries.[68] The Shatt has been a boundary, albeit disputed, between Iran and Iraq. Kuwait lies just around the corner of the Gulf from the Shatt marshes and Iran and Iraq. Like the Baltic and Black Seas, there is relatively little outflow or inflow from or to the Gulf. It is not as stagnant as the Black Sea, but a pollution problem in the Gulf, whether deliberate, *e.g.*, petroleum dumping during war or a terrorist attack, or accidental, *e.g.*, in collisions or during war, can have longterm consequences for the Gulf environment, not to mention freedom of navigation.[69]

*7. Vital Shipping Chokepoints.*

Yet another, and critically enduring, factor is that waters enclosing the Arabian Peninsula have three of the world's most economically and strategically important waterways: the Strait of Hormuz, entry for the Gulf; the Suez Canal and Bab El Mandeb Strait, entries and exits for the Red Sea, through which 10 percent of world commerce flows. Suez and Bab El Mandeb cut transit time dramatically for merchantmen or naval forces moving between the Mediterranean Sea and the Indian Ocean;[70] closing the Canal during the Arab-Israeli wars forced travel around Africa and promoted building larger petroleum tankers to supply the world. "The . . . Gulf . . . with the Strait of Hormuz, which gives access to it from the Gulf of Oman and the Indian Ocean, might well be described as an international oil highway"[71] or "the West's lifeline," and a collision or terrorist attack in the Strait could

have serious consequences.[72] More than 80 tankers passed through Hormuz daily.[73] The number is less today.

## Part B. The Course of the War and Others' Responses

The precipitating event for US involvement in the 1980-88 Gulf War was the USSR invasion of Afghanistan and danger to the Gulf because of a power vacuum there.[74] US President Jimmy Carter's January 23, 1980 State of the Union Address treated the Gulf area as a vital American interest; he said the United States would respond with force if necessary: "Let our position be absolutely clear: An attempt by any outside force to gain control of the... Gulf region will be regarded as an assault on the vital interests of the United States . . , and such an assault will be repelled by any means necessary, including military force."[75] US naval task forces were already in the Indian Ocean because of the Hostage Crisis;[76] they remained there. The Carter Doctrine, as this point in the Address came to be called, promoted a basic rationale for prepositioning ships with stores for the Rapid Deployment Joint Task Force (RDJTF) at Diego Garcia, a British Indian Ocean dependency, and preparing for possible RDJTF deployment.[77] RDJTF was not then a strong or mobile enough force to make it a serious US policy instrument,[78] although its "jurisdiction" stretched over 19 countries, from Pakistan to Egypt to Kenya, an area twice as large as the continental United States with nearly impossible lines of communication and some of the most inhospitable terrain on Earth.[79] The other, unstated goal was protecting Saudi Arabia. The United States would respond "positively" to requests for assistance from "non-belligerent friends" in the region.[80]

Activist Iraqi Muslim Shiites, the dominant sect in Iran, tried to assassinate Iraq's deputy premier in April 1980. Iraq began rooting out these activists, bombed an Iranian border town, expelled Iranian residents and Iraqis of Iranian descent, and called on Iran to vacate Abu Musa, Lesser and Greater Tunb, occupied by Iran and formerly UAE territory. Iran began training infiltrators, and Iraq supported important members of the Shah's government resident in Baghdad, who tried to topple the Iranian government. Iraq sought and received backing from Kuwait and Saudi Arabia, fearful of Iranian antimonarchial policy; according to Iran, Kuwait and Saudi Arabia signed secret agreements on September 12 to boost oil outputs considerably and to contribute sales revenues to Iraq's war effort. (Saudi Arabia had signed an agreement with Iraq in February 1979, reportedly including mutual security arrangements.) After border clashes in the summer of 1980, Iran began shelling Iraqi towns in early September. Iraq demanded territorial cessions, purportedly part of the 1975 settlement.[81]

*1. 1980: Opening Moves; First Efforts at Ending the War.*

On September 22 Iraq invaded Iran.[82] Two days later Jordan offered Iraq total support, including arms bought from the USSR and Western powers. Jordan also gave Iraq access to the Port of Aqaba and land and air facilities for imports and exports.[83] The war had begun.[84]

On September 21 and 24 Iraq declared the 1975 agreement demarcating the Shatt abrogated,[85] asserting it would exercise full sovereignty over the Shatt.[86] Iraq required Iranian ships using the Shatt to engage Iraqi pilots and fly the Iraqi ensign at the truck. Iran refused to do this.[87] When Iraq had invaded Iran on September 22 claiming self-defense,[88] an Iranian Notice to Mariners (NOTMAR) declared waterways near its coast a war zone, announced new shipping lanes after ships passed Hormuz, disclaimed responsibility if vessels did not follow the lanes, refused access to Iraqi ports, thereby closing the Shatt,[89] and warned of retaliation if Gulf States gave Iraq facilities.[90] Refusal of access to Iraqi ports was later characterized as a "blockade" of the Iraqi coast.[91] There were also sporadic attacks on shipping in the Shatt in the early days of the war.[92] Whether this resulted in pollution into the Gulf cannot be determined; undoubtedly there was spillage from bunkers, tankers and damaged facilities. Attacking States' motivation and care, in terms of concerns, if any, for the environment is not known.

On September 23 the European Community (EC) endorsed an Arab League appeal for a ceasefire and "emphasize[d] the vital importance for the entire international community of freedom of navigation in the Gulf, with which it is imperative not to interfere."[93] From the beginning of the war until near the end, however, the EC made no effort to harmonize policy, due to lack of internal cohesion and a clash of cultures.[94] Several Arab States, Libya and Syria among them, had supported Iran in the League; Algeria, Lebanon, Libya, the Palestine Liberation Organization and South Yemen had boycotted the meeting.[95] Five days later the UN Security Council's Resolution 479 called for ending hostilities.[96] Iraq, denying territorial ambitions, accepted the Resolution; Iran considered the 1975 treaty valid and demanded condemnation of Iraqi aggression.[97] Although the resolution had not mentioned freedom of navigation, Japan and the United States stressed that principle's primary importance.[98] Resolution 479 also supported the UN Secretary-General's efforts to settle the dispute through mediation or conciliation, and in November he appointed former Swedish Prime Minister Olaf Palme as mediator; Palme's efforts were largely unsuccessful.[99]

On October 1 Iran declared the Shatt closed for all maritime craft until further notice.[100] On October 5 a US NOTMAR announced Iran had warned that "all coastal waters [were] battle areas. All transportation of materials to Iraqi ports [was] prohibited." After passing Hormuz, merchant traffic should stay south of designated points. The Shatt estuary should be avoided, and mariners were cautioned to be alert to unusual, abnormal or hostile actions while in the Gulf.[101]

Iran's rationale for its war zone declaration was twofold, "the first being of a defensive nature.... Iran was [concerned with] protect[ing] its coastline against intrusion by ships likely to present a risk to national security.... [F]oreign ships wishing to pass through the zone had to request prior authorization.... Ships calling at a port in ... [a] countr[y] bordering the ... Gulf were, for obvious security reasons, subject to stricter regulations," being required to contact Iran's naval headquarters 48 hours in advance. "Iran's second concern was to guarantee the safety of international shipping.... [T]he zone could be dangerous to shipping due to warlike events likely to take place there. Without going so far as forbidding access to the zone, Iran ... recommend foreign ships to avoid the zone by following shipping lanes outside it, thereby disclaiming responsibility for any damage which might be incurred on passing through the zone. Thus warned ..., ships which persisted ... did so at their own risk."[102] Iran began shuttling merchant convoys under naval protection down her coast, through Iraq's Gulf Maritime Exclusion Zone (GMEZ), to the lower Gulf.[103] According to an Iranian commentator, "contrary to allegations, Iran never extended its war zone to ... Hormuz and, on 22 October ..., reaffirmed a commitment to keeping the Strait open to navigation."[104] The United States later welcomed belligerents' assurances that Hormuz would remain open.[105] Despite lapses in its threats to close the Strait,[106] or its apparent use of others' territorial sea for naval maneuvers,[107] there is clear evidence to the contrary of a commentator's view that Iran's position in the Third UN Conference on the Law of the Sea (UNCLOS III) that produced the 1982 LOS Convention "remained faithful to monarchical Iran's worldview regarding the navigation regime of the Gulf, most notably, opposition of a special regime for straits used for international navigation ..., as well as insistence on prior authorization of warships intending to exercise innocent passage through the territorial sea."[108]

On October 7 Iraq declared the Gulf north of 29 degrees 30 minutes North latitude "a prohibited war zone;" this was the Tanker War arena until 1984.[109] This war zone declaration was reportedly reprisal, or retaliation, for the Iranian "blockade."[110] By far the most severe blow to the Iraqi economy was Iran's successful closure of the Gulf, soon after hostilities began, to Iraqi oil exports.[111] Closing Iraq's coast and Iranian bombing of Iraqi oil terminals forced Iraq to use pipelines to Kuwaiti, Saudi, Syrian and Turkish ports to export oil to finance the war, or to export or import war-sustaining goods by other means, *i.e.,* nearby third-State ports. The result was that Kuwait and Saudi Arabia sold oil and turned over at least part of the proceeds to Iraq as loans. They also made cash grants to Iraq.[112] Estimates of Saudi and Kuwaiti financial aid range from $25 billion to $65 billion.[113] Although having sided with Iran early in the war, Syria allowed Iraqi oil exports through the Kirkuk (Iraq)-Tripoli (Lebanon)-Banias (Syria) pipeline until 1982.[114] During the fall, "as reprisal for Kuwaiti assistance to Iraq," Iranian warplanes attacked

Kuwaiti border posts and bombed the Um-Aish oil refineries, 25 miles below the Iraqi border.[115]

Whether these were arms-length bargains, or these States acted out of fear of a powerful neighbor, or otherwise, is less than clear.[116] Bahrain, Qatar and the UAE maintained strict official silence, although two UAE principalities (including Ras Al Khaimah, which lost islands to Iran in 1971)[117] loaned Iraq $1-3 billion by the end of 1981, Abu Dhabi loaned $500 million a year by 1983, and Qatar loaned another $1 billion.[118] UK intelligence discovered Iraqi helicopters and troops in Oman preparing to invade and occupy Abu Musa and the Tunbs; the UK and US governments successfully pressed Oman to scuttle the Iraqi plan. Later, Saudi Arabia persuaded Iraq to abandon the plan.[119] Thus, at the beginning of the war nearly all Gulf littoral States supported, or at least tilted toward, Iraq. Jordan had solidly supported Iraq, opening the Port of Aqaba on the Red Sea for Iraqi civilian and military imports. According to Iran, Jordan also permitted Iraqi use of an air base.[120] This support was probably necessary for survival of the Iraqi regime, because Iranian bombardment of Iraqi Gulf ports early in the war made Iraq effectively a landlocked country. By the end of 1980 its oil exports had dwindled from over 3 million to 1 million barrels a day.[121] Although officially neutral, Turkey leaned toward Iraq.[122] Nevertheless, perhaps 10 percent of Turkey's exports went to Iran during the war and another 10 percent to Iraq.[123] Egypt sold weapons to Iraq and may have augmented the Iraqi army with mercenaries and volunteer detachments. Egyptian pilots took part in air raids on Iran.[124]

Officially neutral, the United Kingdom improved relations with Iraq. France was also neutral, but its policies favored Iraq.[125] Private contractors in both countries signed deals with Iraq, and other States' arms dealers went through Iraq's oil customers to supply Iraq arms and spares.[126] At the beginning of the war the United States did not have diplomatic relations with either belligerent; US relations with Iran were bad because of the ongoing Hostage Crisis. On the other hand, the USSR had relations with both and was in a less strained position with respect to Iran, for which there had been historic Russian interest. Soviet aid to Iran stood at $1 billion in 1980.[127] By the end of the war the USSR had provided $8.8 to 9.2 billion in military assistance, most of it coming through Aqaba.[128] The initial Soviet response to the invasion was strong disapproval, despite the 1972 Iraq-USSR friendship treaty, and may have resulted in beginning Iraqi overtures to the United States.[129] Italy's previously solid economic relations with Iraq were put under pressure when it declared neutrality; Italy's Fincantieri shipyard could not then deliver 11 warships Iraq ordered as part of a $1.1 billion contract. Italian export licenses granted in 1981 lapsed because of the government's decision to ban military exports to the belligerents. Iraq then refused to pay on its $2 billion debt to Italy. Italian companies and Italian nationals also worked on Iranian construction projects; this kept Italy from a high diplomatic profile. Italian businesses operated

with both belligerents. The FRG maintained a more evenhanded approach. Smaller northern European States not dependent on Gulf oil looked to the United Nations to resolve the war. Spain and Greece, Gulf oil dependent, got all of it they needed.[130]

The Islamic revolution left Iran in poor financial condition. As more skilled, better educated and wealthy people fled, oil production declined, and foreign exchange reserves dwindled from $14.6 billion in 1979 to $1 billion in 1981.[131] However, Iran had military spare parts reserves, a legacy of the Shah's rule;[132] these supplied its war machine for awhile. Syria and Libya supported Iran, airlifting USSR-made arms to Iran; Syria provided intelligence.[133] Some private arms dealers in States officially leaning toward Iraq sold supplies to Iran.[134] Israel sold Iran arms and spares from its stocks and got others from European sources. North Korea, East Germany and Cuba, eager to buy oil, sold Iran military supplies.[135] The USSR, officially linked closely with Iraq,[136] may have sold war goods to Iran as well, but Iraqi reverses in 1982 prompted promises of Soviet aid to Iraq.[137] The USSR was caught among three conflicting foreign policy issues: its relationship with Iraq, an official amicable stance toward the Iranian revolution, and an international atmosphere marred by the Afghanistan invasion and tense US-Iran relations after the Hostage Crisis. The Soviet Union had declared its neutrality early in the war, however.[138] The USSR appeared dissatisfied with Iraqi military action in late 1980, and flirted with Iran and its friends, *inter alia* signing a Friendship Treaty with Syria in October. Nevertheless, the Soviet Union did not totally abandon Iraq. Iraq, perhaps petulently, rejected arms from the USSR this time. Warsaw Pact countries—Bulgaria, East Germany, Poland—increased arms sales to Iraq. Early in the war Iran rebuffed a Soviet arms offer. Iran did get satellite information on impending Iraqi attacks, however.[139] Iran was determined to be militarily self-sufficient as part of the Islamic revolution. Iraq, on the other hand, relied increasingly on Gulf State financial subventions, up to $18-20 billion by the end of 1981. Iraq also came to rely on the superpowers diplomatically too.[140]

In November Iranian NOTMARs directed ships entering or leaving Iranian ports to get coordinates for Gulf travel from its navy and to inform the relevant Iranian port of their position hourly. Inbound ships had to give estimated time of arrival at Bandar Abbas and be cleared. If not cleared, they were to anchor there. Early in 1981 a NOTMAR directed all very large crude carriers or ultra large crude carriers (VLCC or ULCC), not inbound for Iranian ports and intending to cross the Iranian restricted zone, to contact Iranian naval headquarters with travel information 48 hours before departure,[141] ostensibly for ship safety reasons.[142]

"Although neither Iran nor Iraq declared contraband lists, the fact that both nations attacked neutral crude oil carriers, loaded and in ballast, indicated both . . . regarded oil as contraband. Whether classified as absolute or conditional contraband, oil and the armaments which its sale or barter on international markets

[would] bring, were absolutely indispensable to the war efforts of the . . . belligerents."[143] No prize courts were established until the end of the war, when Iran published its rules, which did not include a contraband list.[144]

The UK Armilla Patrol was deployed in the Gulf from the beginning;[145] Gulf States provided it and other western navies facilities.[146] Logistics sources limited Patrol operations to the lower Gulf, up to 40 miles north of Dubai, and outside war zones; UK merchantmen steaming to Kuwait were not protected northward.[147] A US guided missile cruiser was ordered to the Gulf in October; President Carter wanted a naval task force presence to keep Hormuz open.[148] By October 15 at least 60 Australian, French, UK and US warships were in the Indian Ocean to protect the oil route; 29 Soviet vessels were also there.[149] US overall policy had these themes:

(1) United States neutrality . . .
(2) American expectation of neutrality and non-interference by other nations; particularly the U.S.S.R.
(3) Defense of United States vital interests including:
    (a) Preservation of freedom of navigation to and from the Gulf,
    (b) Prevention of the war's expansion in ways that would threaten the region's security.
(4) A desire for the immediate cessation of hostilities and solution of the dispute by diplomatic means.

These derived from US goals of peace and preventing a wider war.[150] The United States had imposed economic sanctions on Iran when the Hostage Crisis began. Some controls were revoked in 1981 after the hostages' return, others remained in force, and more controls were imposed again in 1987 because of Iran's actions against US flag vessels in the Gulf.[151] The United Kingdom had passed special legislation to permit Orders in Council to limit contracts related to Iran in early 1980, and this legislation also remained in effect during the war.[152]

When the war began 70 neutral-flag vessels were trapped in the Shatt. Despite UN good offices in October 1980, including a plea for a ceasefire to allow them to leave under a UN[153]or Red Cross flag,[154] Iraq refused to allow it, citing its "full" sovereignty over the Shatt.[155] Iran had accepted the proposal.[156] The ships remained in the waterway for the rest of the war.

### *2. 1981: Efforts at Settlement; the Gulf States Organize the GCC.*

In March 1981 the Islamic Conference Organization (ICO) offered the belligerents a peace plan; they rejected it.[157] UN mediation, which had begun in November, had failed by April.[158]

Between May and November 1981 Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE established the Gulf Cooperation Council under Saudi leadership with French and UK advice, to effect coordination, integration and interconnection

between member States to achieve unity among them. GCC members moved toward economic integration and defense and security coordination between 1981 and the end of the war.[159] The Council initially stressed economic and social planning, as is evident from its Charter, but security issues eventually emerged as the GCC's primary focus.[160] The Council "consistently supported Iraq and repeatedly called for cease-fire in the war, fully endorsing Security Council resolutions."[161] Although the GCC tried to underline its neutrality, Iran may have seen its establishment as a step against it and the Islamic revolution.[162] However, one member, UAE, pursued its special relationship with Iran; the GCC secretariat approved it to maintain open, friendly communication with Iran. Even here there was ambivalence because of Iran's occupying Abu Musa and the Tunbs.[163] Similarly, although basically supporting Iraq, Kuwait felt pressure from Iran because of its geographic proximity.[164]

Militarily, the GCC was weak, relative to the belligerents, except the Saudi air force; the other five States mustered only 100,000 in their armed forces.[165] The GCC was never totally unified, at least early in the war. For example, Qatar, because of a Saudi-Qatar dispute over the Khufu strip, withdrew forces from Peninsula Shield I, the first relatively modest GCC combined exercise. This action, according to an Iranian commentator, reportedly "followed a succession of other blows to attempts at constructing a common defense arrangement."[166] Later Peninsula Shields (II, 1984; III, 1987), were more successful. For the first time in the Twentieth Century, forces from all GCC States participated in cooperative military activities aimed at defending their territories. Although the war initially posed a threat to GCC States, the end result was a stronger, more unified military structure. In 1984 its Council decided on a rapid intervention force for peacekeeping operations in the Gulf area; in 1987 the Council approved a comprehensive security strategy, which may amount to a collective defense pact.[167] Nevertheless, most Western analysts concluded during the war's early years that the narrow military significance of any GCC measures would remain marginal. Council members, even if they acted in unison, were seen as lacking manpower and infrastructure to mount an adequate defense against a determined aggressor. Although the GCC States could not stop a Soviet attack, they could increase the political and military costs of aggressive moves by regional States, *e.g.*, Iran or Iraq, and thereby serve as a deterrent.[168] GCC States also negotiated a web of bilateral internal security arrangements to combat subversion and terrorism.[169] The May 1981 GCC summit in Abu Dhabi declared that the Gulf should remain free of international conflicts and expressed fear of foreign intervention. Its November Riyadah conference expressed hope that efforts coming from the ICO, non-aligned States, and the United Nations, would be successful. Thus the GCC came to emphasize the ICO as a mediator between the belligerents.[170] Thus, early in the war, the GCC's significance and the emerging regional security framework was seen

> as an information-sharing network for . . . contain[ing] . . . internal subversion and violence; as a wholly indigenous and domestically palatable framework for serious and routine consultation with a view toward enhancing members' diplomatic initiatives and deterrent capabilities against external aggression; and as a possible venue for establishing more realistic, efficient, and compatible industrial plans in an era of reduced income.

Much would depend on events in Iran and Iraq, however.[171]

Also in 1981, at Saudi request, US Air Force AWACS aircraft deployed to Saudi Arabia to enhance surveillance capabilities.[172] The incoming Reagan Administration saw the USSR as the major threat in the Gulf, a purported shift in US policy.[173] On Saudi advice, the Administration sent a special emissary to Baghdad in April 1981, and Iraq announced in July that the head of the US interests section would be treated as a *de facto* ambassador.[174] US military presence was to be increased, including assets prepositioning a Navy-Marine Corps task force, Army and Air Force exercises, creation of the RDJTF, and efforts to get access to Indian Ocean facilities.[175] A May 27 US NOTMAR repeated previous warnings and Iran's revised shipping guidelines.[176]

In May 1981 Iran seized a Kuwaiti survey ship and a Danish vessel, *Elsa Cat*, bound for the UAE and Kuwait and carrying military equipment to Iraq; Iraq protested *Elsa Cat*'s seizure. Both vessels were let go. Iran was careful at this time to avoid provoking neighbors or major Western powers, being dependent on transshipments from the UAE and food imports through the Gulf.[177] In October an Iranian air raid damaged Kuwaiti Umm Aish oil installations. Beginning in 1981 and continuing through 1984, Iraq attacked commmercial vessels in the northern Gulf, usually tankers and cargo ships calling at Bandar Khomeni or Bushire, Iran after being convoyed through Iranian territorial waters.[178] In March 1982 it was reported that Iraq had mined the Bandar Khomeni - port of Bandar Mashahr channel to the open sea. An Iranian tanker had been lost in February, probably to mines.[179] There are apparently no published reports of oil spillage and pollution, or pollution from other cargoes or bunkers from these or later attacks, except for the 1983 Nowruz attack.[180] However, it is safe to infer that there was spillage and therefore pollution of harbors and offshore sea areas; the extent is unknown. The minelayers' motivation and care in conducting these and later attacks is also unknown. In April 1982 Syria had shut off Iraq's oil pipeline access to the Mediterranean; Iraq could now only export oil through Saudi Arabia and a trans-Turkey pipeline.[181] In 1984 the Turkish line was expanded; in 1987 a second leg was built. Oil was also trucked across Jordan to the Port of Aqaba. This network, which included a spur pipeline to Yanbu in Saudi Arabia, increased Iraqi export capacity from 650,000 barrels a day in 1982, the low point during the war, to 2.5 million barrels a day in 1987, or close to prewar output.[182] Iran also realized the danger of

lifting its oil through Gulf ports and planned a 1200-kilometer pipeline to Jask in the Indian Ocean.[183]

*3. 1982: More Efforts at Peacemaking; Iraq's Maritime Exclusion Zone.*

In May 1982 Iraq tried to invoke the Arab League mutual defense treaty to get military aid from League members. Syria warned that if Egypt, a League member, lined up with Iraq, Syria would go with Iran. The result was a political standoff.[184] Algerian attempts to mediate the dispute almost resulted in a breakthrough.[185] The Gulf Cooperation Council's emergency meeting in April had declared support for efforts to end the war, and its May emergency meeting had adjourned until May 30 to allow efforts, including those of the ICO, to end the war. When this effort collapsed, the GCC called on Iran to respond positively to Iraq's peace initiatives. For the first time, the Council identified Iran as the intransigent party. The GCC repeated this call in July 1982. This year marked the GCC's awakening to shouldering its security responsibilities more forcefully. GCC defense ministers authorized comprehensive cooperation in security affairs.[186] Peninsula Shield II was held in 1984, a result of these decisions.[187]

In June 1982 the GCC had offered a peace plan: ceasefire, withdrawal to the 1975 borders and negotiations on other issues.[188] In July and October Security Council Resolutions 514 and 522 called for a ceasefire.[189] The UN Secretary-General reported Iraq was ready to cooperate in implementing Resolution 514, which also called for UN observers to supervise a ceasefire and withdrawal.[190] Iran was not; the next day (July 13, 1982) Iran launched the first of many offensives into Iraq, the first real invasion of its adversary.[191] In September the Arab League urged ending the war and complying with Council resolutions.[192] Iraq subscribed to this peace plan, sponsored by Saudi Arabia; Iran rejected it,[193] demanding $150 billion in indemnity.[194] Even Saudi Arabia's private offer to pay $50 billion to Iran in indemnity was refused.[195] Israel's invading Lebanon in June also helped blow these efforts off course. By late 1982 all Gulf States had policies of strict neutrality because of fear of Iran except Kuwait and Saudi Arabia, which strongly favored Iraq. Kuwait was fearful of its northern neighbor as well; Iraq continued to demand a lease of Kuwait's Bubiyan Island at the Shatt's mouth. Saudi Arabia agreed to pay for five Super Etendard fighters, sold by France to Iraq, in Saudi oil money. Kuwait and Saudi Arabia also guaranteed performance of foreign companies' defense contracts with Iraq.[196] Observers claim Iraq could not have sustained its war effort without the French deliveries.[197] The United States authorized sale of 60 helicopters for "agricultural purposes" and $460 million of credits for American rice.[198]

On August 12, 1982 Iraq had announced its GMEZ, advising it would attack any ship within the zone and that tankers docking at Iran's Kharg Island, regardless of nationality, would be targets. Kharg was Iran's main export terminal.[199] When announcing the GMEZ and "blockade" of Kharg, Iraq stressed that its war zones

were designed to cope with difficulties in distinguishing between vessel nationalities in the Gulf.[200] On August 29 Iran responded, declaring it would protect foreign shipping, began escorting foreign shipping, and deployed ships with surface-to-air missiles at Kharg. Iran began giving naval protection to shuttle convoys of Iran-flagged and neutral flag merchantmen lifting oil from Iranian northern Gulf ports to those farther down its shore for world export. Iraq attacked ships in its GMEZ through September. The GMEZ was modified in November, Iraq "ask[ing] all companies and owners of oil tankers that their vessels [would] be subject to danger upon entering the . . . zone."[201] In general, however, up to March 1984, Iraq attacked all ships in its GMEZ.[202] This aspect of the war was the only theater where the initiative lay with Iraq.[203] The US freedom of navigation policy was redefined to keeping Gulf access open for nonbelligerents.[204] Contacts with the United States increased, and in 1982 the United States removed Iraq from its list of States supporting international terrorism,[205] thereby opening a door for more Iraq-US contacts, *e.g.*, intelligence information and business.[206] The USSR by now had receded from its initial disapproval of Iraq's invasion and began to increase supplies to Iraq, to the point where the Soviet Union underwrote most of Iraq's 1987 defense effort. The USSR was primarily concerned with Iraq's survival; an Iranian military victory was not considered to be in the Soviet Union's best interests.[207]

The November 1982 Bahrain Gulf Cooperation Council summit focused on Iranian complicity in a failed coup in Bahrain, and "More than any other event, [it] molded the GCC's view on how to react toward Iran." Although Saudi Arabia failed to convince GCC members to help Iraq financially, it succeeded in identifying the Iranian Islamic Revolution as a threat to the GCC. After the summit GCC defense ministers and others conferred to coordinate contingency plans for containing the war, *i.e.*, to prevent spillover into their territories. These officials asked Iran to respond to the ICO, UN and other peace missions; there was no response. Given these rejections, the GCC decided to officially support Iraq.[208] In January 1983 Iran, Libya and Syria issued a "Damascus Communique," condemning Iraq and expressing support for Iran. GCC foreign ministers sent a strong rebuke, saying the Communique did not serve Arab unity and would not help end the war. The 1983 Non-Aligned Movement (NAM) summit urged a ceasefire appealing to the United Nations to consider a peacekeeping force at the belligerents' borders.[209]

*4. 1983: Assault on the Environment; The UN Supports Freedom of Navigation.*

On March 2, 1983 Iraq bombed Iran's Nowruz offshore oilfield, causing an immense slick; previously it had bombed Kharg facilities.

> Efforts to arrange a cease-fire . . . to allow anti-pollution activities were unsuccessful, and the persistent oil slick in a level of pollution which some experts believed would

> cause permanent damage to the Gulf ecosystem; . . . by early June . . . desalination plants in Saudi Arabia had to be closed, while Dubai [one of the UAE] announced on 3 June that it had [imposed a ban] on all imports of fish from neighbouring Gulf countries after the discovery that existing stocks had been contaminated by oil.

In some areas the oil was reportedly two feet thick. International shipping lanes were threatened, since many vessels use sea water for cooling and distilling into fresh water. Early reports that the slick had equalled the area of Belgium were later discounted. Strong winds blew it offshore and partially dispersed it. Iraq rejected Iran's request for a partial truce so that oil cappers could try to stop the 2000 to 5000 barrels a day flow.[210] (A merchantman's allision with a well on January 27 had caused part of the spill.[211]) The United States may have been involved in helping get the spill capped.[212] Iran characterized the attack as a clear violation of the Kuwait Regional Convention organization regulations which "strictly prohibit[ed] military attacks on oil installations."[213] Iraq countered that the conventions "ha[d] no effect in . . . armed conflict."[214] The London-based War Risks Rating Committee raised marine cargo insurance rates in 1982 and again in 1984 because of Iraqi attacks on Gulf shipping.[215]

In October the Security Council called for a ceasefire. Resolution 540 "*Condemn[ed]* all violations of international humanitarian law, in particular . . . the Geneva Conventions of 1949 in all their aspects, and call[ed] for the immediate cessation of all military operations against civilian targets, including city and residential areas[.]" The Resolution

> . . . *Affirm[ed]* the right of free navigation and commerce in international waters, call[ed] on all States to respect this right and also call[ed] upon the belligerents to cease immediately all hostilities in the region of the Gulf, including all sea-lanes, navigable waterways, harbour works, terminals, offshore installations and all ports with direct or indirect access to the sea, and to respect the integrity of the other littoral States.

The Council "*Call[ed] upon* both parties to refrain from any action that may endanger peace and security as well as marine life in the region of the Gulf."[216] In voting to approve Resolution 540, the USSR made it clear that it would firmly oppose armed intervention in the Gulf for any reason, including freedom of navigation.[217] The Gulf Cooperation Council's fourth summit endorsed the resolution. The GCC thus went on record, for the first time, to support freedom of navigation in the Gulf.[218]

On January 1, 1983 the US Central Command (CENTCOM) had been established to replace the RDJTF to plan and coordinate US military operations in the region more effectively. France and Britain continued to maintain a substantial Indian Ocean naval presence, with ships regularly sent there.[219] The USSR also continued its Indian Ocean presence. President Reagan had reaffirmed and

expanded the Carter Doctrine to include US interest in dealing with threats to Saudi Arabia and readiness to keep the Strait open if Iran tried to stop shipping there. US buildup continued.[220] Operation Staunch sought to curtail the arms flow to Iran.[221] US policy had changed in late 1983, following Iraqi officials' visit to Washington, where they advised the United States that closing the Gulf to Iraqi oil exports had hurt the Iraqi economy and that Iraq would have to increase the cost of the war to Iran in order to press Iran to end it.[222] In December 1983 Iran sought to revive the Regional Cooperation for Development Agreement with Pakistan and Turkey that the Shah had established in the 1960s. Pakistan and Turkey received the overture cordially.[223]

*5. 1984: Attacks on Tankers and Other Shipping; Responses.*

Perhaps presciently, the United States published this Notice to Airmen (NOTAM) and NOTMAR in January 1984:

> A. U.S. naval forces operating in international waters within the... Gulf, Strait of Hormuz and the Gulf of Oman are taking additional defensive precautions against terrorist threats. Aircraft at altitudes less than 2000 ft AGL [above ground level]... not cleared for approach/departure to or from a regional airport are requested to avoid approaching closer than five NM [nautical miles] to U.S. naval forces. It is also requested that aircraft approaching within five NM establish and maintain radio contact with U.S. naval forces on [designated frequencies]. Aircraft which approach within five NM at altitudes less than 2000 ft AGL whose intentions are unclear to U.S. naval forces may be held at risk by U.S. defensive measures.
>
> B. This notice is published solely to advise that hazardous operations are being conducted on an unscheduled basis; it does not affect the freedom of navigation of any individual or State.... [224]

Iran protested this and later "cordon sanitaires"[225] around US warships and aircraft, and US Navy ships transiting Iran's territorial sea during the war.[226] The United States rejected the protests, asserting a right of self-defense.[227] These claims were seen as a hardening of positions between Iran and the United States. The US official position was that Iran was refusing to end the war, and not Iraq, which had accepted Resolution 540, and that Iraq attacked shipping in its GMEZ, while Iran was hitting neutral vessels in international waters. By now 19 US warships, including a carrier, were in the Gulf area.[228] Britain decided not to use an envelope around its Armilla Patrol.[229]

In March 1984 the United States reportedly tried to persuade some Gulf States to avoid a crisis by letting the United States use their military facilities and to allow military supplies prepositioning in Bahrain, Oman and the UAE. The United States had coordinated contingency plans with Great Britain for escorting tankers and providing air cover in the Gulf and the Strait of Hormuz. US plans also

reportedly included blockading Kharg Island, mining Iranian Gulf ports and commando raids on Iranian bases. However, the United States insisted that it be invited into the region and that any arrangement must involve Western allies. The mission came to naught.[230] Part of the background for the US initiative may have been Kuwait's claim that Iran had attacked Bubiyan Island, owned by Kuwait, and Kuwait's complaint of Iranian hospitality to terrorists who hijacked a Kuwaiti airliner and escaped to Iran.[231]

In February 1984 the Iraqi GMEZ had been extended to 50 miles around Kharg Island; Iraq warned that ships approaching Bandar Khomeni or Bushire would be sunk.[232] Bandar Khomeni approaches had been mined the previous October.[233] Britain protested a March 1 Iraqi attack on a convoyed cargo ship, *The Charming*, in the Bandar Khomeni approaches; Indian and Turkish vessels were also attacked.[234] The war was creeping down the Gulf. Tankers were hit in Iraqi air attacks on Kharg, and Iraq destroyed Saudi tankers outside its GMEZ. Iran attacked Kuwaiti and Saudi tankers, including a supertanker, *Yanbu Pride*, for the first time in April and May 1984.[235] Iraqi attacks were airborne, since the Iran "blockade" had effectively bottled up Iraq's relatively weaker naval forces.[236] Iraq had shifted its anti-shipping campaign focus in an effort to attack the weak link in Iran's war economy and to arouse world interest in the conflict,[237] perhaps to "draw in other states, the Western powers in particular, in the hope that they would support Iraq and help to bring about a peaceful settlement."[238] Iraq had some success in disrupting Iranian oil exports; its attacks promoted third State measures designed to protect their nationals' commercial interests.[239] In attacking mostly neutral-flag tankers sailing independently,

> Iraq appears to have devoted minimal effort to obtaining visual identification of the target before [launching missiles;] . . . accidents . . . did occur. Iran does not appear to have begun attacking commercial shipping until Iraq commenced its anti-tanker campaign . . . . Since there was no sea traffic with Iraq, Iran attacked neutral merchant shipping destined to and from neutral ports . . . , presumably . . . to persuade Iraq's financial backers, the other Gulf States, to dissuade Iraq from its campaign against the Kharg Island tankers. Iran's attacks on merchant shipping were less numerous . . . and, in general, less costly in lives and property . . . , [being] conducted with rockets instead of missiles. . . . Iran devoted more effort to target identification than did Iraq. . . . Iran did not conduct its attacks in declared . . . zones[,] and some . . . attacks were . . . in neutral territorial waters.[240]

This expansion of the Tanker War led the United States to grant a Saudi request to buy Stinger short-range air defense missile systems.[241] The USSR supplied Iraq with weapons, consistent with its bilateral friendship and cooperation treaty, and at the same time Soviet weaponry may have found its way to Iran through North Korea and the PRC.[242] Soviet arms sales seemed to follow the fortunes of the battlefield and Soviet failure to achieve influence within Iran.[243] France was becoming a

heavy supplier to Iraq[244] and in 1984 sold $4.5 million in arms to Saudi Arabia,[245] which may have found their way to Iraq.[246] Sweden began selling arms to Bahrain but mostly to Iran through middlemen in Austria, Brazil, Ecuador, Singapore, Thailand and Yugoslavia. Among these sales were 40 "pleasure cruisers," as designated by a Swedish manufacturer, to the Iranian coast guard. At the same time the UN Secretary-General chose a Swedish politician who later became prime minister, Olaf Palme, as mediator between the belligerents.[247]

The Tunis May 9-10 Arab League Summit Conference strongly condemned attacks on Kuwaiti and Saudi tankers.[248] The Soviet Union was concerned that Iranian attacks on the tankers would result in a major regional war on its borders and a possibility of US intervention. Although the USSR negotiated with Iran in June 1984 concerning Soviet military support of Iraq, little changed in Soviet behavior, which was becoming increasingly pro-Iraq, partly due to Iranian purges of pro-Soviet groups in Iran.[249]

In April an Iraq-laid mine had damaged a Saudi tanker, and in May Iran initiated a retaliatory policy against Arab shipping.[250] On May 21 the GCC States complained to the Security Council about Iranian "acts of aggression on the freedom of navigation" to and from their ports, asserting that "Such acts of aggression constitute a threat to the stability and security of the area and have serious implications for international peace and security."[251] Iran justified the attacks on reaction against aid to Iraq by States in the region, and "indivisibility of security in the ... Gulf."[252] Although this argument concededly had no basis in law, Iran hoped target States would pressure Iraq, whom they had been supplying,[253] to stop attacks on Iran.[254] During Council meetings many States addressed freedom of navigation.

> ... Norway ... expressed regret that ships had been attacked in international waters outside the declared war zones, and stated that free and safe navigation should be secured for international shipping in the area. ... Kuwait said that attacks against Saudi and Kuwaiti tankers were acts of aggression committed against ... two countries ... not parties to the ... conflict, carried out in violation of ... conventions according to which the high seas [were] open to all countries. This view was shared in general terms by other Gulf States such as Bahrain, Oman, [UAE] and Saudi Arabia. Yemen also denounced those attacks aimed against tankers belonging to States ... not parties to the conflict. The importance of ... free navigation and free commerce was further stressed by ... Ecuador, [FRG], India, Jordan, Liberia, Morocco, Pakistan, Somalia and Sudan[.] ... Panama called on the ... Council to take action to ensure that the right of free navigation and trade in international waters might be effectively exercised by all .... [T]he Netherlands pointed out the legal aspects of the attacks on shipping in the Gulf, recognizing that under international law belligerents may ... restrict shipping to and from ports of ... belligerents, and that such measures do of necessity affect the rights of third States under whose flags such shipping is conducted; ... deliberate and indiscriminate attacks against merchant shipping in any part of the Gulf were to be considered absolutely outside the scope of the permissible use of armed force. The Soviet Union, ... restating that any foreign

> armed intervention in the . . . Gulf was inadmissible, no matter what the pretext, asserted that international law demand[ed] strict observance of . . . freedom of navigation, as laid down in general maritime law and in binding treaty obligations. The other permanent members of the . . . Council reaffirmed in rather general terms the legitimate rights and interests of third States.[255]

The Arab League Secretary General also invited the Council to take appropriate measures to protect navigation in the region and to ensure safety of international sea lanes and channels.[256] Many States addressing the Council had vessels under their registries, perhaps under flags of convenience (*e.g.*, Liberia, Panama), or were major carriers, in the Gulf trade. Many had been or would be major naval players in the Tanker War.[257] The resulting Resolution 552 (June 1, 1984)

> . . . *Call[ed] upon* all States to respect, in accordance with international law, the right of freedom of navigation; . . . *Reaffirm[ed]* the right of free navigation in international waters and sea lanes for shipping en route to and from all ports and installations of the littoral States that are not parties to the hostilities; . . . *Call[ed] upon* all State to respect the territorial integrity of the States . . . not parties to the hostilities . . . ; . . . *Condemn[ed]* the recent attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia; . . . *Demand[ed]* that such attacks should cease forthwith and that there should be no interference with ships en route to and from States . . . not parties to the hostilities; . . . *Decide[ed]*, in the event of non-compliance with the present resolution, to meet again to consider effective measures . . . commensurate with the gravity of the situation . . . to ensure the freedom of navigation in the area . . . .[258]

A GCC draft resolution would have named Iran as an aggressor.[259] A week later the London Economic Summit of major Western powers and Japan

> . . . expressed [its] deep concern at the mounting toll in human suffering, physcial damage and bitterness that this conflict has brought; and at the breaches of international humanitarian law that have occurred.
>
> . . . The hope and desire . . . is that both sides will cease their attacks on each other and on the shipping of other States. The principle of freedom of navigation must be respected. We are concerned that the conflict should not spread further and we shall do what we can to encourage stability in the region.
>
> . . . We also considered the implications for world oil supplies . . . . [T]he world oil market has remained relatively stable. . . . [T]he international system has both the will and the capacity to cope with any foreseeable problems through the continuation of the prudent and realistic approach . . . being applied.[260]

Almost simultaneously Saudi aircraft, with US AWACS help, downed an Iranian fighter over the Gulf after two warnings; there was a dispute as to whether it was in international or Saudi airspace, but in any event Iran appeared unwilling to

challenge the Saudis. Two weeks later Saudi Arabia established an Air Defense Identification Zone (ADIZ), the Fahd Line, beyond Saudi territorial sea limits. This allowed Saudi interceptors, guided by US AWACS and refuelled by US air tankers, to engage other aircraft, primarily Irani, threatening shipping.[261] Saudi Arabia also proclaimed a 12-mile safety corridor within the GCC States' territorial sea. It was intended to provide security for neutral shipping carrying oil from Kuwait and other supporters of Iraq.[262]

At the same time, however, pragmatists within Iran tried to reassure GCC States; a diplomatic breakthrough for Iran came a year later, in May 1985, when the Saudi foreign minister paid an official State visit. There were also high-level exchanges between Iran and Oman and the UAE. The one area where diplomatic progress eluded Iran was the tanker war. Even here, for more than a year Kuwait and Saudi Arabia tried to resolve differences through bilateral negotiations. The Tanker War was not amenable to diplomatic solution between the Gulf Arabs and Iran, because it was an Iraqi war policy. Iraq controlled the timing and intensity of attacks on Iranian shipping and oil installations; with fewer operational aircraft and weapons, Iran had to choose when and against whom to respond. Tankers carrying Kuwaiti oil became special targets of Iranian attacks because of all the GCC countries, Iran had the least friendly relations with Kuwait, which was far weaker militarily than Saudi Arabia.[263]

During the summer of 1984 mines detonated in the Gulf of Suez and the Strait of Bab el Mandeb, choke points for the Red Sea to the west of Saudi Arabia, damaging several ships. Although Iran and Libya were accused of laying the mines, Iran denied the charges; it is thought that the Libyan cargo ship *Ghat* laid them. Egypt exercised its right under the Constantinople Convention to inspect all shipping, and a half dozen navies cooperated in locating and destroying the mines. Saudi Arabia received US assistance in sweeping its ports of Jidda and Yanbu.[264]

A UN-sponsored ceasefire in the land war supposedly lasted from June 1984 to March 1985. The belligerents agreed to stop attacks on civilian population centers.[265] Iran proposed that the truce include Gulf shipping as well, and Iraq insisted that any agreement must allow it to repair or replace its Gulf oil export facilities. Impasse resulted.[266] Kuwait also negotiated with the Netherlands to buy mine-hunting ships;[267] a UK order had forbidden export of small boats and boat parts.[268]

The UN Secretary-General report mandated by Resolution 552 included States' concerns over incidents since June 4. The report, later supplemented, expressed International Transport Workers Federation (ITF) "deep concern" over "serious escalation of attacks on innocent and neutral merchant ships and their crews" in the war. The International Chamber of Shipping (ICS) chair and the President of the International Shipping Federation (ISF) also declared that merchant shipping attacks "had led to much loss of life and to the destruction and damage of many

vessels; they appealed to the Secretary-General and the [UN] to continue efforts to end the attacks." The Secretary-General brought these concerns and Resolution 552 to the belligerents' attention.[269]

*6. 1985: War of the Cities Renewed; The Tanker War Continues; Heightened Responses.*

In 1985 the truce was broken; the War of the Cities was renewed.[270] In April European heads of State issued a declaration asking for the war to end and for belligerents to stop using chemical weapons; at the same time, however, large shipments of European arms began arriving in Iraq.[271] Iraq successfully renewed attacks on Kharg and Iranian tankers; Iran restarted a campaign against neutral tankers with less success.[272] By the end of 1985 "the tanker war had [become] the most important feature of the Iran-Iraq War."[273] In June 1985 Iran had intercepted and detained *Al-Muharaq,* a Kuwaiti-flag ship Kuwait bound but supposedly carrying "5 tonnes of merchandise clearly intended for Iraq." Iraq had been using Kuwait as an entry port for goods since the beginning of the war.[274] (It was only in late 1987 and early 1988 that Iran enacted a prize law;[275] this *ex post facto* legislation was justification for seizure of *Al-Muharaq* and other Kuwait-bound ships.)[276] In September Iran's visit and search procedures, looking for strategic materials for Iraq, were stepped up. Although Iran could not (or chose not to try to)[277] close Hormuz by military action, Iran might succeed in scaring off enough shipping to make a difference,[278] since oil sales financed Iraq's war effort, and it had to ship through the Gulf, being denied Mediterranean Sea pipeline access except through Turkey.[279] Iranian crude was now being ferried in Iranian tankers from Kharg to Sirri Island in the lower Gulf, where it was stored in "mother" ships for transfer to customers' tankers. Iranian tanker shuttles also operated between Kharg and Lavan Island in the lower Gulf.[280] Iran also established a helicopter base on its offshore Reshadat oil platform 75 miles from the Qatari coast.[281] Iran was also beginning to feel the pinch of seriously depleted stocks of replacement parts, particularly for its air force.[282]

The August 1985 Casablanca Arab League summit supported prior resolutions favoring Iraq. "It was against this background that Baghdad mounted its effective air strikes against Kharg oil terminal."[283] Algeria, Lebanon, Libya, South Yemen and Syria boycotted the meeting; in June 1985 Libya and Iran had signed a Strategic Alliance Treaty. These moves were seen as evidencing growing division in the Arab world over the war.[284] Turkey continued to support Iraq, the United States had formally restored diplomatic relations with Iraq in November 1984, and the US-Iraq trade became three times (at $1 billion), that of the USSR with Iraq. Direct links between the US embassy in Baghdad and the United States were established.[285] France continued as a major supplier for Iraq, although she also supplied Iran. China was Iran's major supplier through North Korea, but it too supplied

Iraq, through Egypt. Iran was becoming more isolated, however.[286] At the same time Soviet sales to Iraq increased, the USSR reduced oil imports from financially strapped Iran.[287]

Because of the belligerents' actions, the United States published this NOTMAR *Special Warning* in September 1985:

> 1. U.S. Mariners are advised to exercise extreme caution when transiting the . . . Gulf which are becoming increasingly dangerous due to continued attacks on vessels outside the military zones declared by Iran and Iraq.
>
> 2. In view of recent Iranian visit, search, and in some cases seizure of vessels of third countries within the . . . Strait of Hormuz, and the Gulf of Oman, U.S. mariners are advised to exercise extreme caution and to be alert to possible hazardous conditions, including hostile actions, when transiting these waters.
>
> 3. . . . Iran . . . has issued guidelines for the navigational safety of merchant shipping in the . . . Gulf, the relevant portions of which are . . . :
>
> —After transiting . . . Hormuz, merchant ships sailing to non-Iranian ports should pass 12 miles south of Abu Musa Island; 12 miles south of Sirri Island; south of Cable Bank Light; 12 miles south of Farsi Island; thence west of a line connecting the points 27-55N, 49-53E, and 29-I0N, 49-12E.; thereafter south of the line 29-I0N, as far as 48-40E.
>
> —All Iranian coastal waters are war zones.
>
> —All transportation of cargo to Iraqi ports is prohibited.
>
> —. . . Iran . . . will bear no responsibility for merchant ships failing to comply with the above instructions.
>
> 4. Deep draft shipping should be aware of shoal waters south of Farsi Island.
>
> 5. . . . Iraq . . . has stated that the area north of 29-30N is a prohibited war zone. It has warned that it will attack all vessels appearing within a zone believed to be north and east of a line connecting the following points: 29-30N, 48-30E, 29-25N, 49-09E, 28-23N, 49-47E, 28-23N, 51-00E. . . . Iraq . . . has further warned that all tankers docking at Kharg Island regardless of nationality are targets for the Iraqi Air Force.
>
> 6. In view of continued hostilities between Iran and Iraq and recent acts of interference or hostility against vessels of their countries, U.S. mariners are advised, until further notice, to avoid Iranian or Iraqi ports and coastal waters and to remain outside the areas delimited in paragraphs 3 and 5 above.

The NOTMAR added that the United States did not recognize the validity in law of any foreign rule, regulation or proclamation so published.[288] "While the United States obviously recognized provocations by both sides . . . , it . . . regarded Iranian attacks against neutral shipping as the major problem. [US] policy regarding the war was to avoid military involvement, if possible, while providing friendly Gulf States with [means] . . . to defend themselves."[289] For example, while asserting freedom of the seas and straits transit passage policies, the United States offered to work with the GCC and to help it militarily if aid was requested publicly and there was access to suitable facilities.[290] At about the same time GCC-Iran relations

appeared to be improving.[291] Individual GCC members' policies continued as before, however. Saudi Arabia and Kuwait aided Iraq with $4 billion in 1984, and late that year Iranian aircraft penetrated the Saudi ADIZ and hit a Kuwait-bound freighter. There was an assassination attempt on the Kuwaiti emir in May 1985, said to have been fomented by Iran.[292] The United Kingdom announced a $3-4 billion sale of combat aircraft to Saudi Arabia.[293] The UAE mostly continued to support Iran, with $1 billion in trade between them. The UAE was concerned about its offshore oil facilities, which pumped two-thirds of its oil. Moreover, 20 percent of its population were Shiites.[294]

In October 1985 France began defending French-flag merchantmen. A French warship positioned itself between the *Ville d'Angers* and an Iranian warship, warning the Iranian that it would use force if the Iranian tried to intercept *Ville d'Angers.* French ROE declared that French warships would fire on forces refusing to break off attacks on neutral merchant ships; the result was a drop in attacks near French men-of-war.[295]

*7. 1986: Boarding of Merchant Ships; Attacks on Shipping and Port Facilities.*

On January 12, 1986 Iran boarded and searched the *President Taylor,* a US-flag vessel.[296] The United States acknowledged a belligerent's right to board and search but cautioned about overstepping rights and norms, "and even violence, inherent in all ship search incidents."[297] Later that month the UK justified Iranian interceptions and seizures of UK-flagged merchantmen as self-defense.[298] The Netherlands recognized the right of visit and search but only for ships proceeding to and from belligerents' ports.[299] In April 1986 a US destroyer warned an Iranian warship off what may have been a planned boarding of *S.S. President McKinley,* a US flag merchantman.

In February 1986 Security Council Resolution 582 called for a ceasefire; it "*Deplore*[*d*] the escalation of the conflict, especially territorial incursions, the bombing of purely civilian population centres, attacks on neutral shipping or civilian aircraft, the violation of international humanitarian law and other laws of armed conflict and, in particular, the use of chemical weapons contrary to . . . the Geneva Gas Protocol."[300] That month Iraq extended its exclusion zone up to an area close to Kuwaiti territorial waters.[301] Also in that month, the United States concluded its agreement with the United Kingdom for use of Diego Garcia as a naval support facility.[302]

In May, after more Iranian strikes on shipping, the United States reaffirmed a commitment to Saudi self-defense, freedom of navigation, free flow of oil, and open access through Hormuz.[303] That day Iran warned that its naval forces would attack US warships escorting or convoying cargo ships carrying cargo for Iraq or which tried to interfere with Iran's interception procedures.[304] A US May 14 NOTMAR advised:

1. U.S. naval forces operating in international waters within the... Gulf, Strait of Hormuz and the Gulf of Oman and the Arabian Sea north of twenty degrees north are taking additional defensive precautions against terrorist threats. All surface and subsurface ships and craft are requested to avoid closing U.S. forces closer than five nautical miles without previously identifying themselves. U.S. forces especially when operating in confined waters, shall remain mindful of navigational considerations of ships and craft in their immediate vicinity. It is requested that radio contact with U.S. naval forces be maintained on [designated frequencies] when approaching within five nautical miles of U.S. naval forces. Surface and subsurface ships and craft that close U.S. naval forces within five nautical miles without making prior contact and or whose intentions are unclear to such forces may be held at risk by U.S. defense measures.

2. These measures will also apply when U.S. forces are engaged in transit passage through... Hormuz or when in innocent passage through foreign territorial waters and when operating in such waters with the approval of the coastal State.

The Notice was published "solely to advise that measures in self-defense will be exercised by US naval forces.... [and] will be implemented in a manner that does not impede the freedom of navigation of any vessel or State."[305]

In August Iraq bombed Iran's Sirri oil terminal for the first time; a UK-registered, Hong Kong-owned tanker was badly damaged. By that month Iraq had hit five of the 11 shuttle tankers operating between Kharg and Sirri. Iran's Lavan and Larak oil terminals were bombed later that year. In September 1986 Iranian warships fired on, stopped and searched a USSR merchantman, *Pyotr Emtsov,* Kuwait bound with arms ultimately destined for Iraq.[306] During 1985-86 Iran inspected over 1000 vessels.[307] In October Security Council Resolution 588 called for compliance with Resolution 582.[308] In November Iraq bombed the UAE Abu al-Bukhosh off-shore oil installations.[309] The 1986 Iraqi attacks reduced Iranian oil production considerably; a fall in world oil prices aggravated Iran's economic straits.[310]

A November 20 US International NOTAM reported Iranian airspace was closed to US-flag aircraft and that

U.S. Naval Forces in the... Gulf, Strait of Hormuz, Gulf of Oman, and Arabian Sea (North of 20 Degrees North) are taking additional defensive precautions against terrorist threats. Aircraft at altitudes less than 2000 ft. AGL which are not cleared for approach/departure to or from a regional airport are requested to avoid approaching closer than 5 nm to U.S. Naval Forces.

It is requested that aircraft approaching within 5 nm of U.S. Naval Forces establish and maintain radio contact with U.S. Naval Forces on [certain frequencies]. Aircraft which approach within 5 nm at altitudes less than 2000 ft. AGL whose intentions are unclear to U.S. Naval Forces may be held at risk by U.S. defensive measures....[311]

In that month UK naval presence increased due to increased attacks on neutral shipping.[312]

Iraq began to default on foreign loans, but its leading creditors—the FRG, France, Japan and Turkey—rescheduled debts, along with India and Yugoslavia. By 1986 Iraq's pipeline through Saudi Arabia was in operation, and another through Turkey was under construction. Oil sales from these conduits would reassure creditors.[313] The USSR began a massive military support program of $4.9 billion for 1986, compared with $4 billion for the previous year, for Iraq. However, in August Saudi Arabia had to abandon its price-war strategy at the Organization of Petroleum Exporting Countries (OPEC), which helped its relations with Iran.[314] The Soviet Union, under Mikhail Gorbachev's leadership, appeared to begin a new policy toward the war, resolving to ending it by expanding diplomatic contacts with Iran. Nevertheless USSR arms sales to Iraq continued until the end.[315] By the next year the Soviet Union was in effect underwriting much of the Iraqi defense effort.[316] Although not known at the time, US arms sales to Iran through Israel in what came to be known as the Iran-Contra affair began about then.[317] A Danish-flag vessel, *Else-HT*, made voyages with these goods on board in May and June from Eilat, an Israeli port on the Gulf of Aqaba and near Jordan's Port of Aqaba, to Bandar Abbas.[318] After an Iranian attack on a UK merchantman in September, Britain closed Iran's military procurement office in London. Britain was Iraq's second largest nonmilitary supplier.[319] UK companies helped with tools and parts too.[320]

### *8. 1987: Escalating US Involvement; Reflagging and Convoys; Attack on* U.S.S. Stark

In late January 1987 the ICO met in Kuwait and heard the UN Secretary-General call for an international panel to determine war guilt. Iran boycotted the meeting. The United States moved six warships, usually based in Bahrain, to the upper Gulf to provide naval cover for the meeting.[321] About then an Italian yard delivered two corvettes and a support ship to Iraq; they sailed for Alexandria, Egypt, en route to Umm Qasr, an Iraqi port. Warned of a possible Iranian Silkworm attack, they returned to Italy.[322]

In March 1987 the United States expressed concern over Iran's testing 1100-pound warhead, 85 kilometer range, PRC-manufactured Silkworm missiles in the Gulf. Kuwait became increasingly concerned about Iranian attacks on its tankers and requested Soviet and US protection. Internationalization of the Tanker War was "exactly what [Iran] wanted to avoid, but... that is precisely what happened." The war had entered a new phase.[323] (A US congressman also suggested mining Iranian ports to force it to stop its attacks in the Gulf.)[324] In April Iran delivered a note through Algeria concerning the right of transit passage through the Strait of Hormuz. The US response rejected an Iranian claim that LOS Convention

principles were contractual and not customary in nature, saying the LOS Convention represented longstanding customary law. The United States also "reject[ed]... any claim by Iran of a right to interfere with any vessel's lawful exercise of the right of transit passage in a strait used for international navigation."[325]

In May Kuwait and the United States completed negotiations leading to transfer of 11 tankers owned by Kuwaiti Oil Tanker Co. (KOTC), the Kuwaiti State shipping company, from the Kuwaiti to the US flag. This preempted the USSR, which had to settle for chartering three tankers to Kuwait; these charters were later renewed into 1988.[326] The Soviet Union was "deliberately vague on the question of military protection."[327] The UK position, stated in Parliament after the first US convoy sailed, was that vessel owners were free to reregister their vessels as long as national requirements were met, and that with reregistration went an obligation for the Royal Navy to defend these vessels.[328] Three KOTC tankers were later reregistered in Britain.[329] The USSR kept its arrangement with Kuwait in perspective; a rapid Soviet naval buildup in the Gulf might prompt a much greater US naval presence and might provoke GCC concerns about the USSR, both contrary to Soviet interests.[330] In June 1987 a Soviet Deputy Foreign Minister said the USSR had no intention of increasing its naval force in the Gulf.[331] Although assailed in some quarters, most commentators felt US reflagging comported with international law.[332] Iran tried to pursuade Kuwait to stop the reflagging process; when this failed, Iran declared that Kuwait had practically turned itself into an Iraqi province with its resources at the disposition of France, the USSR and the United States. Iran said it could not allow Iraq to receive guaranteed oil income to beef up its war machine through Kuwaiti tankers flying other flags.[333]

At about this time an Iranian patrol boat fired on and damaged a Soviet merchantman, *Ivan Koroteav.* In mid-May a Soviet tanker chartered to Kuwait, *Marshal Chuykhov,* hit a mine which the USSR said Iran laid. A second Kuwait-bound tanker was mined on June 19. Mines were detected in approaches to the channel leading to Kuwait's Mina Ahmadi terminal.[334] Mines began appearing throughout the Gulf. Iranian small boats, Revolutionary Guards crewed, laid them just before a preselected vessel arrived in the area.[335] The Saudi and US navies took a month to clear the channel to Kuwait and its approaches.[336] A Soviet response to attacks on its merchantmen was to deploy three more minesweepers to the Gulf.[337]

On May 17 two Iraqi fighter-launched Exocet missiles hit the frigate *U.S.S. Stark,* presumably unintentionally. There were deaths and injuries among its crew and severe damage to the ship.[338] (In 1989 Iraq paid US claims for the *Stark* attack.)[339] There is no report of the extent of pollution resulting from loss of bunker fuel; this appears to be true for later attacks on naval vessels in engagements. The United States added three ships to MIDEASTFOR, ordered its forces to a higher state of alert[340] and revised its Rules of Engagement (ROE) for possible interactions between US and Iraqi forces and anyone else displaying hostile intent or

committing hostile acts.[341] UK ROE continued to reflect Britain's view that the UN Charter, Article 51, governed UK responses.[342] "The rules of engagement [were] intended to avoid escalation, although the varied nature of potential threat and the possibility of surprise attack [were] recognized and the inherent right of self-defence of Royal Navy ships or British merchant vessels under their protection, is not circumscribed or prejudiced." The result would have posed "interesting questions" if a UK warship could have defended UK merchantmen or British-crewed ships. One "practical solution" might have been that attack on a merchant ship "might reasonably [have been] perceived as an attack on the warship as well. In that situation, the warship [would] be able to defend itself and in doing so defend the merchant vessel accompanying it."[343] The nature of other naval participants' ROE have not been published, but undoubtedly they reflected, or were limited by, States' views on the scope of self-defense, national policies, and defense capabilities.[344]

The US ROE had their complement in a July 1987 US NOTAM and NOTMAR:

> A. In response to the recent attack on . . . *Stark* and the continuing terrorist threat in the region[,] U.S. naval vessels operating within the . . . Gulf, Strait of Hormuz, Gulf of Oman and the Arabian Sea, north of 20 degrees north, are taking additional defensive precautions. It is requested that aircraft (fixed wing and helicopters) approaching U.S. naval forces establish and maintain radio contact with U.S. naval forces on [designated frequencies]. Unidentified aircraft whose intentions are unclear or who are approaching U.S. naval vessels may be requested to identify themselves and state their intentions as soon as they are detected. . . . [T]o avoid inadvertent confrontation, aircraft . . . including military aircraft may be requested to remain well clear of U.S. vessels. Failure to respond to requests for identification and intentions or to warnings and operating in a threatening manner could place the aircraft at risk by U.S. defensive measures. Illumination of a U.S. naval vessel with a weapons fire control radar could result in immediate U.S. defensive reaction.

The notice was published "solely to advise that measures in self-defense are being exercised by US naval forces in this region." The NOTAM/NOTMAR closed: "[T]hese measures will be implemented in a manner that does not unduly interfere with the freedom of navigation and overflight[.] . . ."[345] This Notice was revised in September 1987:

> In response to the recent attack on . . . *Stark* and the continuing terrorist threat in the region, U.S. naval vessels operating within the . . . Gulf, Strait of Hormuz, Gulf of Oman, and the Arabian Sea, north of 20 degrees north, are taking additional defensive precautions. Aircraft (fixed wing and helicopters) operating in these areas should maintain a listening watch on [certain frequencies]. Unidentified aircraft, whose intentions are unclear or who are approaching U.S. naval vessels, will be contacted on these frequencies and requested to identify themselves and state their intentions as soon as they are detected. . . . [T]o avoid inadvertent confrontation,

> aircraft . . . including military aircraft may be requested to remain well clear of U.S. vessels. Failure to respond to requests for identification and intentions, or to warnings, and operating in a threatening manner could place the aircraft . . . at risk by U.S. defensive measures. Illumination of a U.S. naval vessel with a weapons fire control radar will be viewed with suspicion and could result in immediate U.S. defensive reaction. This notice is published solely to advise that measures in self-defense are being exercised by U.S. naval forces in this region. The measures will be implemented in a manner that does not unduly interfere with the freedom of navigation and overflight. . . .
>
> U.S. naval forces in the . . . Gulf, Strait of Hormuz, Gulf of Oman, and Arabian Sea (North of 20 Degrees North) are taking additional defensive precautions against terrorist threats. Aircraft at altitudes less than 2000 ft AGL which are not cleared for approach/departure to or from a regional airport are requested to avoid approaching closer than 5nm to U.S. naval forces.
>
> It is requested that aircraft approaching within 5nm of U.S. naval forces establish and maintain radio contact with U.S. naval forces on [designated frequencies]. Aircraft approaching within 5nm at altitudes less than 2000 ft. AGL whose intentions are unclear to U.S. naval forces may be held at risk by U.S. defensive measures. . . . [346]

This was a much stronger statement of intentions than the Notice of a year earlier.[347] "In the wake of the Kuwaiti reflagging, it was (perhaps deliberately) left unclear as to how far the [US] protective umbrella was to extend." Promises of escort for US-flagged ships would "depend . . . on the situation" as well as for foreign flag shipping in certain cases.[348] The US reaction may have been partly due to media reports of Iran's training 20,000 Revolutionary Guards to attack US ships in fast Swedish-built "pleasure boats."[349]

In July the US Navy began convoying reflagged tankers.[350] Previously the United States "had found intermittent convoys an effective deterrent to Iranian action. Indeed, Iran refrained from harassing ships carrying other flags when they sailed in the vicinity of US warships."[351] Only a small percentage of tankers plying the Gulf were convoyed, however.[352] Reflagged tankers carried no contraband to or oil from Iraq.[353] On July 24 the reflagged *Bridgeton* and on August 10 the *Texaco Caribbean,* under charter to a US company, hit mines; the Navy began providing mine protection.[354] (Although US Navy destroyer types had escorted *Bridgeton* to Kuwait, the Navy outfitted Kuwaiti commercial tugs with minesweeping gear for the return trip. When civilian tug crews refused to undertake minesweeping, Navy volunteers manned the tugs for the return.[355] "[T]he [*Bridgeton*] incident opened a chapter of direct US-Iran naval confrontation in the Gulf."[356] Whether a result of deliberate Iranian decision or Iranian Revolutionary Guard fervor, mines began appearing all over the Gulf and outside the Gulf, in the Strait of Hormuz and Gulf of Oman, and in Kuwaiti and Omani territorial waters. French and UK naval

operations expanded to meet the threat in the latter areas.[357] In late August *U.S.S. Guadalcanal* rescued an Iraqi fighter pilot downed by an Iranian air-to-air missile in international waters. He was repatriated through Saudi Red Crescent Society officials. There is no record of Iranian consent or protest.[358]

The UK Armilla Patrol began "accompanying" but not escorting or convoying UK merchantmen; one result was that foreign vessels were attracted to UK registry to gain protection, at least in the lower Gulf, where there were new mine threats. British vessels were not armed against attacks; UK seafarer unions opposed arming.[359] Italy opposed it as a matter of policy too.[360] After Iranian forces attacked a French flag cargo ship, *Ville d'Anvers*, France broke off diplomatic relations. However, even with reinforced naval presence, it could not organize convoy protection on the US model and relied on a policy of accompanying French flag ships.[361] The USSR sent a *Krivak* class frigate to escort four Soviet ships carrying arms from the Strait of Hormuz to Kuwait for ultimate destination in Iraq, a signal to belligerents that the USSR would protect Soviet-flag ships.[362] Some merchantmen began to carry chaff canisters to confuse incoming missiles; others were repainted dull, non-reflective gray for the same reason. Although most merchant ships remained unarmed, a US helicopter reported coming under missile fire from a Greek ship. Iran reportedly completed testing its Silkworm missiles. Press reports said Iran's air force had established a suicide plane squadron to attack merchant shipping like the World War II Japanese *kamikazi* flights.[363] Iran began three days of naval maneuvers in the Gulf, dubbed Exercise Martyrdom, which involved firing a shore-to-ship missile and ramming a speedboat loaded with explosives into a dummy naval target.[364] Some Iranian naval maneuvers were in Saudi territorial waters.[365] Besides traditional boardings, Iran began using helicopters for visit and search.[366] The Gulf was becoming a more dangerous place as actors crowded the arena and employed new techniques for old methods and new technologies.

Two US warships' Sparrow missiles shot at a radar target suspected of hostile intent missed, and warning shots were fired across two dhows' bows in August.[367] The US Navy, claiming a right of self-defense, captured the Iranian landing ship *Iran Ajr* caught laying mines in September.[368] Three Iranian crew died, two were lost at sea, and the United States repatriated 26 crewmen to Iran through Omani Red Crescent auspices five days later. Shortly thereafter they were turned over to Iranian officials, along with the remains of the three who had died. It is not known whether Iraq consented or objected to these arrangements.[369] Iran asserted that self-defense could only be claimed in response to an armed attack and that this was aggression.[370] It also promised revenge and gave an "explicit warning" that it would soon be engaged on another front.[371] However, the US attack "effectively halted Iranian minelaying for six months."[372] But by mid-1987 Iranian aircraft, helicopters, small boats and warships had attacked over 100 ships of 30 nationalities.

Iraq had attacked over 200 vessels, mostly Iranian owned or chartered.[373] In late May 1987 the USSR had sent three minesweepers to join two frigates that had patrolled the Gulf since 1986; this was in response to Iranian mining of Soviet-flag ships.[374]

The June 1987 Venice Economic Summit had "agree[d] that new and concerted international efforts [were] urgently required to bring the Iran-Iraq War to an end." Besides calling upon the belligerents to end the war and supporting the United Nations, the Summit "reaffirm[ed] that the principle of freedom of navigation in the Gulf is of paramount importance for us and for others and must be upheld. The free flow of oil and other traffic through the Strait . . . must continue unimpeded." The Summit pledged to consult on ways to pursue these important goals effectively.[375] In July unanimous UN Security Council Resolution 598

> *Deplor[ed]* . . . bombing of purely civilian population centres, attacks on neutral shipping or civilian aircraft, the violation of international humanitarian law and other laws of armed conflict, and . . . use of chemical weapons contrary to . . . the 1925 Geneva Gas Protocol, . . . *Demand[ed* that belligerents] . . . observe an immediate cease-fire [and] *Call[ed] upon* all other States to exercise the utmost restraint and to refrain from any act which may lead to further escalation and widening of the conflict . . . .

The Resolution also declared for the first time during the war that there had been a breach of the peace and that the Council was acting under the UN Charter, Articles 39-40.[376] Iraq accepted Resolution 598 on July 23.[377] On September 3 the 12-member European Community supported Resolution 598, "strongly condemn[ing] recent attacks on merchant ships in the Gulf and reiterat[ing] . . . firm support for the fundamental principle of freedom of navigation, which is of the utmost importance to the whole international community."[378]

On August 3 Iran had announced it planned naval maneuvers in its territorial waters in the Gulf and in the Gulf of Oman, warning all vessels, commercial or military, against approaching these waters. Iraq protested, noting that Iranian territorial waters included part of the Strait of Hormuz and waters between the Tunb and Forur islands, claiming that under the 1982 LOS Convention, Article 38(1),[379] and the 1958 Territorial Sea Convention, Article 16(4),[380] that Iran could not suspend passage through international straits, and that the International Maritime Organization (IMO) had declared shipping lanes passing close to Tunb and Forur.[381]

By the end of July US Navy escorts had been receiving informal cooperation from France and Britain and support and assistance from Saudi Arabia and other GCC States.[382] In July and August France ordered its aircraft carrier *Clemenceau* to the Gulf; France's prime minister declaring, "We have no aggressive intentions, but we want to be respected and we will be respected."[383] In August, Britain[384] and

France agreed to send minesweepers to the Gulf, and by September Italian,[385] Belgian and Netherlands ships, the latter to operate jointly with Armilla Patrol protection,[386] were on the way. Saudi Arabia committed its four minesweepers to clearance operations.[387] On August 20, the Western European Union (WEU) declared Europe's vital interests required that freedom of navigation in the Gulf be assured at all times.[388] The capacity of WEU members to consult on this policy "was all the more important[,] given a previous record of disunity."[389] By now Iran had lost the international diplomatic leverage it had been cultivating for the previous three years.[390]

On October 8, Iranian speedboats fired on US helicopters; in accordance with US self-defense principles and ROE, the helicopters returned fire, sinking one boat and damaging others. Iran claimed the US helicopters fired first and vowed a "crushing response." Some argued it was a "carefully calculated reprisal."[391] US Navy personnel rescued six Iranian Revolutionary Guards boat crew members; two died aboard *U.S.S. Raleigh.* Survivors and remains were returned to Iran through Omani Red Crescent auspices. It is not known whether Iraq consented or objected to repatriation.[392] Later that month the United States, claiming self-defense, responded to an Iranian Revolutionary Guards Silkworm attack in Kuwaiti territorial waters on a US flag tanker, *Sea Isle City,* by destroying the Iranian Rostum offshore oil platform in the southern Gulf. *Sea Isle City*'s master, a US national, was blinded in the attack. When the attack on *Sea Isle City* occurred, it was not under US Navy convoy; convoying ceased when vessels reached Kuwaiti territorial waters. Rostum was a Guards gunboat communications base and was not directly involved in the Silkworm strike. Those manning it were given time to evacuate before the attack began. Rostum apparently was not engaged in oil production; therefore, the attack did not create a threat to the environment.[393] The US strike was stated to be in specific response to the *Sea Isle City* attack; connection with an Iranian attack on the *Sungari,* which had occurred a day before *Sea Isle City* was hit, was avoided. Although *Sungari* was beneficially US owned, it was Liberian flagged.[394] Iran claimed the platform attacks were aggression and that self-defense could only be asserted in response to armed attack.[395] (US import controls on Iranian goods were said to be a reason for the attacks.[396] There is some evidence Iran was aiming at oil tankers in the Kuwaiti port of Al-Hamadi, where Kuwaiti and Saudi oil donated to Iraq was being lifted to pay for ammunition shipped to Iraq through the Port of Aqaba.)[397] US response for the *Sea Isle City* Silkworm attack, and not for the *Sungari* attack, established some precedent that at this time the United States did not consider open registry ships, even if owned by US interests, to have enough connection to merit protection. This view changed as the war deepened, at least where US nationals were in the crew.[398] There were no more confrontations with the United States for the next six months as a result of the US response on Rostum.[399] Iranian Guards speedboats continued to harass

unprotected shipping;[400] three days after the US response to the *Sea Isle City* attack, Iran hit the Kuwaiti deep-water Sea Island Terminal.[401] Iran made it clear that this action was intended as retaliation for the Rostum attack.[402]

> This exchange of blows was notable because of Iran's care not to attack the US directly but to target its regional allies.... [T]he most Iran did was to probe the extent and scope of the US commitment... to find the weak links, the grey areas. Yet it did over-reach itself when it was caught red-handed in minelaying, thus unwittingly providing ammunition to those who argued that it was Iran that constituted a menace to the freedom of navigation.... [I]t found the impulse to defy the United States, whatever the consequences, irresistible, providing the [Iranian Islamic] revolution with the high drama that it so cherished, even at the risk of diverting from the princip[al] issue—the land war.... Iranian leaders were confident that the US presence could not last forever, that sooner or later the expense of the enterprise and the distraction of other issues... would see a withdrawal of the US fleet.[403]

Future events would prove this assessment to be incorrect. By the end of 1987 Western naval presence in the Gulf appeared more durable than might earlier have been expected. However, for the time being Iran continued to see its strategy paying off, weakening US credibility with its Gulf allies, exasperating its military, and drawing the United States from impartiality to messy partisanship.[404]

In November, an Arab League Extraordinary Summit "expressed anxiety at the continuation of the war and voiced... indignation at [Iran's] intransigence, provocations and threats to the Arab Gulf States." The Summit "condemned Iran's... procrastination in accepting...Resolution 598... [, and] called on Iran to accept the Resolution and implement it *in toto*..." The Summit asked the international community to "shoulder its responsibilities, exert effective international efforts and adopt measures adequate to make [Iran] respond to the calls for peace." Iraq's accepting Resolution 598 and positive response to peace initiatives was appreciated. It confirmed support for Iran's defending its territory and "legitimate rights" but declared solidarity with Kuwait and Saudi Arabia as to Iranian threats, aggression and violations of holy places.[405] A few days later Iranian speedboats shot up three tankers carrying Saudi oil, but Syrian pressure succeeded in getting Iran to refrain from hitting targets in Kuwait.[406] Iran's president visited the United Nations to discuss a peace plan. However, UN diplomatic activity was to stop by early 1988.[407] Nevertheless, the Secretary-General continued to press Iran to accept the UN proposal.[408] It was only in October 1987 that Iran and Iraq formally broke off diplomatic relations,[409] a further sign of polarization.

During that month a US warship fired on a UAE fishing vessel, resulting in a death and three injured crew; the United States said it fired in self-defense but expressed regret over the incident, which had occurred between the UAE coast and Abu Musa, from which Iranian speedboats carried out Gulf shipping raids.[410] The United States was particularly concerned about small boats; Iran had been

conducting naval maneuvers in its exclusion zone and territorial waters, including simulated speedboat attacks on suicide runs.[411] In December a US warship helped rescue a Cypriot crew after an Iranian gunboat attack set their tanker ablaze. Tanker masters began tailing convoys or simulating them during night steaming.[412] During that month *H.M.S. Scylla* and *York* protected merchant ships from Iranian speedboat attacks.[413]

On December 11, NATO Council "Ministers underlined the importance of an early and full implementation of [Resolution] 598. They also recalled the importance of freedom and security of navigation in the Gulf. They call[ed] for appropriate follow-up action . . . to resolve these problems."[414] Late in December a GCC conference confined itself to expressing "deep regret at 'the destructive war' . . . and urging the UN Security Council to implement Resolution 598 as soon as possible." Part of this was due to Omani and UAE opposition, caused by the geography that compelled Oman and Iran to patrol Hormuz jointly, and the UAE's financial affiliation with Iran. The growing risk to neutral shipping increased trade through the UAE, where goods would be shipped overland. Sentiment against an arms embargo directed toward Iran was the same in the GCC and the Security Council. Nevertheless, the December GCC Summit approved a comprehensive security strategy that may have amounted to a collective self-defense pact.[415] However, some governments, notably China, France, the FRG and the USSR, were persuaded that Iran's not rejecting Resolution 598 meant Iran might be genuinely interested in a negotiated settlement to end the war. Permanent Security Council members (China, France, USSR) would veto any US-sponsored resolution to impose sanctions.[416] Iran claimed naval presences from States outside the Gulf violated Resolution 598, Article 5.[417]

Meanwhile, the USSR and the United States continued to support Iraq, the Soviet Union through military supplies, the United States by $961 million in agricultural commodity credits in 1987.[418] The USSR and its Eastern European satellites continued to send negligible amounts of military equipment to Iran, but there was no question about the USSR's priorities.[419]

*9. 1988: End Game: Intensity of Responses; Collapse and Ceasefire.*

A January 2, 1988 US NOTMAR reflected the intensity of the situation:

> 1. U.S. mariners are advised to exercise extreme caution when transiting the . . . Gulf, the Strait of Hormuz, and the Gulf of Oman, due to hostilities between Iran and Iraq. Mariners are further advised to avoid Iranian or Iraqi ports and coastal waters and to remain outside the areas delimited in paragraphs 2 and 3 below until further notice.
>
> 2. Iran has stated:
>
> A. Iranian coastal waters are war zones.
>
> B. Transportation of cargo to Iraqi ports is prohibited.

C. Guidelines for the navigational safety of merchant shipping in the ... Gulf are ...: after transiting ... Hormuz, merchant ships sailing to non-Iranian ports should pass 12 miles south of Abu Musa Island; 12 miles south of Sirri Island; south of Cable Bank Light; 12 miles south of Farsi Island; thence west of a line connecting the points 27-55N. 49-53E. and 29-10N. 49-12E.; thereafter south of the line 29-10N. as far as 48-10E.

D.... Iran disclaims any responsibility for merchant ships failing to comply with the above instructions.

E. Iranian naval forces patrol the Gulf of Oman up to 400 kilometers from the Strait of Hormuz.

3. Iraq has stated:

A. The area north of 29-30N. is a prohibited war zone.

B. It will attack all vessels appearing within a zone believed to be north and east of a line connecting the following points: 29-30N. 48-30E., 29-25N. 49-09E., 28-23N. 49-47E., 28-23N. 51-00E.

C. All tankers docking at Kharg Island regardless of nationality are targets for the Iraqi Air Force.

4. Several vessels have suffered damage from moored or floating mines in the ... Gulf. U.S. mariners should exercise caution in navigable waters throughout the Gulf region and particularly in the following areas where moored mines have been encountered:

A. The Mina Al Ahmadi/Mina Ash Shu'aybah Channel (28-56N. 48-53E.) and its approaches.

B. The shipping channels south and west of Farsi Island.

5. Mariners should be aware that Iranian naval forces visit, search and in some cases seize or divert to Iranian ports vessels of non-belligerents in the Persian Gulf/Gulf of Oman region.

The United States took no position on the zones' legal validity.[420] During 1987 the belligerents had attacked 178 merchantmen.[421]

At the end of January 1988 Iran promulgated a prize law, article 3 of which declared the following to be war prizes:

(a) All goods, merchandise, means of transport and equipment belonging to a State or to States at war with ... Iran.

(b) Merchandise and means of transport ... belonging to neutral States or their nationals, or to nationals of the belligerent State if they could effectively contribute to increasing the combat power of the enemy or their final destination, either directly or via intermediaries, is a State at war with ... Iran.

(c) Vessels flying the flag of a neutral State as well as vehicles belonging to a neutral State transporting the goods set out in this article.

(d) Merchandise, means of transport and equipment which ... Iran forbids from being transported to enemy territory.[422]

The Law provided that property listed in Article 3(a), *i.e.*, property of a State at war with Iran, would become the property of Iran; Article 3(b) and 3(c) property, *i.e.*, of neutrals would be confiscated and adjudicated. Article 3(d) means of transport

would "become the property of. . . Iran or be confiscated according to circumstances. Any person contesting this must appear before the [prize] Tribunal."[423]

Iraqi attacks on tankers resumed February 10, 1988, after a month's lull.[424] The War of the Cities began again on February 28, 1988; Iran shelled Basra after Iraq bombed an oil refinery near Tehran. Iraq hit Halabja, an Iraqi town captured by Iran, with chemical weapons in March. Later that month Saudi Arabia confirmed buying 1600-mile CSS-2 ballistic missiles from the PRC. On March 30 Iranian gunboats fired on a Kuwaiti military base on Bubiyan Island.

In early 1988 the United States noted willingness to consider a UN Gulf naval force, if a collective action concept was spelled out clearly; the United States would not support a UN force replacing US and US-aligned forces.[425] The United Kingdom was unenthusiastic,[426] but Italy and the USSR supported the idea.[427] The Soviet Union wanted to replace the large Western naval presence with a UN flotilla.[428]

During this time there were clashes involving US naval forces, several with Iran and one with Iraq.[429] On April 14 *U.S.S. Samuel B. Roberts,* a frigate like *Stark,* hit a mine in a field Iran laid in shipping lanes in international waters 70 miles east of Bahrain.[430] In response, on April 18, the United States engaged Iranian warships and neutralized two Iranian oil platforms that had conducted or supported attacks on neutral shipping. Occupants of the two oil platforms (Sassam and Sirri, both located in the lower Gulf) were first given the opportunity to evacuate. Sirri had been responsible for about eight percent of Iran's oil exports. Iran saw the US response (which represented an escalation in US military action) as siding with Iraq, perhaps because Iraq reconquered al-Faw near Basra the day of the Sassan/Sirri attack. Several Iranian naval units, including two frigates, were destroyed or damaged during that operation.[431] This engagement, dubbed Operation Praying Mantis, was the largest combined air and surface engagement in war-at-sea for the US Navy since World War II. Iran protested the platform attacks as aggression.[432] The United States rejected the protest.[433] A few days later Iranian speedboats attacked an oil rig in the UAE Mubarak oil field, operated by US interests, 30 miles north of Sharjah, and a tanker and freighter that were nearby. While thus engaged the boats were hit by US air strikes.[434] Shipping and oil commerce in the southern Gulf virtually stopped for two days. UK- and French-accompanied convoys were temporarily halted.[435] Some commentators trace the turning point in the war to April 17-18, when Iran lost the Fao peninsula to Iraq and their warships to the US Navy.[436]

By now five NATO nations besides the United States—Belgium, Britain, France, Italy, the Netherlands—had sent over 25 warships to the Gulf for escort and mine suppression duty. The FRG, constitutionally restricted from sending forces there, augmented its Mediterranean Sea NATO presence with four ships. Norway sent a minesweep to NATO Channel Command; Luxembourg, which has

no navy, backed the Belgian-Dutch commitment financially. Australia and Japan, the latter also constitutionally limited, installed precise navigation transmitters in the Gulf and dispatched diver and mine disposal teams. The Netherlands Navy collaborated very closely with the Royal Navy. Belgium, Italy and the Netherlands probably would not have deployed forces except for WEU's political cover.[437] French forces, reflecting France's longterm withdrawal from the NATO command structure, operated independently[438] but cooperated with other navies, agreeing to consult within the WEU framework.[439] Italy followed the same policy.[440] WEU naval experts convened regular meetings in London to discuss the evolving threat.[441] Even the USSR and US navies occasionally cooperated in finding and destroying Iranian mines.[442] At about the same time Hans Dietrich Genscher, the FRG foreign minister, was emerging as representing Iranian interests in efforts to end hostilities through mediation.[443] However, "the unprecedented international concern and focus on the war in the United Nations and in the Gulf's waters, with the extraordinary and unprecedented participation of many European NATO States in an 'out of area' operation, ushered in a new phase" of the war.[444] The multinational maritime naval operation was not, however, under the command of any State or States.[445]

After Iranian gunboats attacked a Saudi-owned tanker off Dubai on April 24,[446] on April 29 the United States announced it would begin assisting "friendly, innocent neutral vessels flying a nonbelligerent flag outside declared war exclusion zones that are not carrying contraband or resisting legitimate visit and search by a ... Gulf belligerent.... Following a request from the vessel under attack, assistance [would] be rendered by a US warship or aircraft if this unit [was] in the vicinity and its mission permit[ted] rendering such assistance."[447] This incremental US escalation, partly in response to requests from Saudi Arabia, the UAE and US oil shippers navigating under foreign flags,[448] was a more generous protection promise than Britain had announced in February, when UK policy shifted to permit protecting foreign flag ships having a clear majority UK interest in ownership.[449] This did not include Armilla Patrol protection for ships on which British seamen were employed.[450] Although officially more conservative than the US policy, it was a distinction without a difference, since UK warships gave humanitarian assistance to neutral vessels after an attack and were prepared to interpose between an attacker and a target ship. The interposing warships were prepared to assert self-defense if attacked while helping a foreign vessel. France pursued a similar, perhaps more forward-leaning interposition policy. French warships were "available to assist [merchantmen] according to circumstances."[451] What French warships would do in a confrontation is less than clear; French ROE stated options, but these have not been published.[452] Italian escort was limited to Italian-flag merchantmen, although Italian ROE promised response if a belligerent committed a hostile act; the ROE did not contemplate "repressive acts" directed toward bases of

operation.[453] NATO countries agreed to provide mutual support and cooperation in keeping international waterways free of mines,[454] although France operated separate mine clearance[455] and Italy had separate bilateral arrangements for the work.[456]

In May 1988 Iraqi air strikes hit Iran's Larak oil terminal in the Strait of Hormuz. *Seawise Giant,* Liberian registered and the world's largest supertanker, was among five ships damaged.[457] Iran began a 10-day combined forces exercise in the Persian Gulf and the Gulf of Oman, to show that its maritime power was not as crippled as the United States had said.[458]

The July 3 Airbus tragedy arose in the context of Iraqi speedboat attacks and concern over possible air attacks on US warships, or its supply barges anchored in Kuwaiti waters, perhaps to coincide with the Fourth of July.[459] In April 1988, during Operation Praying Mantis,[460] Iranian military aircraft had taken off from the nearby Bandar Abbas airport, also used by civil aviation. These aircraft appeared close to commencing attacks on US aircraft but did not.[461] Other Iranian aircraft had exhibited "targeting behavior" while observing Praying Mantis events from afar, apparently to provide radar information,[462] *i.e.,* to possibly vector closer planes to targets. On July 2-3 Iranian speedboats positioned themselves at the western approach to the Strait of Hormuz to challenge merchant ships, a tactic that had been a prelude to attack.[463] During the evening of July 2, *U.S.S. Elmer Montgomery* had responded to a distress call from a Danish tanker under Iranian speedboat attacks.[464] That same day two Iranian F-14s came within seven miles of *U.S.S. Halsey.*[465] Other F-14s were known to be at Bandar Abbas.[466] After *Montgomery* heard challenges over the radio and many speedboats were seen approaching a Pakistani merchantman on July 3, *U.S.S. Vincennes* was sent to the area to investigate the *Montgomery* report. *Vincennes'* helicopter was fired on by Iranian small boats, which "were deemed to have hostile intent." *Vincennes* opened fire on the boats. Two minutes later, Iran Air Flight 655, a civil airliner, took off from Bandar Abbas for Dubai, across the Gulf, on a flight path through the area of the on-going naval battle near Hormuz.[467] Seven minutes later and after repeated radio warnings, and owing to *Vincennes'* preoccupation with the ongoing surface action and misinterpretation of electronic information and commercial air schedules on board, *Vincennes* fired surface to air missiles that destroyed Flight 655. When *Vincennes'* commanding officer gave the order to fire, in the middle of the surface melee, he "believed that the *Vincennes* and the *Montgomery* were the subject of a coordinated sea and air attack involving [Iranian] Revolutionary Guard speedboats and an F-14 aircraft." The United States claimed a right of self-defense for the mistaken attack.[468]

A week after the Airbus tragedy, US ship-based helicopters attacked Iranian gunboats that had set afire a Panama-registered, Japanese-owned tanker with US nationals in the crew,[469] thus implementing the new US policy of defending other

countries' merchantmen upon their request and consistent with other US operational commitments.[470]

By the end of the war the US Navy had conducted over 100 convoys in the Gulf.[471] Other navies were also engaged in numerous escort operations.

On the diplomatic front, Saudi Arabia broke relations with Iran April 27, 1988, a few days after US actions against Iranian warships and speedboats.[472] Perhaps more importantly, during that year a pipeline from Al-Zubair in Iraq to Yanbu in Saudi Arabia was completed, allowing Iraqi oil to flow to Yanbu, where it could be shipped to South Africa for hard currency or arms.[473] Iraq may have also completed a smaller pipeline to Turkey that year, which with the Yanbu line would have boosted its oil exports to 3.2 million barrels a day, about the prewar peak level.[474] This may have been a counterpoint to Iran's economic cooperation accord of the previous summer with the Soviet Union, by which the USSR agreed to build a pipeline to carry Iranian oil to the Black Sea. A shipping route in the Caspian Sea was settled. A second connection between airline and railway systems was also planned.[475] However, Iran's economy was in a shambles, with only $1 billion in foreign exchange reserves left, after an upswing the year before. Part of this erosion was due to Iraqi bombing in the first quarter of 1988, which reduced oil production considerably.[476]

In June 1988 a second Arab League Extraordinary Summit reaffirmed its 1987 stand on the war.[477] On June 15 the European Community and the GCC issued a joint political declaration:

> ... They explicitly emphasized that freedom of navigation and unimpeded flow of trade is a cardinal principle in international relations and international law. In this context, they call upon the international community to safeguard the right of free navigation in international waters and sea lanes for shipping *en route* to and from all ports and installations of the [Gulf] littoral States ... not parties to the hostilities.[478]

The June 20 Toronto Economic Summit supported Resolution 598, condemned use of chemical weapons, deplored proliferation of ballistic missiles in the region, and "renew[ed the Group of Seven] commitment to uphold ... freedom of navigation in the Gulf."[479] By mid-June Britain and France had restored diplomatic relations with Iran. (The United States had severed relations with Iran during the hostage crisis,[480] and these were not restored.) Saudi Arabia announced a $12-30 billion arms deal, including six to eight minesweepers, with Britain and bought 1600-mile ballistic missiles from China.[481]

Iran announced acceptance of Resolution 598 on July 17;[482] on August 8 the UN Secretary-General announced a ceasefire effective August 20.[483] The next day the Council approved the Secretary-General's report on the war and decided to establish UN Iran-Iraq Military Observer Group (UNIIMOG)[484] to help the peace process.[485] Withdrawal from occupied territories began, but the 1990-91 war

ended UNIIMOG's mandate.[486] UNIIMOG seemed to have worked reasonably well during its short commission.[487] Negotiations between Iran and Iraq with respect to their disputed border began simultaneously with the ceasefire and continued thereafter.[488] These discussions broke down over Iraq's insistence that it should control the entire Shatt al-Arab waterway; neither side was prepared to compromise on this issue, and both refused a political solution. However, two weeks after Iraq invaded Kuwait in 1990, Iraq conceded most Iranian demands, agreeing to revert to the 1975 treaty providing for joint sovereignty over the Shatt and to return prisoners of war (POWs). These concessions had been Iranian peace conditions stated soon after the 1980 Iraqi invasion.[489] No major exchanges of POWs, mostly captured ground forces but undoubtedly including naval personnel, came until 10 years later.[490]

Iran announced on August 20 it would continue inspecting vessels during the ceasefire; this was a largely theoretical gesture,[491] although Iraq protested it.[492] The commitment of the European naval force was extended to clear 2000 mines from the northern Gulf and the Shatt al-Arab after the ceasefire. Operation Cleansweep has been hailed as the "culmination of a major pioneering landmark in European naval co-operation." There had been no coordination of merchant ship protection among WEU navies, however.[493] The United States announced the end of escorted convoy operations in the Gulf in October 1988, although US forces would be positioned to act if US-flagged vessels were directly threatened.[494] Later this was replaced by a monitoring system.[495] In January 1989 "deflagging" procedures for reverting the tankers to the Kuwaiti ensign began.[496] In March 1990 the last US Navy minesweepers came home.[497] Increased US naval presence in the Gulf, resulting in over 100 convoys, was considered an "unqualified success;"[498] other participating States gave their operations high marks.[499] Iraq, deeply in debt to several Western States, Japan and the USSR, declared victory, and Iran felt skeptical relief, at the end of hostilities.[500]

## Part C. Conclusions

"The Iran-Iraq conflict was a major war, not a small war. For the only time since World War II, deliberate and sustained operations were carried out against merchant ships" by the belligerents.[501] It was also one of the longest wars of the century, with a million casualties, mostly in the land campaigns.[502] Perhaps virtually every Iraqi family lost a son, brother or father,[503] or 150,000 killed among 400,000 casualties. An entire generation lost a decade of its life, and the country had only begun to face the social costs it would have to pay.[504] For Iran, the war brought disillusionment and moderation in its Islamic fundamentalism and perhaps 300,000 dead.[505] Direct and indirect economic costs of the war to Iran and Iraq came to about $1.2 trillion, plus another $1.1 trillion to rebuild their economies. "The total cost of the war exceed[ed] the oil revenue of the two States throughout the

twentieth century."[506] Iraq's booming prewar economy and rapid economic development may have been set back two decades, and a large non-Arab debt remained to slow economic recovery.[507] Iraq's foreign debt stood at $65 billion in 1985, with perhaps half owed GCC States; it had ballooned to $100 billion at the war's end.[508] Iraq's only positive gain may have been in its armed forces; its ground forces were five times larger with 955,000 effectives at the war's end; by 1988 Iraq had doubled its available tanks and aircraft. [509] Nearly all of the increase in military hardware was due to Soviet aid.[510] Counting reserves, Iraq had nearly all the working population of the country under arms.[511] Iran also increased its total active military manpower, mostly in ground forces, but its mechanized units, combat aircraft, tanks, artillery and naval power were reduced considerably by the last years of the war.[512]

It was a war that resolved nothing, changed little, toppled neither regime, and settled none of the underlying issues.[513]

> ... [T]his [was] a war worthy of a place of honour in Barbara Tuchman's March of Folly. It will be cited as a classic example of the power of an individual's blind dogmatism in totalitarian states to lead a people towards disaster and thereby to change history. This occurrence could well repeat itself[,] especially in the prevailing instability presided over by autocratic regimes in the Middle East.[514]

The 1990-91 Gulf War, beginning with Iraq's invasion of Kuwait, began two years later[515] and proves the point; there may be repetitions in the future. The key lesson to be learned from the war, according to Chaim Herzog, then President of Israel, was that no State can survive militarily in isolation. "The nations of the world are interdependent, and a major element in any middle and small nation's military capability must . . . be based on its international economic and political standing. The . . . War proved that this must be a major and vital consideration in the defence of any country."[516]

The war at sea, while relatively less costly in terms of life and less important than the land, air and missile campaigns in terms of people involved, was a significant part of the conflict.

*1. The Tanker War.*

The Tanker War was the most important aspect of naval warfare during the conflict.[517] It was the largest loss of merchant ships and mariners' lives since the Second World War:

> Throughout the eight year . . . War, Iran and Iraq . . . attacked more than 400 commercial vessels, almost all of which were neutral State flag ships. Over 200 merchant seamen . . . lost their lives. . . . [T]he attacks . . . resulted in excess of 40 million dead weight tons of damaged shipping. Thirty-one of the attacked merchants were sunk, and another 50 [were] declared total losses. For 1987 alone, the strikes

> against commercial shipping numbered 178, with a resulting death toll of 108. In relative terms, by the end of 1987, write-off losses in the Gulf War stood at nearly half the tonnage of merchant shipping sent to the bottom in World War II. . . . [S]hips . . . of more than 30 different countries, including . . . permanent members of the . . . Security Council, [were] subjected to attacks.

Only about one percent of Gulf voyages involved attacks, however.[518] Nevertheless, in terms of percentages of losses due to maritime casualties worldwide, the statistics were staggering. During 1982, the first year of the Tanker War, 47 percent of all Liberian-flag tonnage losses due to maritime casualty worldwide occurred in the Gulf. In 1986 the figure was 99 percent; in 1987, more than 90 percent, and the final percentages may have gone higher due to marine insurance underwriters' late declaration of constructive total losses. Flags of convenience were flown by most Gulf tankers, a third being owned by US nationals, with another substantial portion chartered by US nationals. The financial loss to US interests was therefore substantial. Insured losses declared by underwriters were heavy, reaching $30 million in one month, with resulting tremendous increases in war risk premiums. The total cost of conducting the war, and the direct and indirect damage caused by it, was nearly $1.2 trillion. If there were

> any good things that could be said of this conflict, they [were] that the Gulf War [became] the principal factor in reducing the overtonnage of the world oil tanker fleet and in aiding a recovery of the tanker market, and . . . tremendous advances in marine firefighting equipment and techniques [were] directly attributable to recent experience in the Gulf.

To a US government expert, "this [was] too thin a silver lining to justify the cloud."[519] Iran attacked ships of more than 32 national flags, while Iraq mostly concentrated on vessels flagged or chartered by Iran. Iraq concentrated on attacking ships within Iran's war zone, while Iran mostly attacked vessels in the lower Gulf, outside its or Iraq's zones. Iraq tended to shoot first and identify later, while Iran conducted careful vessel reconnaissance and specific vessel identification. Iraq used aircraft for its strikes, while Iran employed conventional aircraft, helicopters, surface combatants and small boats, the latter manned by Revolutionary Guard forces.[520] Iraq never caused a major interruption in Iran's exports to finance its war.[521]

Several warships—US frigates *Samuel B. Roberts* and *Stark*, and major units of the belligerents' navies as well as smaller craft like *Iran Ajr*—were severely damaged or sunk. Some losses resulted from opposing belligerents' attacks, some occurred through mistake, and some through self-defense responses by States not party to the conflict. There were deaths and injuries among crews. Belligerents and neutrals lost air crews through combat losses or accidents. There were losses of personnel at offshore terminals and other oil facilities. These facilities, including

some in territories of neutral States, were also damaged. Attacks on oil platforms resulted in deaths, injuries, and material destruction. The *Vincennes* tragedy caused 290 deaths.[522] These losses do not include those incurred during the land campaigns.[523]

One interesting result of the war was reduced use of the Strait of Hormuz as an oil lifeline to the West. While tankers lifted nearly 20 million barrels a day through the Strait in 1978, this had been reduced to 6.4 billion in 1985. Oil discoveries outside the Gulf, pipelines from Iraq through Saudi Arabia and Turkey, and the Saudis' construction of an east-west pipeline with capacity of 3.2-5 million barrels a day may be "insurance—in case the Strait . . . is closed." These developments may inhibit skyrocketing oil prices if there are more political-military developments in the region.[524] Yet another factor is increased production from other oil fields, *e.g.*, the North Sea.

*2. The Marine Environment.*

The environment was also a loser, a major casualty to the Gulf being the 1983 Nowruz attack.[525] Undoubtedly attacks on other terminals and offshore oil facilities caused spills.[526] And undoubtedly attacks on loaded tankers and other vessels, ships in ballast and warships, resulted in loss of cargoes, primarily petroleum, and bunkers.[527] Aircraft losses likely spread sheens on the Gulf.[528] Apart from the Nowruz spill, there is no indication that States considered the impact of military activity on the environment or the developing law protecting it.[529] Completion of overland oil pipelines[530] may reduce risk of pollution at sea in the Gulf, but these pipelines are vulnerable to attack by any number of methods (particularly if laid close to the shore) during war or accidents at any time. Pipeline construction has only shifted the environmental risk to the land.

*3. The Role of the United States and the Soviet Union.*

In terms of US policy, it has been said that

> By playing a leading role in the Gulf as well as in the United Nations, the United States unquestionably helped bring Iran to the negotiating table . . . U.S. policy helped reestablish U.S. credibility among the Gulf Arab States by demonstrating that the United States could sustain a low-key, politically sensitive, and consistent military policy. . . . U.S. military planners were quite pleased with the . . . cooperation they enjoyed from Gulf States normally reluctant to be so forthcoming. . . . U.S. policy "kept the Soviets out of the Gulf" in any significant operational sense, while U.S. policymakers nonetheless worked successfully with the Soviets in the United Nations in forging Resolution 598. All these produced . . . satisfaction among U.S. diplomats involved in the year's [1988's] events.
>
> . . . [T]he United States shared credit for bringing the cease-fire into effect with a wide range of factors. Iraq's extended bombing campaign, of which the tanker war was but a minor part, slowly ground Iran's economy down to crisis levels by the end of

> 1987, and Iran's efforts to deal with its economy only exacerbated deep fissures among competing political factions in Tehran. Economic deprivation combined with battlefield stalemate to produce... war weariness across Iran.... The "war of the cities" provoked confusion and fear out of all proportion to the relatively meager physical damage.... In some sense, Iraq can be said to have won its war with Iran.

Luck also played a role.[531] Other factors that might be mentioned, at least in the context of the Tanker War, included cooperation of the Gulf States and US NATO allies and other States affected by the war's dislocations and attacks on their shipping. The overwhelming supply of arms and other goods to Iraq also was a major factor.[532] However, "[i]t should now be clear that US involvement in the Gulf during the... War, particularly during the... 'tanker war'... was part of a long-standing continuum of American foreign policy."[533]

The USSR tried to achieve several goals: preserving its influence in Iraq, gaining influence in the GCC and Iran, and reducing US influence in the region, *e.g.*, by chartering tankers to Kuwait. The war bolstered Soviet standing in the region. At war's end Iraq could not afford to alienate the USSR or end its dependence on Soviet arms supplies. Iran would have to improve its relations with the Soviet Union to encourage the USSR to moderate its support of Iraq. While the Gulf States were much less dependent on the Soviet Union, they were not anxious to see the USSR leave the Gulf after the war; Soviet presence was seen as useful to keep the United States concerned about the region. Soviet post-war gains were therefore not significant. With the war over, there were fewer opportunities and greater obstacles for extending Soviet political and military influence in the Gulf.[534] The USSR's disintegration three years later of course meant loss of whatever gains it had made during the war. Iraq lost an arms supplier, Iran lost a whipping boy,[535] and the other Gulf States lost a makeweight. The Soviet Union's demise meant a triumph of US policy, and just in time for the 1990-91 Gulf War.[536]

*4. The Role of International Organizations.*

The United Nations, and particularly the Security Council, emerged from Cold War gridlock to a more active role in peacemaking. Its resolutions affirming freedom of navigation are particularly important for this analysis.[537] The Arab League, at first gridlocked because of divisions among its members, some of whom (*e.g.*, Syria) supported Iran and others Iraq (*e.g.*, Kuwait, Saudi Arabia), came together at the end of the war.[538] States in other established international organizations, *e.g.*, individual NATO members, cooperated together more or less under the WEU with Persian Gulf States to support freedom of navigation. WEU's revitalization has been traced to the Tanker War shipping threat.[539] These European States, while following a Western political strategy, were able to distinguish themselves from US policy. They made separate, if not radically different, definitions of Western interests in the Gulf. Deployment of European naval power to the Gulf

improved the status of European States with many Gulf Cooperation Council members, particularly Kuwait and Saudi Arabia.[540]

The European Community, evolving into the European Union during the war years, and the Economic Summits lent diplomatic pressure to end the conflict.[541] Nevertheless, it appeared likely that although the EU will harmonize policies in Europe, European States will muddle through with individual policies in the Gulf in the future.[542]

However, the most impressive development during 1980-88 was the organization of the Gulf Cooperation Council of other Gulf States in 1981, which by war's end could "have good reasons for being pleased and confident.... They... successfully weathered the Iranian revolution, eight years of Iran-Iraq fighting, and a whole range of direct or covert Iranian efforts to undermine them. They [could] reasonably argue that the future [could] not be worse than the recent past."[543] It has been correctly predicted that

> ... [T]he GCC states will strive to maintain their unity to limit the chances of turmoil spreading from one state to the rest. Together, they will try to hew a middle path between Iran and Iraq... to achieve a balance of power in the Gulf and limit the opportunities for super-power intervention .... Because the GCC states can never attain an even mildly formidable ... defense posture, their attention is properly focused on diplomacy. Nevertheless, practical steps toward closer security cooperation... can serve to deny the attractions of outside meddling in the affairs of the weaker members of the community, and put the larger powers on notice that the GCC states are determined to act together to preserve their political integrity.[544]

For the United States, a problem could be military equipment purchases from other countries, thereby lessening dependence on America while increasing dependence on other States.[545]

*5. The Ensuing Chapters.*

From any perspective the Tanker War was costly in terms of people, property, pollution of the environment, and perhaps international law. The Chapters that follow analyze the war in the context of the UN Charter, and in particular the inherent right of individual and collective self-defense in Article 51;[546] the law of the sea in the context of the Persian Gulf;[547] the law of naval warfare, apart from Charter considerations, at stake in the Tanker War;[548] and the law of the sea, the law of the maritime environment, and the law of naval warfare.[549]

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NOTES

1. I delivered parts of this Chapter as a paper, "Targeting Enemy Merchant Shipping and Neutral Merchant Vessels That Have Acquired Enemy Character: State Practice Following World War II," at the Naval War College Symposium on the Law of Naval Warfare, February 1-3, 1990, Newport, R.I., which was published, revised, as *State*

*Practice in* Grunawalt. Other portions were part of a research report, *U.S. National Security Interests in the Persian Gulf: The Maritime Strategy Reconsidered,* March 8, 1989, to fulfill National Defense University diploma requirements.

2. Peter Hayes, *Chronology 1988,* 68 FOREIGN AFF. 220, 236 (1989); *see also* nn. 484-92 and accompanying text. This Chapter's history of events, 1980-88, has been compiled in part from HIRO, NAVIS & HOOTEN and FOREIGN AFFAIRS' *America and the World* issue; usually there is no further citation of these sources unless there is particular relevance. *See* Elaine P. Adam, *Chronology 1981,* 60 *id.* 719, 734-35, 739-40 (1982); Janis Kreslins, *Chronology 1982,* 61 *id.* 714, 725-26 (1983); *Chronology 1983,* 62 *id.* 777, 788-92 (1984); *Chronology 1984,* 63 *id.* 672, 682-86 (1985); Kay King, *Chronology 1985,* 64 *id.* 645, 658-61 (1986); Horace B. Robertson, *Chronology 1986,* 65 *id.* 653, 662-76 (1987); Hayes, *Chronology 1987,* 66 *id.* 638, 655-60 (1988); Hayes 232-38. Another summary is in 26 ILM 1434 (1987). Other citations, nn. 3-549, refer to accounts, often from media sources, of particular events.

3. S.C. Res. 598, *in* WELLENS 454.

4. John H. Cushman, Jr., *Navy to End Convoys in Gulf But It Will Still Protect Ships,* N.Y. TIMES, Sept. 17, 1988, at 2.

5. *Kuwait to "Deflag" Ships,* WINSTON-SALEM J., Jan. 19, 1989, at 9; for analysis of the reflagging, *see* Parts IV.C.3, IV.C.6, IV.D.5, V.D.2, V.D.4, V.J.4.

6. *Last 3 "Sweeps" Head Home,* US Navy Internal Relations Activity, Information for Your Use 4 (May 1990); *see also* TAMARA MOSER MELIA, "DAMN THE TORPEDOES." A SHORT HISTORY OF U.S. NAVAL MINE COUNTERMEASURES, 1777-1991, at 127 (1991).

7. R.M. BURRELL & ALVIN J. COTTRELL, IRAN, THE ARABIAN PENINSULA, AND THE INDIAN OCEAN 2 (1972); HIRO 2; Andrea Gioia, *Commentary, in* DE GUTTRY & RONZITTI 57.

8. *See generally, e.g.,* NORMAN FRIEDMAN, DESERT VICTORY: THE WAR for KUWAIT (1991); US Department of Defense, Final Report to Congress: Conduct of the Persian Gulf War (Apr. 1992) (DOD Report). *Id.,* App. O; *Iraqi Symposium,* 15 S. ILL. L.J. 411 (1991); Oscar Schachter, *United Nations Law in the Gulf Conflict,* 85 AJIL 452 (1991); *Symposium on International Law and the Rules of War,* 1991 DUKE J. COMP. & INT'L L.1; which analyze international law aspects of that war.

9. Accords on USSR withdrawal and other aspects of resolving that war include Agreement on Principles of Mutual Relations, in Particular on Non-Interference & Non-Intervention, Apr. 14, 1988, Afghan.-Pak., 27 ILM 581 (1988); Declaration on International Guarantees, Apr. 14, 1988, USSR-US, *id.* 584; Agreement on Voluntary Return of Refugees, Apr. 14, 1988, Afghan-Pak., *id.* 585; Agreement on Interrelationships for Settlement of Situation Relating to Afghanistan, with Annex, Apr. 14, 1988, Afghan.-US, *id.* 587. *See* HIRO 71, 73, 122, 162, 263 on relationships between the Iran-Iraq war and the Soviet Afghanistan intervention.

10. Tousi, n. I.30, 50.

11. *Id.*

12. *See generally* United States Diplomatic & Consular Staff in Iran (US v. Iran), 1979 ICJ 23, 1980 *id.* 3 (Hostage Case); CABLE 206; HIRO 1, 36-37, 71, 215-21, 223, 227, 231, 240, 263; nn. 282, 317, 326, 339 and accompanying text.

13. Islam's Shiite branch, State religion of Persia (later Iran) since 1506, has been a divisive force between Iran and Iraq, once part of the Ottoman Empire, for centuries. For analysis of the interaction of the Shiite and Sunni sects before and during the war, and Iran's role as a predominantly Gulf Shiite State, and other Gulf States, whose population are predominantly Sunni, *see generally* CHUBIN & TRIPP ch. 9; PHILIP MANSEL, CONSTANTINOPLE: CITY OF THE WORLD'S DESIRE, 1453-1924, at 39, 189-90 (1996); Shireen Hunter, *The Iran-Iraq War and Iran's Defense Policy, in* Naff, GULF SECURITY ch. 7 (effect on the military); Christopher C. Joyner, *Introduction: The Geography and Geopolitics of the Persian Gulf, in* Joyner 1, 12-13; David Menashri, *Iran: Doctrine and Reality,* in KARSH 42-57; Hossein S. Seifzadeh, *Revolution, Idcology, and the War, in* Rajaee, IRANIAN PERSPECTIVES 90-97; Robin Wright, *The War and the Spread of Islamic Fundamentalism, in* KARSH 110-20; Neguin Yavari, *National, Ethnic and Sectarian Issues in the War, in* Rajaee, IRANIAN PERSPECTIVES 75-89. As *id.*'s title suggests, most of its chapters present an Iranian viewpoint that may seem at variance with other views.

14. *See generally* HIRO *passim.*

15. *See generally* Geneva Gas Protocol; US Renunciation of Certain Uses in War of Chemical Herbicides & Riot Control Agents, Apr. 8, 1975, Exec. Order No. 11,850, 40 Fed. Reg.16,187 (1975). *See also* Fourth Convention, arts. 3(1), 13, amplified by Protocol I, arts. 1, 48-52, 57, 59, and Protocol II, arts. 1, 4(2)(d), 13. The President of the United States declined to recommend Protocol I for Senate advice and consent. Message from President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, Treaty Doc. 100-2, 100th Cong., 1st Sess., *in* 26 ILM 561 (1987). Over a third of the nations of the world, including NATO allies,

had ratified one or both Protocols by the Tanker War's end. *See* SCHINDLER & TOMAN 701-03; *Ratifications and Accessions to the Geneva Conventions and/or to the Additional Protocols between 1.3 1988 and 30.6 1988,* insert *in* DISSEMINATION (No. 10, Sept. 1988). Many provisions are considered customary international law, *e.g.*, prohibitions against some reprisals. For analysis of the Gas Protocol, Fourth Convention and Protocol I in the Tanker War context, *see* nn. VI.268-71, 281-99, 401-55 and accompanying text.

16. *See generally* David Holloway, *Gorbachev's New Thinking,* 68 FOR. AFF. 66 (No.1, 1989); Robert Levgold, *The Revolution in Soviet Foreign Policy, id.* 82. *Compare* these views *with* Admiral C.A.H. Trost, US Chief of Naval Operations, This Era and the Next: American Security Interests and the US Navy, address at Naval War College, Newport, R.I., Jan. 10, 1989, typed release from US Navy Internal Relations Activity; and US Secretary of Defense Frank C. Carlucci, *Preface* to Soviet Military Power: An Assessment of the Threat 4, 5 (1988).

17. This multi-sided power structure in the ensuing discussion adds several countries to participants listed in John E. Peterson, *Defending Arabia: Evolution of Responsibility, in* INTERNATIONAL ISSUES and PERSPECTIVES 117 (1980), which, as its title indicates, is primarily concerned with Arabian peninsula issues.

18. Ahmad Naghibzadeh, *Western Europe and the War, in* Rajaee, IRANIAN PERSPECTIVES 39, 42, referring to Exchange of Letters Respecting Recognition & Protection of an Arab State in Syria (Sykes-Picot Agreement), May 9/16, 1916, Fr.-Gr. Brit., 221 CTS 323.

19. Iraq is a major oil producer with 100 billion barrels of reserves. *See generally* Joyner, n. 13, 8-9 for a geopolitical sketch of Iraq at the end of the Tanker War; MAJID KHADDURI, SOCIALIST IRAQ: A STUDY IN IRAQI POLITICS SINCE 1968 (1978) for internal Iraqi politics analysis in the decade before the war.

20. Iran is also a major oil producer, with 93 billion barrels in proven reserves and six refineries, including Abadan, a 20-minute flight from Iraq. *See generally* Joyner, n. 13, 7-8 for a geopolitical sketch of Iran at the end of the Tanker War.

21. Charter Establishing Gulf Cooperation Council, Including Rules of Procedure & Unified Economic Agreement, May 25 & Nov. 11, 1981, 26 ILM 1138 (1987) (GCC Charter) created the GCC. *See also* SIMMA 706; William Van Orden Gnitchel, *The Arab States' Gulf Cooperation Council: Rules for Trade and Industry,* 20 INT'L LAW. 309 (1986); Joseph A. Kechichian, *The Gulf Cooperation Council and the Gulf War, in* Joyner 91; Nassibe G. Ziade, *Introductory Note, in* INTERNATIONAL ISSUES, n. 17, 11 (1980) (explaining GCC's genesis, development); Richard P. Johnson, *Conquering Fear in the Gulf,* 115 PROCEEDINGS 78 (Mar. 1989) (analyzing GCC in action); Michael Sterner, *The Gulf Cooperation Council and Persian Gulf Security, in* Naff, GULF SECURITY ch. 1. GCC States line the Gulf western shore. For analysis of the region's geography, *see* nn. 66-69 and accompanying text.

22. The smallest of the Gulf States, the island nation of Bahrain has one of the largest oil refineries in the region and considerable oil reserves. *See generally* Joyner, n. 13, at 11 for a geopolitical sketch of Bahrain at the end of the Tanker War. Bahrain became independent in 1971. MACDONALD 30.

23. Kuwait has significant oil reserves and offshore pumping facilities. *See generally* Joyner, n. 13, 9-10 for a geopolitical sketch of Kuwait at the end of the Tanker War. Kuwait became independent in 1961. MACDONALD 30.

24. Oman has significant oil reserves. *See generally* Joyner, n. 13, 11-12 for a geopolitical sketch of Oman at the end of the Tanker War. Oman has been independent since 1650. MACDONALD 60 n.18.

25. Qatar has significant oil reserves. *See generally* Joyner, n. 13, 10 for a geopolitical sketch of Qatar at the end of the Tanker War. Qatar became independent in 1971. MACDONALD 30.

26. Saudi Arabia has a 10 million barrel per day pumping capacity and reserves estimated at 170 billion barrels, the largest on Earth. *See generally id.* 6-7 for a geopolitical sketch of Saudi Arabia at the end of the Tanker War.

27. Abu Dhabi has one of the richest oil areas on Earth; Dubai is a major world gold trader. Like many new States, the UAE and neighboring Qatar have experienced internal instability. BURRELL & COTTRELL, n. 7, 18-22; MACDONALD 30; Joyner, n. 13, 10-11.

28. Peterson, n. 17, 118-21.

29. CABLE 179.

30. *Id.* 182.

31. *Id.* 189; *see also* MACDONALD 33; James Stewart, *East of Suez,* 92 PROCEEDINGS 40 (Mar. 1966). Kuwait was admitted to the United Nations in 1963. *Introductory Note,* WELLENS 839, 841. The Arab League, or League of Arab States, is governed by two treaties: Pact of League of Arab States, Mar. 22, 1945, 70 UNTS 238; Treaty of Joint Defence & Economic Co-operation Between Arab States, with Military Annex, June 17, 1950, 157 BFSP 669, 48 AJIL SUPP. 51 (1955). Thus the League can be seen as a regional self-defense organization under UN Charter, art. 51, and as a regional

arrangement under *id.*, art. 52. *See* HUSSEIN A. HASSOUNA, THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES ch. 1 (1975); MAJID KHADDURI, THE GULF WAR: THE ORIGINS AND IMPLICATIONS OF THE IRAQ-IRAN CONFLICT 140 (1988); ROBERT W. MACDONALD, THE LEAGUE OF ARAB STATES (1965); SIMMA 701; Gerhard Bebr, *Regional Organizations: A United Nations Problem*, 49 AJIL 166, 181 (1955); Khadduri, *The Arab League As a Regional Arrangement*, 40 *id.* 756 (1946); nn. III.800-17 and accompanying text.

32. Frank R. Barnett, *Preface, in* BURRELL & COTTRELL, n. 7, v; *see also* MACDONALD 28.

33. German or Italian relationships with area States have been less affected by historical considerations. Naghibzadeh, n. 18, 42.

34. CABLE 196.

35. BURRELL & COTTRELL, n. 7, 8-14.

36. *Id.* 14-15; *see also* n. 50 and accompanying text.

37. BURRELL & COTTRELL, n. 7, 15-16; MACDONALD 33.

38. BURRELL & COTTRELL, n. 7, 22-30; MACDONALD 150; Saideh Lotfian, *Regional Powers and the War, in* Rajaee, IRANIAN PERSPECTIVES 13, 25. MACDONALD 34-36 lists these among 38 territorial disputes and settlements in the region, some of which have been cited previously. For analysis of agreements on continental shelf and other sea boundaries, *see* Parts IV.B.2-IV.B.4, IV.D.2-IV.D.3.

39. BURRELL & COTTRELL, n. 7, 37.

40. For years Middle East Force consisted of two overage destroyers and a seaplane tender or a transport as flagship. Later more modern destroyers deployed. *Id.* 35-36. CENTCOM later exercised command over the much larger and far more capable Joint Task Force Middle East (JTFME). *See* nn. 77-80 and accompanying text.

41. The US return from investments in the area has been in the billions of dollars for years. BURRELL & COTTRELL, n. 7, 37; Peterson, n. 17, 121-23; *see also* Peter W. DeForth, *U.S. Naval Presence in the Persian Gulf: The Mideast Force Since World War II*, 28 NWC REV. 28 (No. 1, 1975).

42. Peterson, n. 17, 123; *see also* HIRO 14. The UK withdrawal was announced in 1968. Barnett, n. 32, v.

43. BURRELL & COTTRELL, n. 7, 8, 31-33.

44. "Because many ruling families [in Gulf States other than Iraq] owe their power and position to England, one should never overlook British influence." Naghibzadeh, n. 18, 42.

45. *See, e.g.*, nn. 37-38 and accompanying text (Iran claims to Bahrain; Saudi claims to Abu Dhabi, Dhofar, Khufu strip).

46. The agreement had a 15-year life with automatic renewal for 5-year increments unless one State notified the other 12 months before the treaty expired. Treaty of Friendship & Cooperation, Apr. 15, 1972, Iraq-USSR, art. 12, *in* KHADDURI, n. 19, 241, 243. For further analysis of this and similar bilateral agreements of the Soviet Union, see nn. III.289-302 and accompanying text.

47. Iran's Shah was promised any but nuclear weapons. HIRO 15.

48. NAFF, IRAN-IRAQ WAR 62; Peterson, n. 17, 125.

49. John Chipman, *Europe and the Iran-Iraq War, in* KARSH 215, 220.

50. International Border & Good Neighbourly Relations Treaty, June 13, 1975, Iran-Iraq, with Protocols, 14 ILM 1133 (1975). HIRO xii, 8-10, 17; Harry Post, *Border Conflicts Between Iran and Iraq: Review and Legal Reflections, in* DEKKER & POST ch. 1 (1992); Jalil Roshandel, *Facts and Allegations: Iraqi Disclaimer of the 1975 Treaty, in* Rajaee, IRANIAN PERSPECTIVES 98-103; and Ibraham Anvari Tehrani, *Iraqi Attitudes and Interpretation of the 1975 Agreement, in* Rajaee, IRAN-IRAQ WAR 11-23 analyze boundary disputes, diplomacy and the 1847, 1937 and 1975 treaties. *See also* Bennice L. Liner, *Iran and Iraq: An Overview*, 32 NWC REV. 97 (No. 4, 1984); Charles G. Macdonald, *Regionalism and the Law of the Sea: The Persian Gulf Perspective* 73, 28 *id.* (No. 5, 1980). These are longstanding disputes; they and religious differences within Islam were sources of friction between the Ottoman Empire, which governed Iraq through World War I, and Persia, now Iran, the Empire's principal enemy, down to today. HIRO 7-8, 21-33; MANSEL, n. 13, 39, 189-90.

51. BURRELL & COTTRELL, n. 7, 16-18; CABLE 198; HIRO 14; *see also* nn. 31, 34 and accompanying text. Iran said it was "restor[ing] its sovereignty" over the islands. Tehrani, n. 50, 12-13.

52. US Secretary of Defense Caspar W. Weinberger, *A Report to Congress on Security Arrangements in the Persian Gulf*, June 15, 1987, *in* 26 ILM 1434, 1441-42 (1987); *see also* HIRO 72-74. T.B. Millar offered a more comprehensive rationale for what Soviet naval policy was designed to accomplish in the region:

1. to be in a position to exercise effective influence over both ends of the Suez-Red Sea passage: this must strengthen their strategic and diplomatic-negotiating position;

2. to replace the [UK] as the dominant external power in the Arabian Peninsula and ... Gulf area: the Western oil companies and half of the West's oil supplies are then in a measure hostages to Soviet political and economic policies;

3. under Soviet "protection," to foster self-defense and cooperative defense against China in India and Southeast Asia;

4. to obtain positions of political and military strength throughout the ... region, ... to exercise control over sea routes between the western and eastern Soviet Union, and to be able to influence the policies of local governments toward Soviet ends in a crisis or at other times of decision;

5. to provide arms to local governments to foster these ends, and to weaken or destroy the influence of competitive powers or ideologies;

6. to keep watch on [US] naval activities, especially Polaris submarines; and

7. to ensure increased access to certain raw materials, to trade extensively and profitably within the region, and to use trade for political ends if the occasion arises.

T.B. MILLAR, SOVIET POLICIES IN THE INDIAN OCEAN AREA 6 (1970), quoted *in* BURRELL & COTTRELL, n. 7, 34-35. *See also* Joyner, n. 13, 13; James T. Westwood, *The Soviet Union and the Southern Sea Route*, 35 NWC REV. 54, 63 (No. 1, 1982).

53. Barnett, n. 32, v; *see also* nn. 42-45 and accompanying text.

54. Kazem Sajjadpour, *The USSR and the War*, *in* Rajaee, IRANIAN PERSPECTIVES 29-30, referring to Treaty of Friendship & Co-Operation, n. 46.

55. This had been true for over 10 years. *Compare* BURRELL & COTTRELL, n. 7, 4 *with* Naghibzadeh, n. 18, 40.

56. ELSTON WHITE, NATURAL AND ENERGY RESOURCES 104-12 (1985). Japanese dependence stood at 90 percent in the Seventies. BURRELL & COTTRELL, n. 7, 4.

57. Ralph A. Cossa, *America's Interests in the Persian Gulf Are Growing, Not Decreasing*, ARMED FORCES J. INT'L 58 (June 1987); these figures are consistent with those for the Seventies. *See generally* BURRELL & COTTRELL, n. 7, 3-5.

58. Naghibzadeh, n. 18, 43.

59. CLINTON H. WHITEHURST, JR., THE U.S. MERCHANT MARINE: IN SEARCH OF AN ENDURING POLICY 72 (1986); Joyner, n. 13, 5.

60. *See generally* ROBERT E. MCCLEAVE, TRANSPORTATION 19-29 (1986); WHITEHURST, U.S. MERCHANT MARINE, n. 59, 225. BOLESLAW A. BOCZEK, FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY (1962); RODNEY CARLISLE, SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE (1981) analyze development of flags of convenience; *see also* ERNST G. FRANKEL, REGULATION AND POLICIES OF AMERICAN SHIPPING 74-77 (1982); SAMUEL A. LAWRENCE, UNITED STATES MERCHANT SHIPPING: POLICIES AND POLITICS 101-04, 182-89 (1966), WHITEHURST, ch. 18; Frank L. Wiswall, Jr., *Flags of Convenience*, ch. 4 *in* UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET (William A. Lovett ed. 1996). WHITEHURST and *id.*, THE U.S. SHIPBUILDING INDUSTRY: PAST, PRESENT AND FUTURE (1983) are recent studies of the US merchant marine, elaborating on MCCLEAVE'S analysis.

61. *See generally* Annex III: Merchant Ships of the World: Ships of 500 grt & Above As of 1 July 1985, *in* Convention on Conditions for Registration of Ships, Feb. 7, 1986, 26 ILM 1229, 1246-50 (1987) (Ship Registration Convention). However, the Soviet surge was on a cusp of general decline. *See* N. Shashnikar, *World Shipping Competition*, ch. 3 *in* UNITED STATES SHIPPING POLICIES, n. 60, 67, 74-76.

62. The Conference "had a great influence for later deliberations on the protection and preservation of the marine environment" in UN Committees and in LOS Convention drafting. *Introduction*, ¶ XII.11, *in* 4 Nordquist 8-9; *see also* RESTATEMENT (THIRD), Part VI, *Introductory Note*, at 99; *id.*, § 602 r.n.1; *see also* BIRNIE & BOYLE 39-53; Carol Annette Petsonik, *The Role of the United Nations Environment Programme (UNEP) in the Development of International Law*, 5 AM. U.J. INT'L L. & POL. 351 (1990).

63. Kuwait Regional Convention for Co-operation on Protection of the Marine Environment from Pollution, Apr. 24, 1978, 1140 UNTS 133 (Kuwait Regional Convention); Protocol Concerning Co-operation in Combating Pollution by Oil & Other Harmful Substances in Case of Emergency, Apr. 24, 1978, *id.* 201 (Kuwait Protocol), analyzed in Parts IV.A.2, VI.B.2.a, VI.B.2.c(I), VI.B.2.c(III).

64. BOWMAN & HARRIS 295 (11th Cum. Supp. 1995).

65. MACDONALD 79. Chapter IV analyzes the Tanker War in the LOS context; Chapter VI considers maritime environmental issues.

66. The Liberty Ships of World War II displaced 5,000 to 10,000 tons. Modern aircraft carriers displace 80,000 tons and require over 75 feet of water to navigate safely.

67. *See also* n. 51 and accompanying text.

68. The industry declined after World War II when cultured pearls entered the market; 75,000 pearlers once plied their trade in Gulf offshore waters. BURRELL & COTTRELL, n. 7, 1.

69. MACDONALD 25-26, 78-79, 165-66, publishing maps, and Joyner, n. 13, 2-4, also publishing a map, supplied material for the foregoing; *see also* nn. 36, 50, 85, 86, 89, 100, 153-56, 489 and accompanying text.

70. Cossa, n. 57, 58-59.

71. Gioia, *Commentary*, n. 7, 57.

72. MACDONALD 78; Eliyahu Kanovsky, *Economic Implications for the Region and World Oil Market, in* KARSH 231, 249.

73. More than 60 a day passed through Hormuz during the early Seventies. BURRELL & COTTRELL, n. 7, 9; Joyner, n. 13, 4. Tanker traffic declined by the war's end. Kanovsky, n. 72, 249; *see also* n. 524 and accompanying text. MACDONALD's estimate for 1968 of one tanker every 15 minutes seems high, unless he means passage during daylight hours only.

74. S.P. Menefee, *Commentary, in* DE GUTTRY & RONZITTI 99, 100.

75. President Jimmy Carter, *State of the Union Address*, Jan. 23, 1980, 1 Public Papers: Carter 1980-81, at 194, 197 (1981); NAFF, IRAN-IRAQ WAR 64. On July 19, 1979, responding to statements by Palestine Liberation Organization supporters, the US State Department had issued a warning to oil tanker crews and other vessels to be alert for attempts by terrorists to seize or sink a ship in the Persian Gulf. In August 1979 Lloyd's of London had announced that special war-zone insurance would be required for tankers traveling through the Gulf. There was also the possibility that a terrorist attack might occur in the Strait. MACDONALD 165.

76. Two carrier task forces were on station at various points during the next year. CABLE 205-06; Harold H. Saunders, *The Iran-Iraq War: Implications for US Policy, in* Naff, GULF SECURITY 59, 64; *see also* nn. 39-49 and accompanying text.

77. Diego Garcia development began in 1979, along with agreements between the United States and Egypt, Kenya, Oman and Somalia to permit US access to facilities in those countries. *See, e.g.*, Agreement Concerning Availability of Certain Indian Ocean Islands for Defense Purposes of Both Governments, Dec. 30, 1966, US-UK, 18 UST 28, 603 UNTS 273; Agreement Concerning Privileges & Immunities of US Military and Related Personnel in Egypt, July 26, 1981, 33 UST 3353; NAFF, IRAN-IRAQ WAR 63-64; Saunders, n. 76, at 63. In 1986 the United Kingdom and the United States concluded a more specific agreement on Diego Garcia. Agreement Concerning US Naval Support Facility on Diego Garcia, Feb. 25, 1976, UK-US, 27 UST 315, 1018 UNTS 372 (Diego Garcia Agreement); *see* n. 302 and accompanying text. In late 1978 the *U.S.S. Constellation* carrier task force had sailed for waters off Iran to manifest US concern for the chaos in Iran, but the order was cancelled a few days later after USSR protests of "gunboat diplomacy." The result was damage to US prestige. In March 1979 two battle groups were sent to the Arabian Sea after the Hostage Crisis. *See* n.76. The latter was reminiscent of an earlier manifestation of presence in 1974. *Id.* 201. In April 1980 *U.S.S. Nimitz* launched helicopters in the Arabian Sea in a failed attempt to rescue US Embassy hostages in Teheran. *Id.* 206. For a juridical account of the crisis, *see generally* Hostage Case, n. 12; *see also* n. 12 and accompanying text. UK relations with Iran were then cool and a little better with Iraq. A.V. Lowe, *Commentary, in* DE GUTTRY & RONZITTI 241, 242-43. The United States had lacked formal diplomatic representation in Baghdad since 1967. However, diplomatic contact with Iran and Iraq proceeded in third country capitals or in the United Nations. HIRO 71.

78. At the time RDJTF was more of a tripwire to demonstrate to the USSR that the United States was prepared to respond on a global basis if threats to the region developed. The projection was for facilities for four or five divisions (80,000-100,000 troops) to be ordered to the region within a month. Seven ships were initially sent. WHITEHURST, U.S. MERCHANT MARINE, n. 59, at 121-22; Thomas L. McNaugher, *U.S. Policy and the Gulf War: A Question of Means, in* Joyner 111, 112; Saunders, n. 76, 65-66. *See also* Part IV.C.4.

79. RDJTF was often erroneously known as the RDF or Rapid Deployment Force. Maxwell Orme Johnson, *The Role of U.S. Military Force in the Gulf War, in* Joyner 127, 129-30.

80. Within two weeks after outbreak of the war four US Airborne Warning and Control Systems (AWACS) aircraft were dispatched to Saudi Arabia; they were later sold to the Saudis as the GCC moved from a posture of internal security cooperation to economic and defense security posture. HIRO 75; SIMMA 706; Lotfian, n. 38, 19; Saunders, n. 76, 69. *See also* nn. 172, 261 and accompanying text. US-built Saudi facilities were designed to allow handling US forces "should the Saudis feel in the future that their security required deployment of US forces."

Saunders 63. This precaution may have been useful during the 1980-88 war but was a godsend during the 1990-91 war. *See* A. Reza Sheikholeslami, *Saudi Arabia and the United States: Partnership in the Persian Gulf, in* Rajaee, IRAN-IRAQ WAR 103-22 for a highly critical, and occasionally less than balanced, account of Saudi-US relations during the Tanker War.

81. *See generally* John Devlin, *Iraqi Military Policy: From Assertiveness to Defense, in* Naff, GULF SECURITY 129-39; Keith McLachlan, *Analyses of the Risks of War: Iran-Iraq Discord, 1979-1980, in* Rajaee, IRAN-IRAQ WAR 24-31.

82. For analysis of Iraqi war aims, *see* Phebe Marr, *The Iran-Iraq War: The View from Iraq, in* Joyner 59. For analysis of phases of Iran's war aims, *see* Eric Hooglund, *Strategic and Political Objectives in the Gulf War: Iran's View, in id.* 39. Iran and Iraq did not end diplomatic relations until October 1987, during the war's seventh year. CHUBIN & TRIPP 252. *See also* n. 409 and accompanying text.

83. HIRO 35-39, 75-76; Lotfian, n. 38, 14-16; Itamar Rabinovich, *The Impact on the Arab World, in* KARSH 101, 102-03.

84. The UK position in 1980-88 was that Iran and Iraq were in a "conflict," not a war, and that States' rights and duties derived from and were limited by the UN Charter, in particular Art. 51, which preserves an inherent right of individual and collective self-defense. The US view was that it was a war, and that belligerent rights, *e.g.*, rights of visit and search and neutrality, applied. "This refusal to categorise the conflict as a war, with all the consequences which that entailed, is perhaps the most significant aspect of British practice concerning the Gulf conflict." Lowe, *Commentary*, n. 77, at 244-45. *See also* Christopher Greenwood, *Remarks, in* Panel, *Neutrality, The Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, 1988 ASIL PROC. 158, 159-61, citing Foreign and Commonwealth Affairs Secretary of State answer, Jan. 28, 1986, 90 Parl. Deb., H.C. (6th ser.) 426 (1986), *in* DE GUTTRY & RONZITTI 268. France had a similar position. *Cf.* Jean Mallein, *Commentary, in id.* 389, 395, 397. Italy apparently recognized a state of war between the belligerents. Italian Defence Minister statement before IV Permanent Commission (Defense), Sept. 8, 1988, Boll. Comm., X Legis., IV Commissione Permanente (Difensa) 4 (Sept. 8, 1988), *in* DE GUTTRY & RONZITTI 441; Andrea de Guttry, *Commentary, in* DE GUTTRY & RONZITTI 419, 432. Belgium and the Netherlands, the other naval participants, considered it a war, since they tried to observe "neutral[ity] in the broad sense of that word." Frits Kalshoven, *Commentary, in* DE GUTTRY & RONZITTI 475, 483. The belligerents perceived it as a war. *See, e.g.*, Iran Notice to Mariners No. 17/59, Sept. 22, 1980; Iraq UN Permanent Representative letter to UN Secretary-General, May 5, 1983, UN Doc. S/15752 (1983), *in id.* 37, 86-87. The position of the GCC or the USSR, which had naval forces in the area; countries, *e.g.*, Australia or Japan, which played roles in the Gulf; or States that played no known direct role, *e.g.*, Federal Republic of Germany (FRG) or Norway, is not clear. *See* nn. 438-46 and accompanying text. The USSR did declare its neutrality in September 1980, however, and strongly disapproved of the Iraqi invasion. CHUBIN & TRIPP 191; Sajjadpour, n. 54, 31. The UN Security Council—in which China, France, the UK, the US and the USSR are permanent members pursuant to UN Charter, art. 23(1)—styled it a conflict but also referred to "hostilities" or cited humanitarian law applicable to war. *See, e.g.*, S.C. Res. 514 (1982) ("conflict"); S.C. Res. 552 (1984) ("hostilities," "conflict"); S.C. Res. 620 ("conflict," Geneva Gas Protocol), *in* WELLENS 450, 457, 473. Other international organizations' reactions varied. *Compare, e.g.*, Statement by Nine Member States of the European Community, Sept. 23, 1987, Bull. Eur. Communities, Commission, No. 9, at 7 (1980), *in* DE GUTTRY & RONZITTI 553 ("conflict") *with* Vienna Economic Summit, *Statement on Iran-Iraq War and Freedom of Navigation in the Gulf*, June 9, 1987, 87 Bulletin 4 (Aug. 1987) ("war"). For reasons developed in succeeding chapters, the Iran-Iraq interaction, 1980-88, was a war; "conflict" may be employed as an occasional synonym. Counting noses, Iran, Iraq and most major naval powers in the Gulf (Belgium, Italy, Netherlands, United States) thought it a war, and two States (France, United Kingdom), a conflict. UK terminology was inconsistent; although the Second Report title referred to "Iran/Iraq Conflict," *id.* ¶ 6.1 said "the war started in 1980...." Read closely, international organizations' statements have the same inconsistency.

85. Post, n. 50, 32-33; *see also* nn. 36, 50 and accompanying text.

86. *Introductory Note, in* WELLENS 443.

87. HIRO 39. Merchant ships customarily fly a country's colors whose port they enter at the truck and display their registry flag elsewhere, usually at the stern.

88. *Id.* 40-41; *Introductory Note, in* WELLENS 443.

89. Iran NOTMAR No. 17/59, Sept. 22, 1980, *in* DE GUTTRY & RONZITTI 37; *see also* Defense Mapping Agency/Hydrographic Center, *Special Warning No. 48*, Sept. 22, 1980, *in id.* 133, warning mariners to avoid the Shatt and Iranian waters until further notice; Djamchid Momtaz, *Commentary, in id.* 19.

90. David L. Peace, *Major Maritime Events in the Persian Gulf War, in* Panel, n. 84, 146, 147; Peace, *Major Maritime Events in the Persian Gulf War: A Juridical Analysis*, 31 VJIL 545, 547 (1991); J. Ashley Roach, *Missiles on Target: Targeting and Defense Zones in the Tanker War, id.* 593, 600-02 (1991).

91. Momtaz, n. 89, 21-22; *see also* HIRO 41 (Iran "imposed a naval blockade of the Shatt..., trapping many ships and incapacitating Basra port").

92. 27 KEESING 31006 (1981); Gioia, *Commentary,* n. 7, 59.

93. Statement by Nine Member States of the European Community, Sept. 23, 1980, Bull. Eur. Communities, Commission, No. 9, at 7 (1980), *in* DE GUTTRY & RONZITTI 553; *see also* Lowe, *Commentary,* n. 77, 243, citing *inter alia* UK Foreign and Commonwealth Affairs Secretary of State answer, Dec. 7, 1983, 50 Parl. Deb., H.C. (6th ser.) 176 (1983); UK UN Permanent Representative statement before UN Security Council, June 1, 1984, UN Doc. S/PV.2545 (1984), *in* DE GUTTRY & RONZITTI 380, 382 (UK position).

94. *Cf.* Naghibzadeh, n. 18, 40.

95. On January 30, 1979 Iraq and Syria had signed a mutual defense pact, declaring intent to create a unified State to organize Arab opposition to the Camp David Accords achieved during the Carter administration. Libya and Syria signed a merger agreement September 10, 1979, to form an Arab Steadfast and Confrontation Front. By summer the Libya-Syria unity scheme had failed; there was no barrier to Syrian support of Iran. Lotfian, n. 38, 20-21; Gabriella Venturini, *Commentary, in* DE GUTTRY & RONZITTI 523, citing 27 KEESING 31010 (1981); 29 *id.* 32037 (1983).

96. S.C. Res. 479 (1980), *in* WELLENS 449; *see also Introductory Note,* n. 31, 443.

97. *Introductory Note,* n. 31, 443; *see also* HIRO 42.

98. Venturini, *Commentary,* n. 95, 524, citing *inter alia* US UN Permanent Representative statement before UN Security Council, Sept. 28, 1980, 80 Bulletin 61 (Nov. 1980).

99. Anthony Clark Arend, *The Role of the United Nations in the Iran-Iraq War, in* Joyner 191, 192-93.

100. Iran NOTMAR No. 18/59, Oct. 1, 1980, *in* DE GUTTRY & RONZITTI 37.

101. Defense Mapping Agency/Hydrographic Center, *Special Warning No. 49,* Oct. 4, 1980, *in* DE GUTTRY & RONZITTI 134.

102. Momtaz, n. 89, 20-21.

103. 28 KEESING 31850 (1982); 29 *id.* 32689 (1983); 30 *id.* 32689, 33057 (1984); 31 *id.* 33560 (1985); Gioia, *Commentary,* n. 7, 72; Lowe, *Commentary,* n. 77, 251.

104. Momtaz, n. 89, 20-21, citing *inter alia* Iran Foreign Minister letter to UN Secretary-General, Oct. 22, 1980, UN Doc. S/14226 (1980) (footnote omitted).

105. US Deputy Secretary of State Warren Christopher, *Conflict in Iran and Iraq,* Oct. 17, 1980, 80 Bulletin 52 (Nov. 1980); US UN Permanent Representative Donald F. McHenry, *Iran-Iraq Conflict,* Oct. 23, 1980, *id.* 73 (Dec. 1980); Menefee, *Commentary,* n. 74, 102. The French and UK positions were the same. Lowe, *Commentary,* n. 77, 243-44, citing *inter alia* UK UN Permanent Representative statement, n. 93; Mallein, n. 84, 395, citing French Foreign Affairs Ministry Spokesperson statement, Aug. 3, 1987, *in* DE GUTTRY & RONZITTI 414.

106. *See, e.g.,* nn. 148, 216, 278, 303, 325, 357, 379-81, 463 and accompanying text.

107. *See* nn. 364-65 and accompanying text; *see also* nn. 379-81, 411, 458 and accompanying text.

108. *Compare* Efraim Karsh, *From Ideological Zeal to Geopolitical Realism: The Islamic Republic and the Gulf, in* KARSH 26, 37, *with* MACDONALD 183-84 (Iranian advocacy of regulated straits passage, special regime for the Gulf). Saudi Arabia, by contrast, followed the position eventually adopted by the LOS Convention. *Id.* 182-83.

109. Defense Mapping Agency/Hydrographic Center, *Special Warning No. 50,* Oct. 7, 1980, 2, *in* DE GUTTRY & RONZITTI 134-35; *see also* W.J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare,* 24 CYBIL 91, 118 (1986); Gioia, *Commentary,* n. 7, 72; Roach, *Missiles on Target: Targeting,* n. 90, 604-05.

110. Gioia, *Commentary,* n. 7, 57, 63, citing *inter alia* Iraq UN Permanent Representative letter to UN Secretary-General, May 27, 1984, UN Doc. S/16590 (1984); Iraq UN Permanent Representative letter to UN Secretary-General, Feb. 20, 1985, UN Doc. S/16972 (1985), *in* DE GUTTRY & RONZITTI 90, 92; Momtaz, n. 89, 23, citing Iraq Foreign Minister letter to UN Secretary-General, Oct. 19, 1984.

111. Iraq began the war with $35 billion in foreign exchange reserves, but the war's cost, increased civilian commodity imports, and paying for millions of foreign workers, mostly Egyptians and Sudanese, soon whittled it away. Kanovsky, n. 72, 233, 236-37. Although the number of Egyptians working in Iraq—40 percent of Egyptians working abroad, 400,000 to up to 1.3 million—may have declined as the war progressed, remittances home made up 30 percent of Egypt's merchandise deficit. Funds transfers home went from $580 million to $1 billion for 1982-83. A 1983 Egypt-Iraq economic accord, by which Egyptians could repatriate 60 percent of earnings, was a result. Even so, an increased drain was predicted, perhaps $1.4 billion for the next year. Philip H. Stoddard, *Egypt and the Iran-Iraq War, in* Naff, GULF SECURITY 25, 49-50.

112. 2 CORDESMAN & WAGNER 90-91, 101-02 , 133-34, 170, 186; HIRO 75-76; Farhaug Mehr, *Neutrality in the Gulf War,* 20 ODIL 105 (1989); Francis V. Russo, *Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law,* 19 *id.* 381, 393 (1988).

113. CHUBIN & TRIPP 154; Kanovsky, n. 72, 237; Kechichian, n. 21, 92. Saudi deficits every year after 1982-83 was a ripple effect of supporting Iraq. Kanovsky 248. However, Saudi oil production had promoted an economic boom before 1980. *See* MACDONALD 51-52.

114. Lotfian, n. 38, 21; *see also* nn. 95, 112, 181 and accompanying text. Closing the Syrian pipeline cost Iraq $8 billion in income. Iraq had a major budget shortfall in 1982, even with $19 billion in Gulf State subsidies. Devlin, n. 81, 142.

115. Lotfian, n. 38, 18.

116. HIRO 76-77 believes these States acted out of concern for Shiite minorities within their populations, who might align ideologically with the Shiite Iranian State, and because their offshore oil platforms and other facilities were vulnerable to Iranian attack. Saudi Arabia may have allowed Iraq to use its airspace and even its air bases, although the official Saudi position was to the contrary. *Id.* 76. The result, early in the war, for Kuwait was occasional Iranian raids on border posts and attacks on one of its refineries. *Id.* 77. Kanovsy, n. 72, 248 says Gulf States feared Iran and granted or loaned money to Iraq to buy protection and to bolster their military resources.

117. *See* n. 51 and accompanying text.

118. Three of the seven UAE principalities supported Iran, including Dubai, where 20,000 Iranian merchants were based. HIRO 77, 116; Kanovsky, n. 72, 237; Lotfian, n. 38, 18.

119. HIRO 77-78.

120. *Id.* 79-80; Lotfian, n.38, 16. Saudi Arabia may have allowed use of its air bases, perhaps as temporary Iraqi aircraft sanctuaries. Daniel Pearl, *Same Old Song: Iraq's Best Planes Are Mainly in Iran,* WALL ST. J., Apr. 29, 1998, at A1, A10.

121. Marr, n. 82, 65.

122. HIRO 81.

123. *See generally* Henri J. Barkey, *The Silent Victor: Turkey's Role in the Gulf War, in* KARSH 133-53.

124. *Compare* Lotfian, n. 38, 17, an Iranian source, *with* Stoddard, n. 111, 36-37, 50-51.

125. HIRO 81-82. This may be partly explained by UK access to North Sea oil, which gave Britain "the luxury, at least initially, of seeing her interests more plainly as retaining decent relations, to the extent that the policies of either belligerent allowed;" and for France, the 15 billion franc debt Iraq owed; "like all large creditors in similar circumstance France was . . . obliged to continue to assist Iraq or risk losing all." Moreover, "[a] declaratory policy of neutrality . . . was in part a fruit of the realization that the United Kingdom was not in a position to play a balancing role . . . diplomatically or militarily;" there were yet vestiges of feeling about Britain's "colonial" history in the Middle East. Chipman, n. 49, 217-19.

126. These came from Austria, Brazil, Colombia, Egypt, France, PRC, South Africa and Spain. HIRO 82; Lotfian, n. 38, 18-19; Mohiaddin Mesbahi, *The USSR and the Iran-Iraq War: From Brezhnev to Gorbachev, in* Rajaee, IRAN-IRAQ WAR 69, 88-89; Stoddard, n. 111, 36-37.

127. CHUBIN & TRIPP 204, 237.

128. Mesbahi, n. 126, 89.

129. CHUBIN & TRIPP 191.

130. Chipman, n. 49, 221-22; *see also* n. 322 and accompanying text.

131. Previously there had been a steady rise in Iran's economy after the 1953 oil crisis. Kanovsky, n. 72, 241-42; MACDONALD 45. Iraq started the war with a $35 billion foreign exchange kitty, which was soon frittered. Kanovsky 237; *see also* nn. 112-24 and accompanying text.

132. CHUBIN & TRIPP 207. Iran's military power had increased significantly since World War II, when Britain and the USSR jointly occupied Iran. MACDONALD 42-45.

133. HIRO 80-81; Rabinovich, n. 83, 104.

134. HIRO 81-83.

135. US-manufactured materials began filtering into Iran, at the same time US export controls were in force, as early as 1980, through Israeli and UK middlemen. *Id.* 83, 117-18.

136. *See* nn. 46-49, 54 and accompanying text.

137. HIRO 83-84.

138. Sajjadpour, n. 54, 30-31; *see also* CHUBIN & TRIPP 204-05, 221; Mark N. Katz, *Moscow and the Gulf War, in* Joyner 139, 140-42; Robert S. Litwak, *The Soviet Union and the Iran-Iraq War, in* Karsh 200-05.

139. Sajjadpour, n. 54, 32, referring to Treaty of Friendship & Cooperation, Oct. 8, 1980, Syria-USSR, 1222 UNTS 343. CHUBIN & TRIPP 191 say the USSR "strongly disapproved" of the Iraqi invasion.

140. HIRO 84-85.

141. Iran NOTMAR No. 20/59, Nov. 4, 1980; *id.* No. 22/59, Nov. 16, 1980; *id.* No. 23/59, Jan. 21, 1981, *in* DE GUTTRY & RONZITTI 38; *see also* Momtaz, n. 89, 23.

142. Momtaz, n. 89, 21. Iraqi air strikes damaged an ULCC, *Seawise Giant,* at Iran's Larak oil terminal late in the war. *See* n. 457 and accompanying text.

143. NWP 9A Annotated, ¶ 7.4.1, citing *inter alia* Milton Viorst, *Iran at War,* 65 FOREIGN AFF. 349, 350 (1986); *see also* 2 CORDESMAN & WAGNER 92; Peace, *in* Panel, n. 90, 148-49; Peace, *Major Maritime Events,* n. 90, 547-48; J. Ashley Roach, *Missiles on Target: The Law of Targeting and the Tanker War, in* Panel, n. 90, 154, 156-57; Roach, *Missiles on Target: Targeting,* n. 90, 596-97, 600-01. For analysis of contraband and related issues, *see* Part V.D.

144. Iran Law Regarding Settlement of Disputes over War Prizes, Nov. 17, 1987, DE GUTTRY & RONZITTI 39 (Iran Prize Law), not in force until Jan. 31, 1988. *Id.* Panel, n. 84, met a few months after the Law went into force; its almost simultaneous publication with research and presentation of the Panel probably accounts for Panel at 170 (Burnett remarks) and Panel, *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf (Part II),* 1988 ASIL PROC. 599, 609 (Wiswall remarks) statements that no prize courts were established. There is no record of any Iraqi court.

145. JAMES CABLE, NAVIES IN VIOLENT PEACE 60-70 (1989); Lowe, *Commentary,* n. 77, 247, citing *inter alia* Second Report ¶ 6.18. The United Kingdom was at pains, within limits imposed by close relationship to the United States, to stress the independence of her military activity. Chipman, n. 49, 221.

146. The Patrol held at least one joint exercise with a Gulf State. Lowe, *Commentary,* n. 77, 247, citing *inter alia* Second Report ¶ 6.9.

147. Second Report ¶ 6.11; Lowe, *Commentary,* n. 77, 247; *see also* Ross Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones,* 37 ICLQ 629, 641 (1988);

148. President Carter, *Remarks at a Question-and-Answer Session with Local Residents* (of Lyndhurst, N.J.) Oct. 15, 1980, 3 Public Papers: Carter 1980-81, at 2268 (1982); Menefee, *Commentary,* n. 74, 102.

149. CABLE 208. The United States stopped shipments on turbines for Iraqi frigates being built in Italy. 27 KEESING 31011 (1981). *See also Council Calls on Iran and Iraq to Settle Dispute Peacefully,* 17 UN Chron. 5, 7 (Sept. 1980). The ships sat out the war in Italy.

150. Menefee, *Commentary,* n. 74, 101, citing *inter alia* US UN Permanent Representative statement before UN Security Council, Sept. 28, 1980, 80 Bulletin 61 (Nov. 1980); Christopher, n. 105; *see also* Saunders, n. 76, 71-72. French and UK policies were the same on freedom of navigation. *See* Lowe, *Commentary,* n. 77, 143-44, citing UK UN Permanent Representative statement, n. 93; Mallein, n. 84, 394.

151. See Executive Order No. 12170, 3 CFR 457 (1980); Executive Order No. 12205, *id.* 248 (1981), *amended;* Executive Order No. 12211, *id.* 253; Executive Order No. 12282, *id.* 113 (1982); Executive Order No. 12294, *id.* 139; Executive Order No. 12613, *id.* 256 (1988); *see also* Notice of President, Sept. 30, 1997, 62 Fed. Reg. 51591 (1997); International Emergency Economic Powers Act, 50 USC §§ 1701-06; Dames & Moore v. Regan, 453 US 654 (1981).

152. Iran (Temporary Powers) Act 1980 (Eng.).

153. 27 KEESING 31014 (1981); 28 *id.* 31522 (1982); Gioia, *Commentary,* n. 7, 59.

154. Boleslaw Boczek, *Law of Warfare and Neutrality: Lessons from the Gulf War,* 20 ODIL 239, 244, 257 (1989).

155. Gioia, *Commentary,* n. 7, 59-60, citing Iraq President letter to UN Secretary-General, Oct.16, 1980, UN Doc. S/14221 (1980), *in* DE GUTTRY & RONZITTI 84.

156. UN Secretary-General letter to Iraq President, Oct. 16, 1980, UN Doc. S/14221 (1980), *in* DE GUTTRY & RONZITTI 84.

157. HIRO 50; Hooglund, n. 82, 42. *See* nn. III 813-17 for analysis of the ICO. Charter of the Islamic Conference Organization, Feb. 28, 1973, 914 UNTS 111, established ICO.

158. Hooglund, n. 82, 42.

159. *See generally* GCC Charter, n. 21; HIRO 78; SIMMA 706; *see also* n. 21 and accompanying text.

160. SIMMA 706; Sterner, n. 21, 17.

161. Venturini, *Commentary,* n. 95, 531.

162. HIRO 78-79.

163. Kechichian, n. 21, 93-95; *see also* nn. 51, 81, 119 and accompanying text.

164. Kechichian, n. 21, 95; *see also* Barry Rubin, *The Gulf States and the Iran-Iraq War, in* KARSH 121, 123-25. Although tilting toward Iraq like the Soviet Union, the GCC was cool to USSR friendship feelers until early 1985. Katz, n. 138, 142.

165. Kechichian, n. 21, 93. Despite fluctuations in Saudi-US relations, Saudi Arabia depended on the United States for its defenses and began building them as early as the Sixties. MACDONALD 51.

166. *Compare* Kechichian, n. 21, 108 and Sterner, n. 21, 18, dating Peninsula Shield in 1983, *with* Lotfian, n. 38, 25, placing the exercise in 1981. Lotfian may refer to "tame" 1981 and 1982 GCC defense studies. Early exercises served more as symbolic political rather than strategic functions, manifesting GCC commitment to common defense strategy. Sterner 18. *See also* nn. 38, 45 and accompanying text.

167. SIMMA 706; Kechichian, n. 21, 108.

168. Sterner, n. 21, 18-19.

169. Kuwait resisted a multilateral pact because of its extradition requirements. *Id.* 17-18.

170. Kechichian, n. 21, 95; Sterner, n. 21, 20-21.

171. Sterner, n. 21, 20; *see also* Saunders, n. 76, 68-70.

172. US Secretary of Defense Caspar W. Weinberger, *The Permanence of U.S. Interests in the Persian Gulf,* remarks at American Defense Preparedness Association, May 20, 1987, Office of Assistant Secretary of Defense (Public Affairs) News Release No. 264-87, at 3 (1987). The AWACS were later sold to Saudi Arabia as GCC States began considering defense needs. Lotfian, n. 38, 19; Saunders, n. 76, 69; *see* nn. 80, 261 and accompanying text.

173. *Interview with US Secretary of State Alexander Haig,* Mar. 5, 1981, American Foreign Policy Current Documents 1981, at 654 (1984) (*Haig Interview*); Menefee, *Commentary,* n. 74, 102.

174. HIRO 75.

175. This was an expansion and continuation of the Carter Administration policy. *Interview with President Ronald Reagan,* Feb 2, 1981, American Foreign Policy Current Documents, 1981, at 653; *Haig Interview,* n. 173, 654; HIRO 78; Menefee, *Commentary,* n. 74, 102; *see also* nn. 77-78 and accompanying text.

176. Defense Mapping Agency/Hydrographic Center, *Special Warning No. 53* (May 27, 1981), *in* DE GUTTRY & RONZITTI 136.

177. 2 CORDESMAN & WAGNER at 336-37; NAVIS & HOOTEN 63; Iraq UN Permanent Representative letter to UN Security Council President, Aug. 19, 1981, UN Doc. S/14637 (1981), *in* DE GUTTRY & RONZITTI 85; Momtaz n. 89, 24; 2 von Heinegg 102.

178. NAVIS & HOOTEN 72; 28 KEESING 31850, 31852 (1982); 30 *id.* 32689 (1984); Gioia, *Commentary,* n. 7, 61.

179. 28 KEESING 31522 (1982).

180. *See* nn. 210-15 and accompanying text.

181. 2 CORDESMAN & WAGNER 133-34; HIRO 80; Devlin, n. 81, 142-43; Kanovsky, n. 72, 238; *see also* nn. 112, 114 and accompanying text.

182. Kanovsky, n. 72, 238; Marr, n. 82, 67. Iraq also explored building a pipeline through Jordan to the Port of Aqaba; this did not materialize. Rabinovich, n. 83, 102.

183. Michael Lenker, *The Effect of the Iran-Iraq War on Soviet Strategy in the Persian Gulf, in* Naff, GULF SECURITY 81, 88.

184. HIRO 81; *see also* Stoddard, n. 111, 29-30. For analysis of the Arab League, *see* nn. 31, III.800-17 and accompanying text.

185. Hooglund, n. 82, 43.

186. Kechichian, n. 21, 96-97.

187. *See* nn. 165-71 and accompanying text.

188. HIRO 62-63.

189. S.C. Res. 514, 522 (1982), *in* WELLENS 450-51. Iran's conditions for a settlement had been retaining the 1975 border agreement, n. 50, repatriation of 100,000 Iraqi citizens expelled by Iraq, a declaration that Iraq caused the war, $100 billion in war damages, and punishing Saddam Hussein as a war criminal.

190. *Introductory Note,* n. 31, 443. Although Javier Perez de Cuellar had been elected UN Secretary-General to succeed Kurt Waldheim in January 1981, the UN role in the war remained predominantly the same. Arend, n. 99, 193.

191. By and large these were only marginally successful. *See* HIRO 87-98.

192. *Final Declaration of 12th Summit of Arab Heads of State,* Sept. 6-9, 1982, 21 ILM 1144, 1145-46 (1982). For other peace initiatives, *see* 28 KEESING 31852 (1982) (GCC); 29 *id.* 32595 (1983); 30 *id.* 33058 (1984) (GCC condemned Iran aggression); 31 *id.* 33561 (1985) (Arab League, others); 32 *id.* (1986) (GCC claimed Iran persisted in ignoring efforts to end war).

193. Terms included ceasefire during the pilgrimage season, Iraq's evacuating Iranian territory and $70 billion compensation to Iran from the Islamic Reconstruction Fund, to be financed by the Gulf States. HIRO 91, 114.

194. Iran had recaptured Khoramshahr port and was confident of more victories. Tousi, n. I.30, 58.

195. *Id.*

196. HIRO 63, 114-15.

197. Naghibzadeh, n. 18, 44-45.

198. HIRO 119.

199. Defense Mapping Agency/Hydrographic Center, *Special Warning No. 62,* Aug. 16, 1982, *in* DE GUTTRY & RONZITTI 136; *see also* 28 KEESING 31850 (1982); Gioia, *Commentary,* n. 7, 72-73; Momtaz, n. 89, 29.

200. Gioia, *Commentary,* n. 7, 73, citing *inter alia* 28 KEESING 31850 (1982). Iraq later justified its attacks as self-defense. Gioia, citing Iraq UN Permanent Representative letter to UN Secretary-General, May 5, 1983, UN Doc. S/15752 (1983); Iraq UN Permanent Representative letter to UN Secretary-General, Dec. 23, 1983, UN Doc. S/16238 (1983); Iraq UN Permanent Representative letter to UN Secretary-General, May 24, 1984, UN Doc. S/16590 (1984), *in* DE GUTTRY & RONZITTI 86-90.

201. 2 CORDESMAN & WAGNER 171; 28 KEESING 31850 (1982); 29 *id.* 32594 (1983); 30 *id.* 32680, 33058-59 (1984); 31 *id.* 33560 (1985); Roach, *Missiles on Target: Targeting,* n. 90, 605; Defense Mapping Agency/Hydrographic Center, *Special Warning Modifying Special Warning No. 62,* Nov. 24, 1982, *in* DE GUTTRY & RONZITTI 137.

202. W.J. Fenrick, *Military Objectives in the Law of Naval Warfare,* 7 BSFHV 1, 20 (1991).

203. HIRO 98.

204. *United States Commitment to Maintain Free Access to the Persian Gulf Area,* Oct. 5, 1980, *in* American Foreign Policy Basic Documents, 1977-80, at 800 (1983); Menefee, *Commentary,* n. 74, 101-02.

205. CHUBIN & TRIPP 193.

206. *Id.* 193-94.

207. *Id.* 191-92.

208. Kechichian, n. 21, 97.

209. *Id.* 98.

210. HIRO 98; Andrea de Guttry & Natalino Ronzitti, *Introduction, in* DE GUTTRY & RONZITTI 3, 9; Ronald A. DeMarco & John P. Quinn, *The Impact of War and Military Operations Other Than War on the Marine Environment: Policy Making on the Frontiers of Knowledge, in* PROTECTION OF THE ENVIRONMENT 87, 93-94; Frank R. Finch, *This Land Is Our Land: The Environmental Threat of Army Operations, in id.* 99, 109; Gioia, *Commentary,* n. 7, 76; 29 KEESING 32594-95 (1983); Rainer Lagoni, *Comments: Methods or Means of Warfare, Belligerent Reprisals, and the Principle of Proportionality, in* DEKKER & POST 115, 121; Menefee, *Commentary,* n. 74, 103; Margaret T. Okorodudu-Fubara, *Oil in the Persian Gulf*

*War: Legal Appraisal of an Environmental Disaster,* 23 ST. MARY'S L.J. 123, 129 (1991); Saeid Mirzaee Yengejeh, *The Need for Modification and Development of the Laws of War in Modern International Law, in* Rajaee, IRAN-IRAQ WAR 217, 223-24. John Salter, *Environmental Legal Issues Arising from the Gulf Conflict,* 10 OIL & GAS TAX REV. 348, 349 (1990) estimates the Nowruz leakage at 30,000 tons of crude a day, considerably more than other accounts. Yengejeh 223 estimated a 250,000-barrel total spillage. General accounts of the war paid no attention to the environmental damage. *See* HIRO 98; NAVIS & HOOTEN 56.

211. Iraq UN Permanent Representative letter, May 5, 1983, n. 200, *in* DE GUTTRY & RONZITTI 86.

212. Menefee, *Commentary,* n. 74, 103, citing Senior US Government Official, *Visit of Sultan Qaboos of Oman,* Apr. 12, 1983, American Foreign Policy Basic Documents, 1983, at 694, 695 (1985); President Reagan, *Remarks at the Welcoming Ceremony for Amir Isa bin Sulman Al Khalifa of Bahrain,* July 19, 1983, 2 Public Papers: Reagan 1983, at 1049 (1985).

213. Gioia, *Commentary,* n. 7, 76, citing *inter alia* UN Docs. S/15723 (1983); S/16049 (1983), S/16465 (1984) and referring to Kuwait Regional Convention and Kuwait Protocol, n. 63; *see also* Yengejeh, n. 210, 224; Parts IV.A.2, VI.B.2.a, VI.B.2.c(I), VI.B.2.c(III).

214. Gioia, *Commentary,* n. 7, 77, citing Iraq UN Permanent Representative letter, May 5, 1983, n. 200; Iraq UN Permanent Representative letter, Dec. 23, 1983, n.200, ¶ 2, *in* DE GUTTRY & RONZITTI 86, 89.

215. 28 KEESING 31850 (1982); 30 *id.* 33058 (1984).

216. S.C. Res. 540 (1983), *in* WELLENS 451 (italics in original). The United States supported the resolution and had reemphasized its freedom of navigation policy when Iran threatened to restrict Gulf shipping or to close Hormuz. Menefee, *Commentary,* n. 74, 103; *see also* Fenrick, *Exclusion Zone,* n. 109, 120-21.

217. Venturini, *Commentary,* n. 95, 524, citing UN Doc. S/PV 2493, at 13 (1983).

218. Kechichian, n. 21, 97.

219. McNaugher, *U.S. Policy,* n. 78, 112; Weinberger, *The Permanence,* n. 172, 3. The command was reorganized twice more in 1987. John H. Cushman, Jr., *U.S. Reorganizing the Gulf Command,* N.Y. TIMES, Dec. 8, 1987, at A11. *See also* 3 CORDESMAN & WAGNER ch. 5, analyzing CENTCOM and strategic technology for limited force engagements; Johnson, n. 79, 129-31; nn. 77-78, 175 and accompanying text. At first the Reagan Administration did not fully think through RDJTF uses for some contingencies. Saunders, n. 76, 74-75.

220. NAFF, IRAN-IRAQ WAR 64-65.

221. CHUBIN & TRIPP 208; McNaugher, *U.S. Policy,* n. 78, 112. The Carter and Reagan Administrations did not have the capacity to meet all possible contingencies, nor did either fully think through what those commitments involved. Saunders, n. 76, 73.

222. Saunders, n. 76, 72.

223. If this had matured, it would have helped exclude the Soviet Union from the area. Lenker, n. 183, 89-90. Reviving the Agreement prompted the USSR to suggest to Pakistan and Turkey that they review their bilateral economic relations. Lenker 96. Pakistan had considerable trade with Gulf States, mainly Abu Dhabi, Iran, Iraq, Kuwait, Saudi Arabia and the UAE. Its migrant workers labored in many of these countries; there were small Pakistani military contingents in many of them. *See generally* Craig Baxter, *Pakistan and the Gulf, in* Naff, GULF SECURITY ch. 5. Turkey had been leaning toward Iraq. *See* nn. 112, 122, 182 and accompanying text.

224. Notice to Airmen and Mariners for Persian Gulf, Strait of Hormuz, Gulf of Oman and Northern Arabian Sea, Jan. 22, 1984, *in* DE GUTTRY & RONZITTI 137 and Marian Leich, *United States Defense Measures in the Persian Gulf Area,* 78 AJIL 884 (1984); *see also* Menefee, *Commentary,* n. 74, 103. The US warnings were published within days after its report on the US Marine headquarters bombing at Beirut International Airport in 1983, accomplished by a gas-enhanced explosive device carried in a light truck and Iranian complicity in the attack. The concern was that boats or aircraft would try similar suicide runs on US warships. CHUBIN & TRIPP 209; Roach, *Missiles on Target: Targeting,* n. 90, 609.

225. *See* Stanley F. Gilchrist, *The Cordon Sanitaire — Is It Useful? Is It Practical?,* 35 NWC REV. 60 (May-June 1982).

226. Momtaz, n. 89, 33-34; *see also* Iran note to US State Department, Mar. 15, 1989, UN Doc. S/20525 (1989) *in* DE GUTTRY & RONZITTI 41.

227. US State Department message to Iran, July 12, 1984, *in* 78 AJIL 884 (1984); *see also* David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense and State Responsibility,* 16 YALE INT'L L.J. 245, 248 (1991).

228. CHUBIN & TRIPP 209.

229. UK ROE never have been and likely never will be published. Lowe, *Commentary,* n. 77, 249.

230. Tousi, n. I.30, 53.

231. Thomas L. McNaugher, *Walking Tightropes in the Gulf, in* KARSH 171, 188.

232. 30 KEESING 33057 (1984); *see also* Gioia, *Commentary,* n. 7, 73; nn. 88-90, 103, 109-10 and accompanying text.

233. During 1984 Iran mounted more offensives into Iraqi territory, trying unsuccessfully to cut the Baghdad-Basra highway. The war's cost in material and people spiraled upward. Iraq continued a capital intensive war; Iran used its supply of manpower to keep costs down. HIRO 102-13.

234. UK Foreign and Commonwealth Affairs Secretary of State statement, Mar. 8, 1984, 55 Parl. Deb., H.C. (6th ser.) 994 (1984); NAVIS & HOOTEN 74; Lowe, *Commentary,* n. 77, 251.

235. Momtaz, n. 89, 29.

236. Gioia, *Commentary,* n. 7, 62; *see also* nn. 89, 91-92, 100-02 and accompanying text.

237. HIRO 132-33; Fenrick, *Military Objectives,* n. 202, 20.

238. Karsh, n. 108, 37.

239. Iraqi bombing also forced Iran to import refined oil products, thereby worsening Iranian balances of payments. Gioia, *Commentary,* n. 7, 62; Kanovsky, n. 72, 242-43.

240. Fenrick, *Military Obectives,* n. 201, 20; *see also* HIRO 145; Gioia, *Commentary,* n. 7, 61-62.

241. The Gulf States did not offer bases to the United States at this time, however. CHUBIN & TRIPP 209; Menefee, *Commentary,* n. 74, 104, citing David Evans & Richard Campany, *Iran-Iraq: Bloody Tomorrows,* 111 PROCEEDINGS 38 (Jan. 1985); Ralph Danziger, *The Persian Gulf Tanker War, id.* 160, 163 (May 1985); Lotfian, n. 38, 20; President Reagan, *Interview with Television Correspondents Representing Nations Attending the London Economic Summit,* May 31, 1984, 1 Public Papers: Reagan 1984, at 772 (1986).

242. HIRO 122-23; Tousi, n. I.30, 53.

243. Sajjadpour, n. 54, 32-34. The Soviet Union also reacted to Tudeh Party purges in Iran and expulsion of Soviet diplomats accused of complicity with the Party, which was the Iranian communist party. CHUBIN & TRIPP 222; Katz, n. 138, 142; Litwak, n. 138, 206.

244. HIRO 123-27.

245. Lotfian, n. 38, 20.

246. *See* nn. 112, 126 and accompanying text.

247. HIRO 127-28.

248. The GCC had tried to mediate in the war in March without success. At the Arab League meeting, boycotted by Libya and Syria, the GCC supported a League call to States to stop selling arms and spares to Iran. *Id.* 115; Venturini, *Commentary,* n. 95, 530.

249. Litwak, n. 138, 205-06; Sajjadpour, n. 54, 34-35; *see also* n. 243 and accompanying text.

250. Hooglund, n. 82, 47.

251. Bahraini, Kuwaiti, Omani, Qatari, Saudi & UAE UN Permanent Representatives' letter to UN Security Council President, May 21, 1984, UN Doc. S/16574 (1984), *in* DE GUTTRY & RONZITTI 536; *see also* Venturini, *Commentary,* n. 95, 514; *Introductory Note,* WELLENS 473. The United States supported the GCC. US UN Deputy Permanent Representative statement before UN Security Council, May 30, 1984, 80 Bulletin 73 (Aug. 1984).

252. Momtaz, n. 89, 29, citing Iran UN Permanent Representative letter to UN Secretary-General, May 25, 1984, UN Doc. S/16585 (1984), *in* DE GUTTRY & RONZITTI 43.

253. Momtaz, n. 89, 29-30.

254. *Id.* 31.

255. Venturini, *Commentary,* n. 95, 524-26, citing UN Doc. S/16586 (1984) (Norway); *id.* S/PV 2541, at 5, 18 (1984); *id.* S/PV 2543, at 6, 26, 31 (1984) (Bahrain, Kuwait, Oman, Saudi Arabia, UAE); *id.* S/PV 2541, at 26 (Yemen); *id.* S/PV 2542, at 3, 6, 10, 16 (1984), *id.* S/PV 2543, at 9, 12, 22, *id.* S/PV 2546, at 7, 17, 22, 37 (1984) (Ecuador, FRG, India, Jordan, Liberia, Morocco, Pakistan, Somalia, Sudan); *id.* S/PV 2542, at 26 (Panama); *id.* S/PV 2546, at 13 (Netherlands); *id.* at 28 (USSR); 38 Y.B.U.N. 229 (1984).

256. Venturini, *Commentary*, n. 95, 530, citing UN Docs. S/PV 2541, at 7, 42 (1984); S/PV 2663, at 6, 14 (1984).

257. *See generally* nn. 125-40, 437-45 and accompanying text. For the importance of flags of convenience, or open registry, *see* n. 60 and accompanying text; Parts IV.C.3, IV.C.6, IV.D.5, V.D.2, V.D.4, V.J.4.

258. S.C. Res. 552 (1984), *in* WELLENS 473. (italics in original)

259. Venturini, *Commentary*, n. 95, 531.

260. Statement by the Group of Seven, 84 Bulletin 5 (Aug. 1984); *see also* Venturini, *Commentary*, n. 95, 533.

261. HIRO 131, 153-54; Lotfian, n. 38, 19.

262. L.F.E. Goldie, *Targeting Enemy Merchant Shipping: An Overview of Law and Practice, in* Grunawalt 1, 17.

263. Hooglund, n. 82, 47-48.

264. MELIA, n. 6, 119; 31 KEESING 33371-73 (1985); Scott C. Truver, *Mines of August: An International Whodunit*, 111 PROCEEDINGS 94 (May 1985); *The Gulf of Suez Mining Crisis: Terrorism at Sea, id.* 10 (Aug. 1985). Convention Repecting Free Navigation of the Suez Canal, Oct. 29, 1888, arts. 1-7, 171 CTS 241, 243-44, *in* MOORE 264-65, the Convention of Constantinople established rights governing Suez Canal operations.

265. *Introductory Note*, n. 86, 444.

266. HIRO 130.

267. The mine-hunters were not delivered during the war; Kuwait did not pursue purchase. Kalshoven, *Commentary*, n. 84, 483-85.

268. Export of Goods (Control) (Amendment No. 2) Order 1985, Aug. 12, 1985, *in* DE GUTTRY & RONZITTI 257.

269. UN Secretary-General, *Report in Pursuance of Security Council Resolution 552*, Dec. 31, 1984, UN Doc. S/16877 (1984), *in* DE GUTTRY & RONZITTI 538; *see also* Venturini, *Commentary*, n. 95, 529, noting periodic addenda, January 22, 1985 - December 31, 1987.

270. HIRO 134-36; Taheri Shemirani, *The War of the Cities, in* Rajaee, IRAN-IRAQ WAR 32-40. The United States pressed Iraq not to make unrestricted air attacks on Iran's economic infrastructure during the War of the Cities. CHUBIN & TRIPP 210.

271. Naghibzadeh, n. 18, 41; *see also* nn. 112, 126, 244 and accompanying text.

272. HIRO 143; Menefee, *Commentary*, n. 74, 104-05.

273. T.M. ORFORD, THE IRAN-IRAQ CONFLICT: RECENT DEVELOPMENTS IN THE LAW OF NAVAL ENGAGEMENTS 60 (1988); *see also* Danzinger, n. 241; Menefee, *Commentary*, n. 74, 105.

274. Momtaz, n. 89, 25, citing *inter alia* T.S. Schiller, *The Gulf War and Shipping: Recent Developments, in* B.A.H. PARRITT, VIOLENCE AT SEA 114 (2d ed. 1986).

275. *See* nn. 144, 422-23 and accompanying text.

276. Momtaz, n. 89, 25.

277. Iran realized that Iraq's strategy was to push Iran into extreme reactions, *e.g.*, closing the Strait; Iran tried to keep its responses to the lowest level and to alleviate international fears of possible closure of the Strait. Karsh, n. 108, 37.

278. KEN BOOTH, LAW, FORCE AND DIPLOMACY AT SEA 178 (1985); L.F.E. Goldie, *Low Intensity Conflict at Sea*, 14 SYRACUSE J. INT'L L. & COMM. 597, 625-26 (1988); Momtaz, n. 89, 24.

279. *See* nn. 95, 112, 114, 122, 181-82, 223, 313 and accompanying text.

280. HIRO 145.

281. *Id.* 146-47.

282. These were at least in part replenished through the Iran-Contra deal. CHUBIN & TRIPP 211-14; *see also* nn. 12, 317 and accompanying text.

283. HIRO 158.

284. Lotfian, n. 38, 21.

285. Amazia Baram, *Iraq: Between East and West, in* KARSH 78, 80-81; Lotfian, n. 38, 158-63.

286. Hunter, n. 13, 178; Lenker, n. 183, 97; Lotfian, n. 38, 163-66.

287. Litwak, n. 138, 206-07.

288. US Defense Mapping Agency Hydrographic/Typographic Center, National Ocean Service & US Coast Guard, *Special Warning No. 67, in* Notices to Mariners (No. 1, 1980).

289. Menefee, *Commentary,* n. 74, citing US Undersecretary of State for Political Affairs Michael M. Armacost, Jr., *"Our Bilateral Relationship with Saudi Arabia is the Keystone of Our Strategic Interests in the Gulf,"* statement to Subcommittee of US Senate Appropriations Committee, June 5, 1984, American Foreign Policy Current Documents, 1984, at 512, 513; Reagan, n. 241, 772.).

290. Menefee, *Commentary,* n. 74, 105, citing US Secretary of State George Shultz, *Progress and Stability in the Gulf,* Oct. 1, 1985, American Foreign Policy Current Documents, 1985, at 543 (1986).

291. HIRO 154-55.

292. *Id.* 155-56.

293. Lotfian, n. 38, at 20.

294. HIRO 156-57.

295. Frank L. Wiswall, Jr., *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf,* 31 VJIL 619, 623 (1991).

296. OFORD, n. 273, 61.

297. Principal Presidential Deputy Press Secretary Larry M. Speakes, *Statement on Iran's Search of the United States Merchant Ship President Taylor,* Jan. 13, 1986, 1 Public Papers: Reagan 1986, at 39 (1988); *see also* Menefee, *Commentary,* n. 74, 105.

298. 90 Parl. Deb., H.C. (6th ser.) 426 (1986) (Response of Secretary of State for Foreign & Commonwealth Affairs). Iran's intercepting *Barber Perseus,* a UK flag merchantman was the precipitating event. Panel, n. 84, 158-59 (Greenwood remarks).

299. Frits Kalshoven, *Commentary, in* LAW OF NAVAL WARFARE 272, 274.

300. S.C. Res. 582 (1986), *in* WELLENS 452-54. Resolution 582 debates were less sharp in condemning destruction of navigation than that preceding adoption of Resolution 552, n. 258. Venturini, *Commentary,* n. 95, 526.

301. Gioia, *Commentary,* n. 7, 73.

302. Diego Garcia Agreement, n. 77; *see also* n. 77 and accompanying text.

303. Principal Presidential Deputy Press Secretary Larry M. Speakes, *Statement on Attacks on Shipping in the Gulf,* May 12, 1986, 1 Public Papers: Reagan 1986, at 586 (1988); *see also* Menefee, *Commentary,* n. 74, 105.

304. OFORD, n. 273, 61; Menefee, *Commentary,* n. 74, 105.

305. US Defense Mapping Agency Hydrographics/Topographic Center, National Ocean Service & US Coast Guard, Automated Notice to Mariners III-9 (No. 39, 1986), *in* DE GUTTRY & RONZITTI 139; *see also* Menefee, *Commentary,* n. 74, 105-06.

306. 2 CORDESMAN & WAGNER 229-30; Norman Cigar, *The Soviet Navy in the Persian Gulf: Naval Diplomacy in a Combat Zone,* 42 NWC REV. 56 (No. 2, 1989). There is speculation that Saudi Arabia allowed refuelling of Iraqi aircraft involved in these attacks at Saudi bases or that there was in-flight refuelling. HIRO 173-74.

307. Momtaz, n. 89, 24.

308. S.C. Res. 588 (1986), *in* WELLENS 453.

309. Maybe it was a mistake; Iraq also hit Iran's Sirri oil terminal. *See* 2 CORDESMAN & WAGNER 236-37; Fenrick, *Military Objectives,* n. 202, 20.

310. Kanovsky, n. 72, 242-43.

311. Federal Aviation Administration, US Department of Transportation, International Notices to Airmen 2 (Nov. 20, 1986).

312. Lowe, *Commentary,* n. 77, 247.

313. HIRO 178-79, 230-32..

314. Iran-Kuwait relations remained tense. *Id.* 215, 227.

315. The growing Iran-USSR relationship was disturbing to Iraq. CHUBIN & TRIPP 197, 223-25; Sajjadpour, n. 54, 35-36. USSR-GCC country relations began to expand in the Gorbachev era. Oman and the UAE established diplomatic relations in 1985 with the Soviet Union, and Qatar did so in 1988. CHUBIN & TRIPP 235; Katz, n. 138, 142.

316. CHUBIN & TRIPP 192.

317. HIRO 215-22; *see also* Tousi, n. I.30, 54-55. The United States was not the only country touched by an arms sales scandal. There were revelations in France, the FRG, Italy, the Netherlands, Portugal, Spain and Sweden. The United Kingdom was the only country not affected by these kinds of revelations, primarily because its companies' sales were directed toward the Gulf States, particularly Saudi Arabia. Britain was given the twin political advantage of an honest claim of neutrality while contributing positively to the confidence, stability and strength of the small States with whom she had long established links. Chipman, n. 49, 220; Naghibzadeh, n. 18, 45; nn. 42-44 and accompanying text. The Iran-Contra scandal was a factor in the US decision to reflag Kuwaiti tankers to demonstrate sincerity of US friendship and loyalty to Kuwait. Hooglund, n. 82, 49. *See also* nn. 12, 282, 326, 333 and accompanying text.

318. Another delivered arms and ammunition to Iran in October 1986. HIRO 220.

319. *Id.* 230; Naghibzadeh, n. 18, 45.

320. Naghibzadeh, n. 18, 45-46.

321. HIRO 222-23.

322. These were part of a $1.5 billion order for six corvettes, four frigates and a support ship placed in 1980. *Id.* 223. *See also* n. 130 and accompanying text.

323. CHUBIN & TRIPP 214; Hooglund, n. 82, 48-49.

324. Les Aspin, US House Armed Services Committee Chair. CHUBIN & TRIPP 215.

325. ROACH & SMITH 312, quoting in part US Diplomatic Note to Algeria Embassy, Aug. 17, 1987.

326. 2 CORDESMAN & WAGNER 271-81; Cigar, n. 306, 59, 63. Another reason for reflagging appears to have been a US desire to prevent Soviet influence spreading in the Gulf. Menefee, *Commentary,* n. 74, 107, 121-22, citing *inter alia* US Assistant Secretary of State for Near Eastern & South Asian Affairs Richard W. Murphy statement before US House Foreign Affairs Committee, Subcommittee on Europe & the Middle East, May 19, 1987, 87 Bulletin 59, (July 1987). Kuwait had approached the United States in late 1986 about changing registries. *See also* HIRO 186, 223-24; Weinberger, *Report,* n. 52, 1434 ; Elizabeth Gamlen & Paul Rogers, *U.S. Reflagging of Kuwaiti Tankers, in* Rajaee, IRAN-IRAQ WAR 123-51; W.L. McDonald, *The Convoy Mission,* 114 PROCEEDINGS 36 (May 1988); McNaugher, *Walking,* n. 231, 172-76; Menefee 121. Naval protection was also part of the reflagging negotiations. *Id.* 122. McNaugher, *U.S. Policy,* n. 78, 114, says reflagging seems to have had less to do with guilt over Iran-Contra nn. 12, 282, 317 and accompanying text, or fear of Soviet intrusion than "with the prevailing assumption that extending U.S. naval protection to a few more tankers would differ little from 'business as usual' in the Gulf." The USSR rationale for helping Kuwait may have had a "showing the flag" component, but the charters also helped earn hard currency. *Cf.* WHITEHURST, US MERCHANT MARINE, n. 59, 233-40.

327. Litwak, n. 138, 208.

328. David D. Caron, *Choice and Duty in Foreign Affairs: The Reflagging of the Kuwaiti Tankers, in* Joyner 153, 157-58.

329. Gamlen & Rogers, n. 326, 128.

330. Katz, n. 138, 143.

331. Litwak, n. 138, 209.

332. Weinberger, *Report,* n. 52, 1448, 1450-52, 1458 1461-63; Caron, n. 328, 161-66; Scott Davidson, *United States Protection of Reflagged Kuwaiti Vessels in the Gulf War: The Legal Implications,* 4 INT'L J. ESTUARINE & COASTAL LAW 387 (1989); Myron H. Nordquist & Margaret G. Wachenfeld, *Legal Aspects of Reflagging Kuwaiti Tankers and Laying Mines in the Persian Gulf,* 31 GER. Y.B. INT'L L. 138 (1988); Peace, *Major Maritime Events,* n. 90, 553-54; Rudiger Wolfrum, *Reflagging and Escort Operations in the Persian Gulf: An International Law Perspective,* 20 VJIL 387 (1989); Julie Mertus, Comment, *The Nationality of Ships and International Responsibility: The Reflagging of the Kuwaiti Oil Tankers,* 17 DENV. J. INT'L L. & POL'Y 207 (1988); Tod A. Phillipps, *Exchanging Excuses for Use of Force—The Tug of War in the Gulf,* 10 HOUSTON J. INT'L L. 275 (1988); Wachenfeld, Comment, *Reflagging Kuwaiti Tankers: A U.S. Response in the Persian Gulf,* 1988 DUKE L.J.174, 202; Assistant Secretary of State Richard William Murphy statement, May 19, 1987, 87 Bulletin 58-60 (1987). US Undersecretary of State for Political Affairs Michael H. Armacost statement to US Senate Foreign Relations Committee, June 16, 1987, 26 ILM 1429, 1431 (1987) said Kuwait had already reflagged two tankers under the UK ensign. In fact there were many more. Second Report, ¶¶ 6.14-6.15, reporting that at one time 50 to 60 Norwegian ships might have switched to the UK flag; *see also* Lowe, *Commentary,* n. 74, 251. Some in the United States

opposed the transfer. *See generally* Gamlen & Rogers, n. 326, 133-35. For a view from inside the State Department, *see* GEORGE P. SHULTZ, TURMOIL AND TRIUMPH. MY YEARS AS SECRETARY OF STATE 925-30 (1993).

333. HIRO 188.

334. *Id.* 186-88, 226; Second Report ¶ 6.6. Although the USSR protested strongly, the Soviet media tended to minimize these attacks. Katz, n. 138, 143-44; Litwak, n. 138, 209.

335. Belgian Defence Minister statement before Joint Foreign Relations & National Defense Committee of Belgian Chamber of Representatives, Sept. 17, 1987, Chambre des Representants, Compte rendue analitique, Sess. ordinaire 1986-1987, reunion publique de Commission, Sept. 17, 1987, at 1122, *in* DE GUTTRY & RONZITTI 508, 509; MELIA, n. 6, 120.

336. HIRO 187; MELIA, n. 6, 120.

337. Litwak, n. 138, 209.

338. *See generally* US Secretary of State George P. Schultz statement, May 20, 1987, 87 Bulletin 62-63 (July 1987); US Assistant Secretary of State for Near Eastern & South Asian Affairs statement before House Foreign Affairs Committee, Subcommittee on Europe & the Middle East, May 19, 1987, *id.* 59; 2 CORDESMAN & WAGNER 289-90, 549-58; Fenrick, *Military Objectives*, n. 202, 20; Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 83 AJIL 558 (1989); Menefee, *Commentary*, n. 74, 106, 123-25; William H. Nelson, *Peacekeepers at Risk*, 115 PROCEEDINGS 90 (July 1987); Michael Vlahos, *The Stark Report*, 114 PROCEEDINGS 64 (May 1988); *Iran-Iraq War and Navigation in the Gulf*, 26 ILM 1422-31 (1987). *See* Joseph F. Bouchard, *Accidents and Crises: Panay, Liberty and Stark*, 41 NWC REV. 87 (No. 4, 1988), for a comparative study.

339. Agreement Concerning Claims Resulting from Attack on *U.S.S. Stark*, Mar. 27-28, 1989, Iraq-US, T.I.A.S. 12030, 26 ILM 1427 (1987), 28 *id.* 644 (1989). Iraq first tried to blame Iran for the attack. Two days after the tragedy Iraqi President Hussein and Iraqi Foreign Minister Tariq Aziz expressed "deep sorrow" and apologized, expressing hope the incident would not affect cordial Iraq-US relations. There was some reason for the United States to regard the attack as a deliberate reprisal, coming only months after the Iran-Contra revelations. CHUBIN & TRIPP 197; Baram, n. 285, 86; *see also* nn. 12, 282, 317, 326 and accompanying text.

340. Assistant to the President for Press Relations Marlin Fitzwater, *Statement*, May 18, 1987, 1 Public Papers: Reagan 1987, at 525 (1989); McNaugher, *U.S. Policy*, n. 78, 114-15.

341. Weinberger, *Report*, n. 52, 1454-55, 1459-60, 1463. O'CONNELL, INFLUENCE OF LAW 169-80; James C. Duncan, *The Commander's Role in Developing Rules of Engagement*, 52 NWC REV. 76 (No. 3, 1999); Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 AIR FORCE L. REV. 245 (1997); J. Ashley Roach, *Rules of Engagement*, 36 NWC REV. 46 (No. 1, 1983), 14 SYRACUSE J. INT'L L. & COMM. 865 (1988); Ivan A. Shearer, *Rules of Engagement and the Implementation of the Law of Naval Warfare*, *id.* 767 analyze ROE from an international law perspective. *See also* BRADD C. HAYES, NAVAL RULES OF ENGAGEMENT: MANAGEMENT TOOLS FOR CRISIS (1989). After the *Stark* incident and US ROE revision, Pentagon debate raged as to how strict ROE should be, *i.e.*, how much leeway on-scene commanders should be given. Johnson, n. 79, 136.

342. The United Kingdom and France held the view that Iran and Iraq were involved in a conflict, not a war, and that the Charter governed their actions. *See* n. 84 and accompanying text.

343. Panel, n. 84, 159-61 (Greenwood remarks), quoting and referring to UK Foreign & Commonwealth Office & Ministry of Defence, *Joint Memorandum in Reply to Questions Put by Defence Committee*, *in* Defence Committee, Third Special Report 1986-1987: The Protection of British Merchant Shipping in the Persian Gulf (March 1987), H.C. 409 (1987), *reprinted in part in* DE GUTTRY & RONZITTI 270-73; *see also* Second Report ¶ 6.19. UK ROE have not been published. *See* n. 229 and accompanying text.

344. *E.g.*, Second Report ¶ 6.22 (Omani ROE "very restrictive," limiting risk of exchange of fire with Iranian forces); de Guttry, *Commentary*, n. 84, 424-32, 438-39, citing *inter alia* Italian Defence Minister statement before IV Permanent Commission (Defence), Sept. 24, 1987, Boll. Commissioni, X Legislatura, IV Commissione Permanente (Difesa) (Sept. 4, 1987), at 4, *in* DE GUTTRY & RONZITTI 453, 455 (Italian forces would respond to "hostile action against our military or merchant ships, if necessary taking such action before the hostile act . . . has taken place;" ROE classified); Kalshoven, *Commentary*, n. 84, 489 (Netherlands ROE reflective of Dutch strict neutrality position but unpublished); Mallein, n. 84, 401-02, discussing French Armed Forces Information & Political Relations Service, Press Release ¶ 4 (July 22, 1987), *in* DE GUTTRY & RONZITTI 413, 414 (ROE not revealed, but govern procedure "in the case of threat or of attack").

345. US Defense Mapping Agency Hydrographic/Topographic Center, National Ocean Service & US Coast Guard, Revised Notice to Airmen/ Notice to Mariners for the Persian Gulf Area (July 1987), *in* DE GUTTRY & RONZITTI 140.

346. US Defense Mapping Agency Hydrographics/Topographic Center, National Ocean Service & US Coast Guard, Notice to Mariners III-1.12 (No. 39, Sept.1987), *in id.* 141.

347. *Compare id. with* Notice to Mariners III-9, n. 305. *See also U.S. Navy Procedure for Communicating with Unidentified Aircraft* (1988), *in* 28 ILM 942 (1989); Peace, *in* Panel, n. 84, 149-50; Peace, *Major Maritime Events*, n. 90, 552; Roach, *Missiles on Target: Targeting*, n. 90, 610; Weinberger, *Report*, n. 52, 1454-55, 1459-60, 1463.

348. Menefee, *Commentary*, n. 74, 107, citing Secretary of State Shultz, *Extent of the U.S. Role in the Gulf*, May 28, 1987, American Foreign Policy Current Documents 1987, at 426 (1988); *see also* Linnan, *Iran Air*, n. 227, at 249-50; W. Hays Parks, *Righting the Rules of Engagement*, 114 PROCEEDINGS 83 (May 1988); Peace, *Major Maritime Events*, n. 90, 552; Roach, *Missiles on Target: Targeting*, n. 90, 610; Weinberger, *Report*, n. 52, 1454-55, 1459-60, 1463.

349. SHULTZ, n. 332, 931, quoting a British Broadcasting Company report; *see also* n. 247 and accompanying text.

350. The USSR had offered naval protection, but the United States agreed to convoy during reflagging negotiations. Menefee, *Commentary*, n. 74, 121-22.

351. McNaugher, *Walking*, n. 231, 173-74.

352. CHUBIN & TRIPP 215.

353. US Assistant Secretary of State for Near Eastern & South Asian Affairs statement, n. 338, 87 Bulletin at 59; US Undersecretary of State for Political Affairs statement before Senate Foreign Relations Committee, June 16, 1987, *id.* 78 (Aug. 1987); Menefee, *Commentary*, n. 74, 123.

354. 2 CORDESMAN & WAGNER 290-92, 298-300; MELIA, n. 6, 120; NAVIS & HOOTEN 136; Walter Isaacson, *Into Rough Water*, TIME, Aug. 10, 1987, at 8; John H. McNeill, *Neutral Rights and Maritime Sanctions: The Effects of Two Wars*, 31 VJIL 631, 635, 638 (1991); Menefee, *Commentary*, n. 74, 126-27; Ronald O'Rourke, *The Tanker War*, 114 PROCEEDINGS 33 (May 1988); Peace, *in* Panel, n. 84, 149; Peace, *Major Maritime Events*, n. 90, 554; Frank C. Seitz, Jr., *SS Bridgeton: The First Convoy*, 114 PROCEEDINGS 52 (May 1988); 2 von Heinegg 104; Wolfrum, *Reflagging* n. 332, 397-98. CHUBIN & TRIPP 215 err in christening *S.S. Bridgeton* as *U.S.S. Bridgeton, i.e.*, as a commissioned US Navy warship. *Bridgeton* was a merchant tanker.

355. MELIA, n. 6, 121.

356. HIRO 187.

357. NWP 1-14M Annotated, ¶ 9.2.3 n. 26; McNaugher, *U.S. Policy*, n. 78, 116; McNaugher, *Walking*, n. 231, 180. Iran said *Bridgeton*'s mining was due to "invisible hands." CHUBIN & TRIPP 217.

358. NWP 1-14M Annotated, ¶ 7.11, n. 169.

359. Second Report ¶¶ 6.11-6.14; Lowe, *Commentary*, n. 77, 248.

360. Italian Merchant Navy Minister statement before IX Permanent Commission (Transport, Posts and Telecommunications), Sept. 10, 1987, Boll. Commissioni, X Legislatura, IX Commissione Permanente 4 (Sept. 10, 1987), *in* DE GUTTRY & RONZITTI 446-47.

361. Mallein, n. 84, 391, citing written answer by French Secretary of State for Maritime Affairs, Question 36188, J.O., Mar. 21, 1988, p. 1301, *in* DE GUTTRY & RONZITTI 408; *see also* written answer by French Defense Minister, Question 29022, J.O., Sept. 14, 1987, at 5148.

362. 2 CORDESMAN & WAGNER 234; Cigar, n. 306, 56.

363. 33 KEESING 35160, 35597 (1987).

364. HIRO 187. The media had reported that 20,000 Revolutionary Guards had been training to attack US ships. *See* n. 349 and accompanying text.

365. SHULTZ, n. 332, 933-34.

366. 32 KEESING 34514 (1986).

367. Menefee, *Commentary*, n. 74, 127; O'Rourke, n. 354, 33.

368. US intelligence tracked *Iran Ajr* from its Iranian port to the high seas near Qatar. A US frigate-based helicopter with night vision capability cameras detected minelaying activity and saw six mines laid. The helicopter fired on the ship. At daybreak the *U.S.S. Jarrett* boarded *Iran Ajr* and captured the vessel and crew. President Reagan letter to US Speaker of the House Jim Wright, Sept. 24, 1987, 23 Weekly Comp. Pres. Doc.1066-67 (1987); US UN Permanent Representative letter to UN Security Council, Sept. 22, 1987, UN Doc. S/19149 (1987), *in* DE GUTTRY & RONZITTI 220; *see also* CABLE 210; 2 CORDESMAN & WAGNER 318-19; HIRO 189; Melia, n. 6, 126; Menefee, *Commentary*, n.

74, 127; O'Rourke, n. 354, 33. Britain supported the US position. Answer by UK Minister of State, Foreign & Commonwealth Office, Nov. 25, 1987, 490 Parl. Deb., H.L. (6th ser.) 724-25 (1987); Second Report ¶ 6.24; Lowe, *Commentary*, n. 77, 252.

369. NWP 1-14M Annotated ¶ 7.11 n. 168; Gamlen & Rogers, n. 326, 140; McNaugher, *U.S. Policy*, n. 78, 116; *see also* n. 358 and accompanying text.

370. *See* Momtaz, n. 89, 32, citing Iran Foreign Affairs Minister letter to UN Secretary-General, Sept. 29, 1987, UN Doc. S/19161 (1987), *in* DE GUTTRY & RONZITTI 44. Iran President Ayatollah Khomeni was shocked by the US attack; he denied the ship had been laying mines. SHULTZ, n. 332, 934.

371. CHUBIN & TRIPP 217.

372. MELIA, n. 6, 126.

373. Weinberger, *The Permanence*, n. 172, 4; *see also* Table 9.7, *Targets in the Tanker War as of October 12, 1987*, *in* 2 CORDESMAN & WAGNER 327-28. As of June 1988, the 1988 figures were 32 ships attacked by Iraq, and 35 by Iran. Second Report ¶ 6.1.

374. HIRO 226; Cigar, n. 306, 64; Hayes, *Chronology 1987*, n. 2, 655-60; Litwak, n. 138, 209.

375. Vienna Economic Summit, n. 84, 4. *See also* Menefee, *Commentary*, n. 74, 108; Venturini, *Commentary*, n. 95, 533; Weinberger, *Report*, n. 52, 1449-50.

376. S.C. Res. 598 (1987), *in* WELLENS 454. The UN Secretary-General had called for a new approach in a January 1987 press conference, and for Security Council permanent members to make a special concerted effort to end the war. Beginning in February the United States took the lead in fashioning the resolution. Caron, n. 328, 193-95; Hooglund, n. 82, 50; McNaugher, *U.S. Policy*, n. 78, 118-20; McNaugher, *Walking*, n. 231, 176-78.

377. *Introductory Note*, n. 31, 445.

378. Statement by Member States of the European Community, Sept. 3, 1987, 3 Eur. Pol. Co-op. Bull. 93 (No. 2), *in* DE GUTTRY & RONZITTI 554.

379. Iraq became a Convention party June 30, 1985; the treaty did not go into effect until after the war. LOS CONVENTION, 1833 UNTS 397; n. IV. 3. Presumably Iraq claimed under customary law. *See* n. IV. 3 and accompanying text.

380. Neither belligerent was a Convention party. TIF 391. Presumably Iraq claimed under customary law. *See also* Parts IV.B.4, IV.D.3.

381. Iraq UN Permanent Representative *note verbale* to UN Secretary-General, Aug. 7, 1987, UN Doc. S/19025 (1987), *in* DE GUTTRY & RONZITTI 93, 94; *see also* nn. 51, 81, 119, 163 concerning Iran's seizure of Gulf islands.

382. US Assistant Secretary of State for Near Eastern and South Asian Affairs Murphy, *Search for Peace in the Persian Gulf*, July, 1987, American Foreign Policy Current Documents 1987, at 442 (1988), *reprinting in part Developments in the Middle East, July 1987: Hearing and Markup Before the Subcommittee on Europe and the Middle East of the Committee on Foreign Affairs*, H. R., 100th Cong., 1st Sess. 5-9 (1987); Menefee, *Commentary*, n. 74, 120.

383. CABLE 210.

384. In late July Britain refused to aid US minesweeping; it reversed this policy August 11, 1987. UK ships had swept the Red Sea in 1984. Second Report ¶ 6.7; Lowe, *Commentary*, n. 77, 247. During the summer of 1984, mines detonated in the Gulf of Suez and the Strait of Bab el Mandeb, damaging several ships. Although Iran and Libya were accused of minelaying, Iran denied the charges; it is thought the Libyan cargo ship *Ghat* laid them. Egypt exercised its Treaty of Constantinople, n. 264, right to inspect shipping. A half dozen navies cooperated in locating and destroying mines. 31 KEESING 33371-73 (1985).

385. The precipitating event for Italy was the September 3 Iranian gunboat attack on an Italian merchant ship, *Jolly Rubino*. de Guttry, n. 84, 420.

386. *See generally* Netherlands Defence Minister & Foreign Affairs Minister letter to President of Second Chamber of Netherlands States-General, June 24, 1988, Tweede Kamer der Staten-Generaal, Vergaderjaar 1987-1988, 20075 No. 19, *in* DE GUTTRY & RONZITTI 504; Netherlands Defence Minister & Foreign Affairs Minister letter to President of Second Chamber of Netherlands States-General, Oct. 16, 1987, Tweede Kamer der Staten-General, Vergadderjaar 1986-1987, at 20075 No. 5, *in id.* 497; Belgian National Defence Minister statement before Joint Foreign Relations & National Defence Committee of Belgian Chamber of Representatives, Sept. 17, 1987, Chambre des Representants, Compte rendue analitique, Sess. ordinaire 1986-1987, Reunion publique de Commission of Sept. 17, 1987, at 1122, *in id.* 508; Kalshoven, *Commentary*, n. 84, 476-77.

387. 2 CORDESMAN & WAGNER 300, 304, 313-14; Hayes, n. 2, at 655-60.

388. Kalshoven, *Commentary,* n. 84, 478; Venturini, *Commentary,* n. 95, 532. Treaty of Economic, Social & Cultural Collaboration & Collective Self-Defence, Mar. 17, 1948, 19 UNTS 51 (WEU Treaty) formed the WEU. Its 1954 protocols subordinated military matters to NATO. *See also* nn. 437, III. 819.

389. Chipman, n. 49, 224.

390. Hooglund, n. 82, 50.

391. President Reagan letter to Speaker of the House Wright & President of the Senate, Oct. 20, 1987, 23 Weekly Comp. Pres. Doc. 1206 (1987); US UN Permanent Representative letter to UN Security Council, Oct. 9, 1987, UN Doc. S/19194 (1987), *in* DE GUTTRY & RONZITTI 221; CHUBIN & TRIPP 217-18; 2 CORDESMAN & WAGNER 328-31; HIRO 190; McNeill, *Neutral Rights,* n. 354, 638-39; Menefee, *Commentary,* n. 74, 109, 127-28; N.Y. TIMES, Oct. 20, 1987, at A10; Peace, *in* Panel, n. 84, 152; Peace, *Major Maritime Events,* n. 90, 557-58.

392. NWP 1-14M Annotated ¶ 7.11, n. 168; *see also* nn. 358, 369 and accompanying text.

393. CHUBIN & TRIPP 218; 2 CORDESMAN & WAGNER 328-31; HIRO 190-91; Gamlen & Rogers, n. 326, 140; McNaugher, *U.S. Policy,* n. 78, 116; McNaugher, *Walking,* n. 231, 184; N.Y. TIMES, Oct. 20, 1987, at A10; *see also* President Reagan *Statement on the United States Reprisal Against Iran,* Oct. 19, 1987, 2 Public Papers: Reagan 1987, at 1201 (1989); Secretary of Defense Weinberger statement, Oct. 19, 1987, *id.* 1201; US UN Permanent Representative letter to UN Security Council, Oct. 19, 1987, UN Doc. S/19219 (1987), *in* DE GUTTRY & RONZITTI 221; President Reagan letter to Speaker of the House Wright, Oct. 20, 1987, 23 Weekly Comp. Pres. Doc. (1987); McNeill, *Neutral Rights,* n. 354, 638-39; Menefee, *Commentary,* n. 74, 109, 128; Peace, *Major Maritime Events,* n. 90, 557-58.

394. Wiswall, *Neutrality,* n. 295, 622.

395. *See* Momtaz, n. 89, 32, citing Iran Foreign Affairs Minister letter to UN Secretary-General, Oct. 9, 1987, UN Doc. S/19192 (1987); Iran Foreign Affairs Minister letter to UN Secretary-General, Oct. 21, 1987, UN Doc. S/19224 (1987), *in* DE GUTTRY & RONZITTI 46-47. In 1992 Iran sued the United States in the ICJ for destroying these platforms and others destroyed in a similar April 18, 1988 response; the Court upheld jurisdiction under Treaty of Amity, Economic Relations & Consular Rights, Aug. 15, 1955, 8 UST 899, 284 UNTS 93 (FNC Treaty). Oil Platforms (Iran v. US), 1996 ICJ 803, 820 (Prelim. Objections) (Oil Platforms Case). *See also* Bernard H. Oxman, *International Decisions,* 91 AJIL 518 (1997); nn. III.454-57 and accompanying text.

396. Menefee, *Commentary,* n. 74, 109, citing Executive Order No. 12613, n. 151; President Reagan, *Statement on Trade Sanctions Against Iran,* Oct. 26, 1987, 2 Public Papers: Reagan 1987, at 1232, (1989); President Reagan, *Message to the Congress Reporting on the Prohibitions of Imports from Iran, id.* 1245; *see also* n. 151 and accompanying text.

397. The South African munitions supposedly arrived at Aqaba in oil tankers half filled with water and half with munitions. The same ships would then proceed to Al-Hamadi to pick up oil for South Africa. Lotfian, n. 38, 18-19.

398. *See* nn. 447-48 and accompanying text.

399. McNaugher, *U.S. Policy,* n. 78, 117; McNaugher, *Walking,* n. 231, 184, 186.

400. McNaugher, *Walking,* n. 231, 186.

401. CHUBIN & TRIPP 218.

402. Gamlen & Rogers, n. 326, 141.

403. CHUBIN & TRIPP 218.

404. *Id.* 219.

405. *Text of Communique from Amman Summit,* 27 ILM 1651-52 (1988). Iraq had accepted Resolution 598 in July. *See* n. 377 and accompanying text. Although Venturini, *Commentary,* n. 95, 531 says that while this decision did not address freedom of navigation and merchant ship attacks, its supporting Resolution 598, n. 376, incorporated these aspects of the war by reference. *See* nn. 376-77 and accompanying text. Moreover, an August Arab League foreign ministers conference had denounced minelaying in the Gulf and approved Kuwaiti actions to protect its security in the Gulf. HIRO 233-34.

406. HIRO 192.

407. *Id.* 198-200.

408. Caron, n. 328, 195.

409. CHUBIN & TRIPP 252.

410. O'Rourke, *Tanker War,* n. 354, at 33; Peace, *in* Panel, n. 84, 152-53; Peace, *Major Maritime Events,* n. 90, 558. Similar situations had occurred in August 1987 with no casualties; deadly force was not required. HAYES, NAVAL RULES, n. 341, 46; Howard S. Levie, *The Status of Belligerent Personnel "Splashed" and Rescued by a Neutral in the Persian Gulf Area, in* Panel, n. 144, 597; Levie, *The Status of Belligerent Personnel "Splashed" and Rescued by a Neutral in the Persian Gulf Area,* 31 VJIL 610 (1991).

411. Hayes, *Chronology 1987,* n. 2, 658. In October Iran had reported that a half million volunteers were prepared for "martyrdom-seeking operations" to resist the United States in the Gulf. CHUBIN & TRIPP 219.

412. 2 CORDESMAN & WAGNER 336-37; Hayes, *Chronology 1987,* n. 2, 660.

413. CABLE 210; CABLE, NAVIES, n. 145, 73.

414. North Atlantic Council Statement, Dec. 11, 1987, NATO Communiques, 1987, at 27, *reprinted in part in* DE GUTTRY & RONZITTI 555. In May NATO had not acceded to a US request for help in protecting oil tankers in the Gulf. *Cf.* 34 KEESING 35933 (1988); *see also* Venturini, *Commentary,* n. 95, 532.

415. Oman, Qatar and the UAE were opposed to the embargo. HIRO 236-37; SIMMA 706; McNaugher, *Walking,* n. 231, 185. These States had connections with Iran. *See* nn. 118, 163, 177, 263, 294 and accompanying text.

416. Hooglund, n. 82, 51-52; Litwak, n. 138, 209. France and the United States wanted sanctions only against Iran, but Britain preferred an evenhanded approach. Chipman, n. 49, 226.

417. Iranian and USSR policy converged on this point. CHUBIN & TRIPP 228-29.

418. HIRO 239-40. Iraq had become deeply suspicious of Soviet motives in advocating S.C. Res. 598, however. CHUBIN & TRIPP 199-200.

419. McNaugher, *U.S. Policy,* n. 78, 121. During the summer the USSR had rejected a US plan for the Council's imposing an arms embargo on Iran. Katz, n. 138, 144. Iranian and Soviet interests in the Gulf "merely came to overlap to a degree in 1987." USSR aid to Iran in 1987 was $100 million, a tenth of what it had been in 1980. CHUBIN & TRIPP 227, 237; n. 128 and accompanying text.

420. US Defense Mapping Agency Hydrographic/Topographic Center, n. 288, at I-1.8 (Nov. 1, 1988).

421. CABLE 210.

422. Iran Prize Law, n. 144, art. 3, *in* DE GUTTRY & RONZITTI 39. The Law was approved and ratified in January 1988. *Id.* 39.

423. Merchandise subject to rapid deterioration or "not worthwhile preserving" would be sold, the money put in an account pending prize tribunal disposition. Iran Prize Law, n. 144, arts. 4-5, *in* DE GUTTRY & RONZITTI 39-40. *See also* Momtaz, n. 89, 23-28; Jeffrey Schlosser, *U.S. Policy in the Persian Gulf,* 87 Bulletin 38, 41 (Oct. 1987).

424. HIRO 202.

425. Assistant to the President for Press Relations Fitzwater, *Statement on the United States Military Strike in the Persian Gulf,* Apr. 18, 1988, 1 Public Papers: Reagan 1988, at 136 (1990); Menefee, *Commentary,* n. 74, 120.

426. Lowe, *Commentary,* n. 77, 250; *see also* Second Report ¶¶ 7.12-7.20.

427. Italian President of Council of Ministers statement before Italian Chamber of Deputies, Oct. 8, 1987, Atti Parlamentari, Camera dei Deputati, X Legislatura, Discussioni 3027 (1987), *in* DE GUTTRY & RONZITTI 456, 460-61; Italian Chamber of Deputies, Resolution 9/1924/1, Jan. 14, 1988, Atti Parliamentari, Camera dei Deputati, X Legislatura, Discussioni, p. 7276 (1988), *in id.* 465; de Guttry, *Commentary,* n. 84, 437-38; Panel, n. 84, 171 (Kaladkin remarks).

428. Litwak, n. 138, 209.

429. Ronald O'Rourke, *Gulf Ops,* 115 PROCEEDINGS 43 (May 1989).

430. MELIA, n. 6, at 126-27. Probably mines had been laid just before ships transited. *See* n. 335 and accompanying text. Gamlen & Rogers, n. 326, 141 err in saying *Roberts* was written off. *Roberts,* although heavily damaged then, rejoined the fleet.

431. President Reagan letter to Speaker of the House Wright, Apr. 19, 1988, 24 WEEKLY COMP. PRES. DOC. 493 (1988); Fitzwater, *Statement,* n. 425; US Assistant to the President for Press Relations statement, Apr. 18, 1988, 2 Public Papers: Reagan 1988, at 463 (1990); US Department of State message to Iran, Apr. 18, 1988, American Foreign Policy, 1988, at 439 (1989); US UN Permanent Representative letter to UN Security Council, Apr. 18, 1988, UN Doc. S/19791 (1988), *in* DE GUTTRY & RONZITTI 222; *see also* CABLE 211; 2 CORDESMAN & WAGNER 375-80; HIRO 202-04; MELIA, n. 6, 126-27; Gamlen & Rogers, n. 326, 141; Bud Langston & Don Bringle, *The Air View: Operation Praying*

*Mantis*, 115 PROCEEDINGS 54 (May 1989); McNaugher, *U.S. Policy*, n. 78, 117; McNaugher, *Walking*, n. 231, 189-90; Menefee, *Commentary*, n. 74, 110, 129; O'Rourke, *Gulf Ops*, n. 429, at 44; J.B. Perkins III, *The Surface View: Operation Praying Mantis*, 115 PROCEEDINGS 66 (May 1989). HAYES, NAVAL RULES, n. 341, 51-52, characterized the US response to *Roberts'* mining as a reprisal. For analysis of reprisal, *see* nn. III.591-616 and accompanying text.

432. Momtaz, n. 89, 32, citing Iran Foreign Affairs Minister letter to UN Secretary-General, Apr. 18, 1988, UN Doc. S/19796 (1988), *in* DE GUTTRY & RONZITTI 48; *see also* Gamlen & Rogers, n. 326, 141-42.

433. *Cf.* US State Department message to Iran, Apr. 18, 1988, *in* American Foreign Policy, 1988, at 61 (1989); Britain supported the US response. Answers by UK Secretary of State for Foreign & Commonwealth Affairs, Apr. 18, 1988, 131 Parl. Deb., H.C. (6th ser.) 551 (1988); *see also* Second Report ¶ 6.24; Lowe, *Commentary*, n. 77, 252. In 1992 Iran sued the United States in the ICJ for destroying these platforms and those lost in October 1987 during a similar response. The Court found jurisdiction. Oil Platforms Case, n. 395, 1996 (2) ICJ 820; *see also* n. 395 and accompanying text.

434. HIRO 204; Gamlen & Rogers, n. 326, 141; McNaugher, *Walking*, n. 231, 189-90.

435. Gamlen & Rogers, n. 326, 141.

436. Shahram Chubin, *Iran and the War: From Stalemate to Ceasefire*, *in* KARSH 13, 22; McNaugher, *Walking*, n. 231, 187-88; Mesbahi, n. 126, 39. Iraq had lost Fao to Iran in February 1986. Baram, n. 285, 82, 84; Chubin 16. Chaim Herzog, *A Military-Strategic Overview*, *in* KARSH 255, 263 says the turning point came in 1987 when Iran failed to capture Basra.

437. US Department of State, Western Defense: The European Role in NATO 16-17 (1988); *see also* Second Report ¶ 6.7; 2 CORDESMAN & WAGNER 313-17; Belgian Defence Minister, Press Release, Mar. 25, 1988, ¶ 4(e), *in* DE GUTTRY & RONZITTI 517, 519; Chipman, n. 49, 224-25; Venturini, *Commentary*, n. 95, 532-33. 2 CORDESMAN & WAGNER 528 say US convoying catalyzed other States' participation in naval operations.

NATO forces operated as a coalition and not as part of the NATO alliance, which is limited to attacks on parties' territory in Europe, North America and certain ocean areas but not the Gulf. *See* North Atlantic Treaty, Apr. 4, 1949, arts. 5-6, 63 Stat. 2241, 2243-44, 34 UNTS 243, 246, as modified by Protocol on Accession of Greece and Turkey, Oct. 17, 1951, art. 2, 3 UST 43, 44, 126 UNTS 350. Iraq risked a NATO response if it crossed Turkey's border during the 1990-91 Gulf War. Walker, *Crisis Over Kuwait* 44. There may be a question as to whether the European navies operated under the WEU; Britain preferred to operate apart from WEU. *Compare* Second Report ¶ 6.7 *with* Kalshoven, *Commentary*, n. 84, at 476; *see also* Venturini 532. *See also* Western European Union, *Press Guidelines Concerning the Meeting on the Situation in the Gulf*, Aug. 20, 1987, 35 Eur. Y.B. 19 (1987), *in* DE GUTTRY & RONZITTI 555; Netherlands Foreign Affairs Minister & Defence Minister letter to President of Second Chamber of Netherlands States-General, Sept. 7, 1987, Tweede Kamer der Staten-Generaal, Vergaderjaar 1986-1987, p. 20075 No. 1, *in id.* 495; Belgian Foreign Relations Minister statement before Joint Foreign Relations & National Defence Committee of Belgian Chamber of Representatives, Sept. 17, 1987, Chambre des Representants, Compte rendue analitique, Sess. ordinaire 1986-1987, Reunion publique de Commission Sept. 17, 1987, *in id.* 506. WEU was created by WEU Treaty, n. 388, amended by Protocols, Oct. 23, 1954, 211 *id.* 342, 358, 364; and 1990 and 1992 protocols. *See* BOWMAN & HARRIS 177 (11th Cum. Supp. 1995). The 1954 protocols subordinated WEU military decisions to NATO. However, the Maastricht Treaty on European Union, Feb. 7, 1992, art. J, *in* 31 ILM 247, 323-27 (1992) would pledge development of a common security policy through WEU. *See also* nn. 388-89, III.309, 800-17 and accompanying text.

438. *Cf.* Mallein, n. 84, 394.

439. Chipman, n. 49, 225; *see* nn. 388-389 and accompanying text.

440. Chipman, n. 49, 225. This reflected Italy's diplomatic posture. *See* n. 84.

441. Chipman, n. 49, 225.

442. McNaugher, *Walking*, n. 231, 186; *cf.* MELIA, n. 6, 124, (US Navy cooperation with other countries' sweeping operations).

443. HIRO 164, 232, 238.

444. CHUBIN & TRIPP 215.

445. *Cf. id.*

446. HIRO 205.

447. Secretary of Defense Frank Carlucci statement, 88 Bulletin 61 (July 1988); Gamlen & Rogers, n. 326, 141, who say other information at the press conference indicated the policy change was directed toward Iranian attacks. The

initial executive decision had been made with respect to protecting a jack-up barge, *Scan Bay*, of Panama registry but with US nationals aboard. O'Rourke, *Gulf Ops*, n. 429, 46-47.

448. McNaugher, *U.S. Policy*, n. 78, 117-18.

449. Second Report ¶¶ 6.12, 6.25; Lowe, *Commentary*, n. 77, 248.

450. Second Report ¶ 6.12; Lowe, *Commentary*, n. 77, 248-49.

451. Second Report ¶ 6.25; French Foreign Affairs Minister statement, June 16, 1987, Questions, J.O., June 16, 1987, at 2441, *in* DE GUTTRY & RONZITTI 405; French Secretary of State for Maritime Affairs written answer, Question 36188, J.O., Mar. 21, 1988, p. 1301, *in* DE GUTTRY & RONZITTI 408; Lowe, *Commentary*, n. 77, 249; Mallein, n. 84, 396-401.

452. French Armed Forces Information & Political Relations Service, Press Release, July 22, 1987, ¶ 4, *in* DE GUTTRY & RONZITTI 413-14; Mallein, n. 84, 401-02.

453. Italian Council of Ministers President statement before Italian Chamber of Deputies, Oct. 8, 1987, Atti Parlamentari, Camera dei Deputati, X Legislatura, Discussioni 3027 (1987), *in* DE GUTTRY & RONZITTI 456, 458; Italian Defence Minister statement before IV Permanent Commission (Defense), Sept. 8, 1987, Boll. Commissioni, X Legislatura, IV Commissione Permanente (Difesa) 4 (Sept. 8,1987), *in* DE GUTTRY & RONZITTI 441, 446; Italian Defence Minister statement before IV Permanent Commission (Defense), Sept. 24, 1987, *id.* (Sept. 24,1987), *in* DE GUTTRY & RONZITTI 453, 455; de Guttry, *Commentary*, n. 84, 423-27; Kalshoven, *Commentary*, n. 84, 476.

454. Secretary of Defense Carlucci statement, April 29, 1988, 88 Bulletin 61 (1988), strongly supporting Resolution 598, n. 376, and deploring belligerents' use of chemical warfare. On May 9 S.C. Resolution 612 (1988), *in* WELLENS 456, condemned chemical warfare; *see also* nn. 376-78 and accompanying text.

455. Mallein, n. 84, 394.

456. Italian Defence Minister statement before IV Permanent Commission (Defense), Sept. 24, 1987, Boll. Commissioni, X Legislatura, IV Commissione Permanente (Difensa) 4 (1987), *in* DE GUTTRY & RONZITTI 453, 454; de Guttry, *Commentary*, n. 84, 434-36.

457. 34 KEESING 35938 (1988).

458. HIRO 207.

459. *Id.* 210-11.

460. *See* n. 431 and accompanying text.

461. Langston & Bringle, n. 431, 57-58.

462. Perkins, n. 431, 70; *see also* M.C. Agresti, letter to the editor, 116 PROCEEDINGS 19, 20 (Jan. 1990).

463. Linnan, *Iran Air Flight*, n. 227, 251, citing US Department of Defense, *Investigation Report: Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988* (1988) (Iran Air Flight 655 Report), App. E to International Civil Aviation Organisation, *Fact-Finding Investigation: Destination of Iran Airbus A300 in the Vicinity of Qeshm Island, Islamic Republic of Iran on 3 July 1988* (Nov. 1988).

464. Linnan, *Iran Air Flight*, n. 227, 251, citing Iran Air Flight 655 Report, n. 463, E-7; *see also* McNaugher, *Walking*, n. 231, 190.

465. Linnan, *Iran Air Flight*, n. 227, 251, citing *Investigation into the Downing of an Iranian Airliner by the U.S.S. "Vincennes": Hearing Before Subcommittee on Armed Services of the United States Senate*, 100th Cong., 2d Sess. 9 (1988) (Rear Admiral William M. Fogarty, Director of Policy & Plans, US Central Command; Head, Investigation Team testimony, Sept. 8, 1988).

466. Linnan, *Iran Air Flight*, n. 227, 251, citing Iran Air Flight Report, n. 463, E-6.

467. Linnan, *Iran Air Flight*, n. 227, 251-52, citing Iran Air Flight Report, n. 463, E-7; McNaugher, *Walking*, n. 231, 190.

468. Linnan, *Iran Air Flight*, n. 227, 252-57, citing Iran Air Flight Report, n. 463, *passim*. For other factual accounts, *see generally* 2 CORDESMAN & WAGNER 573-84; HIRO 210-12; Louise Doswald-Beck, *Vessels, Aircraft and Persons Entitled to Protection During Armed Conflict at Sea*, 65 BYBIL 211, 271-74 (1994); Norman Friedman, *The Vincennes Incident*, 115 PROCEEDINGS 72 (May 1989); Langston & Bringle, n. 431, at 54; Menefee, *Commentary*, n. 74, 110, 129-30; Perkins, n. 431, 66, 70; *The Vincennes Incident*, 116 PROCEEDINGS 19 (Jan. 1990). Iran claimed the United States was guilty of aggression. *See* Momtaz, n. 89, 32-33, citing Iran Foreign Affairs Minister statement before UN Security Council, July 14, 1988, UN Doc. S/PV 2818 (1988), *in* DE GUTTRY & RONZITTI 49. Britain supported the US self-defense claim.

Answer by UK Secretary of State for Foreign & Commonwealth Affairs, July 6, 1988, 136 Parl. Deb., H.C. (6th ser.) 1046 (1988); Lowe, *Commentary,* n. 77, 252. This was not the only mistake during the fog of war; Iraq's attack on the *Stark* and US shots at dhows are two more examples. *See* nn. 338-39, 367, 410 and accompanying text. Soviet media claimed that the United States was trying to "kindle" the war. Litwak, n. 138, 210. Gamlen & Rogers, n. 326, 142-43, offer only a partial factual summary in criticizing the attack. The tragedy may have helped promote an end to the war. *See Introductory Note,* n. 31, 445; n. 482 and accompanying text. The ICJ suit was settled in 1996. *See* Agreement on Case Concerning Aerial Incident of 3 July 1988, Before the International Court of Justice, Feb. 9, 1996, Iran-US, TIAS——, 35 ILM 572 (1996).

469. President Reagan letter to Speaker of the House Wright, July 14, 1988, 24 WEEKLY COMP. PRES. DOC. 938 (1988); *see also* 2 CORDESMAN & WAGNER 390-94; Menefee, *Commentary,* n. 74, 110: O'Rourke, *Gulf Ops,* n. 429, 47.

470. *See* n. 447 and accompanying text.

471. Between 28 and 33 escort ships were involved, under Joint Task Force Middle East (JTFME), subordinate to CENTCOM. JTFME was a combination of the Middle East Force that had been in the Gulf since World War II, albeit augmented considerably since the war's outbreak, and carrier battle groups ordered to the area. Johnson, n. 79, 131-32.

472. Saudi Arabia, although unable to persuade other Gulf States to take firm stands against Iran, had been encouraged by US self-defense efforts. The immediate cause was Iran's refusal to accept the Saudis' curtailment of Iranian pilgrims for the hajj, based on the ICO formula. HIRO 236; Lotfian, n. 38, 20.

473. Kanovsky, n. 72, 238; Lotfian, n. 38, 19; Marr, n. 82, 67.

474. Kanovsky, n. 72, 238; *see also* CHUBIN & TRIPP 154, 230.

475. CHUBIN & TRIPP 230-31; Katz, n. 138, 144.

476. Kanovsky, n. 72, 243. By the war's end, Iran's oil revenues were half its military expenditures; except for 1980-82, Iraqi military expenditures equalled or exceeded oil revenues, its principal foreign exchange source to finance its war effort. CHUBIN & TRIPP 125.

477. League of Arab States, *Text of Communique from Algiers Summit,* 27 ILM 1654 (1988), referring to *Text of Communique from Amman Summit,* n. 405; *see also* nn. 405-09 and accompanying text.

478. European Economic Community, its Member States, and the Cooperation Council for the Arab States of the Gulf and its Member States, *Joint Political Declaration,* June 15, 1988, 4 EUR. POL. COOP. DOC. BULL. 173 (No. 1, 1988), *in* DE GUTTRY & RONZITTI 554.

479. Statement by the Group of Seven, June 20, 1988, 88 Bulletin 49 (Aug. 1988); *see also* Venturini, *Commentary,* n. 95, 533; nn. 376-377 and accompanying text.

480. *See* nn. 11-12, 76-77, 127, 151 and accompanying text.

481. Lotfian, n. 38, 20.

482. The note referred to the Airbus tragedy, which thus may have had a perverse effect of promoting peace. Iraq had accepted Resolution 598 the year before. *Introductory Note,* n. 31, 445; *see also* HIRO 242-45; nn. 459-68 and accompanying text. Tousi, n. I.30, 57-58, puts the date at July 18 by Iran's Minister of Foreign Affairs and July 21 by Ayatollah Khomeni, saying the real reason for acceptance was Iran's parlous economic situation, even with $12 billion in foreign loans. Its armed forces' war weariness and the psychological effect of Iraq's gas warfare were also factors. Edmund Gareeb, *The Roots of Crisis: Iraq and Iran, in* Joyner 21-22. Within the United States the airbus accident controversy gave way to "self-congratulations on a job well done." McNaugher, *U.S. Policy,* n. 78, 118.

483. UN Secretary-General Report, Aug. 8, 1988, UN Doc. S/20093 (1988), *in* WELLENS 470; *see also* Caron, n. 328, 197-99.

484. UNIIMOG was established for six months and continued until February 1991. S.C. Res. 619 (1988); 631, 642 (1989); 651, 671, 676 (1990); 685 (1991), *in* WELLENS 456-60; *see also* Caron, n. 328, 199-200; *Peace-Keeping, in* SIMMA 565, 580.

485. S.C. Res. 620 (1988), *in* WELLENS 457, again condemned use of chemical weapons in the war; *see also* nn. 376-77 and accompanying text.

486. *Introductory Note,* n. 31, 447-48. *See, e.g.,* DOD Report, n. 8; FRIEDMAN, n. 8, for analysis of this war; for legal analysis, *see, e.g.,* DOD Report, App. O; *Iraqi Symposium,* n. 8; Schachter, n. 8; *Symposium,* n. 8.

487. Caron, n. 328, 203.

488. Post, n. 50, 35; *see also* nn. 36, 50, 69, 85-86, 89, 100, 153-56 and accompanying text. Iraq tried to get more conditions attached to the ceasefire: UN clearance of the Shatt; Iraq's Gulf and Hormuz navigation rights to be

guaranteed; if the belligerents failed to achieve a comprehensive peace settlement, the United Nations should play an active role in restoring direct official talks. These were a smokescreen as Iraq sought to consolidate territorial gains. It failed. HIRO 245-47.

489. Caron, n. 328, 201-03; Lotfian, n. 38, 21-22; Charles G. MacDonald, *Iran, Iraq, and the Cease-Fire Negotiations, in* Joyner 208, 212-20; Walker, *Crisis Over Kuwait* 37 n. 64; *see also* nn. 36, 50, 69, 85-86, 89, 97, 100, 153-56, 486 and accompanying text. For other Iranian views, *see generally* Ali Asghar Kazemi, *Peace Through Deception: The Iran-Iraq Correspondence, in* Rajaee, IRANIAN PERSPECTIVES 111-19; Djamchid Momtaz, *The Implementation of UN Resolution 598, in id.* 123-32.

490. Douglas Jehl, *Iran and Iraq Begin Big Trade of P.O.W.'s*, N.Y. TIMES, Apr. 7, 1998, at A3. Iran has refused to return over 100 Iraqi aircraft flown to Iran to escape destruction by the coalition during the 1990-91 war, however. Pearl, n. 120, A1.

491. Momtaz, n. 89, 28, citing Iran Foreign Minister Declaration to UN General Assembly, Oct. 3, 1988.

492. Iraq Foreign Affairs Minister letter to UN Secretary-General, Aug. 20, 1988, UN Doc. S/20140 (1988), *in* DE GUTTRY & RONZITTI 95. Stopping and searching vessels during peace talks was a negotiating factor, however. HIRO 252-53.

493. Alfred Cahen, The Western European Union and NATO 47-50 (1989); 33 KEESING 35360 (1987), 34 *id.* 36106 (1988); Chipman, n. 49, 225; Venturini, *Commentary*, n. 95, 532-33.

494. Assistant to the President for Press Relations statement, Sept. 26, 1988, American Foreign Policy, 1988, at 460 (1989); Cushman, *Navy to End*, n. 4, 2.

495. O'Rourke, *Gulf Ops*, n. 429, at 43.

496. *Kuwait to "Deflag,"* n. 5, 9.

497. Half had been sent home earlier. MELIA, n. 6, 123, 127; *see also* n. 6 and accompanying text. Netherlands and UK minesweepers had been ordered home a year earlier; Belgian and Italian ships left in 1988. Netherlands Minister of Defence & Minister for Foreign Affairs letter to President of Second Chamber of Netherlands States-General, Oct. 4, 1988, Tweede Kamer der Staten-Generaal, Vergaderjaar 1988-89, 20075 No. 20, *in* DE GUTTRY & RONZITTI 505; Belgian Minister of Defence, n. 437, ¶ 4(f), *id.* 517, 519; Lowe, *Commentary*, n. 77, at 247.

498. US Assistant Secretary of State for Near Eastern & South Asian Affairs Murphy, *Progress Report on the Persian Gulf*, Mar. 15, 1988, American Foreign Policy Current Documents 1988, at 437 (1989) *reprinting in part Developments in the Middle East, March 1988: Hearing Before the Subcommittee on Europe and the Middle East of the Committee on Foreign Affairs*, H.R., 100th Cong., 2d Sess. 2-3 (1988) reported 40 convoys, but Johnson, n. 79, 131-32, probably relying on later, more complete data, says there were over 100 convoys. Menefee, Commentary, n. 74, 120; n. 471 and accompanying text.

499. *E.g.*, Second Report 6.17-20; Belgian Minister of Defence, n. 437, ¶ 4, *in* DE GUTTRY & RONZITTI 518-19.

500. HIRO 248-49, 253.

501. Fenrick, *Military Objectives*, n. 202, 20; *see also* Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 1991 CYBIL 238, 260.

502. HIRO 1, 250; MacDonald, n. 489, 210; Farhang Rajaee, *Views from Within, in* Rajaee, IRANIAN PERSPECTIVES 1, 2. *Id.* 1 argues the Vietnam War was "essentially an incipient civil war in South Vietnam in the mid-1960s," and the strife between China and Japan in Manchuria beginning in 1931 "never reached a point where one State declared war against the other." China tried to regain Manchuria in 1937 in a conflict that merged into World War II. Many would argue the Vietnam case differently, and China's war with Japan was equally long, eight years.

503. Caron, n. 328, 191; Tousi, n. I.30, 51.

504. Marr, n. 82, 70.

505. Efraim Karsh, *Introduction, in* KARSH 1, 2-3.

506. Rajaee, n. 502, 2. An earlier estimate was $700 billion. Farhang Rajaee, *Introduction, in* Rajaee, IRAN-IRAQ WAR 1. Bahman Baktiari, *International Law: Observations and Violations, in id.* 152, 164, reports Iranian estimates of reparations as high as $400 million by 1986.

507. Marr, n. 82, 70.

508. Kuwait and Saudi Arabia gave Iraq between $25 billion and $65 billion in financial assistance. Kanovsky, n. 72, 237; Kechichian, n. 21, 92-93; Laith Kubba, *The War's Impact on Iraq, in* Rajaee, IRAN-IRAQ WAR 47, 48; *see also* nn. 112-18 and accompanying text. Kanovsky 239 estimates Iraqi external debt at $40-50 billion at the end of 1987 with

only $1 billion in foreign exchange reserves. An interesting byproduct of the war was an Iraqi policy change toward a free enterprise system. *Id.* 239-40.

509. Karsh, n. 505, 10.

510. Mesbahi, n. 126, 89.

511. Kubba, n. 508, 53.

512. CHUBIN & TRIPP 303-05 (1980-86 statistics, which do not include battlefield and sea losses during the war's last two years.)

513. Rajaee, *Views from Within,* n. 502, 3; *see also* HIRO 254-66. McNaugher, *U.S. Policy,* n. 78, 122, declares, however, that "In some sense, Iraq can be said to have won its war with Iran." Iraqi President Hussein said as much in 1991. Rajaee, *Introduction, in* Rajaee, IRAN-IRAQ WAR 1. *See also* Karsh, n. 505, 3-4.

514. Herzog, n. 436, 266, referring to BARBARA W. TUCHMAN, THE MARCH OF FOLLY (1984).

515. *See* n. 8 and accompanying text.

516. Herzog, n. 436, 267. Iraqi President Hussein obliquely recognized this in 1982 but persisted with war for six more years. CHUBIN & TRIPP 193.

517. 2 CORDESMAN & WAGNER 530.

518. Russo, *Neutrality at Sea,* n. 112, 397; Frank L. Wiswall, *Remarks, in* Panel, n. 144, 594-95; Wiswall, *Neutrality,* n. 295, 621. Second Report ¶ 6.1 says 471 merchant mariners died, and 407 ships were attacked, and 8 more were mined.

519. Wiswall, *Remarks,* n. 518, 595; HIRO 1, 250-51; *see also* Wiswall, *Neutrality,* n. 295, 621. L.F.E. Goldie, *Maritime War Zones and Exclusion Zones, in* Robertson 156, 176, agreed with most of these points but argued that threat of an oil surplus in the 1980s and "favorable conditions of insurance . . . rendered such attacks relatively less unacceptable to the tanker fleets owners than did such attacks during the World Wars," when there was scarcity of shipping and cargoes. *See also* R. Glenn Bauer, *Effects of War on Charter Parties,* 13 TUL. MAR. L.J. 13, 17-24 (1988).

520. Peace, *in* Panel, n. 84, 147-48; Peace, *Major Maritime Events,* n. 90, 548-49; Roach, *Missiles on Target,* n. 143, 156; Roach, *Missiles on Target: Targeting,* n. 90, 603-08.

521. 2 CORDESMAN & WAGNER 530.

522. *See* nn. 459-68 and accompanying text.

523. In 1988 Second Report ¶ 8.1 estimated that the war had "killed or maimed many hundreds of thousands of people;" *see also* nn. 502-04 and accompanying text.

524. Kanovsky, n. 72, 249.

525. *See* nn. 210-14 and accompanying text.

526. *See, e.g.,* nn. 112, 178, 272, 283, 306, 309-10, 334, 401, 457 and accompanying text.

527. *See, e.g.,* nn. 92, 178-80, 234-40, 250-60, 272-73, 292, 303, 306, 319, 334, 338-39, 354, 368-73, 391-93, 412, 424, 431-34, 446, 469 and accompanying text.

528. *See, e.g.,* nn. 261, 358, 459-68 and accompanying text.

529. *See* n. 210 and accompanying text; *see also* Chapter VI.

530. *See, e.g.,* nn. 112, 114, 181-83, 279, 313, 473-75, 524 and accompanying text.

531. McNaugher, *U.S. Policy,* n. 78, 122.

532. *See, e.g.,* nn. 83, 120, 124, 126, 130, 139, 177, 196, 207, 242-44, 286-87, 315, 418, 510 and accompanying text.

533. Johnson, n. 79, 135-36; *see also* Karsh, n. 505, 8.

534. Katz, n. 138, 146-48; Litwak, n. 138, 210-12; *see also, e.g.,* nn. 52-54, 84, 127, 136-39, 149, 207, 242-43, 249, 287, 315-16, 330-31, 337, 362, 374, 416, 419, 427-28, 442, 475, 500 and accompanying text.

535. Litwak, n. 138, 211 (USSR accused Iran of beaming anti-Soviet religious propaganda to Islamic populations in Soviet central Asia).

536. *See* n. 8 and sources cited.

537. *See, e.g.,* nn. 84, 96, 161, 189-90, 192, 216-18, 251-59, 300, 308, 376-77, 416-17, 479, 482-87 and accompanying text.

538. *See, e.g.,* nn. 31, 93-95, 184-85, 192-94, 248, 256, 283-84, 405, 477 and accompanying text.

539. Chipman, n. 49, 225; *Europe's Multilateral Organizations,* 3 Dispatch 531, 534 (1992); *see also, e.g.,* nn. 388-89, 414, 437-41, 443-44, 454-56, III.309, 800-17 and accompanying text.

540. Chipman, n. 49, 227.

541. *See, e.g.,* nn. 84, 93-94, 260, 271, 375, 378, 478-79; *see also* nn. III.818-19 and accompanying text.

542. Chipman, n. 49, 227.

543. Rubin, n. 164, 132.

544. Sterner, n. 21, 21; *see also* nn. III.800-17 and accompanying text.

545. Geoffrey Kemp, *The Arms Race After the Iran-Iraq War, in* KARSH 269, 273-74. *See, e.g.,* nn. 21-28, 80, 84, 159-72, 186-99, 192-93, 208-09, 218, 248, 250-59, 262-63, 290-94, 315, 330, 382, 415, 481, 510, and accompanying text for analysis of the GCC's Tanker War roles.

546. Chapter III.

547. Chapter IV.

548. Chapter V.

549. Chapter VI.

# Chapter III

# CLAIMS TO MINIMUM WORLD PUBLIC ORDER ON THE OCEANS

Chapter II demonstrates that attempting to preserve minimum public order in the Gulf during the Tanker War involved many participants with varying (sometimes multiple) perspectives in different arenas and situations with numerous coercive and persuasive strategies at their command.[1] This and succeeding chapters examine claims to authority in the effective power process as part of the ongoing global social process.[2] As McDougal and his associates have noted, international law as the effective global power process is subject to claims by participants to optimize their goals in that process.[3] In some instances these claims are part of the civic order, *i.e.,* private orderings or private claims, as opposed to public order norms or claims to public order.[4] But civic order claims, as will be seen, may have serious and strong impact on public order claims and claimants. For example, attacks on merchant ships caused phenomenal increases in insurance rates; these in turn affected global oil prices, and rising oil prices undoubtedly influenced government decisionmakers.[5] By the same token, decisions of governments, based in their perception of law, undoubtedly influenced their considerations on assisting one or both belligerents and their attitudes toward private parties who had dealings with belligerents. The tilt toward supporting Iraq that grew throughout the war, and a corresponding decline in support of Iran, although there were cross-currents the other way, is an example of this interrelationship.[6] Although Jessup argued for an interstitial transnational law,[7] more recently Lowenfeld has made the point, as law of war manuals have for a sliding scale of conflict between war and peace,[8] that there is a sliding scale relationship between public law and transnational law that governs matters between private actors and between private actors and States, sometimes an actor's own country and sometimes another nation.[9] And while the Chapter III-VII analysis in this volume concentrates on public law analysis, the incidence of civic order relationships, *i.e.,* transactions governed by transnational law, must be borne in mind.

Because of the Charter's trumping effect on treaty law[10] and its strong influence on customary norms,[11] and because several participants in the Tanker War, *e.g.,* France and the United Kingdom, believed that the Charter and not the LOAC governed,[12] analysis begins with study of Charter-related claims, particularly issues of self-defense and neutrality. This Chapter ends with an examination of the law of treaties and its relationship with crisis and armed conflict.

## Part A. UN Charter Norms; Related Issues

The history of the Charter, and its drafting and record of negotiations, have been well-documented. [13] The general contours of practice under the Charter have also been chronicled.[14] This is not the place to mine anew these lodes. What follows is a statement of provisions of the Charter, followed by summaries of claims and counterclaims [15] under the Charter and related sources of law, with conclusions (outcomes) as to the current state of the law.

### *1. Norms Stated in the Charter*

Five parts of the Charter are relevant to the Tanker War: its Preamble, Purposes and Principles; self-defense and related concepts in the Charter era; lawmaking under the Charter; pacific settlement of disputes; and action under the Charter to deal with threats to the peace, breaches of the peace, and acts of aggression. A half century of practice under the Charter has developed in some instances. In other cases pre-Charter norms still have force.

*a. The Preamble, Purposes and Principles of the Charter.* The Charter Preamble initially expresses Member States' determination:

> to save succeeding generations from the scourge of war[;] . . . to reaffirm faith in fundamental human rights, . . . in the equal rights of . . . nations large and small [;] to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained [;] and to promote social progress and better standards for life in larger freedom.

To achieve these goals, UN Members have pledged:

> to practice tolerance and live together in peace . . . as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for [promoting] economic and social advancement of all people[.][16]

All Persian Gulf States, and all countries that were Tanker War participants, although perhaps as States not parties to the conflict, are UN Members. Iran and Iraq are original Members.[17]

Little use of the Preamble's statements have been made since 1945. One recent example, however, occurred during the Tanker War itself, when the Security Council noted "that Member States pledged together to live together in peace with one another as good neighbors in accordance with the Charter. . ."[18] The Preamble in other cases "reinforces, without being essential to, the propositions [founded on other parts of the Charter] being advanced"[19] There have been occasional uses of

the Preamble in other Council and General Assembly resolutions relevant to this study, however. The General Assembly's Uniting for Peace (UFP) Resolution discussions in 1950 referred to the Preamble.[20] The General Assembly's Friendly Relations Declaration of 1970 [21] also employed Preamble language. To the extent that these resolutions have been incorporated by practice, *e.g.,* by subsequent General Assembly-recommended peacekeeping operations under a UFP precedent,[22] or have been incorporated by reference in later resolutions[23] or authoritative pronouncements, the Preamble has had added vitality.

In any event, the drafters intended that all Charter provisions "being... indivisible as in any other legal instrument, are equally valid and operative." Each provision must be construed and applied together.

(a) The "Preamble" introduces the Charter and sets forth the declared common intentions which brought us together in this Conference and moved us to unite our will and efforts, and made us harmonize, regulate, and organize our international action to achieve our common ends.
(b) The "Purposes" constitute the *raison d'etre* of the Organization. They are the aggregation of the common ends on which our minds met; hence, the cause and object of the Charter to which member States collectively and severally subscribe.
(c) The chapter on "Principles" sets, in the same order of ideas, the methods and regulating norms according to which the Organization and its members shall do their duty and endeavor to achieve the common ends. Their understandings should serve as actual standards of international conduct.[24]

Thus the Preamble is an integral part of the Charter as a statement of "motivating ideas and purposes," although it does not define UN Members' obligations. These ideas and purposes can be, and have been, used to evidence the Charter's ideas and purposes in considering the articles of the Charter. In effect, the Preamble is a series of pledges,[25] fulfillment of which are in the Charter's Purposes, Principles and constitutive provisions.

**i. Purposes of the Organization: Articles 1(1), 1(2).** Although the United Nations as contemplated under the Charter is "a multipurpose organization, ... maintenance of [international] peace and security is the primary purpose of the Organization and takes priority over other purposes." The order of listing the UN's Purposes, Charter article 1(1) stating the goal of international peace and security first, supports this view:[26]

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to

> the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[27]

Goodrich and his collaborators note the difference between Article 1(1)'s language, *i.e.,* the United Nations may "take *effective* collective measures" to prevent and remove threats to the peace, to suppress aggression or other breaches of the peace, the "measures" language of Articles 39, 41 and 42, Article 50's "preventive or enforcement measures," Article 5's "preventive or enforcement *action*," and the "enforcement measures" Article 2(7) mentions. This language difference has been cited as authority for the UFP Resolution; the Council might have a duty to take "measures" or action, but the General Assembly's responsibility and powers under Article 10 should be determined by Article 1(1)'s twofold injunction for "effective collective measures" to maintain or restore peace.[28] Article 1(1) also assumes that resolution of a dispute or situation will be in accordance with international law and "justice," a provision inserted to protect small States,[29] a corollary to the sovereign equality of all UN Members.[30] Implementing Article 1(1), at least in terms of the Charter language, has been through Articles 2(3), 2(4), and Chapter VI-VIII. Therefore, analysis of the use of Article 1(1) will be deferred until later.[31]

Another of the UN's Purposes is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[32] Most analysis has focused on elevating self-determination to a human right,[33] sometimes in mutilateral conventions,[34] and often invoked in efforts to end colonialism, the Declaration on Granting of Independence to Colonial Countries and Peoples being a watershed.[35] A collateral effect has been developing the idea that self-determination includes permanent sovereignty over natural resources [36] and a State's right to freely dispose of its natural wealth and resources.[37]

Assembly and Council interpretations of Article 1(2) played a background role in naval matters after World War II. In the Algerian Civil War (1957-59) the Assembly referred to "the right of the Algerian people to self-determination"[38] after France gave Algerians the right to determine their status.[39] The resolution passed after the French interdiction campaign [40] and had no impact on claims of legality of that operation. Assembly Resolution 1514, declaring all peoples including those under cclonial rule have self-determination rights, was incorporated by reference in Council resolutions on Rhodesia (1965-80).[41] In this case the Royal Navy enforced Council-directed interdiction of Beira-bound tankers loaded with oil invoiced to Rhodesia.[42]

Article 1(2) played no stated role in the Tanker War; self-determination was not an issue. However, the issue of "the inalienable right" of all States "freely to

dispose of their national wealth and resources"[43] was behind the desires of States like Kuwait and Saudi Arabia to export petroleum, part of their "natural wealth," through their ports and all sea lanes. Shipping flagged under other States was engaged in lifting petroleum from these ports and otherwise in legitimate trade within the Gulf.[44] The Council condemned hostilities in "sea-lanes, navigable waterways, harbour works, terminals, offshore installations and all ports with direct or indirect access to the sea . . .."[45] The Council later reaffirmed "the right of free navigation in international waters and sea lanes for shipping to and from all ports and installations of the littoral States . . . not parties to the hostilities[.]" Iran had attacked commercial shipping en route to and from Kuwaiti and Saudi ports.[46] To the extent that these attacks frustrated the rights of Kuwait, Saudi Arabia, and other Gulf States not parties to the war to dispose of their natural wealth, attacks on shipping carrying these exports could be seen as a violation of Article 1(3) as interpreted by the Assembly and the Council.

**ii. Principles in the Charter: Articles 2(3), 2(4).** The principle expressed in Article 2(3) is a logical corollary of the principle of Article 2(4), which prohibits threat or use of force against a State's territorial integrity or political independence, or in any manner inconsistent with the Purposes of the United Nations. Article 2(3) requires UN Members to settle their international disputes by peaceful means so that international peace and security, and justice, are not endangered. A legacy from the League Covenant era, the language of Article 2(3) has been incorporated in many international agreements.[47] Its substance, mingled with Articles 33-36's parallel policies,[48] has been restated in many UN resolutions, including Security Council Resolution 479, the first Council action in the Iran-Iraq war.[49]

Article 2(4) of the Charter "lays down one of the basic principles of the United Nations,"[50] incorporating by reference Article 1's Principles and declaring, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[51] Article 2(4) must be interpreted in the context of other Charter norms; *i.e.,* it may be tempered by other rights *(e.g.,* of self-defense) under the Charter or general international law under a number of theories.[52] The point of difference is the relative scope of the right of self-defense and the extent to which the right of self-defense qualifies Article 2(4), an analysis deferred for consideration in the context of self-defense and related issues.[53]

Definition of terms lies beneath the problem of interrelationships between Article 2(4), which at least restates a customary rule,[54] and other claims. Two views have developed on what "threat or use of force" means: Does "force" mean only "armed force," or does it include economic or political pressure?[55] Most commentators say force means only armed force and does not include economic or political

pressure.[56] Recent treaty negotiations support a narrow definition of "force." States have negotiated separate provisions prohibiting coercive economic or political methods.[57] Proponents of a clause to include economic coercion with military coercion as a ground for voiding a treaty, failed in the Vienna Convention on the Law of Treaties negotiations.[58] The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations also lacks such a provision.[59] Although the General Assembly has adopted resolutions calling upon States to refrain from economic or political coercion, neither the Assembly nor the Council has determined that such coercion equates with use of force under Article 2(4).[60] The Assembly may have come close with the 1970 Friendly Relations Declaration, but analysis reveals that the line has not been crossed.[61] Other examples are consensus approval of a definition of aggression [62] and the Charter of Economic Rights and Duties of States (NIEO).[63]

Similar to the US position that aggression "cannot be so comprehensive as to include all cases . . . and cannot take into account the various circumstances which might enter into the determination of aggression in a particular case[,]"[64] the Resolution definition of aggression parallels Article 2(4): "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter . . . , as set out in this Definition."[65]

A State's first use of armed force in violation of the Charter is *prima facie* evidence of an act of aggression, although the Security Council may determine that, under the circumstances, no act of aggression has been committed.[66] The Definition considers the following as acts of aggression whether or not there has been a war declaration:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockade of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[67]

The list is not exhaustive.[68] Article 5(1) is the only direct reference to economic strategies: "No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression."[69] Thus economic need cannot justify aggression, but that does not mean that a coercive economic strategy is aggression.

As with the 1970 Friendly Relations Declaration, NIEO Article 32 proclaims that "No State may use or encourage ... economic, political or any other ... measures to coerce another State ... to obtain ... subordination of the exercise of its sovereign rights."[70] Because of the vote on NIEO (118-6-10) and developed States' solid opposition, and NIEO's status as not being a first measure of codification and progressive development,[71] it is unlikely that Article 32 recites custom. State practice under the Vienna Convention confirms this view.[72]

One issue, for which there are no clearcut answers in Charter practice, is whether the "territorial integrity" phrase in Article 2(4) includes the "floating territory" of a vessel flying a State's flag.[73] The *Corfu Channel Case* settled the issue for warships; the judgment included an award for damage to the UK ships and for personnel injured or killed.[74] Security Council resolutions affirmed freedom of navigation in the 1967 Arab-Israeli conflict [75] and in the Tanker War;[76] in the past other resolutions approved interdiction of Beria-bound merchantmen as part of sanctions action against Rhodesia.[77] The freedom of navigation resolutions confirmed vessels' right to be free of belligerent interference; the Rhodesia interception resolution can be seen as a derogation on a right of "floating territorial integrity" in the sense of Article 2(4).[78]

Even if a ship might not be considered part of a State's territory and therefore not subject to Article 2(4), attacks on individual merchant ships are acts of aggression and are subject to self-defense response(s) under Article 51. This issue was particularly relevant for the Tanker War.

Although Article 2(4) does not cite aggression specifically, it does prohibit Members from acting "in any other manner inconsistent with the Purposes of the United Nations" in their international relations. Article 1(1) states the UN's primary [79] Purpose as maintaining international peace and security through collective action to "suppress ... acts of aggression or other breaches of the peace ...." Therefore, UN Members have an obligation to refrain from acts of aggression against other States. And, as also developed under the self-defense analysis,[80] the *Nicaragua Case* adopted the broader French-language version of the Charter, Article 51. Article 51's English language version reads:

> Nothing in the . . . Charter shall impair the inherent right of individual or collective self-defense if *an armed attack* occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the . . . Council and shall not in any way affect the authority and responsibility of the . . . Council under the . . . Charter to take at any time such action as it deems necessary . . . to maintain or restore international peace and security.

The French version reads:

> Aucune disposition de la . . . Charte ne porte atteinte au droit naturel de legitime defense, individuelle ou collective, dans le cas ou un Membre des Nations Unies est l'objet *d'une agression armee,* jusqu a ce que le Conseil de Securite ait pris les mesures neccaires pour maintenir la paix et la securite internationales. Les mesures prises par des Membres dans l'exercice de ce droit de legitime defense sont immediatement portees a la connaissance du Conseil . . . et n'affectent en rien la pouvoir et le devoir qu'a le Conseil, en vertu de la . . . Charte, d'agir a tout moment de la maniere qu'il judge necessaire pour maintenir ou retablir la paix et la securite internationales.[81]

The right of self-defense, however defined,[82] arises when there is an "armed attack," under the English language version, or under the French version when there is an *"agression armee,"* which connotes a broader range of activity or situations triggering a right of self-defense.[83]

Both versions and those in the Chinese, Russian and Spanish languages are equally authentic.[84] However, since the languages in which the drafting was done were English and French, Goodrich and his associates argue that more weight should be given the English and French texts and, if there is a discrepancy between the two, the interpretation most likely to be correct would be that based on the language of the text that was originally adopted.[85] Under this view, since Article 51 is the result of a UK, *i.e.,* English language, proposal,[86] the "armed attack" phrase of the English language version should prevail.

Linnan has advocated using the Vienna Convention on the Law of Treaties to guide analysis of the relationship between Articles 2(4) and 51. [87] The same approach might be taken for the situation of equally authoritative texts where words chosen for versions in differing languages have different meanings. The Vienna Convention, article 33, provides in pertinent part:

> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language. . . .
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
> 4. . . . [W]hen a comparison of the authentic text discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning

which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Articles 31 and 32 of the Convention provide:

*31. General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for . . . interpret[ing] . . . a treaty shall comprise, in addition to the text, including its preamble and annexes[.] . . .
3. There shall be taken into account, together with the context . . .
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

*32. Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, . . . to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.[88]

There have been several theories for interpreting treaties,[89] but Jimenez de Arechaga says Vienna Convention principles declare existing law.[90] Although other approaches have appeal,[91] the Convention's mainstream approach will be the principal path of analysis.

Article 31(1) "establishes . . . the 'golden rule' of interpretation[:]"[92] Give a treaty its ordinary meaning in its context and in the light of its object and purpose. Article 31(2) further defines the context to include the treaty preamble. Along with the context these are relevant, for this purpose: subsequent practice establishing the parties' agreement as to its interpretation, Article 31(3)(b); and relevant applicable rules of international law, Article 31(3)(a); and a special meaning to a term if the parties agree to such, Article 31(4). Therefore, the first task is to examine intrinsic evidence; the second is a gradual progression from this center to more peripheral evidence, with a concession to parties' specific intent "if it is established," convincingly, "that the parties . . . intended" such.[93] The last qualification does not apply, since the problem lies with the meaning of Article 51's wording, for which there is no terminological consensus.[94] The problem in terms of Vienna Convention

Article 31 analysis boils down to an issue of subsequent practice and relevant, applicable international law rules.[95]

The most recent authoritative pronouncement on the meaning of "armed attack"—*"agression armee"* in Article 51 is the *Nicaragua Case.* The ICJ accepted the broader French-language Article 51 version, stating in *dictum* that the Definition of Aggression Resolution, Article 3(g), stated a customary rule; sending armed bands, irregulars or mercenaries across a border would be armed attack justifying self-defense. (The Court went on to say, however, that supplying arms or other logistics across a border was not aggression and that therefore a US collective self-defense claim under Article 51 was not admissible.)[96] And since the same word—*"agression"*—is used in Article 1(1) and Article 51,[97] the same meaning should be imported into Article 1(1) as incorporated by reference in Article 2(4).

The narrow question is whether there can be armed aggression against ships.

The Definition of Aggression Resolution, Article 3, declares: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter . . . as set out in this definition."[98] Although it could be argued that "territorial integrity" in Article 1 includes the "floating territory" of ships, the negotiators did not address this possibility; they voted down amendments to refer to the territorial sea and airspace, although one State (Indonesia) added it by interpretative statement. Article 1 only covers armed aggression, and not economic or political coercion; it does not cover threat of force, as distinguished from use of force.[99] Article 2 declares a first use of force in violation of the Charter to be *prima facie* evidence of aggression, but that the Security Council may determine that no aggression has occurred, perhaps because the act(s) or consequence(s) are not that serious.[100] The Definition also recites certain *per se* principles, subject to Article 2's first-use and *de minimis* principles, in Article 3, which provides in part:

> Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
>
> . . .
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State . . .

Article 3(c) says that blockading coasts or ports by armed forces is aggression.[101] The ICJ has stated that article 3(g), denouncing sending armed bands across a border, states custom; one commentator says all of Article 3 probably restates custom, although others disagree.[102] The Article 3 list is nonexclusive.[103]

An ambiguity remains as to the phrase "marine and air fleets." Does this include a single merchantman flagged under a target State's flag? Article 3(d) covers attacks on a warship, a warship formation, or a group of merchantmen, *e.g.,* a fishing fleet.[104] Attacking a single neutral warship is never permitted in territorial

waters,[105] and by well-established custom on the high seas as well.[106] Choice of the expression "fleets" for article 3(d) was done "advisedly,... to exclude from the purview of the Definition the use of force [by an attacking State] against a single or a few commercial vessels . . ., especially when they enter [attacking State] jurisdiction," according to Dinstein, who cites Broms, chair of the UN committee that produced the Definition.[107] Dinstein concludes that "A reasonable degree of force (in the form of search and seizure) may be legitimate against foreign merchant ships even on the high seas."[108] However, Broms did not refer to merchant ships generally; he and the Committee referred only to fishing vessels and fleets.[109] Dinstein's view appears inconsistent with what the Committee actually decided. It is also clear that coastal States, engaged in legitimate policing of their coastal waters (*e.g.,* territorial sea, contiguous zone, EEZ) do not commit aggression under article 3(d) when they pursue, and possibly attack, merchant ships for violations.[110]

The Dinstein view is inconsistent with what the UN Committee actually decided. The UK Committee delegate pointed out during negotiations that Article 3(d) would not impugn coastal State action *"in accordance with international law* for the legitimate enforcement of its authority." A saving clause describing coastal State rights had been omitted from Article 3(d). Including it would

> risk that such a clause might be taken to imply that any vessel... which ventured within the jurisdiction of another State might be subjected to any degree of force—even an armed attack—that the State might choose to inflict on it in the exercise of its own authority, which was not the... Committee's intention.[111]

Thus, far from indicating that attacks on independently-sailing merchant ships could not trigger a self-defense response, the Committee was trying to avoid the problem of unlawful attacks in the first place. There is no indication that the Committee even considered self-defense in this context. The Committee did not intend to exclude attacks on independently-steaming merchantmen from the Definition, for which self-defense or other legitimate response(s) might be appropriate.

As incidents like the *Mayaguez* seizure demonstrate,[112] to say that not all attacks on merchant ships can result in an aggression claim justifying a self-defense response is dangerous business indeed. Even as a self-defense response that is not proportional can become aggression,[113] not every attack on an independently-sailing merchantman should be shielded from an aggression claim. Some merchant ships, *e.g.,* passenger liners, are forbidden targets in any case;[114] even with modern commercial shipping's highly automated nature, and the resulting relatively low size of crews, a deliberate attack on a single cargo merchantman can involve many people's lives. The liner exception does not cover the situation of other vessels carrying hundreds of passengers, *e.g.,* ferries or work-boats transporting employees of offshore drilling rigs, nor does it cover a common situation of cargo vessels with a

small passenger manifest. Moreover, the reality of merchant traffic on the seas is that *no* merchant ships, unless they are fishing vessels or tugs and tows, ever sail in company. A view that all independently-sailing merchant ships could be attacked without the attacking State risking being branded an aggressor would mean that no merchant ship would be safe, under any circumstances, since all sail independently.[115] Presumably an all-out, simultaneous, world-wide attack on all ships flagged under the target State would qualify for Dinstein, but that hypothetical lacks reality.

The "fleets" expression does not follow the principles of prior treaty law, whether ratified or not. These agreements point to coverage of attacks on single ships as enough to trigger a risk of a charge of aggression if the act or its consequences are serious enough, under the Definition Resolution formula.[116] Charter era State practice buttresses this conclusion. The Resolution includes blockade as a qualified *per se* instance of aggression.[117] As a practical matter, blockade runners do not try to avoid interception in groups. If it is assumed that the law of blockade still includes an ultimate right to attack and destroy merchant vessels trying to evade blockade, and it is submitted that this remains the case,[118] then illegal use of blockade includes the illegal destruction of blockade runners as part of unlawful aggression. And if such be true in the context of blockade, then it is likewise true that illegal destruction of a single merchantman, sailing independently, would be likewise susceptible to condemnation, if the situation is serious enough,[119] under the Resolution formula. Even if attacking a single merchant ship does not come under Article 3(d)'s "marine... fleets" principle, prior treaty law and State practice since 1945 points toward a strong potential of a finding of aggression for such an attack.[120]

The record of treaties negotiated before the Charter era and immediately after 1945 is mixed as to whether attacks on shipping constitute aggression; no recent agreements have been concuded on the issue. Some multilateral and bilateral agreements categorize them as acts of aggression;[121] many do not.[122] For purposes of this analysis, however, it is most significant that Iran bound itself twice, and Iraq once, to multilateral agreements specifically defining attacks on "vessels or aircraft of another State" as acts of aggression.[123] Did "vessels" include merchantmen as well as State ships? Contemporary USSR proposals in the League of Nations, similar to the Definition list without the latter's nonexclusivity clause, spoke of "knowingly attacking the naval or air forces of another State."[124] Applying general principles for interpreting ambiguous treaty terms, it would seem that the unmodified words, "vessels" or "ships," meant not only State vessels, *i.e.*, warships, but merchantmen as well. The Vienna Convention on the Law of Treaties, Article 31(1) restates a customary rule: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms ... in their context and in the light of its object and purpose."[125] The ordinary meaning

of "ship" or "vessel," unadorned by an adjective, is just that—it connotes all seagoing conveyance, military or commercial. This is reinforced by the context of the era. The USSR, a primary promoter of an aggression definition, was a socialist, command economy, in which the State owned all commercial ships through trading companies.[126] At the time the USSR claimed an absolute theory of sovereign immunity,[127] as distinguished from capitalist countries' acceptance of modified, restricted forms of immunity.[128] Although the USSR might have advocated a more narrow theory for aggression in League debates,[129] when treaties were negotiated with other, often capitalist, States, these conventions' coverage was broaden enough to cover all ships. Other countries' positions cannot be determined with certainty, but *Comments* to the Harvard Draft Convention on Rights and Duties of States in Case of Aggression, proposed exclusively by US (and therefore capitalist) commentators,[130] support a view that "vessel" or "ship" meant all vessels or ships, regardless of relationship with a registry State.[131] Moreover, including attacks on merchantmen within a definition of aggression would further the treaties' policies in minimizing opportunity for legally-sanctioned violence.

Language of multilateral agreements contemporaneous with the Charter were inconclusive or would appear to have drifted toward a view that only attacks on warships would constitute acts of aggression; however, examples given were non-exclusive.[132] Thus there is some support in treaties for a view that States have considered attacks on single merchantmen an act of aggression; this is particularly true for Iran and Iraq, whose treaty record is clearer than that of most States.[133] To be sure, the law of treaties says that treaties cannot create rights for third States unless these States accept them, but treaty rules can state custom.[134]

State practice since 1945 supports a view that attacks on single ships can amount to aggression. During the 1973 Yom Kippur War, the Syrian navy seized *Romantica,* an Italian liner, later released upon the Italian ambassador's intervention.[135] Loss of the neutral *Venus Challenger,* sunk with all hands as a victim of an Indian missile during the 1971 India-Pakistan conflict, has been severely criticized.[136] The United States protested and responded with force to Cambodia's seizure of the US-flag *Mayaguez* in 1975, claiming self-defense.[137] A US Court of Appeals found Argentina liable for its attack on Liberian-flag *Hercules* outside a declared war zone during the 1982 Falklands/Malvinas War.[138]

If today diminished in value because of failure of ratification [139] or acceptance of the final text, draft multilateral treaties or single-action proposals carry some weight as a secondary source because of their authors' eminence as scholars.[140] These sources support a view that "vessels" include merchantmen sailing alone. In this regard the 1933 USSR proposal is interesting; it would have said the first attack on another State's "naval or air forces" was an act of aggression.[141] The full League Committee's 1933 draft Act Relating to the Definition of the Aggressor changed this to the first attack on another State's "vessels or aircraft,"[142] some indication of

accepting a broader definition of targets that could trigger a claim of aggression. The 1939 Harvard Draft Convention on Rights and Duties of States in Case of Aggression says that a single merchantmen, if attacked, could trigger a claim of aggression.[143] Few Charter era commentators [144] have expressed a view, independently of the "fleets" expression in Definition of Aggression, Article 3(d),[145] perhaps because it is now obvious that an initial attack on a neutral merchant ship, traveling alone, can be an act of aggression.[146] If we presume availability of the 1977 *Hague Recueil* [147] or its equivalent in Baghdad and Tehran when the Tanker War began, the legal rationale for destruction and loss of life may be predicated on this view, at least in part.

*Appraisal.* Although the record of claims and counterclaims is not clear, it is submitted that an attack on a merchant ship, steaming independently on lawful purposes, can be an act of aggression that can merit a self-defense response. An attack on a man-of-war, sailing alone, can also be an act of aggression. Attacks on a formation of warships, or on a fleet of merchantmen (*e.g.*, a fleet of fishing trawlers) can be aggression that will support a self-defense response. As McDougal and Feliciano and others have shown,[148] not every "attack" is serious enough to merit a self-defense response, and a self-defense response must be necessary and proportional in any event.[149] A target State may choose to make no response, or to counter with retorsions or non-force reprisals,[150] perhaps in connection with self-defense measures. Moreover, some attacks may be subject to defenses, *e.g.*, mistake, as in the *Stark* and Airbus cases.[151] Any proportional self-defense response to an assault perceived at the time [152] as an aggressive armed attack is legitimate.

Thus, the logical corollary of the principle in Article 2(4), prohibiting the threat or use of force against the territorial integrity or political independence of a State, or in any manner inconsistant with the UN's purposes,[153] is the principle expressed in Article 2(3): "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[154] A legacy from the League Covenant era, Article 2(3)'s language has been restated in many international agreements.[155] The substance of Article 2(3), commingled with the parallel policies of the Charter, Chapter VI, Articles 33-36,[156] has also been restated in the Friendly Relations Declaration.[157]

***b. The Inherent Right of Self-Defense Under Article 51; Other Concepts.*** As noted above, Article 51's French language version (*agression armee*) connotes a broader meaning than the English language phrase, "armed attack."[158] (Both versions, along with the other official languages, are equally authentic but a commentator's analysis may point to the English language version as the one to follow.)[159] Another difference in meaning between Article 51's two versions is the English language phrase, "inherent right of... self-defense," which in French becomes "droit naturel," i.e., the connotation of "natural right." Thus there is an "inherent" or

"natural" right to self-defense by a State whenever there is armed aggression against that State. The problem is compounded by use of English in important treaty negotiations for 20 years before the Charter negotiations.

During negotiations leading to the Pact of Paris, which outlaws war as an instrument of national policy,[160] US Secretary of State Frank B. Kellogg sent identical notes to participants, stating that the draft Pact did nothing to "restrict or impair in any way the right of self-defense inherent in every sovereign State and implicit in every treaty." Self-defense was characterized as "inalienable" and a "natural right," which "[e]very nation is free at all times and regardless of treaty provisions" to exercise.[161] Great Britain had expressed a similarly broad view of the matter earlier,[162] as had other States.[163] Ultimately all parties accepted or "noted" the US interpretation when the Pact was signed August 27, 1928.

About a year earlier the PCIJ had decided the *Lotus Case,* which strongly recognized States' sovereignty to act as they chose in the absence of law.[164] (State sovereignty, although occasionally assailed by some,[165] remains a fundamental principle of international law.)[166] Under *Lotus,* States should have been as free to act *within* the law of self-defense as it then stood when their sovereignty was threatened by an act of war that was a violation of law; *i.e.,* there was no law to support the act. Thus if it be assumed that the self-defense gloss on the Pact of Paris carries over into the UN Charter drafting less than a generation later, there is at least the possibility of a latent ambiguity, if Article 51's English or French version carries with it a different and broader right of self-defense than the other, a right extending back into pre-Charter understandings of the scope of the right. The same issue lurks in the difference between "armed attack"—with its connotation of actual, physical assault—and *"aggression armee,"* "armed aggression," connoting a lower threshold for triggering a right of self-defense.

We have seen how Linnan's analysis, employing interpretation methods in the Vienna Convention on the Law of Treaties, was helpful in determining the meaning of "armed attack"—*"agression armee"* in Article 51.[167] Since the same issues are at stake with respect to the point on the "inherent right" -*"droit naturel"* dichotomy, that method will be employed to determine the meaning of this phrase.

The most recent authoritative pronouncement on the meaning of "inherent right" - *"droit naturel"* in Article 51 is the Nicaragua Case, where the ICJ accepted the broader French version of Article 51 to state that the right of individual or collective self-defense is a matter of customary international law, as evidenced in the Friendly Relations Declaration interpretation of Article 51.[168] Sohn has convincingly noted the similarity of language between the understandings to the Pact of Paris and the *"droit naturel"* language of the French text of Article 51.[169] The Court accepted the broad view of "inherent right" advocated by Bowett and others.[170] With respect to the "armed attack" - *"aggression armee"* issue, the Court agreed with the Definition of Aggression[171] that sending armed bands, irregulars or mercenaries

across a border was aggression, where this amounted to an actual armed attack by regular forces.[172] The Case involved incursions across land borders, but it is reasonably clear that the Court accepted the French text's slightly broader definition.[173] Therefore, it may be inferred that other forms of armed attack listed in the Definition, *e.g.*, naval blockade,[174] also declare customary law. And if this is so, there may be other forms of aggression that customary law now defines as such [175] in a particular context to justify a self-defense response. The Court did hold, however, that cross-border assistance to rebels in providing weapons, logistics, or other support was only a threat of use of force or perhaps intervention into the affairs of another State, and therefore not enough to be characterized as an aggression so as to justify action by the target State in self-defense.[176] Two dissents pointed out that some situations involving logistics might be characterized as an armed attack, *i.e.*, aggression.[177] The Court declined to consider anticipatory self-defense issues; the parties had agreed it was not an issue.[178]

Although the Court's opinion is a secondary source and has no precedential value in the common-law sense,[179] its recitation of customary principles is, however, entitled to great respect. Other Charter era instances of customary claims for national self-defense, particularly in the context of naval warfare, are ambiguous.

The Definition of Aggression does not enlarge or contract the right of self-defense: "Nothing in this definition shall be construed as . . . enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful."[180] States may respond to aggression in self-defense or by other appropriate means,[181] *e.g.*, retorsion or nonforce reprisals.[182]

There is no evidence of a special meaning given Article 51 by the intent of the parties.[183] Thus recourse to supplementary means of interpretation under Vienna Convention Article 32 is necessary, *i.e.*, examining preparatory works. To be sure, use of preparatory works should not be considered as a second phase or as a resort when ambiguity or obscurity remains,[184] but they do assume increased importance when Vienna Convention Article 31 analysis yields mixed results.[185]

The Charter drafters negotiated against a background of the League of Nations Covenant and the interwar years. The Dumbarton Oaks Proposals for the Charter had no equivalent to Article 51, [186] and the negotiating history of the conference that produced the Charter stated in part that "The unilateral use of force or *similar coercive measures* is not authorized or admitted. The use of arms in legitimate self defense remains *admitted and unimpaired.*"[187] (The Nicaragua Case [188] has demolished the opposing argument, that the right of self-defense is wholly confined to Article 51 which preempts any customary norm.)[189]

If the right remains "admitted and unimpaired," reference must be had to the latest major agreement before the Charter concerned with the issue, *i.e.*, the Pact of Paris still in force with about 69 parties as of January 1, 1998,[190] and negotiations, including general understandings, before signature and ratification.[191] There

were no reservations concerning self-defense attached to the Pact; diplomatic correspondence constituting part of that treaty's preparatory works were interpretations, *i.e.*, understandings.[192] Resort to analysis by analogy under the Vienna Convention on the Law of Treaties [193] confirms that the diplomatic correspondence [194] on the Pact contained understandings, not reservations. The Vienna Convention, Article 2(1)(d), says a reservation is "a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions . . . in their application to that State." The US notes to prospective parties were transmitted June 23, 1928, two months before signature of the Pact.[195] Ratifications were exchanged much later.[196] Moreover, since self-defense was not mentioned in the Pact, the diplomatic notes, even if they might otherwise be considered reservations, could not "exclude or modify the legal effect of the treaty . . .." In effect, then, the notes were "clarification[s] of the State[s'] position," or "declarations of a purely explanatory character."[197] The contemporary position of two US Secretaries of State was that the self-defense corollary to the Pact was an understanding, not a reservation.[198]

*Appraisal.* The Nicaragua Case confirms that a separate customary norm for self-defense may exist alongside the Charter recitation in Article 51.[199] Article 51 says the right of individual and collective self-defense is "inherent," the same word used in the reservations [200] for the Pact of Paris.[201] Such being the case, whether Article 51 applies to a situation, or whether a customary norm applies, the result is the same. The right of individual and collective self-defense as understood and practiced before ratification of the Charter continues unabated, subject to application of conditioning factors, *e.g.*, developing custom, perhaps stated in resolutions (the Definition of Aggression [202] comes to mind); treaties, and other sources of law,[203] including *jus cogens* norms.[204] If the right of individual and collective self-defense has risen to the status of a *jus cogens* norm, as some have claimed, *e.g.*, it takes priority over other treaty norms like Charter provisions not having *jus cogens* status.[205] If another *jus cogens* norm, *e.g.*, the right to territorial integrity and political independence recited in Charter Article 2(4), is involved, a *jus cogens* right of self-defense must be balanced against the other *jus cogens* norm(s).[206]

**i. Individual Self-Defense.** When commentators' views and Article 51's interpretation through treaty canons analysis are considered,[207] a relatively broad right to self-defense has developed. "U.N. practice in Art. 51, composed as it is of scanty, vague and contradictory elements, says nothing, or at least nothing clear, about the grounds for self-defense."[208] Besides maritime conflicts, only a handful of situations have involved published self-defense claims by a participant. In one of these, the Security Council rejected Israel's anticipatory self-defense claim for its raid on an Iraqi nuclear reactor.[209]

In the *Corfu Channel Case,* referred to the ICJ by the Council,[210] the Court said a second passage of UK warships, ready for action if Albania again tried to use force to oppose passage, was not illegal because of Albania's prior Channel mining and resulting loss of British lives and ships.[211] Waldock interpreted the Court's approving UK readiness for Albanian attack as legitimate preparation for imminent threat of attack.[212] Using force to defend the formation would have been legal.[213] (The case also decided that the United Kingdom could not invoke forcible self-help, *i.e,* necessity, to justify use of force; this was held not legitimate in the Charter era.)[214] The decision did not mention Article 51,[215] probably because Albania was not a UN Member when the Court's jurisdiction was invoked.[216] The decision was based entirely on customary law. Although this aspect of the case was little noticed, *Corfu Channel* predicted the Nicaragua Case result three decades later, when the case confirmed a parallel customary self-defense norm, in the latter decision coterminous with Article 51.[217]

In 1948 the Security Council heard Jewish Agency for Palestine claims, before Israel became a State, that Transjordan and Egypt were guilty of aggression. Transjordan (now Jordan) and the Arab League claimed self-defense to protect Jordanian and Arab nationals and to restore peace, security and law and order. Belgium raised self-defense in the Council. Council resolutions did not mention self-defense.[218] This was also true for Indian and Pakistani self-defense claims in the 1948 Jammu and Kashmir dispute.[219]

The beginning of the Korean War in 1950 again illustrates the point, in the collective security context. Although Council resolutions condemned North Korean aggression as a breach of the peace and called upon UN Members to assist UN forces and refrain from assisting North Korea,[220] the Council did not mention the right of self-defense. Similarly, the General Assembly's Uniting For Peace Resolution, passed when the USSR's return to the Council and subsequent Soviet vetoes made Council decisionmaking impossible, does not mention self-defense.[221] (Article 51 provides for a right of collective as well as individual self-defense, and the United States ordered its forces to come to the aid of South Korea before the Council acted.[222] Hence, the Council could have, but did not, approve, disapprove or define South Korea's self-defense rights and other States' self-defense efforts for South Korea.)

In 1951, the Council rejected Egypt's self-defense claim for closing the Suez Canal to, and asserting a right of visit and search of, Israeli merchantmen over two and a half years after hostilities had ceased. The resolution also noted that restrictions of passage of goods through the Suez Canal to Israeli ports were denying valuable supplies to nations not connected with the conflict, and that these restrictions, together with Egypt's sanctions on ships that had visited Israel ports "represent[ed] unjustified interference with the rights of nations to navigate the seas and to trade freely with one another, including the Arab States and Israel[.]"[223]

(Commentators debate whether a right of visit and search during an armistice exists.)[224] The resolution was not supported;[225] there were more seizures and protests.[226] The USSR vetoed a second Council resolution.[227] Five years later the United Kingdom justified its Suez Canal intervention on self-defense, to protect its nationals; France, who combined with Britain in the sea-land operation, did not do so. The justification seemed to lack factual foundation; it has been said General Assembly rejection of the UK argument "cannot be regarded as conclusive to its validity in law."[228]

From February-April 1957, however, US destroyers patrolled the Gulf of Aqaba and the Straits of Tiran to successfully prevent Egyptian interference with US flag merchantmen bound for Israel; other US warships evacuated US citizens and "friendly nationals" on a space-available basis from Haifa, Israel, and Alexandria, Egypt.[229] During 1958-59 UK warships escorted and protected British fishing trawlers in waters Iceland claimed as territorial sea. The United Kingdom eventually withdrew from the "Cod War," and diplomacy resolved the issue.[230] In 1960 Belgium claimed a right to use force, but not based on self-defense, to extract its nationals from the strife-torn Congo.[231]

During the Algeria civil war France's self-defense claim for intercepting and boarding or diverting vessels whose cargoes were suspected to be bound for Algerian rebels was protested vigorously by States whose flag the ships flew. France had declared a 20 to 50 kilometer (11-28 mile) customs zone off Algeria, but high seas interception occurred off Algeria; 45 miles off Casablanca, Morocco; in the Atlantic Ocean; and in the English Channel. It is not clear whether protests were directed at interceptions wherever occurring, or for those outside the zone, *i.e.*, in the Atlantic and the Channel. Although a large-scale operation (4775 ships visited, 1330 searched, 192 rerouted, 1 arrested in 1956), ships whose cargoes were seized were smuggling arms to the rebels. Although arms were imported from the sea off the Algerian coast, others were brought overland through Libya, Morocco or Tunisia, and then across the Algerian border, perhaps through a third State, *e.g.*, Tunisia. Sometimes bogus shipping documents were used. Fishermen smuggled in arms.[232] The Council did not pass a resolution related to the matter.

In 1964 no Council resolution responded to a US self-defense claim in the Gulf of Tonkin (*Maddox-Turner Joy*) incident.[233] From the US perspective, other aspects of the Vietnam War were actions in collective self-defense.[234]

No Council decisions were in resolutions related to Israeli actions against Syria (1964, 1966) and Jordan (1966).[235] Israel was condemned for attacks on Jordan (1966,[236] 1969[237]) and Lebanon (1968-82[238]), however.[239] Although draft resolutions were presented, the Council took no position during the 1967 Six-Day War.[240] During that war Egypt's submarines sank innocent Greek freighters in the Mediterranean Sea, one off Alexandria and another further west.[241] Britain warned it would join other States to assure Straits of Tiran right of passage. A UK

carrier group and the US Sixth Fleet were concentrated in the Eastern Mediterranean, and a second UK carrier was in the Red Sea, but nothing came of the show of force. *U.S.S. Liberty,* a warship on the high seas in the eastern Mediterranean monitoring Israeli transmissions during the Egyptian phase of the war, was damaged in an Israeli PT boat and aircraft attack. Israel later compensated the United States for loss of life, crew injuries and damage to *Liberty*, without admitting fault. *Liberty* was configured like a merchant cargo ship but flew a US ensign, was painted haze grey like all US warships in the Mediterranean, and had traditional US white pendant numbers on the bow and stern. The attack occurred during daylight. US forces were not allowed to retaliate. Israel had declared an imprecise exclusion zone, warning ships to keep away from "the coasts of Israel during darkness." As to what coasts (*e.g.,* conquered territory also?), the warning was less than clear. An informal private warning also had been given the United States.[242] No self-defense claims were raised. The *Liberty* attack might be compared with the sinking of the Israeli destroyer *Eilat,* a belligerent warship steaming on the high seas, during resumption of hostilities in October 1967 *Eilat* was destroyed by Styx missiles fired from an Egyptian patrol boat in Port Said harbor.[243] The difference was that the *Eilat* attack occurred during a period of hostilities, whereas the *Liberty* incident came out of the blue.

In 1968 North Korea seized *U.S.S. Pueblo,* another electronic reconnaissance warship, on the high seas, outside of claimed territorial waters. The crew was returned 11 months later. Other than diplomatic overtures, there was no US response,[244] and the United Nations did not act.

In the 1965 India-Pakistan conflict, Pakistan declared war, published lists of absolute and conditional contraband, and established a prize court, asserting these measures were lawful exercises of self-defense. India's position was ambivalent; it responded with an absolute contraband list, but it is not clear as to whether India acknowledged existence of a war. Since India responded with its contraband lists,[245] this at least indicated that India considered itself an object of an armed attack (if Pakistan would be considered the aggressor), or entitled to respond to Pakistan's actions, if the latter is taken as a self-defense response to Indian actions. Late in 1966 the General Assembly called on the belligerents to observe the rules of warfare.[246] Apparently there were no self-defense claims.

The 1971 India-Pakistan war was over in two weeks;[247] this conflict also resulted in attacks on and destruction of innocent merchantmen. After dark, neutral vessels were not allowed to approach the Pakistan coast closer than 75 miles. The Indian Navy sought to capture or destroy Pakistani merchant ships. More than 115 neutral ships were inspected; India diverted neutral vessels to Calcutta if they carried cargo of military significance after India discovered that ship markings and names had been changed. Three Pakistani merchantmen were captured; a Liberian and a Spanish ship were also sunk. Two merchantmen were destroyed by

Indian surface to surface missiles while at anchor in Karachi roadstead, and the neutral inbound *Venus Challenger* was hit and sunk by a missile 26.5 miles off Karachi. All hands were lost. A Pakistani destroyer also went to the bottom that night, the target of a Styx missile attack. The cause of destruction of *Venus Challenger* was probably the missiles' "capricious behavior" and malfunction or inadequate operation of guidance systems. A week after destruction of *Venus Challenger,* the Bengal Chamber of Commerce published its 40-mile dawn to dusk warning.[248] Again, apparently there were no self-defense claims.

During the 1973 Arab-Israeli Yom Kippur War, international shipping was warned about entering the region of conflict, which first comprised Egyptian and Israeli territorial waters, but later further parts of the sea plus Egyptian, Libyan and Syrian ports. In October the Syrian navy captured and diverted a Greek liner, *Romantica,* which was released the next day after the Italian ambassador's intervention. No further such incidents occurred, perhaps because of international protests, although Egypt regularly stopped, visited and searched neutral merchantmen. Third States' reactions varied. African countries unilaterally suspended or ended diplomatic relations with Israel; Arab countries boycotted oil exports to Israel and the United States. Britain embargoed arms, and this largely affected Israel; except for Portugal, other Western European nations refused to allow use of their territories for supplying or assisting any belligerent. Arab navies adopted a tactic of sheltering beside merchant ships in their harbors after firing missiles at Israeli warships. Egypt declared a blockade in the Red Sea and attacked but missed an Israel-bound tanker. In the Gulf of Suez Egypt acted to blockade the Abu Rudiers-Eilat route used by Israeli-chartered tankers carrying oil from the Israeli-occupied Sinai fields to Eilat. Responding to Egypt's blockade of the Straits of Bab el Mandeb, Israel counter-blockaded the area.[249] Protests regarding Syria's attack on *Romantica* are an indicator that States considered the attack a delict and perhaps also subject to self-defense reaction by Greece if Greece had chosen to respond with proportional force.

In 1972 Iceland asserted a 50-mile fishing zone and cut a UK fishing boat's trawl wires. A UK frigate deployed outside the zone. The next year UK frigates entered the zone after continued Icelandic harassment. Incidents involving UK and German trawlers continued through 1973. In 1972 Britain had sued Iceland in the International Court of Justice, the Court indicated interim measures in 1973, and in 1974 the Court held that Iceland could not bar Britain from historic waters. The parties were admonished to negotiate differences.[250] At about the same time US fishermen experienced seizures of boats and crews, mostly off Latin America's west coast and in the Gulf of Mexico, by States claiming territorial seas or economic zones beyond those claimed by the United States. The US reaction was an insurance system to secure crews' and boats' releases, coupled with US diplomatic

protests.[251] Some countries' fishing boats were attacked in Western Hemisphere waters.[252] There were no claims of self-defense in responses.

In 1973, responding to US assistance to Israel during the Yom Kippur War, Libya declared the Gulf of Sidra below 32 degrees 30 minutes North latitude (the "Line of Death") as Libyan internal waters. The United States and other countries protested; only a few States have recognized the claim since then.[253] The United States began challenging the claim by warships' use of the Gulf, establishing a formal Freedom of Navigation (FON) program in 1979.[254] During a 1981 FON exercise, two Libyan air force jets launched missiles against Navy aircraft, which dodged the missiles and downed the Libyan planes. The United States asserted a right of self-defense. Libya escalated threats against US warships and praised terrorists who hijacked the Italian liner *Achille Lauro* in 1985. Further US FON exercises were undertaken in the Gulf, including one below the Line of Death. US NOTMARs and NOTAMs published these exercises. In 1986, after Libyan land-based missiles were launched against Navy aircraft flying in international airspace but below the Line, and Libyan aircraft penetrated an announced exercise area, the FON force commander declared any Libyan military forces leaving Libyan territorial waters or airspace and threatening US forces would be considered hostile. Thereafter, when Libyan missile patrol boats headed toward US forces, and Libyan shore-based target acquisition radars were activated "with the evident object of firing upon U.S. aircraft," the boats and radars were destroyed or damaged. The boats were not attacked when seeking refuge alongside a neutral merchantman or engaging in search and rescue operations. The United States claimed a right of anticipatory self-defense.[255]

Although the United States notified the Security Council of its self-defense responses in the 1975 *Mayaguez* incident,[256] when US naval aircraft were attacked by Libyan aircraft over the Gulf of Sidra in 1981, and in 1986 when the United States responded to Libyan patrol boat advances, the Council passed no resolutions on the situations.[257]

In 1981 US forces operated under the recently revised Peacetime Rules of Engagement (ROE), which provided "word picture[s]" giving commanders listings of military indicators of hostile intent to consider in self-defense, *i.e.*, when there was a demonstration of a hostile intent to attack that could justify response in anticipatory self-defense. Although ROE might authorize units to respond to the limits of principles of self-defense, including anticipatory self-defense, reaction in a given situation might not rise to the line of permissible responses under the law of self-defense. To the extent permitted by law, national policy and operational plans and orders, force commanders also have discretionary judgment to make other responses. Although US ROE have been classified in most cases, it is commonly known that US force commanders always have the obligation to defend their unit(s). Failure to observe restrictive national ROE in protecting a unit under

a legitimate claim of self-defense cannot result in a counterclaim of a violation of the law of self-defense.[258] In other words, ROE-based responses may articulate a claim of self-defense; if the ROE response is more restrictive than the law of self-defense might permit, practice under the ROE cannot be interpreted as setting the boundaries of self-defense. ROE and the law of self-defense are therefore independent variables, although ROE cannot exceed the boundaries of the law.

During the 1982 Falklands/Malvinas war, although the United Kingdom based its military operation on Art. 51, no Council resolutions passed on the conflict took a clear position on the point.[259] On April 7, 1982 the United Kingdom declared a 200-mile Maritime Exclusion Zone (MEZ), to be effective April 12, for Argentine shipping around the Falklands/Malvinas. On April 23 the United Kingdom established a Defensive Sea Area (DSA) or "defensive bubble" around its task force, warning that approach by Argentine civil or military aircraft, warships or naval auxiliaries would be dealt with "appropriately." On May 1, when fighting started in the islands, the MEZ was changed to a Total Exclusion Zone (TEZ) for ships supplying the Argentine war effort. MEZ coverage was extended May 7 to sea areas more than 12 miles off the Argentine coast. Argentina had declared a 200-mile Defense Zone (DZ) off its coast and around the Falklands/Malvinas on April 13, after having protested the UK action. MEZ enforcement capability came on the day it was effective, April 12. [260] Presumably Argentina could have enforced its DZ if it chose to do so, but after the cruiser *General Belgrano* sinking, Argentine naval forces, except land-based naval aviation and possibly submarines, did not figure in the war. On May 11 Argentina declared all South Atlantic Ocean waters a war zone, threatening to attack any UK vessel therein. Apparently the only neutral-flag ship attacked by Argentina in the war zone was *Hercules*, a Liberian-flag, US interests-owned tanker in ballast. Although the USSR belatedly protested lawfulness of the UK TEZ, it did apparently not object to the Argentine DZ and observed the UK TEZ.[261] The United States had published warnings to US vessels and ships owned by US interests, *e.g., Hercules,* two days before she was hit.[262] On July 12, 1982, active hostilities in the war ended, but the UK TEZ and economic sanctions were continued. Ten days later the TEZ was lifted, but the United Kingdom warned Argentina to keep military ships and aircraft away from the islands, declaring a 150-mile Protection Zone.[263] The TEZ was relatively successful, although Argentina succeeded in airlifts to the islands until the last days of the war. Apparently Argentine sealift efforts failed.[264]

In the Iran-Iraq war, although the Security Council recognized the right of freedom of navigation and called for protection of the marine environment [265] in a context of belligerent and other States' self-defense claims,[266] there was no Council action to take charge of the conflict by decision, as the Charter provides.[267] Both belligerents declared defense, war or exclusion zones,[268] and aside from Council resolutions calling for recognition of freedom of navigation rights and protection

of the environment,[269] the Council did not purport to regulate these. No Council resolution explicitly determined the validity of the self-defense claims of Iran or Iraq.

Thus, at least in 1986 when Combacau's analysis was published on Security Council practice in defining self-defense, "whatever the official pretence, and perhaps the legal situation, the international community is . . . back where it was before 1945: in the state of nature; and . . . the notion of self-defense makes no sense there."[270] The latter part of Combacau's conclusion is overblown, for we may at least draw upon the understandings of the Pact of Paris, as its concepts were carried forward into Article 51.[271] The 1990-91 Gulf War, the most serious challenge to the Council since the Korean conflict, shed no light on the issue. Council Resolution 661 merely confirmed the right of individual and collective self-defense as stated in the Charter.[272] As Combacau intimates, much of this is due to the structure and powers of Charter institutions. Action by the Council must be taken with permanent members' concurrence,[273] and the Soviet veto was a regular feature of Cold War politics. However, other countries (including the United States) vetoed resolutions when allies, friends or interests were involved.[274] Mindful of this, and the "sovereign equality of [UN] . . . Members,"[275] it is no wonder that self-defense has not figured strongly in Council resolutions, which nearly always have been nonmandatory recommendations or calls for action.[276]

The General Assembly record is also relatively meager. Except for certain competences not relevant here, the Assembly's function is recommendatory and subordinate to the Council on matters related to international peace and security.[277] Article 12(1)'s requirement, that the Assembly cannot make a recommendation on a matter relating to international peace and security while the Council is seized of it, explains the Assembly record in part. Usually States will complain to the Council first, as the Charter provides.[278] While the Council debates the matter, the Assembly is impotent. If the Council acts, even through nonmandatory calls for action or recommendations instead of binding decisions under Articles 25 and 48, it remains seized of the matter. If vetoes stop Council action on a particular crisis, it may still remain seized of the matter, depending on its prior resolutions.[279] On the other hand, if the matter comes to the Assembly first, the Assembly may make recommendations until the Council takes it up.

The Assembly's nonmandatory resolutions may recite, and therefore strengthen, customary and treaty norms, or may lead to development of new norms, however.[280] Certain of these resolutions have asserted claims relative to self-defense.

General Assembly Resolution 378 (1950), companion to the Uniting for Peace Resolution passed during the Korean War, recites these recommendations:

> (a) That if a State becomes engaged in armed conflict with another State or States, it take all steps practicable in the circumstances and compatible with the right

of self-defence to bring the armed conflict to an end at the earliest possible moment;

(b) In particular, that such State shall immediately, and in any case not later than twenty-four hours after the outbreak of the hostilities, make a public statement wherein it will proclaim its readiness, provided that the States with which it is in conflict will do the same, to discontinue all military operations and withdraw all its military forces which have invaded the territory or territorial water of another State or crossed a demarcation line, whether on terms agreed by the parties to the conflict or under conditions to be indicated to the parties by the . . . United Nations;

(c) That such State immediately notify the Secretary-General, for communication to the Security Council and to the Members of the United Nations, of the statement made in accordance with [(b)] . . . and of the circumstances in which the conflict has arisen;

(d) That such State, in its notification to the Secretary-General, invite the appropriate organs of the United Nations to dispatch the Peace Observation Commission to the area in which the conflict has arisen, if the Commission is not already functioning there;

(e) That the conduct of the States concerned in relation to the matters covered by the foregoing recommendations be taken into account in any determination of responsibility for the breach of the peace or act of aggression in the case under consideration and in all other relevant proceedings before the appropriate organs of the United Nations[.][281]

That same year the "Peace through Deeds" resolution "reaffirm[ed] that . . . any aggression . . . is the gravest of all crimes against peace and security" and "That prompt united action be taken to meet aggression wherever it arises[.]"[282] The 1970 Friendly Relations Declaration again condemned the threat or use of force, declared a war of aggression to be a crime against peace, and added that "States have a duty to refrain from acts of reprisal involving the use of force." The Declaration added, however, that "Nothing in [its terms should] be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful,"[283] *i.e.*, in self-defense.[284]

Specific situations occurring in the Charter era offer little additional guidance to the meaning of self-defense. The 1950 UFP Resolution has been discussed.[285] In 1966 the Assembly belatedly called upon India and Pakistan to observe the rules of warfare, but only as the war wound down.[286] The Assembly condemned the USSR Afghanistan invasion in 1982 [287] and US action in Grenada the next year.[288]

Thus it might be said, apart from occasional forays into the field or general statements, *e.g.*, the Friendly Relations Declaration, that General Assembly practice, even during the UFP Resolution era occasioned by permanent Council member vetoes, has been spotty. The result is that the definition of self-defense remains as it was in 1945 when the Charter was negotiated in the context of the Pact of Paris and other midcentury agreements. We are thus left with arguments from history, analysis of commentators, and rhetoric from some of the latter.

**ii. Collective Self-Defense.** Article 51 of the Charter permits collective self-defense under the same terms as the right of individual self-defense. Certain aspects of collective self-defense differ from the issue of individual self-defense. However, if the foregoing analysis for the right of individual self-defense is correct, *i.e.*, that ultimate resort to the context of the Charter's drafting is necessary, then similar analysis is necessary to appraise collective self-defense.

Unlike individual States' right of self-defense, which is of ancient lineage, the notion of collective self-defense in the sense of the Charter began with the Congress of Vienna system (1815) established at the end of the Napoleonic wars and continues on a parallel path to this day.[289] Although there have been numerous collective self-defense agreements concluded since 1945, none of these were directly at issue in the Tanker War. North Atlantic Treaty countries operated together during the conflict, but the territorial limits of the Treaty [290] meant they operated under principles of "informal" self-defense, analyzed below. Similarly, two ANZUS Pact members, Australia [291] and the United States, were Tanker War participants; ANZUS did not apply, covering only Pacific area defense.[292] Warsaw Pact countries were participants, the USSR through naval deployments, aid and diplomacy and other Soviet Bloc nations through weapons sales to belligerents,[293] but there was no perceived direct threat to or attack on any Pact party except for attacks on USSR-flag merchantmen, and the Pact was not invoked.[294] Many Arab League States were involved in the war, but a combination of internal dissension within the League, at least at the beginning of the Tanker War,[295] and an apparent interpretation that this regional defense treaty [296] pointed only toward outside aggressors resulted in its not being invoked against either belligerent. The Arab League seems to have functioned during the Gulf War as a regional arrangement that attempted to maintain international peace and security pursuant to Article 52 of the Charter.[297] Although late in the Tanker War the Gulf Cooperation Council Summit approved a comprehensive security strategy that some have said amounts to a collective self-defense pact,[298] there has been no formal publication of this arrangement as a treaty. The strategy can be viewed as an example of informal collective self-defense, also permissible under the Charter.[299]

The Charter thus "contains the first real attempt to reconcile the imposition of duties to maintain international peace and security with the problem posed by the freedom which each sovereign State normally would have[,] to decide when and how such a duty may be fulfilled."[300] Given the context of the preparation of Article 51 while the Act of Chapultepec was going forward to signature,[301] McDougal and Feliciano are correct in saying that the essence of the right of collective self-defense lies in maintaining international peace and security through collaborative arrangements among States.[302]

*I. Other Regional Organizations: Article 52 of the Charter.* The structure of the Charter and practice since 1945 confirm the McDougal-Feliciano view. Article 52(1) of the Charter provides:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Thus, "the Charter basis of collective self-defense arrangements in Article 51 does not exclude the possibility that other provisions of the treaties and activities of the agencies in question came under Article 52."[303] Indeed, "[f]rom the discussions leading up to the approval of the Charter, . . . regionalism was considered primarily in connection with the maintenance of international peace and security."[304]

Although formed for other purposes in 1981, the Gulf Cooperation Council had moved from its initial stated goal of cooperation to protect internal security to a policy of cooperating in economic and defense security by the end of the war.[305] By the end of the war GCC members were cooperating among themselves for mine suppression and other measures, and with other States with navies in the Gulf.[306] The Arab League also partook of a collective defense treaty and economic cooperation system.[307]

*II. Practice During the Charter Era; "Informal" Collective Self-Defense.* Prior practice confirms the view that a right of informal self-defense, besides Article 51's confirmation of the inherent right of collective self-defense, exists in the Charter era. Although there was some objection to the concept of regional defense arrangements,[308] a number of these agreements, articulating the principle that an attack on one member is an attack on all, have been concluded and remain in force.[309] State practice has also confirmed regional arrangements, sometimes *ad hoc*, to deal with threats to the peace, aggression or other forms of breaches of the peace. There have also been bilateral or multilateral assertions of collective self-defense, often without formal prior treaty arrangement.

Lack of a definition of self-defense by the Council or the Assembly in the Korean War has been noted.[310] If it is assumed that UN operations (primarily US directed) after Soviet vetoes began in 1950 could not have been grounded in the UFP Resolution, since General Assembly resolutions have no binding effect,[311] one theory of the multilateral operations in Korea after the USSR veto is "informal" collective self-defense, *i.e.*, cooperating countries pooled forces to resist North Korea's continued aggression and the PRC incursion. The same might be said for contemporaneous US naval operations between Taiwan and the China

mainland.[312] For the United States and South Korea or Taiwan, bilateral defense treaties replaced informal arrangements in 1953 and 1954 respectively.[313]

The 1951 ANZUS Pact was memorialized Australia-New Zealand-US practice after World War II and during the Korean War, another example of informal collective self-defense.[314]

In 1962, OAS countries, under US leadership, relied on Charter Article 52, which permits regional organization resolution of disputes,[315] to enforce a naval quarantine around Cuba during the Missile Crisis. The US proclamation establishing the quarantine, besides citing the Rio Treaty, also relied on a US Congressional resolution recognizing the threat. The proclamation was specific as to cargoes to be halted, *e.g.*, missiles, bombs, bomber aircraft, warheads, and support equipment, "and any other classes of material hereafter designated by the Secretary of Defense [to] effectuate" the proclamation. It exempted other cargoes, *e.g.*, foodstuffs and petroleum, and declared neutral rights would be respected. No blockade was declared, and the proclamation limited use of force to situations where directions under the quarantine were disobeyed if reasonable efforts were made to communicate directions to an interdicted vessel, "or in case of self-defense." (The Rio Treaty authorized "partial or complete interruption of economic relations or of . . . sea communications; and use of armed force[,]" among other measures, parallelling Charter Articles 41-42).[316] While some said self-defense was the proper claim,[317] and others later asserted that the Nicaragua Case would have held the quarantine action a matter of anticipatory self-defense,[318] the OAS-US 1962 claim was based on Article 52 and not Article 51. The point is that Article 52 organizations can organize for informal collective self-defense in situations threatening regional security without benefit of an Article 51 collective self-defense treaty. The Missile Crisis thus might arguably be further precedent for informal self-defense under the Charter.

The 1964 attacks on *U.S.S. Maddox* and *Turner Joy* (the Gulf of Tonkin Incident) have been analyzed.[319] The conflict connecting these incidents, the Vietnam War, is an example of a claim of informal collective self-defense. The US position during the Vietnam War was that it and South Vietnam (RVN) were jointly resisting North Vietnamese aggression and therefore were acting in self-defense. (There were other views; *e.g.*, it was a civil war.)[320] During the conflict, patrol areas for Operation Market Time, which sought to deny seaborne supplies to RVN opponents, was extended to 30 miles off the South Vietnamese coast. Initially Market Time operations took place in a 12-mile defensive sea area. North Vietnam used small coastal fishing vessels to support military logistics in the South. Fishermen and coastal traders were allowed to pass when on legitimate business.[321] In 1972 a mine quarantine program in North Vietnamese waters sought to seal North Vietnam ports.[322] Its antecedent had been the RVN's attempted quarantine to stop sealifted supplies coming to the Viet Cong through the Gulf of Siam and the Mekong Delta.

A RVN destroyer sank a North Vietnamese trawler, believed to be carrying ammunition, in 1972 during these operations.[323]

During the war the United States used Military Sealift Command vessels, US flag charters and occasionally foreign-flag vessels to deliver war material. Several ships were hit; two were sunk by Viet Cong attacks while in South Vietnamese coastal waters. The Viet Cong seem not to have discriminated between vessels carrying war material and civilian-oriented cargoes, *e.g.*, cement.[324] US antisubmarine protection was given high value ships, *e.g.*, troop carriers.[325] While some have claimed SEATO may have applied, and its formal treaty obligations remain in effect, its supporting organization had been dismantled by 1975,[326] and US assistance to South Vietnam might be characterized as another example of informal collective self-defense.

On the face of it, the Tanker War was a bilaterial conflict. However, as analyzed above,[327] some States or groups of States acted to favor one (or in some cases both) of the belligerents throughout the war. As in the case of the Falklands/Malvinas War (1982) and unilateral US help for Britain and the multilateral EC embargo on Argentine goods,[328] this kind of participation arguably could be said to recognize an interim state of nonbelligerency in the Charter era.[329] The same sort of informal participation and influences or attempted influences came through organizations aligned along geographic lines (the Gulf Cooperation Council), common defense interests elsewhere (NATO), common economic interests (the EC and the Group of Seven), and ethnic or religious commonality (the ICO and the Arab League).[330] States also had informal arrangements among themselves. Italy's bilateral mine clearing agreements are an example.[331] The US statement that US Navy protection was available to third-State merchantmen, upon request and if US naval commitments permitted, is another.[332] The clearest example of informal self-defense arrangements was the December 1987 comprehensive security strategy adopted by the Gulf Cooperation Council.[333]

The belligerents also made arrangements that did not rise to the level of a formal Article 51 self-defense agreement or an Article 52 regional arrangement, at least on the public record. A notable example was the belligerents' financing their war through petroleum sales and their importing war goods through third countries.[334] Arms and other sales to belligerents[335] might be seen as another example of an informal arrangement. Below these governmental efforts were the effects of organizations, *e.g.*, the General Council of British Shipping, seafarers' unions, and the marine insurance industry.[336]

*III. Appraisal for the Tanker War.* No formal agreements like the multilateral or bilateral defense treaties of the Cold War era were involved in the Tanker War. However, as with prior conflicts since 1945, *e.g.*, Falklands/Malvinas, States or groups of States aided one side or the other. When States that were not belligerents

concerted together, these amounted to informal collective defense assistance arrangements, sometimes with a belligerent and sometimes among other countries not party to the conflict. There was precedent for this action before and during the Charter era.[337] It is arguable, for example, that the 1990-91 coalition assembled against the Iraqi invasion of Kuwait was governed by principles of informal self-defense, to the extent that there were no formal collective self-defense treaties among coalition countries, before the Security Council authorized force in November 1990.[338] After and to the extent the Council became seized of the matter, coalition actions were governed by Security Council decisions.[339]

Whether claims of informal collective self-defense amount to a resurgence of the pre-Charter concept of an interim legitimate stage of nonbelligerency, between belligerency and neutrality,[340] is an open question. Many States recognize only neutrality or belligerency.[341] It would seem, however, that it is possible that nonbelligerency may have crept in through the door of practice under the Charter between 1945 and 1988, before the end of the Cold War. Whether this will continue with revitalization of the Security Council since 1989 and the USSR's collapse is only a guess. If the Council continues relatively powerless, by the veto or adoption of nonbinding recommendations or calls for action, or if the UFP Resolution procedure is revived with a veto-paralyzed Council, that door remains open.

It would seem, however, that a distinction between belligerency and neutrality can be retained by referring to informal collective self-defense for some situations, *e.g.,* US and EC support of Britain during the Falklands/Malvinas War.[342] Whether informal collective self-defense can sustain actions in all situations must be left to speculation. The problem lies in a definition of the contours of the doctrine. It is fairly clear, for example, that there is a customary right for formal treaty partners to consult before action, and that consultation can include preparation for anticipatory collective self-defense. It is also fairly clear that the inherent right to collective self-defense includes a right of anticipatory self-defense, however that might be limited by principles of necessity, proportionality and admitting of no alternative in a particular situation.[343] Presumably informal collective self-defense includes a right of consultation, but does it include a right of anticipatory response? If the record of informal collective self-defense is sparse in the Charter era, claims to a right of anticipatory response appear to be even more scarce. There are few reports of it in the century and a half of prior practice;[344] there may be many, particularly in the maritime arena since 1914,[345] but the record of State practice is not clear on the point. Lack of media interest, space considerations and relative importance in digests of national practice like Whiteman, lack of commentary by scholars, or national security, may have resulted in no or only episodic reportage.

There is one critical difference between collective self-defense claims, whether anticipatory or otherwise, published in treaties and those asserted under a right of informal self-defense. Today most treaties are published, perhaps first in informal

sources, *e.g., International Legal Materials,* but nearly always later in national series, *e.g., United States Treaties and Other International Agreements,* and perhaps in the *United Nations Treaty Series,* although *International Legal Materials* is selective in publication and the latter two may be decades behind in printing. Some agreements are never published, due to national security considerations,[346] and these may often deal with defense issues. However, at least for published treaties, there is some public notice of their terms,[347] perhaps qualified or explained by practice. By definition, there is no similar method of notice by publication of informal collective self-defense arrangements, except what might be deduced from government notices or the media. It would seem, however, that to avoid claims of unprovoked aggression under Article 2(4) of the Charter, States should notify informal collective arrangements except where security considerations militate against publicity. Notices to Mariners. (NOTMARs) and Airmen (NOTAMs) were employed during the Tanker War to publicize defense, war or exclusion zones and warnings of self-defense action.[348] Even as a requirement of treaty publication is qualified today, *e.g.,* for national security considerations,[349] States in informal collective self-defense arrangements should consider publishing their terms.

**iii. Reporting Self-Defense Measures to the Security Council.** The Charter also requires that "Measures taken by Members in [the exercise of this right of] self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the . . . Council under the . . . Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[350] There is little ambiguity in this requirement, which is not part of customary international law, according to the Nicaragua Case, which added that failing to report "may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defense."[351] The question might be raised, particularly in view of the Court's position that a parallel customary law of self-defense has developed alongside Charter criteria in Article 51,[352] how reporting could be a "factor" for a customary law of self-defense if the reporting requirement is not a part of customary law. Use of "this right of self-defense" in Article 51[353] underscores requiring reporting only in Article 51-governed situations. Whether an Article 51 reporting requirement applies in cases of informal collective self-defense, also permissible under the Charter,[354] is not known and perhaps depends on whether a State claims a right to informal collective self-defense under Article 51 or under customary law.

In any event, the Article 51 reporting requirement appears to have been honored more in the breach.[355] A commentator has argued, however, that failure to report at least indicates that measures taken are not defensive in nature.[356]

**iv. Anticipatory Self-Defense.** The Caroline Case is the classic statement of the right of anticipatory self-defense, *i.e.*, a target State may resort to self-defense before an actual armed attack where the necessity for that defense is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." The action then taken must not be unreasonable or excessive, *i.e.*, it must be proportional to the threat; it must also be necessary. The Tokyo and Nuremberg tribunals recognized a right of anticipatory self-defense, holding the Netherlands could rely on it to justify attack on Japan before a formal war declaration but that Germany could not rely on it to justify attack on Norway.[357]

Does the right of anticipatory self-defense carry forward into the Charter era, or must a State "take the first hit" before responding in self-defense, *i.e.*, is only "reactive" self-defense permitted? Commentators [358] and countries [359] divide sharply on the issue. Commentators [360] and countries [361] may also divide on when self-defense, anticipatory or reactive, is appropriate. The Charter is silent on the point, except to say that UN Members retain the "inherent" right of individual and collective self-defense.[362] The Nicaragua Case did not rule on the issue.[363] Some commentators,[364] and undoubtedly some States, have seemed to change views. Others have taken no clear position.[365]

If the methodology of treaty interpretation is employed, practice under Article 51 has been ambiguous. Bowett notes the UN Atomic Energy Commission's initial report, which said a right of self-defense would arise where a party to a nuclear arms treaty committed a "grave" violation of the treaty.[366] He also cites the Security Council discussion over the Kashmir invasion, justified by Pakistan on anticipatory defense grounds, where only India argued against the view.[367] In 1952 the UN Sixth Committee heard four States argue that a State threatened with impending attack might be justified to respond in self-defense.[368]

The Definition of Aggression resolution includes specific examples not involving armed attack on a State but which are nevertheless considered aggression under the Charter: blockade of ports or coasts which, if complied with, results in no use of force, merely a threat of use of force; "use" of armed forces of a State, within a host State's territory by the host's agreement, but contravening conditions in the agreement initially entitling the visiting armed forces to be there, which might result when such forces are "used" in nonforce situations.[369] The enumeration is not exclusive [370] and could include other circumstances involving threat of force that could trigger a potential for self-defense response. If acts of aggression can justify a proportional self-defense response, it is implicit in the Assembly's approval of these as *per se* acts of aggression by which an anticipatory self-defense response could be triggered.

The case of blockade is illustrative. When blockade is declared against a target State, no armed attack will occur if there are no ships to intercept. There is no way to determine the blockade's effectiveness until interceptions occur or ships

successfully evade blockade. If a target State acts to end the blockade before its goal—intercepting and possibly destroying target State ships—occurs, a target State would be exercising anticipatory self-defense. Thus if armed aggression—the French version of "armed attack" in Article 51[371]—includes blockade as customary law,[372] then target State action to end a blockade may include anticipatory self-defense.

The division of commentators and countries on admissibility of anticipatory self-defense as an option has been recited.[373] Dinstein offers an intermediate position of "interceptive" self-defense, permitted if a State "has committed itself to an armed attack in an ostensibly irrevocable way. Whereas a preventive strike *[i.e.,* anticipatory self-defense] which is merely 'foreseeable' (or even just 'conceivable') an interceptive strike counters an armed attack which is 'imminent' and practically 'unavoidable.'[374] He cites a scenario based on the Japanese task force ordered to attack Pearl Harbor in 1941:

> [h]ad [it] been destroyed on its way to Pearl Harbor, this would have constituted not an act of preventive war but a miraculously early use of counter-force.... [P]ut... another way, the self-defence exercised by the United States (in response to an incipient armed attack) would have been not anticipatory but interceptive in nature.[375]

Dinstein thus justifies Israel's first opening fire in the 1967 Arab-Israeli conflict.[376] The hypothetical interception to end a naval war in 1941, before the Charter era, is undoubtedly true today, if the Japanese task force was past the point of no return *(i.e.,* it could not be recalled) and it was reasonably clear from facts available to the United States at the time.[377] The same can be said of Israel's 1967 attack on Egypt.

Dinstein's analysis does not mention Israel's 1981 raid on the Iraqi nuclear reactor, condemned by the Security Council and others, arguing that the raid came during a continuing state of war between Iraq and Israel,[378] nor does he mention two tactical aspects of the Arab-Israeli conflicts, the Israeli attack on the *U.S.S. Liberty,* and destruction of the Israeli destroyer *Eilat* by missiles.[379] *Liberty* was a US warship operating in international waters of the Mediterranean Sea, gathering intelligence for the United States, when it was attacked by Israeli aircraft and PT boats. The attack clearly violated international law and, as an act of aggression, could have subjected Israel to US proportional self-defense responses.

*Eilat's* loss, also on the high seas, due to an Egyptian gunboat's Styx missiles launched in Port Said harbor occurring during a resumption of the conflict, illustrates the change in naval warfare between 1941 and 1967.[380] (This attack could not raise the self-defense issue, since it occurred during hostilities, rather than at the beginning of hostilities.) Rather than a battleship and carrier formation steaming at 20-30 knots to a position off Hawaii where it could launch raids flown by

aircraft with top speeds of 400 miles an hour, thus giving days or at least hours for a target State to anticipate and deliver an interceptive strike, missile attacks from the same range come in minutes. Moreover, a missile attack is nearly always fatal. One can compare *Eilat's* loss in 1967, the sinking of *Venus Challenger* and a Pakistani destroyer during the 1971 India-Pakistan war,[381] losses of *H.M.S. Sheffield* and other ships during the Falklands/Malvinas war,[382] and *U.S.S. Stark's* near loss during the Tanker War,[383] with survival of many ships during the World War II Kamikazi attacks, where hundreds of manned Japanese suicide planes crashed US warships. Aside from aircraft carriers and battleships, World War II men-of-war were smaller and equally fragile, yet they took many hits before sinking, and most survived.[384] New occasions teach new duties and responsibilities,[385] and if international law is to remain credible, it must parallel technical developments.[386] (That, of course, is the function of custom as opposed to a potentially rigidified treaty regime.)[387]

Dinstein's interceptive defense theory seems but another phrase for anticipatory self-defense in the Pearl Harbor attack hypothetical. He is less than clear about the situation of an anticipated attack on an independently-steaming warship before armed conflict begins. However, as events in the Tanker War and previous incidents demonstrate, some States have asserted a right of anticipatory self-defense [388] or interceptive defense as Dinstein would formulate it.

*I. Libya-US Confrontations.* Libya-US confrontations from 1973 through 1986 illustrate the two views of the scope of self-defense.[389]

In 1973, responding to US assistance to Israel during the Yom Kippur War, Libya declared the Gulf of Sidra below 32 degrees 30 minutes North latitude (the "Line of Death") as Libyan territorial waters.

The United States challenged the claim by warships' use of the Gulf of Sidra, establishing a formal Freedom of Navigation (FON) program in 1979. In 1981, during a FON exercise, two Libyan air force jets launched missiles against Navy aircraft, who dodged the missiles and downed the Libyan aircraft with missiles. Under anyone's view of the right of self-defense, the Navy aircraft had a right to fire in response to the prior Libyan missile attack; it was an example of reactive self-defense.

Tensions again mounted in 1985-86. Libya escalated threats against US warships and praised the terrorists who had hijacked the Italian liner *Achille Lauro.* New US FON exercises were ordered off Libya, including one below the Line. US NOTMARs and NOTAMs publicized the operations. After Libya launched land-based missiles against Navy aircraft flying over international waters below the Line, and Libyan aircraft penetrated the announced exercise area in international waters, the FON force commander declared that Libyan military forces leaving Libyan territorial waters or airspace and constituting a threat to US units

would be considered hostile. Thereafter, when Libyan missile patrol boats headed toward US forces, and Libyan target acquisition radars activated with a likely object of firing on US aircraft, the Libyan boats and radars were attacked and damaged or destroyed. In these cases the US claim was anticipatory self-defense, *i.e.*, taking action to protect ships or aircraft after hostile intent (*e.g.*, closing US ships in an attack profile or illuminating US aircraft with target acquisition radar) was manifested. There was, of course, no obligation for US forces to attack or desist from attacking the Libyan vessels or aircraft, but there was the option to do so, subject to limitations of self-defense, *i.e.*, necessity and proportionality.[390] Indeed, US forces did not fire on Libyan missile patrol boats when they sought refuge alongside a neutral merchantman or were engaged in legitimate search and rescue operations, which illustrate these principles.

In April 1986 US Navy and Air Force planes bombed terrorist operations centers in Libya after two US citizens were killed in a Berlin disco terrorist bombing. The US hard evidence was that Libya was responsible for the disco bombing and was planning further terrorist attacks on US military and diplomatic facilities in Europe. The United States claimed self-defense conditioned by necessity and proportionality as the basis for the operation. French, UK and US vetoes blocked a Security Council resolution condemning the raid.[391]

*II. The Tanker War.* The Tanker War produced numerous examples of reactive self-defense, *i.e.*, self-defense after an initial attack, as well as anticipatory self-defense, both individual and informal collective self-defense.[392]

Iraq responded to Iran's shelling of Iraqi towns in 1980 with a three-front invasion of Iran, claiming self-defense.[393] If it is true that the shelling was not responsive to Iraqi invasions, Iraq's claim of self-defense was legitimate. On the other hand, if Iranian shelling responded to prior Iraqi acts of aggression, the shelling was a proper self-defense response by Iran, and the Iraqi invasion could not be claimed as self-defense. In the latter situation, the invasion was a clear violation of Charter Article 2(4). Use or threat of use of force in response to legitimate self-defense action cannot be claimed as self-defense. Since UN Security Council Resolution 479 was a "call" for cessation of hostilities,[394] and not a "decision,"[395] there was a strong political, but not a legal, obligation on the belligerents to comply.

Both belligerents declared war zones.[396] After the Iraqi invasion, Iran declared its coasts a war zone, closed the Shatt al Arab, refused access to Iraqi ports, and warned of retaliation if other countries gave Iraq facilities. Iran said the zone declaration was for defense and for safety of shipping. Iraq's war zone was north of 29-30N in the Gulf and was reportedly reprisal, or retaliation, for the Iranian war zone declaration.

Iran's war zone declaration was legitimate for Iran's coasts, which were part of its territory.[397] Although the Shatt al-Arab and Iraqi ports were part of the area of

conflict, unless Iran had occupied the area or they were vital to its defense, Iran could not lawfully announce their closure to States not party to the conflict. Still less could Iran issue a generalized warning of retaliation against these States if they gave Iraq facilities, unless States were parties to a collective defense agreement or arrangement with Iraq and employed this treaty arrangement to assist Iraq as the aggressor. Since Iraq had withdrawn from the Baghdad Pact,[398] and was not a GCC member,[399] Iran could not claim that these regional arrangements were assisting Iraq. Iraq was a party, with Bahrain, Kuwait, Qatar, Saudi Arabia and other Arab States, to the Arab Joint Defense Treaty,[400] and it may have been to this Treaty arrangement that Iran directed its warning. It would have been entirely legitimate, if Iran committed aggression by shelling Iraqi communities, for the Treaty States to have collaborated with Iraq in collective self-defense.[401] Although Iran could warn of retaliation, this did not deprive the Treaty States of their right to assist Iraq with collective self-defense responses. The Treaty States might have paid consequences, *e.g.*, by bombing raids on their territory if they did, but they could not be deprived of their treaty obligation by the Iranian warning. On the other hand, if Iraq was the aggressor, *e.g.*, by invading Iran, the Treaty States could not aid Iraq pursuant to the Treaty.[402] Under no circumstances could Iran claim a right of retaliation against States not party to any defense treaty or other similar arrangement with Iraq, *e.g.*, States whose shipping sailed the Gulf, or whose shipping interests used the Gulf, *e.g.*, France, Liberia, Panama, USSR, the United Kingdom, and the United States.

Whether the Iraq war zone declaration was a legitimate reprisal, or was legal in terms of area, duration, *etc.*, is addressed later in this chapter [403] and in Part F of Chapter V. If Iran was the aggressor when it shelled Iraqi communities, then the Iraq war zone, later named the Gulf Maritime Exclusion Zone (GMEZ), was a legitimate self-defense measure, subject to proportionality, *etc.*, considerations.[404] The same is true for the zone's extension, again subject to the same limitations.[405] On the other hand, if Iraq was the aggressor, then the war zones, and the GMEZ, were not legal self-defense measures.

The GCC's establishment in 1981, with a goal of coordinating, integrating and interconnecting, *inter alia* self-defense, among its six western Gulf littoral members,[406] was legitimate under Charter Articles 51-52, even though its self-defense terms were never spelled out like most collective defense treaties. This too is an example of a legitimate "informal" multilateral collective self-defense arrangement.[407] Similarly, it was legitimate for Saudi Arabia to request US Air Force AWACS aircraft surveillance, and for the United States to agree to the operation, in 1981. [408] This is an example of a legitimate informal bilateral self-defense arrangement.[409] In neither case, however, could these informal arrangements be used to aid an aggressor.

The shuttle convoys carrying oil as part of Iran's warfighting, war-sustaining effort down Iran's Gulf coast and through the Iraqi zone were given Iranian naval protection.[410] These vessels were entitled to self-defense protection by Iran. If Iran was correct in asserting that it was a target of Iraqi aggression, these fleets of vessels, if attacked by Iraq, were also targets of aggression.[411] Even if they sailed alone, perhaps with naval escort or perhaps independently, these vessels would be considered targets of Iraqi aggression,[412] if Iraq is deemed to have been the aggressor at the beginning of the war. If, on the other hand, Iran was the aggressor, the attacks were subject to the law of naval warfare.[413]

The same analysis applies for Iranian visits, searches and diversions [414] or attacks on vessels bound for Iraq with military equipment, *e.g.*, the Danish flag vessel *Elsa Cat*,[415] or from Iraq with warfighting or war sustaining cargo (*i.e.*, oil) aboard, if Iraq was the aggressor. Similarly, if Iraq was the aggressor, and if Kuwait was assisting Iraq, and if, *e.g.*, a Kuwaiti survey vessel [416] was assisting the Iraqi war effort, it was properly subject to search, seizure or detention as part of Iranian self-defense. These ships were also subject to search, seizure or detention as part of the law of naval warfare if Iran was the aggressor.[417]

Security Council Resolutions 514, 522 and 540 of 1982 and 1983, calling for a ceasefire, refraining from any action that might endanger peace and security, cessation of military operations against civilian targets, observing humanitarian law, and affirming the right of freedom of navigation, were not Council decisions pursuant to Articles 25 and 48 of the Charter. They did not speak to the self-defense issue. The effect of incorporation of humanitarian law, *etc.*, by reference in these resolutions elevated them to Charter law. At least insofar as conflicts between treaties and the resolutions and practice under them, and perhaps insofar as there was a difference between custom paralleling the treaties, the Charter practice held primacy.[418] The same is true of other resolutions; they may have condemned action, advocated observance of the LOAC, freedom of navigation, or protection of the environment, but in no case did they remove a State's right of self-defense, which under the Charter trumped any treaty law and perhaps also customary norms.[419]

In January 1984 the United States announced new defensive measures for its warships in NOTAMs and NOTMARs. These procedures, a "defensive bubble" or "*cordon sanitaire*" around the ship(s) for a stated distance on the surface of the sea and above the vessel(s) in the air, were justified on self-defense grounds when Iran protested.[420] The UK Armilla Patrol, deployed in the lower Gulf since the beginning of the war, never published use of a defensive envelope.[421] In terms of self-defense, the US *cordon sanitaire* was legitimate; although other navies' warships did not have benefit of a defensive bubble declared by their governments, they could take self-defense measures if threatened or attacked. If a US warship proceeded independently or in formation without an announced *cordon sanitaire*, which was the situation early in the war, that ship and the formation could also take self-defense

measures.[422] The US *cordon sanitaire's* validity in terms of area, duration, *etc.*, is considered separately.[423]

The Armilla Patrol accompanied UK flag merchantmen in the lower Gulf from the beginning of the war; these merchantmen were on their own as they proceeded northward.[424] In October 1985 France began defending French-flag merchantmen. A French warship positioned itself between the *Ville d'Angers* and an Iranian warship, warning the Iranian that if it attempted to intercept *Ville d'Angers,* the warship would use force to prevent the interception. (French ROE declared French warships would fire on forces refusing to break off attacks on neutral merchantmen under attack; the result was a drop in attacks near French men-of-war.)[425] In January 1986 the United Kingdom stated that a right of visit and search of neutral merchantmen, believed carrying cargo to or from a belligerent port, was an aspect of self-defense under Article 51 of the Charter.[426] In March 1986 the United States recognized a basis in international law for belligerent searches of neutral merchantmen.[427] Nevertheless, in April 1986 a US destroyer warned an Iranian warship off what may have been a planned boarding of *President McKinley,* a US flag merchantman.[428] When the Soviet flag *Pyotr Emtsov,* bound for Kuwait with arms ultimately destined for Iraq, was fired upon, stopped and searched by an Iranian warship in September 1986, the USSR protested.[429]

The apparent divergence of views among States depends on the law deemed applicable to the interception, or the interpretation of it. If Article 51 and Charter law in general applied,[430] and if Iraq was the aggressor, Iran could intercept, search and under some circumstances attack third-flag State unarmed merchant ships bound for Iraq, and believed to have warfighting or war-sustaining goods aboard as a self-defense measure. Treaty law to the contrary would be trumped by the Charter.[431] The only general treaty [432] applying to visit, search and diversion or destruction of merchantmen is the London Protocol, which provides in Article 22 that

> . . . The following are accepted as established rules of international law:
>
> (1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.
> (2) In particular, except in the case of persistent refusal to stop on being duly summoned, or active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.[433]

The Tanker War belligerents were party to the treaty, and among naval powers operating in the Gulf, Belgium, France, Italy, Saudi Arabia, USSR, the United

Kingdom and the United States were also parties.[434] No other GCC States were party.[435] Although the London Protocol bound many naval powers in the Tanker War, it could not supersede the Charter [436] and its Article 51 self-defense norms, particularly if Article 51 states a *jus cogens* norm.[437] However, the Protocol, or principles similar to it, could inform the content of self-defense under Article 51. [438] Whether the Protocol applies as customary law or has been superseded by practice since 1936, at least insofar as an unqualified duty to place those aboard a merchantman in safety is concerned, has been debated by commentators and governments,[439] and since the Charter does not address the issue of custom conflicting with a Charter provision, the question arises as to whether practice is sufficient to offset specific London Protocol rules as custom. The issue also arises if there is a parallel, and different, customary self-defense standard to be applied, the situation in the Nicaragua Case.[440] The *San Remo Manual* would restate the rule:

> Merchant vessels flying the flag of neutral States may not be attacked unless they:
> ... (f) otherwise make an effective contribution to the enemy's military action, *e.g.*, by carrying military materials and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

The *Manual* permits attacks on enemy-flag merchantmen as a legitimate military objective if, *inter alia*, they "otherwise mak[e] an effective contribution to military action, e.g., [by] carrying military materials."[441] Whether flying an enemy flag or flying a neutral flag but characterized as enemy because of its activity, *e.g.*, carrying war materials to aid the enemy, both classes of merchantmen are subject to rules of discrimination, military objective and proportionality.[442] Certain merchant ships, *e.g.*, coastal fishermen, are exempt from attack unless they lose exemption by aiding the enemy.[443] This standard, whether observed in the context of informing the content of self-defense or as a law of naval warfare norm, is appropriate. It balances realities of modern technologies available to merchant ships, which might decide to advise the State whose war cargo it carries of an attacker's presence, entitling an attacking platform to treat a ship as directly aiding the enemy and subjecting it to destruction on that account,[444] and Protocol humanitarian considerations.

If Charter law did not apply to a State's actions, the same rules should have been applied as the law of armed conflict.[445] This would be the case for Iraq, if Iraq was the aggressor; even though perhaps guilty of aggression, Iraq was bound to apply the LOAC in prosecuting its actions. If the reverse is true, *i.e.*, Iran was the aggressor and Iraq properly asserted self-defense, the result is the same. Iraq would be governed by the law of self-defense as applicable to its actions against merchant shipping, and Iran was required to apply the LOAC even though it might be guilty of aggression. If neither party was entitled to claim self-defense for these actions,

*i.e.*, because Charter law including the law of self-defense did not apply, LOAC principles applied to both belligerents.[446] Depending on the view of the Tanker War by States not party to the conflict, *i.e.*, whether the Charter applied or not,[447] these States were also required to apply the LOAC as incorporated into Charter law, if they perceived that the Charter applied, or the LOAC if their view was that the law of armed conflict, and not Charter law, applied.

These principles apply to States' protection of their flag shipping on the high seas that was destined for other than belligerents' ports. It was therefore legitimate for the United States to organize convoys of reflagged tankers or to escort single merchantmen, for France and the United Kingdom to accompany UK flag merchantmen, and for France to interpose its warships against belligerents' threatened hostile action against these merchant ships if they were not carrying goods to sustain a belligerent's war effort.[448] If Iran had attacked escorted or convoyed merchantmen as it threatened,[449] convoying or escorting men-of-war could have responded in self-defense. It was legitimate self-defense for these States to operate, individually or perhaps informally as a collective group,[450] to protect against or remove the mine menace from the high seas of the Gulf.[451] It was legitimate for the United States to remove the *Iran Ajr* as a minelaying menace for this reason;[452] mines threatened merchantmen and warships alike, as damage to *U.S.S. Samuel B. Roberts* attests.[453] The United States attacked Iranian platforms used as a gunboat base in response to the Iranian missile attack on the US-flagged *Sea Isle City* with US nationals in the crew,[454] and Iranian gunboats that had attacked a Panama-flag, Japanese-owned tanker with US nationals among the crew.[455] This followed from the policy behind the1986 Libya raid, mounted to destroy State-supported terrorist bases in Libya after two US nationals were killed in a Berlin disco.[456] If the US view is correct, that self-defense measures against those who attack American nationals is lawful, these were legitimate excercises of self-defense. The *Sea Isle City* response, like the response to the Berlin disco bombing, was anticipatory self-defense, in that more threats from these sources could reasonably be expected in the future. The reactive response to the Panama-flag vessel attack and the *Sea Isle City* response involved US nationals aboard, and *Sea Isle City* was US flagged.[457] The United Kingdom committed to a similar response if a vessel, although foreign flagged, had more than half UK beneficial ownership.[458] Foreign-flag vessels could request US protection, which would be given if US forces were in the area and operational commitments allowed it.[459] This too was a legitimate exercise of self-defense, *i.e.*, informal collective self-defense. The request and acceptance was enough to complete a collective self-defense arrangement.[460] However, the practice of some masters in tailing convoys or simulating a convoy [461] would not have entitled those vessels to self-defense protection by warships of other nations unless it had been agreed upon.[462]

Warship protection was also subject to the law of self-defense. The collective and individual States' responses to mines has been noted.[463] It was proper for US and other countries' warnings to declare a defensive bubble or *cordon sanitaire* around their warships to respond to attacks on them. It was also proper for Gulf naval forces to cooperate, perhaps informally as the UK Armilla Patrol did, with other navies for mutual protection.[464] It was proper for the United States to respond to attacks on its seaborne helicopters,[465] to the platform-based attack on *Sea Isle City* as a possible threat to its combatants in the Gulf,[466] and to the mining attack on *Samuel B. Roberts*.[467] Although a US helicopter did not return fire when a Greek flag tanker shot at it,[468] returned fire might have been appropriate if that would have been necessary and proportionate under the circumstances, which are less than clear from the record.

There were several examples of mistaken fire in the Gulf War. The first was the *Stark* attack.[469] US forces fired on several small boats or dhows after the defensive bubbles were announced.[470] The reason for these latter errors can be attributed to the real and continuing threat of Iranian small boat attacks on merchantmen and warships.[471] The *U.S.S. Vincennes* mistakenly shot down Iran Air Flight 655.[472] In the *Stark* and Airbus cases claims were paid and settled without admitting liability.[473] The United States expressed regret over the other losses and probably compensated for injuries, loss of life and damage.[474] Whether the attacking Iraqi aircraft observed proper qualifying principles of discrimination and proportionality is unknown; therefore, whether this was a proper exercise of self-defense is sealed in Baghdad's archives. Whether US forces observed discrimination or proportionality principles in firing on the small boats is likewise not clear from the record; certainly if the commanders reasonably believed that these were Iranian Revolutionary Guard speedboats, they were correct in opening fire to protect their ships. The same is true for the Airbus tragedy.[475] However, if these were reasonably perceived threats, the attacking platforms could fire in self-defense. On the other hand, if the targets were reasonably perceived to be carrying warfighting or war-sustaining goods, they were legitimate targets under the law of naval warfare.[476]

The Tanker War thus strengthens the case that a right of anticipatory self-defense exists in the Charter era as before. To be sure, States are not unanimous in this position, but at the least under the principle of sovereignty[477] States adhering to the use of anticipatory self-defense may continue to advocate it until there is an authoritative decision to the contrary. This is particularly true if, as analyzed above, Iran had a right of visit and search as a means of self-defense.[478] If Iran had the right to stop and search a ship under a self-defense theory to check for warfighting/war-sustaining goods that might not be used for some time against Iran, this could only be under a theory of anticipatory self-defense, as distinguished from reactive self-defense. The same can be said for Iraqi attacks on ships

carrying warfighting/war-sustaining goods for Iran. These interceptions were subject to self-defense limitations, *e.g.,* necessity and proportionality.[479] And if such be the case, then those States protecting, escorting, accompanying or convoying these ships also had a right of self-defense, including anticipatory self-defense, if Iran or Iraq chose to attack instead of visiting and searching merchantmen not carrying warfighting/war-sustaining goods to a belligerent.[480] These States' warships also had a right of self-defense, including anticipatory self-defense, of their units.[481]

The Tanker War strengthens the precedent for informal collective self-defense among States opposed to the belligerents' sink-on-sight policies. Gulf naval forces developed these *ad hoc* coalitions to clear mines,[482] to protect each other,[483] and to protect merchantmen flagged by States other than their own.[484]

The foregoing has proceeded on a theory that the Charter governed these interactions. As will be seen in Chapter V, if certain aspects of the Tanker War were not governed by the law of the Charter, *e.g.,* Iranian visit and search procedures, those procedures were strengthened through practice.

**v. Necessity.** As noted above,[485] a criterion for invoking self-defense, whether in the anticipatory defense mode or in the reactive mode after armed attack, is whether a response with force is necessary, *i.e.,* admitting of no other alternative. Necessity is an accepted principle of international law conditioning the right of self-defense.[486] It applies to war at sea.[487] Alternatives to self-defense run the gamut from nonforce reprisals,[488] retorsions,[489] diplomatic protests [490] or other diplomatic initiatives,[491] use of an adjudicative strategy,[492] or perhaps doing nothing at the time, to await a more propitious moment for asserting a claim, perhaps along with others, in a general adjudicative, diplomatic or other resolution.[493] The difficulty with these choices is that an inappropriate signal may be sent to the initial actor or other participants in the world community. The strategy of force, or alternatives to it, may be used alone, in combination, and in varying degrees.[494] Today the general principle is that self-defense through force is justified only if a goal of compelling compliance with international norms violated in the initial attack cannot reasonably be achieved by other means, *i.e.,* "[F]orce should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile."[495] As the *San Remo Manual* expresses it,

> The effect of these principles [of necessity and proportionality] is that the State which is the victim of an armed attack is entitled to resort to force against the attacker but only to the extent necessary to defend itself and to achieve such defensive goals as repelling the attack, recovering territory and removing threats to its future security.[496]

Commentators differ on whether Charter self-defense norms apply after war begins.[497] However, since LOAC and Charter law necessity principles are virtually the same,[498] and LOAC principles may inform Charter standards if the principles are in a treaty[499] or if Article 51 states *jus cogens* norms,[500] the analysis assumes that standards are the same, or should be, in any case.

Brownlie and Dinstein advance a hypothetical case of a target State's submarine depth-charged by another State's destroyer on the high seas, stating that necessity permits immediate counterattack by the submarine. The same would be true for a destroyer against whom a submarine fires a torpedo, and for neutral merchantmen attacked while under individual or collective defensive warship protection, *e.g.*, while convoyed or steaming independently and being accompanied or escorted,[501] the Tanker War situations.[502] On the other hand, if a destroyer drops a hand grenade—if reasonably perceived by a submarine as an unfriendly irritant and not an attack—or if a frigate tickles a submarine hull with sonar as an unfriendly but nonthreatening act, no right of self-defense by a submarine would arise.[503] By the opposite token, if a frigate indicates hostile intent to a submarine, *e.g.*, by using active, attack-mode sonar and maneuvers demonstrating reasonable probability of attack, or if a submarine behaves similarly, *e.g.*, by setting up a firing solution flooding torpedo tubes and opening torpedo tube doors, the target could take immediate self-defense action as a matter of necessity.

These hypothetical cases illustrate necessity in a case of anticipatory self-defense and are similar to Dinstein's hypothetical, justifying interceptive self-defense to destroy the Japanese task force headed toward Pearl Harbor.[504] As with Israel's 1981 raid on the Iraqi nuclear reactor,[505] a critical anticipatory self-defense issue is the qualification of necessity. The submarine-destroyer hypotheticals, where no weapon has been fired when self-defense action is taken, are relatively easy cases, and fall into the same category as situations involving missiles, including the over-the-horizon variety. If anticipatory self-defense (or interceptive self-defense as Dinstein has it) is a principle of international law, then target ship(s) can respond if necessary for self-preservation.

The Japanese task force, as Dinstein recites it hypothetically, may or may not have been subject to destruction in self-defense. Other alternatives, *e.g.*, interposing a superior US fleet between it and Hawaii at a point beyond flying range of its targets on the high seas, might be considered a reasonable alternative, at least in the 1941 context. If the task force, known to be bound for an attack on Hawaii, would have proceeded onward after warning, the US fleet would have been justifying in destroying it in anticipatory self-defense. If the Japanese task force intentions were not known or there was no reason to believe that attack on Hawaii was planned, there would be no necessity for anticipatory self-defense. When its intentions became known, *e.g.*, through positive intelligence, and there was no reasonable

alternative to forestall attack, the US fleet would have been justified in acting in anticipatory self-defense.

The fleet hypothetical also articulates the problem of national, as opposed to unit, self-defense. [506] Although beyond the scope of the Tanker War analysis, the problem of national survival (as distinguished from survival of a destroyer, for example) may call forth different considerations of necessity.[507] Nations' survival, because of their need for Gulf oil, was a policy behind the Carter Doctrine.[508] Destruction of single tankers could not be pegged on national survival, but necessity could be predicated on a need to save human life endangered during illegal attacks.[509] Accumulating these "pinpricks" to justify a massive attack on a belligerent might have provoked claims of disproportionality.[510]

What distinguishes one situation from another in the context of the necessity component is considering all relevant factors known to the target at the time,[511] *e.g.*, participants, their perceived goals, methods of attack and response, conditions at the time, and probable effects.[512] "The most important condition . . . is the degree of necessity as that necessity is perceived and evaluated by the target-claimant and incorporated in the pattern of its expectations—which, in the particular instance, impels the claimant to use intense responding coercion," *i.e.*, military force. The necessity standard—"great and immediate," "direct and immediate," or "compelling and instant"—has been carried over from customary law into the Charter era.[513]

The Tanker War illustrates several examples of necessity in the self-defense context.

US announcements of a defensive bubble or *cordon sanitaire* [514] were cases of putative necessity. The warning area was advance announcement that unidentified vessels or aircraft not responding to warnings and threatening US warships were subject to being destroyed out of necessity for a ship's self-protection.

Applying the principle of self-defense to Iranian visits and searches of merchantmen suspected of carrying warfighting or war-sustaining cargoes for Iraq is another example of necessity. It was necessary for Iran to visit and search on the high seas if the offending goods were to be seized; once the cargo was ashore, it would be difficult to stop its delivery to Iraq. Attempts to bomb truck convoys in Iraq might have resulted in collateral destruction and more deaths and injuries than in a properly executed visit and search. Iraq, which had no effective navy, resorted to air attacks on shipping moving Iranian warfighting or war-sustaining cargoes. The choice was to permit the cargoes to arrive or to attack on the high seas. A case can be made that the Iraqi attacks were necessary. The same can be said for Iranian attacks on Iraq-bound cargoes. Whether the belligerents exercised proper target discrimination or proportionality is another issue.[515] Whether viewed from a self-defense or LOAC perspective, the standards were the same as under the LOAC for visit and search or attacks.

Convoying and other protective measures for innocent merchantmen were also necessary, in view of repeated belligerent attacks on these ships, regardless of cargo or flag.

Another example of necessity was the US capture and destruction of *Iran Ajr.*[516] Given repeated illegal mining in Gulf shipping lanes, it is clear that Iran would have continued to lay mines. A sure way to end the problem was to end a source of mines, *Iran Ajr.* The same considerations justified States' mine clearance operations, necessary to remove the mine menace, regardless of origin.[517]

Operation Praying Mantis, the destruction of Iranian frigates employed in attacks on neutral merchantmen and of offshore oil platforms serving as a base for speedboats preying on merchant shipping and warships, was also a case of necessity. If the frigates were allowed to continue their deprivations, merchant shipping would continue to suffer attacks, and if the oil platforms were not destroyed, they would have continued as a haven for the boats.[518] Likewise, firing on attacking speedboats engaged in shooting up merchantmen was necessary. If there had been no such response, it is ludicrious to think that other action by naval powers (*e.g.*, verbal radio warnings) would have stopped an ongoing attack. Diplomatic protests, often long after the fact, would have availed nothing to resurrect dead crewmen, restore a burnt-out hull, or raise a sunken ship.

Given evidence of a strong possibility of an Iranian suicide plane or conventional attack on US warships engaged in self-defense at the time, *Vincennes'* destruction of Flight 655 [519] was necessary from a self-defense perspective, if tragically mistaken in result.

The same might be said for US responses to Libyan attempts to forcibly intercept US ships, or to shoot down US aircraft.[520] It takes little logic to justify force responses if missile have been deployed, or hostile intent has been clearly demonstrated, under the circumstance of Libya's challenges to freedom of navigation.

**vi. Proportionality.** In both anticipatory self-defense and self-defense after armed attack (reactive self-defense) response must be proportional.

*(I) Introduction.* The limiting principle of proportionality, like necessity, in a self-defense response is well established in custom.[521] It applies to naval warfare.[522] The proportionality principle applies whether self-defense responds to armed attack or other armed aggression, or whether self-defense measures are anticipatory to imminent armed attack or other armed aggression. However, "responsibility... for a war of aggression may be incurred by the target State, should it resort to comprehensive force in over-reaction to trivial incidents."[523] This is a decisionmaker dilemma when confronted with an event that reasonable evaluators would say is an act of aggression. The problem is further compounded by a view that a single so-called trivial act may be rolled into a collection of other pin-pricks, with the result that a self-defense response against the sum of them all

may be proper.[524] Responses with force that seem disproportionate to a present pin-prick carry a risk that the target of the response might argue that the response is disproportionate, is in effect an armed reprisal, and is therefore an armed attack by the responding State.[525] "Genuine on-the-spot reaction [would have closed the] incident"[526] and may be a preferable course in many, if not most, situations. "The effect... is that a State which is the victim of an armed attack is entitled to resort to force against the attacker but only to the extent necessary to defend itself and to achieve such defensive goals as repelling the attack, recovering territory, and removing threats to its future security."[527]

The analysis for necessity, *i.e.*, whether Charter self-defense principles and limitations on them govern throughout a war, or whether the LOAC applies once a war has begun so that different standards are then employed, also applies to proportionality issues. If proportionality principles are in treaties, the Charter's clause paramount provision trumps them. If self-defense norms are *jus cogens*, they trump custom or treaty based proprotionality norms. Whether a customary proportionality norm can supersede a Charter norm is not clear. Customary and treaty based proportionality norms can, and should, inform any binding Charter or *jus cogens* norms.[528] This analysis takes the position that proportionality norms limiting a right of self-defense and those developed under the LOAC should be the same.

*(II) The Elements or Indicia of Proportionality.* The foregoing comments on a self-defense measure's relative position on a time-line between attack (or imminence of attack, for anticipatory self-defense) and the defensive measure(s) taken is but one index of whether the action is proportional under the circumstances.

Another major factor is the methodology and intensity of the coercion.[529] Besides the now threadbare (and refuted) argument that a massive conventional attack cannot be met by a non-conventional (*e.g.*, nuclear) response, *i.e.*, there must be response in kind,[530] there are finer gradations of the problem. US destruction of *Iran Ajr* in response to Iranian minelaying in shipping lanes[531]—in effect, going to the source of the illegality and eliminating it—is one example. Another example is destruction of the oil platforms from which Iranian speedboats had operated.[532] There need not be identical or even similar response to satisfy the proportionality requirement.

Moreover, such proportional response, as Ago and others have pointed out, need not necessarily be proportional in response to force used in the initial aggression or attack.

> The requirement of the proportionality of the action taken in self-defence ... concerns the relationship between that action and its purpose, namely—and this can never be repeated too often—that of halting and repelling the attack or even, in so far as preventive self-defence is recognized, of preventing it from occurring. It would be mistaken, however, to think that there must be proportionality between the conduct

> constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered.[533]

Put another way, force used in self-defense, including anticipatory self-defense, must be "strictly confined to the object of stopping or preventing the infringement [of the target State's rights] and reasonably proportionate to what is required for achieving this objective."[534] Or, as Dinstein comments in a context of full-scale war, once a war has started, "it can be fought to the finish.[535]... An aggressor State may lose its appetite for continuing... hostilities, but the defending State need not be accommodating."[536] Individual or collective self-defense may carry responses to the source of the aggression, beyond driving the aggressor back to the line (whether geographic or theoretical) until there is total victory [537] if necessary to achieve proportional response in the sense of achieving the objective of ending the source of aggression.[538]

Thus, it was proper under pre-Charter law, for US insistence on Japan's unconditional surrender.[539] It was likewise proper for the Netherlands, which declared war on Japan on December 8, 1941 as anticipatory defense with invasion of the Dutch East Indies imminent,[540] to also insist on Japan's unconditional surrender. It would have been proper for Iran, if invaded by Iraq in 1980 to start the war, to have carried the war to the complete destruction of Iraq,[541] if this were a proportional response necessary to force Iraq to comply with the law.[542] The same is true with respect to Iraqi responses to Iran, if Iran was the aggressor.[543] (As events had it, both sides agreed to a UN-sponsored ceasefire, effectively ending the conflict, including its Tanker War aspects.)[544] Proportionality applies to all levels and intensities of conflict or potential conflict, from anticipatory response to pin-pricks to general war.[545]

O'Connell and Greenwood advance a view that self-defense must occur in the theater of operations generating the claim. In a regional confrontation, a target State would be limited to responding there. For example, in the Falklands/Malvinas War, Britain would have been limited to attacks on military units in the South Atlantic Ocean; a lone Argentine frigate in the Pacific could not have been attacked unless it gave clear evidence of launching an attack.[546] The US Navy could not have responded to North Korea's *Pueblo* seizure except by attacking North Korean assets in Korean waters.[547] Under this view, Iran could not have attacked the Iraqi frigates in the Mediterranean Sea, or perhaps the Atlantic and Indian Ocean off South Africa if after being launched in Italy [548] they had sailed through the Mediterranean and either through Suez or around Africa.

This thesis, while appealing in simplicity and symmetry, lacks reality. To be sure, proportionality means an amount of force necessary to achieve a goal of preventive (*i.e.*, anticipatory) self-defense or repulsing attack.[549] A hypothetical case from the 1982 Falklands/Malvinas War illustrates the fallacy of the position.

If a UK warship encountering an Argentine frigate in the Pacific, thousands of miles from the 1982 Falklands/Malvinas War theater of operations, in terms of ship-to-ship combat, what would have stopped the Argentine—as USSR men-of-war might have during the Cold War—from tailing the other and firing later (*e.g.*, after dark or in bad weather), when the UK warship could not sense a potential for attack? To take the other extreme, from either antagonist's geopolitical world view, a frigate represented a potential asset, wherever located, for prolonging (and perhaps enlarging) the conflict. It might be argued the frigate could only be attacked when it was apparent it was proceeding to contribute to the war. The first question is how that could be determined, since most belligerents do not willingly hand over intelligence, or they may distribute disinformation; recall the cruise of the *Goeben* into Turkish waters during World War I. The second is a surveillant power's problem: Must it follow the frigate once located across the Pacific to be sure it does not reappear at the scene of hostilities? To borrow a phrase, "Use it or lose it"; if ordnance is not used on the frigate in hand, the opportunity (and the frigate) will be lost, only to reappear in a theater of operations. Despite satellite and similar reconnaisance advantage for certain countries (*e.g.*, the United States), not all States are so equipped for worldwide tracking, and in a world of smaller navies and nations less attuned to alliances and friendships, such a State (even if it is the victim of aggression in the first place) may find itself in a situation worse than Britain's attempt to locate surface raiders in World Wars I and II or a wounded Leviathan like *Bismarck* during World War II. And if targets should be limited in a full-scale war, how can other military aspects of proportionality—geographical scope, weapons used, *etc.*,—be limited? It is incongruous that worldwide economic sanctions were asserted against Argentina[550]—some of which had clear reprisal overtones [551]—and yet military options would be limited territorially under the proposed analysis.

The third practical aspect deals with the nature of wars as belligerents have seen them. Most since 1945 have been symmetrical, two-State affairs where belligerents had about the same quality and quantity of forces.[552] Most conflicts since1945 have not been wars of national survival. A problem for proportionality, from a military perspective, arises when some or all of these conditions do not exist. What may be a routine, middle to low-level conflict for one belligerent may be a war for national survival for the other, particularly if two or more middle-level States' forces are opposed to one State's forces, which might have been able to contend with some but not all opponents. For the sole State, the war is a high-intensity conflict; for its opponents, it may be low or medium intensity. During the Korean War, given other States' overt and covert relationships with North and South Korea, it was initially a war of national survival for the South, and then for the North.[553] Israel, nearly always surrounded by opponents, has claimed its wars [554] were matters of national survival; it is doubtful whether its opponents always perceived

them thus. The 1980-88 Iran-Iraq conflict, of which the Tanker War was a part, was a war of national survival, or nearly so, for both sides. These might be compared with, *e.g.*, Falklands/Malvinas,[555] or the India-Pakistan conflicts,[556] where neither side seriously considered it was involved in a war of national survival. If one side—perhaps because of allies arrayed against it, or for other valid reasons—would validly consider it was fighting a war of national survival where destroying every warship of opponent(s) would make a difference, would this mean that in the hypothetical of the frigate in the Pacific,[557] one side could shoot on sight because it had to do so to survive, while the other would have to wait for evidence of imminent attack, because it had a low-intensity conflict on its hands? The situation is even more egregious if the force-heavy State was a target of aggression and would have to await another "first hit" from a State initially in the wrong.

In terms of international law, the theater of operations view may be correct from a perspective for force proportionality, but if proportionality is considered in terms of the object,[558] *i.e.*, righting the wrong, then the analysis is askew. If rectifying the situation—*i.e.*, inducing end to aggression—means destroying the Pacific Ocean frigate, then the frigate is fair game for that reason alone. In terms of a war of national survival by a target State, proportionality with respect to the object sought—maintaining political independence and territorial integrity of equal, sovereign States, all Charter Purposes[559]—necessarily rises to an ever-higher level of permitted violence to preserve these Charter goals for the State affected. Moreover, in a collective self-defense context, the level of military coercion the Charter permits is that necessary to assure survival of a State threatened with annihilation by aggression. Thus in the 1990-91 Gulf War self-defense agreements with the United States,[560] it was the force necessary to assure Kuwaiti survival, not survival of the United States, Kuwait's alliance partner.

There is no precedent for the theater of operations argument.[561] Iran could have attacked the Iraqi warships, once launched and on their way to Iraq through the Mediterranean Sea and either the Red Sea and Indian Ocean or the Atlantic and Indian Oceans. Conversely, Iraq could have attacked Iranian military assets wherever it found them. During the last year of the Tanker War, Iranian speedboats and military aircraft operated in the lower Gulf and the Strait of Hormuz, near the Arabian Sea, a part of the Indian Ocean. Iraq could have attacked these platforms in the Indian Ocean as well as striking oil facilities near the entrance to the Persian Gulf.[562]

The proportionality principle was demonstrated during the Tanker War.

Announced US defensive measures that could be expected if an unidentified aircraft or ship ventured within the defensive bubble for US warships[563] were proportional. The only object of response would be the intruder, and the warning area—up to five miles on the surface and relatively low altitude—was minimal. To be sure, there were mistakes, *e.g.*, when US ships fired on small boats that wandered

into the bubble, but if they appeared to display hostile intent, the US response was proportional under the circumstances. The United States expressed regret over these accidents and undoubtedly offered compensation.[564]

Iranian visit and search procedures for merchantmen suspected of carrying cargo for Iraq's war effort were also proportionate, in that the ship would be released if no offending goods were found. However, it is not clear whether adjudicatory procedures were established for detained vessels until late in the war.[565] Whether Iran could detain ships after the ceasefire [566] depended on terms of the ceasefire and practice under it. For detained ships, the response may not have been proportionate in terms of time. On the other hand, the belligerents' indiscriminate firing at or mining merchantmen and neutral warships alike, or neutral military helicopters, where there was no evidence that they were aiding the enemy, lacked any semblance of proportionality.[567]

Belligerents' attacks on ships in neutral territorial waters or neutrals' oil facilities [568] were clear violations of the Charter.[569] Either the littoral State or the State of the vessel's flag could respond proportionally in self-defense. The coastal State could respond proportionally for attacks on its facilities.[570]

Belligerents' attacks on their opponent's oil tanker convoys, oil platforms and coastal petroleum facilities in self-defense were legitimate, since belligerents' oil sales financed the war.[571] However, attacks had to be proportional; it is doubtful whether some *(e.g.,* Nowruz)[572] were.

US destruction of *Iran Ajr* and the offshore oil platforms were also proportional. *Iran Ajr* was caught laying mines, and its destruction eliminated a source of Iran's illegal action.[573] Oil platforms supported the Iranian speedboats attacking merchantmen; while the response may not have destroyed the same platforms that supported a particular attack or mode of attack in the case of their destruction in response to the Silkworm attack on *Sea Isle City,*[574] this response was also legitimate; it was confined to the kind of platform that could have launched the attack and was in response to attack on only that tanker. Proportionality contemplates responses parallel in intensity to an initial aggression and designed to discourage future attacks. If the launch platforms were destroyed, there could be no future attacks from them. There was no need to respond to the particular platform that launched the attack on *Sea Isle City.*[575]

Defense against Iranian speedboats or warships attacking merchantmen, US military helicopters or US warships was also proportional. As in the case of the announced defense measures, the only targets were the attacking craft or their bases, the oil platforms.[576] The United States was not required to respond, as it chose not to do in the case of the *Stark* attack.[577] Any response to the *Stark* attack would have had to have been proportional in nature, however. From a self-defense perspective, laying aside the mistaken identity issue, *Vincennes'* destruction of Flight 655 [578]

was proportional. The perceived threat was an aircraft, mistakenly thought to be an F-14; only the aircraft was targeted, and only the aircraft was brought down.

Responses to the Libyan aircraft that fired at US aircraft, or electronically locked on to them, and to Libyan missile boat forays, were also proportional. Only those aircraft or boats were targeted and hit. Similarly, the 1986 raid on Libyan terrorist bases was proportional. To be sure, there was collateral damage as in any bombing operation, but the targets were the terrorist operations that had caused the Berlin disco bombing.[579]

*(III) Forbidden Targets: Per Se Disproportionality.* Under the law of warfare *(jus in bello)* certain targets are forbidden objects of attack, no matter how proportionate the response in other respects, and even if proportional armed reprisal is appropriate under the circumstances.[580] The Corfu Channel Case authoritatively stated that the general principle of humanity condemned mining of an international strait with resultant loss of life and UK naval vessels [581] when these ships attempted straits transit passage [582] in a nonwar context. Although the law of naval warfare has developed a relatively concrete list of forbidden targets for armed conflict situations,[583] there has been little Charter era practice for immunity claims for these targets in the self-defense (anticipatory or otherwise) context. Nevertheless, the Corfu Channel principle should apply to deny amenability of these objects as legitimate targets regardless of how proportional or necessary a self-defense response might otherwise be.[584] The LOAC should inform the law of self-defense under these circumstances.[585]

**vii. "No Moment for Deliberation."** Anticipatory self-defense, unlike reactive self-defense, carries a third requirement, from the Caroline Case: there can be no moment for deliberation.[586] This principle is often lumped with necessity; the Tanker War illustrates the difficulty of application as a discrete concept.

US defensive measures announcements and actions under them[587] are relatively straightforward examples. Given the relatively high speed of aircraft or small boats, whether carrying shipkilling missiles or on a suicide mission, and a high risk to a warship of small boats carrying Exocets or the like, it is easy to see that there can be no time for deliberation—*i.e.*, careful consideration up a chain of command—before action must be taken.

Where analysis begins to break down under current views of anticipatory self-defense is in the situation of Iranian visits and searches.[588] If "no moment for deliberation" means time for investigation by other means, then the concept slides semantically into necessity. On the other hand, if the phrase means no other means for investigation, the result is the same. The same comments could be made as to States that ordered or accepted (acquiesced in) convoying or other forms of protection,[589] if that is considered anticipatory self-defense.

The *Vincennes* incident,[590] if considered an anticipatory self-defense case, illustrates the weakness (or elasticity) of the concept as a separate requirement. *Vincennes'* commanding officer had five minutes to deliberate, but was that real "deliberation"? He never knew, due to erroneous information, about Flight 655's true identity; he thought it was an F-14 homing on his ship. In a sense, he had time to deliberate, but only enough time to decide that it was imperative, *i.e.,* necessary, to defend the ship. Under this analysis, there was no moment for deliberation, and *Vincennes'* downing Flight 655 satisfied the third principle of anticipatory self-defense.

Thus the third principle of anticipatory self-defense, "no moment for deliberation," if it exists as a separate concept, was met in these incidents of the Tanker War.

**viii. Rules of Reprisal; Retaliation.** Reprisals, *i.e.,* use of force or other methods *(e.g.,* economic coercion) otherwise illegal to confront a State engaging in illegal conduct *(e.g.,* aggression) to force compliance with international norms, has been characterized as a kind of self-help[591] or sanction.[592] Most say that reprisals involving force where States are not engaged in armed conflict are illegal.[593] Post-1945 practice tends to confirm this view. Anticipatory reprisal using force is forbidden.[594]

The Corfu Cannel Case dismissed the UK argument that directing mine clearance of an international strait was an act of lawful self-help.[595] Israel responded with massive reprisals against Syria for its repeated armistice violations. These too were condemned.[596]

The 1970 Friendly Relations Declaration stated that "States have a duty to refrain from acts of reprisal involving the use of force," which the Resolution asserted was declaratory of international law.[597] "Subject only to the proviso that 'force'... be taken to mean military force, the Western States [agreed] on the question of reprisals."[598]

Even massive economic coercion does not justify a force response, according to the majority view.[599] On the other hand, nonforce reprisals (*e.g.,* economic sanctions or "economic warfare") remain legitimate in the Charter era.[600] There can be collective nonforce economic reprisals, like those the European Community imposed during the Falklands/Malvinas war.[601] Although many States or their nationals aided one belligerent or the other, or both, there was no apparent declared system of economic reprisals during the Tanker War.

Even if justified, reprisals cannot be inflicted against third States. The Cysne arbitration held that although Germany might have been justified in reprisals against Great Britain during World War I, Germany could not destroy a neutral Portuguese vessel carrying goods covered by the reprisal declaration to Britain.[602]

All reprisals are subject to three requirements, carried forward from the pre-Charter era and stated in the Naulilaa Arbitration and the Cysne Case: previous deliberate violation of international law by the other State, an unsuccessful demand for redress, and the reprisal must be proportional to the injury suffered.[603] Some objects cannot be an object of reprisals, whether economic or otherwise; commonly these are considered in the context of the LOAC (jus in bello) and will be analyzed in that situation.[604] However, such reprisals are be subject to the general principles of humanity in the context of "peacetime" reprisals, discussed here, on the same theory that these objects are barred as self-defense targets.[605]

Security Council decisions can, at least in theory, go beyond customary limitations for sanctions amounting to reprisals.[606] A State not injured by illegal actions of another state might be directed to apply sanctions. Sanctions that some might perceive as disproportionate to an illegal action might be imposed. Third States might be harmed by Council decisions, although Charter Article 50 allows a State confronted with special economic problems arising from carrying out those measures a right to consult with the Council for solution of those problems.[607] The Council can be informed by humanity principles and other sources of law, but it can override treaties to the contrary, and its resolution might state a *jus cogens* norm.[608]

Sanctions against South Africa, which began in 1977, are an example of the potential for overriding general reprisal sanction principles.[609] The earlier Rhodesian embargo, which had law of naval warfare overtones, is another example. In 1965-66, as part of the governance transition from Southern Rhodesia to independent, majority-rule Zimbabwe, the Council passed a series of resolutions, denouncing the white Rhodesian government as illegal, and calling on States to refrain from assisting the white minority regime and to institute an oil embargo. One resolution requested that the United Kingdom enforce the embargo. Because the resolution only spoke in terms of embargo and did not authorize blockade or similar measures, the Royal Navy could not order tankers inbound for the Mozambican port of Beira, Rhodesia's access to the sea, to divert. A later resolution specifically authorized diversion, and the Royal Navy ordered diversion when other tankers tried to call at Beira.[610] While the oil interdiction operation had an entirely laudatory purpose, if it is assumed that Rhodesia had no additional petroleum sources, and there were essential needs of the civilian population—*e.g.*, gasoline for ambulances, diesel oil for hospital emergency generators, *etc.*,—a violation of humanitarian law principles might have occurred, and interdictions might be said to have gone beyond customary LOAC rules.[611]

The 1990-91 Gulf War, which erupted after the Tanker War ended, is a third situation where Council sanctions overrode customary law.[612] Resolution 665 authorized Coalition interception of vessels bound for Iraq or occupied Kuwait on August 15, 1990, without reciting humanitarian exceptions.[613] A month later,

Resolution 670 imposed an air embargo but permitted food and medical supplies shipments, subject to Council supervision.[614] At least in theory, the Council could be said to have overridden humanitarian principles denouncing deprivation of the civilian population of food and medical supplies [615] by the omission in Resolution 665. (It was partly cured a month later by Resolution 666, permitting foodstuffs shipments under certain conditions, but the Resolution said nothing about medical supplies.)[616]

**ix. The Temporal Problem: When Does Liability Accrue?**[617] Convictions at Nuremberg and Tokyo were based on what the defendants knew, or should have known, when they made decisions to invade other States.[618] Since then there has been no authoritative statement on whether liability accrues on what decisionmakers knew, or should have known, when a state responds in reactive or anticipatory self-defense. Commentators seem to have been tempted to justify opinions, at least in part, on evidence available after a self-defense decision, perhaps years later.[619]

The developing law for *jus in bello* confirms that the appropriate time for predicating liability is what a decisionmaker knew, or should have known, at the time an operation is authorized. Hindsight can be 20/20; decisions at the time are often clouded with the fog of war [620] or crisis.

Four countries' declarations of understanding [621] to Protocol I [622] to the 1949 Geneva Conventions state that as to protection of civilians in Article 51, [623] protection of civilian objects in Article 52,[624] and precautions to be taken in attacks, stated in Article 57, [625] a commander should be liable based on a commander's assessment of information available at the relevant time, *i.e.,* when the decision is taken.[626] Two of the 1980 Conventional Weapons Convention's four protocols have similar terms, *i.e.,* a commander is only bound by information available when a decision to attack is made.[627]

Protocol I, with its understandings, and the Conventional Weapons Convention are well on their way to wide acceptance among States.[628] These treaties' common statement that commanders will be held accountable based on information they had at the time for determining whether attacks are necessary and proportional has become a nearly universal norm. The *San Remo Manual* has recognized it as the standard for naval warfare, and in 1999 the Second Protocol to the 1954 Hague Cultural Property Convention also adopted this standard.[629] It can be said with fair confidence that this is the customary standard for *jus in bellum.* It should be the standard for *jus ad bellum.* A national leader directing a self-defense response, whether it be reactive or anticipatory in nature, should be held to the same standard. That leader should be held accountable for what he or she, or those reporting to him or her, knew or reasonably should have known, when a decision to respond in self-defense is made.

There is no public record of what those who initiated self-defense measures, whether in reaction to an attack or in anticipation of one, knew or should have known, as was the case in the Nuremberg or Tokyo trials.[630] Therefore, there can be no appraisal of whether the temporal standard was met during the Tanker War.

*2. Related Issues*

*a. State of Necessity and Self-Preservation in the Charter Era.* State of necessity and the now-outmoded concept of self-preservation have often been confused, sometimes with the notion that necessity as a component of self-defense or the LOAC may be so intense that in a situation involving survival of the State that necessity overrides all other factors to permit any action by the target State. This claim of self-preservation, or self-help, is now inadmissible. A state may, however, respond in self-defense.[631]

There is, however, a separate, distinct concept of necessity, apart from a similar term that is a conditioning factor for self-defense or the LOAC, in that in a separate claim of state of necessity, a State against whom action is taken ("a third State") has committed no wrong against a State that takes the action (an "acting State"), and an acting State does not consider itself the third State's target. In self-defense, a target State seeks to defend against aggression by a country in the position of a third State, *i.e.,* the aggressor.[632] State of necessity can be invoked "to preclude the wrongfulness of conduct adopted in certain conditions . . . to protect an essential interest of the [target] State, without [the latter's] existence being in any way threatened.[633] There remain cases "where a . . . [right] of a [third] State can be sacrificed for the sake of a vital interest of the [target] State which would otherwise be obliged to respect that right."[634]

Not all commentators agree on the state of necessity doctrine today.[635] However, LOS Convention, Article 221 allows States "to take [proportionate] measures, in accordance with international law, beyond the limits of the territorial sea" to protect their coastline "or related interests, including fishing, from grave and imminent danger" from pollution or the threat of pollution. The Intervention Convention is to the same effect.[636] These provisions would have vindicated UK action in bombing the derelict *Torrey Canyon* after that Liberian-registered vessel grounded off Britain, threatening the English coast and its population.[637] Although frequently decided on other grounds, ICJ decisions and international arbitrations have recognized the doctrine in many contexts.[638]

The record of State practice and other sources is thus less than clear, but the International Law Commission Special Rapporteur summarizes state of necessity and its scope today, provided a target State invoking state of necessity acts proportionally to a peril:

Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

   (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
   (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

   (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
   (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
   (c) if the State in question has contributed to the occurrence of the state of necessity.

The Commission draft also says: "[W]rongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter. . ."[639] Tanker War participants did not claim state of necessity for their actions, but they could have.

The primary example is US and other States' protecting third-State crews from attacks by Iranian speedboats and aircraft. Self-defense permitted protecting vessels flagged under the ensign of a covering warship or aircraft or protection of nationals of the same State and, upon request, third-State crews.[640] States have a general obligation to act to preserve life at sea, independent of an ongoing armed conflict.[641] This obligation carries with it a right to engage in necessary and proportionate response, in the nature of self-defense, with respect to such ships and personnel. The right to respond could also be based on a theory of state of necessity.

A clearer case involved the Nowruz oil slick created by Iraqi attacks in 1983.[642] Although the slick dissipated without any State's having taken action, littoral countries threatened with loss of coastal fisheries or desalination plants could have acted proportionally with force to eliminate the leakage from Iranian platforms. Similarly, if petroleum leakage from vessels hit on the high seas of the Persian Gulf

was serious enough and threatened a coastal State's shore or other interests, that State could have acted to intervene. Precedent for this is clear.[643] During the 1990-91 war, US aircraft, as a defensive measure, bombed oil manifolds at terminals in occupied Kuwait opened by Iraq. Besides risk to coalition warships, there was risk to western Gulf coastal fisheries and desalination plant intakes.[644] Kuwaiti permission was undoubtedly given, but if it had not, the strikes could have been justified by the state of necessity doctrine.

*b. Retorsion.* A retorsion, or retortion, is a lawful but unfriendly response of a target State to another state's unfriendly practice or act whether illegal or not, to coerce the latter to discontinue that practice or act.[645] Commentators agree that a retorsionary response must be proportional.[646]

During the Tanker War, the US defensive bubble or *cordon sanitaire* warnings in NOTAMs or NOTMARs may have seemed unfriendly acts, but they were legitimate warnings of the right of self-defense if an aircraft or vessel came within range.[647] Accompanying, escorting or offering protection to merchantmen not carrying warfighting or war-sustaining goods to belligerent ports, including outbound cargoes of Kuwaiti or Saudi petroleum, may have seemed unfriendly, if legal, acts to the belligerents, particularly Iran.[648] Iran's naval maneuvers in its territorial sea were legal,[649] but they may have seemed unfriendly acts to its neighbors or to some navies. These retorsions were proportional.

## Part B. UN Mechanisms for Breaches of the Peace, Threats to the Peace, and Aggression

If there has been uneven development of Charter norms as a coherent body of law for States' individual or collective responses to breaches of the peace, threats to the peace, or aggression, the UN record as an Organization has been even less clear. This Part first examines the methodology of UN lawmaking and then sketches the organizational framework for UN lawmaking and in other groups permitted by the Charter in the context of situations involving the law of naval warfare.

### *1. Making the Rules and Stating the Principles: The Security Council*

Aside from General Assembly competence for UN Membership, the budget and trust territories,[650] the only source of positive, primary-source [651] norms is the Security Council. Under Charter Articles 25 and 48, Members agree to carry out "decisions," particularly those related to action to maintain international peace and security.[652] However, the Charter also gives the Council authority to make nonbinding "recommendations" for pacific settlement of disputes,[653] and "recommendations" on issues involving breaches of the peace, threats to the peace or aggression.[654] It may "call upon" parties to resolve a dispute, whether it threatens the peace or not,[655] and it can "call upon" Members for measures to assist in enforcing

decisions.[656] Recommendations and authority to "call upon" Members for action are nonbinding, although "call upon" connotes a stronger prescriptive principle than recommendations; if a call for action is coupled with a decision, the call is binding.[657] A further restriction on Council practice is that Article 25 decisions can only be taken under Chapter VII, dealing with breaches of the peace, threats to the peace and aggression,[658] and with an Article 39 determination to that effect.[659] Thus although Article 25 appears in the Charter just before Chapter VI, stating the Council role in pacific dispute settlement,[660] it has been used along with Article 48 for Chapter VII decisions.

The narrow problem is whether the Council has made a decision. The Namibia opinion declared principles of resolution interpretation; there must be reference to "terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution . . ."[661] In other words, when is a Council resolution a binding decision?[662] Or, perhaps more important for this analysis, when is what appears to be a binding decision nothing more than a nonbinding recommendation, although not so styled?

Analysis of Council decisionmaking—in the broad, nontechnical sense of the word—reveals a trend toward establishing norms affecting law of naval warfare standards.

*a. The Korean War.* Bailey has aptly summarized Council actions for the Korean War: "The... Council decisions on military enforcement... were not binding and, indeed, were only possible because of the fortuitous absence of the Soviet Union."[663] Resolution 82, calling for ceasing hostilities, calling upon North Korea to withdraw north of the 38th parallel and calling upon Members to assist the United Nations,[664] was recommendatory, being issued under Articles 39-41.[665] The Secretary-General felt there had been only a threat to the peace, the United States charged aggression had occurred, and the Council toned down the Resolution to find a "breach of the peace."[666] Resolution 83 followed two days later, recommending that Members assist South Korea "to repel the armed attack and to restore international peace and security in the area," finding North Korea had breached the peace.[667] Besides welcoming assistance given South Korea, and "Recommend[ing]" that Members make forces and assistance available to the United States as head of a unified command, Resolution 84 followed the pattern.[668] The only decision of the war was a Council invitation to the PRC to be present for its discussion of a UN Korean command special report.[669] With the USSR's return and its veto in the Council, UN lawmaking potential shifted to the Assembly.[670]

*b. Arab-Israeli Conflicts.* The Arab-Israeli conflicts generated positive lawmaking before and after the Korean War.

After hortatory resolutions based on Articles 39 and 40,[671] Resolution 50 (1948) called upon Governments and authorities to stop importing or exporting war material into or to Palestine, Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Transjordan or Yemen during a recommended ceasefire. It "Decide[d]" that if this resolution were rejected, or later repudiated or violated, "the situation . . . [would] be reconsidered with a view to action under Chapter VII," *i.e.,* for possible measures involving force.[672] This, the Council's first attempt to define and regulate warfighting/war-sustaining material,[673] was only recommendatory. The only decision was for further action if the parties rejected the resolution's terms. Later resolutions "Order[ed]" a cease-fire, "Decide[d]" the belligerents' responsibility under the ceasefire, and "Decide[d]" on an armistice.[674] After a recommendatory call upon the belligerents for a ceasefire late in 1948, the Council "Reaffirm[ed]" its prior "order" for ceasefire and obeying armistice agreements.[675] These were binding in nature. When fighting broke out again in 1951, the Council called upon parties for a ceasefire, reminding them of Chapter VI obligations to settle disputes by peaceful means.[676] In September 1951 Resolution 95 "not[ed] . . . present practice of [Egypt's] interfering with the passage through the Suez Canal of goods destined for Israel" and "[found] further that such practice [was] an abuse of the exercise of the right of visit, search and seizure[.]" The Resolution "Further [found] that the practice in the prevailing circumstances cannot be justified on the ground that it is necessary for self-defence[,]" and noted that

> . . . restrictions on the passage of goods through the Suez Canal to Israel ports are denying to nations at no time connected with the conflict in Palestine valuable supplies required for their economic reconstruction, and that these restrictions together with sanctions applied by Egypt to certain ships which have visited Israel ports represent unjustified inferference with the rights of nations to navigate the seas and to trade freely with one another, including the Arab States and Israel[.]

The Resolution concluded by "Call[ing] upon Egypt to terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound and to cease all interference with such shipping beyond that essential to the safety of shipping in the Canal itself and to the observance of . . . conventions in force."[677] Because it ended with a recommendatory "call" upon Egypt under Article 40, the Resolution could not be considered binding. However, the Resolution declaration that seizures in the Canal abused traditional rules had evidentiary weight as to a norm.[678] Resolution 101 (1953) similarly "[found] that the retaliatory action at Qibya taken by . . . Israel on 14-15 October 1953 and all such actions constitute[d violations of the ceasefire, the armistice] and the Charter . . . ." Israel was censured.[679] In 1955 Israel was "Condemn[ed] for a similar attack as inconsistent with [the armstice] and under the . . . Charter."[680] The next year an attack on Syria was "Condemn[ed]" after Israel experienced interference

using Lake Tiberias by Syria in violation of the armistice.[681] In 1962, after exchanges of fire between Syria and Israel, Resolution 171 "call[ed] upon the two Governments ... to comply with their obligations under ... the Charter by refraining from the threat as well as the use of force." The Council reaffirmed its prior resolution condemning retaliatory breaches of the armistice, and determined that Israel's attack on March 16-17 was "a flagrant violation of that resolution."[682] A "grave Israel military action" in southern Hebron against Jordan in 1966 earned Israel a censure. The Council "Emphasize[d] ... that ... military reprisal cannot be tolerated and that, if ... repeated, the ... Council [would] consider further and more effective steps as envisaged in the Charter to ensure against the repetition of such acts."[683]

When the 1967 war broke out, the Council called upon the belligerents for a ceasefire and ceasing military activities, on the model of the opening of the Korean War.[684] Later resolutions "Demand[ed]" a ceasefire and observance of it.[685] Resolution 237 only "Recommend[ed]" compliance with the Third Convention,[686] but Resolution 242 "Affirm[ed] ... the necessity ... [f]or guaranteeing freedom of navigation through international waterways in the area[.]"[687] Resolutions 248 and 256 condemned the "large-scale and massive" or "large scale and carefully planned" attacks on Jordan in response to Jordanian violations of the ceasefire in 1968.[688] A 1969 resolution condemned similar "preplanned" Israeli air attacks on Jordanian population centers as a "flagrant" violation of the Charter and the cease-fire resolutions. It repeated a previous resolution's warning, that the Council would meet again "to consider further and more effective steps as envisaged in the Charter to ensure against repetition of such attacks."[689]

The 1973 war precipitated a Council call for ending hostilities and a ceasefire.[690]

In 1981, while Iraq was heavily committed in its war with Iran, Israeli aircraft struck an Iraqi nuclear facility near Baghdad. Israel claimed a right of anticipatory self-defense in that the facility was manufacturing nuclear weapons to be used against Israel.[691] Upon Iraq's complaint,[692] the Council cited Charter Article 2(4) and "[s]trongly condemn[ed] the military attack by Israel in clear violation of the Charter ... and the norms of international conduct." The Council called upon Israel to refrain from any such acts or threats in the future and stated that Iraq was entitled to "appropriate redress, responsibility for which has been acknowledged by Israel."[693]

In 1982, the Council "[d]emand[ed] that ... Israel lift immediately the blockade of the city of Beirut ... to permit the dispatch of supplies to meet the urgent needs of the civilian population and allow the distribution of aid" by UN agencies and nongovernmental organizations, particularly the ICRC. The resolution referred to other resolutions citing the 1949 Geneva Conventions and "regulations attached to the Hague Convention of 1907."[694]

*c. Rhodesia: 1965-79.* The Rhodesia decolonization process, which included embargo and maritime interdiction before Zimbabwe independence was assured, began with General Assembly action. Assembly resolutions noted "a threat to freedom, peace and security in Africa," and called upon States to refrain from rendering assistance to Rhodesia.[695] Rhodesia unilaterally declared independence, and the Assembly "[i]nvite[d]" the United Kingdom to implement the Assembly resolutions and "Recommend[ed that] the . . . Council . . . consider [the] situation as a matter of urgency."[696]

Condemning the independence declaration, the Council first "[d]ecide[d] to call upon all States . . . to refrain from rendering any assistance to this illegal regime."[697] Resolution 217 called upon the UK Government to quell the rebellion and "to take all other appropriate measures which would prove effective in eliminating the authority of the usurpers . . ." The Council also called upon States to desist from providing arms to Rhodesia and to break economic relations, "including an embargo on oil and petroleum products." Continuance of the rebellion was determined to be "in time a threat to international peace and security."[698] Thereafter the United Kingdom declined to intercept Beira-bound tankers.[699] The Council then passed Resolution 221, which "[c]all[ed] upon" Portugal to deny pier and pumping facilities and "[c]all[ed] upon all States" to divert their vessels "reasonably believed to be carrying oil destined for . . . Rhodesia which may be en route for Beira." The Council also "[c]all[ed] upon" the United Kingdom "to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for . . . Rhodesia." Specific authority was given to arrest and detain *Joanna V* upon departure from Beira if she discharged petroleum cargo there.[700] The United Kingdom acted upon this resolution, stopping possible blockade runners.[701]

A month later the Council, "Acting in accordance with Articles 39-41" of the Charter, determined the Rhodesia situation was a threat to international peace and security. The Council "Decid[ed] that . . . Members . . . shall prevent:"

> (a) The import into their territories of asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat and meat products and hides, skins and leather originating in . . . Rhodesia and exported therefrom after the date of the present resolution;
> (b) Any activities by their nationals or in their territories which promote or are calculated to promote the export of these commodities from . . . Rhodesia and any dealings by their nationals or in their territories in any of these commodities originating in . . . Rhodesia and exported therefrom after the date of the present resolution, including in particular any transfer of funds to . . . Rhodesia for such activities or dealings;
> (c) Shipment in vessels . . . of their registration of any of these commodities originating in . . . Rhodesia and exported therefrom after the date of the present resolution;

(d) Any activities by their nationals or in their territories which promote or are calculated to promote the sale or shipment to . . . Rhodesia of arms, ammunition of all types, military aircraft, military vehicles, and equipment and materials for the manufacture and maintenance of arms and ammunition in . . . Rhodesia;
(e) Any activities by their nationals or in their territories which promote or are calculated to promote the supply to . . . Rhodesia of all other aircraft and motor vehicles and of equipment and materials for the manufacture, assembly, or maintenance of aircraft and motor vehicles in . . . Rhodesia; the shipment in vessels . . . of their registration of any such goods destined for . . . Rhodesia; and any activities by their nationals or in their territories which promote or are calculated to promote the manufacture or assembly of aircraft or motor vehicles in . . . Rhodesia;
(f) Participation in their territories or territories under their administration or in land or air transport facilities or by their nationals or vessels of their registration in the supply of oil or oil products to . . . Rhodesia; notwithstanding any contracts entered into or licenses granted before the date of the present resolution[.]

Members were "[r]emind[ed]" of obligations under Article 25; the resolution also "[c]all[ed] upon" them to carry out "this decision of the . . . Council."[702]

Resolution 253 followed in 1968; "[r]eaffirming its determination that the . . . situation in . . . Rhodesia constitute[d] a threat to international peace and security [and a]cting under Chapter VII of the Charter . . .," the Council "[d]ecide[d] that . . . Members . . . shall prevent":

(a) The import into their territories of all commodities and products originating in . . . Rhodesia and exported therefrom after the date of this resolution (whether or not the commodities or products are for consumption or processing in their territories, whether or not they are imported in bond and whether or not any special legal status with respect to the import of goods is enjoyed by the port or other place where they are imported or stored);
(b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export of any commodities or products from . . . Rhodesia; and any dealings by their nationals or in their territories in any commodities or products originating in . . . Rhodesia and exported therefrom after the date of this resolution, including . . . transfer of funds to . . . Rhodesia for the purposes of such activities or dealings;
(c) The shipment in vessels . . . of their registration or under charter to their nationals . . . of any commodities or products originating in . . . Rhodesia and exported therefrom after the date of this resolution;
(d) The sale or supply by their nationals or from their territories of any commodities or products (whether or not originating in their territories, but not including supplies intended strictly for medical purposes, educational equipment and material for use in schools and other educational institutions, publications, news material and, in special humanitarian circumstances, food-stuffs) to any person or body in . . . Rhodesia or to any other person or

> body for . . . any business carried on in or operated from . . . Rhodesia, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply;
> (e) The shipment in vessels . . . of their registration, or under charter to their nationals, . . . of any such commodities or products which are consigned to any person or body in . . . Rhodesia, or to any other person or body for the purposes of any business carried on in or operated from . . . Rhodesia[.]

Members were again reminded of Article 25 obligations. The Council established a Committee to receive reports and obtain information.[703] In 1970 the Council "[d]ecide[d]," in accordance with Article 41, "that Members would *inter alia*, sever all trade and transportation ties with Rhodesia; the Council" "[r]equest[ed]" the UK government to rescind all trade, *etc.*, agreements with Rhodesia and "[R]equest[ed]" that Members "take all possible further action under Article 41 of the Charter [*i.e.*,options not involving the use of force], . . . not excluding any . . . measures provided in that Article[.]"[704]

In 1972 Resolution 314 deplored the failure of States to abide by the embargo sanctions and declared that any national legislation to the contrary "would undermine sanctions and would be contrary to the obligations of States."[705] In 1973 Resolution 333 "[c]all[ed] upon" States to enact legislation "providing for the imposition of severe penalties" for evasion or breach of sanctions. It also

> 5. *Request*[*ed*] States, in the event of their trading with South Africa and Portugal, to provide that purchase contracts with those countries should clearly stipulate, in a manner legally enforceable, the prohibition of dealing in goods of . . . Rhodesian origin; likewise, sales contracts with these countries should include a prohibition of resale or re-export of goods to . . . Rhodesia;
> 6. *Call*[*ed*] *upon* States to pass legislation forbidding insurance companies under their jurisdiction from covering air flights into and out of . . . Rhodesia and individuals or air cargo carried on them;
> 7. *Call*[*ed*] *upon* States to undertake appropriate legislative measures to ensure that all valid marine insurance contracts contain specific provisions that no goods of . . . Rhodesian origin or destined to . . . Rhodesia shall be covered by such contracts;
> 8. *Call*[*ed*] *upon* States to inform the Committee established in pursuance of resolution 253 (1968) on their present sources of supply and quantities of chrome, asbestos, nickel, pig iron, tobacco, meat and sugar, together with the quantities of these goods they obtained from . . . Rhodesia before the application of sanctions.[706]

The economic noose was tightened further in 1976 by Resolution 388, decided under Chapter VII of the Charter, that Members would ensure that their nationals and persons in their territories did not insure:

(a) Any commodities or products exported from . . . Rhodesia after the date of the present resolution in contravention of . . . resolution 253 (1968) which they know or have reasonable cause to believe to have been so exported;
(b) Any commodities or products which they know or have reasonable cause to believe to be destined or intended for importation into . . . Rhodesia after the date of the present resolution in contravention of resolution 253 (1968);
(c) Commodities, products or other property in . . . Rhodesia of any commercial, industrial or public utility undertaking in . . . Rhodesia, in contravention of resolution 253 (1968)[.]

The Council also decided that

> . . . Member States shall take appropriate measures to prevent their nationals and persons in their Territories from granting to any commercial, industrial or public utility undertaking in . . . Rhodesia the right to use any trade name or from entering into any franchising agreement involving the use of any trade name, trade mark or registered design in connexion with the sale or distribution of any products, commodities or services of such an undertaking[.][707]

The same approach (graduated embargo, Committee reporting system) under Chapter VII of the Charter was employed with respect to South Africa.[708]

Majority rule came in 1979, and the sanctions were lifted that year.[709]

The General Assembly also played a role in the transition to Zimbabwe. Besides passing nonbinding[710] resolutions within its sphere,[711] the Council cited the Assembly's prior law-declaring resolutions, *e.g.*, the Declaration on Granting of Independence to Colonial Countries and Peoples.[712]

*d. India-Pakistan: 1965, 1971.* The 1965 naval war was part of a renewed conflict between India and Pakistan. The Security Council, as in other situations, "[c]all[ed]" upon the belligerents to take steps for a cease-fire and to respect the frontier line at issue.[713] The 1971 war was over so quickly that Council Resolution 307 only noted the Pakistani agreement to a cease fire and "[d]emand[ed]" compliance with it.[714]

*e. Falklands/Malvinas: 1982.* Two Council resolutions impacted this relatively brief conflict. Resolution 502 was stronger than many initial responses to a crisis. Finding "a breach of the peace," the Council "[d]emand[ed]" immediate cessation of hostilities and withdrawal of Argentine forces from the Falklands/Malvinas and "[c]all[ed] on . . . Argentina and the United Kingdom . . . to seek a diplomatic solution . . . and to respect fully the purposes and principles of the Charter."[715] The second resolution "[u]rge[d]" parties to cooperate with the Secretary-General's good offices efforts.[716]

*f. The Iran-Iraq Conflict and the Tanker War, 1980-88.* As Charter era conflicts went, the Iran-Iraq war was a long, eight-year affair with heavy losses all around.

Security Council action was relatively minimal: 17 resolutions [717] in that time. Several bear upon the Tanker War and the law of naval warfare.

Resolution 479 (September 23, 1980, issued shortly after the war began)[718] "[*c*]*all*[*ed*] upon" the belligerents to refrain immediately from further use of force and to settle the dispute "by peaceful means and in conformity with international law," echoing Charter Article 33. The resolution"[*u*]*rge*[*d*]" Iran and Iraq to accept mediation, conciliation, resort to regional agencies or arrangements or other peaceful means. It "[*c*]*all*[*ed*] *upon*" States to exercise restraint and to refrain from anything to further escalate and widen the conflict. The Secretary-General's offer to suggest good offices was supported.[719] Although it did not mention freedom of navigation, Japan and the United States stressed the primary importance of that principle.[720] Iraq accepted Resolution 479, denying it had any territorial ambitions; Iran rejected it, demanding condemnation of Iraqi aggression.[721] In October, however, Iraq rejected a UN good offices offer to allow 70 merchantmen trapped in the Shatt al-Arab by the war to depart under a UN or perhaps an ICRC flag; Iran accepted the proposal.[722]

Nearly two years later, Resolution 514 again "[*c*]*all*[*ed*] *for*" a ceasefire and belligerent forces' withdrawal. The Council "[*d*]*ecid*[*ed*] to dispatch a team of [UN] observers to verify, confirm and supervise the ceasefire and withdrawal." Continuing Secretary-General mediation efforts was "[*u*]*rge*[*d*]." Other States were again asked to abstain from action that might contribute to continuation of the conflict.[723] An October 4, 1982 resolution was in the same vein, and welcomed a "part[y's]" (Iraq's) acceptance of Resolution 514's terms and "call[ed] upon the other [Iran] to do likewise[.]"[724]

Resolution 540 (1983) deplored mutual destruction of civilian lives, cities, property and economic infrastructures. The Council condemned violations of humanitarian law, particularly that stated in the First through the Fourth Conventions, and called for "cessation of all military operations against civilian targets, including city and residential areas[.]" Resolution 540 "[*a*]*ffirm*[*ed*]"

> . . . the right of free navigation and commerce in international waters, call[ed] on all States to respect this right and also call[ed] upon the belligerents to cease immediately all hostilities in the region of the Gulf, including all sea-lanes, navigable waterways, harbour works, terminals, offshore installations and all ports with direct or indirect access to the sea, and to respect the integrity of the other littoral States[.]

It also "[*c*]*all*[*ed*] upon both parties to refrain from any action that [might] endanger international peace and security as well as marine life in the region of the Gulf."[725]

In June 1984 Resolution 552 responded to a letter from the GCC States (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, UAE)[726] complaining of Iranian acts of aggression on the freedom of navigation to and from their ports. Although Iran

justified its attacks on reaction against aid to Iraq by States in the region and on other bases, the Council heard States and the Arab League's complaints concerning ship attacks and the right of freedom of navigation,[727] and passed Resolution 552. The Council,

> *Noting* that Member States pledged to live together in peace with one another as good neighbours in accordance with the Charter . . . ,
> *Reaffirming* the obligations of Member States with respect to the principles and purposes of the Charter,
> *Reaffirming also* that all Member States are obliged to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State,
> *Taking into consideration* the importance of the Gulf region to international peace and security and its vital role to the stability of the world economy,
> *Deeply concerned* over the recent attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia,
> *Convinced* that these attacks constitute a threat to the safety and stability of the area and have serious implications for international peace and security,
> 1. *Call[ed] upon* all States to respect, in accordance with international law, the right of free navigation;
> 2. *Reaffirm[ed]* the right of free navigation in international waters and sea lanes for shipping en route to and from all ports and installations of the littoral States . . . not parties to the hostilities;
> 3. *Call[ed] upon* all States to respect the territorial integrity of the States . . . not parties to the hostilities and to exercise the utmost restraint and to refrain from any act which may lead to a further escalation and widening of the conflict;
> 4. *Condemn[ed]* the recent attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia;
> 5. *Demand[ed]* that such attacks should cease forthwith and that there should be no interference with ships en route to and from States . . . not parties to the hostilities;
> 6. *Decide[ed]* in the event of non-compliance with the present resolution, to meet again to consider effective measures . . . commensurate with the gravity of the situation . . . to ensure the freedom of navigation in the area[.]

The Council requested the Secretary-General to report on progress in implementing the resolution.[728]

Resolutions 540 and 552 had no lasting effect. In February 1986 Resolution 582 "[*d*]*eplore*[*d*] . . . escalation of the conflict, especially . . . attacks on neutral shipping or civilian aircraft, the violation of international humanitarian law and other laws of armed conflict and, in particular, the use of chemical weapons contrary to . . . the Geneva Protocol." It also "[*c*]*all*[*ed*] upon . . . Iran and Iraq to observe an immediate cease-fire, a cessation of all hostilities on land, at sea and in the air," to withdraw their forces behind their borders, and called upon the belligerents to submit the conflict to mediation or other peaceful settlement methods. The now-familiar

provision, calling upon other States to refrain from escalating or widening the conflict, was also included.[729] Resolution 588 (October 1986) expressed alarm over the continuing and intensifying conflict and called upon the belligerents to implement Resolution 582.[730]

Resolution 598 (July 1987) again "[*d*]*eplore*[*d*] . . . attacks on neutral shipping or civilian aircraft, the violation of international humanitarian law and other laws of armed conflict and, in particular, the use of chemical weapons contrary to . . . the 1925 Geneva Protocol[.]" Citing Articles 39 and 40 of the Charter, the Council "[*a*]*ct*[*ed*]," "[*d*]*emand*[*ing*] that. . . Iran and Iraq observe an immediate ceasefire. . . ." Other States were admonished not to escalate or widen the war. The Secretary-General was requested to explore, in consultation with the belligerents, entrusting an impartial body with inquiring into responsibility for the conflict and a report to the Council.[731] This was the first time the Council cited Chapter VII of the Charter (threats to the peace, *etc.*) during the war. Iraq accepted Resolution 598 almost immediately.[732] The European Community, the Arab League, NATO countries and the GCC passed resolutions supporting Resolution 598, the GCC urging the Security Council to implement it. The US Secretary of State and other foreign ministers referred to the binding nature of Resolution 598.[733]

During 1987 a UN naval force was discussed; Italy and the United States had supported the idea, the United Kingdom was unenthusiastic, and the United States was willing to consider it but only if a collective action concept was spelled out clearly. The United States would not support a UN force replacing US and US-aligned forces. The idea got nowhere.[734]

Resolution 612 again condemned chemical warfare in May 1988.[735] Iran accepted Resolution 598 in August 1998, and a ceasefire ended hostilities.[736] Subsequent resolutions, 1988-91, condemned use of chemical weapons, called upon States to control export of such to the belligerents, established the UN Iran-Iraq Military Observer Group (UNIIMOG) to supervise the ceasefire, and disbanded UNIIMOG in 1991 with intensification of the crisis over Kuwait.[737]

*g. Appraisal of Security Council Lawmaking.* Security Council intervention with binding or recommended norms affecting war at sea has been episodic and often limited. There are several reasons for this.

Use of the veto, at first largely by the USSR and later by other permanent Council members (France, Great Britain, United States),[738] has affected lawmaking for some maritime conflicts. Permanent members filed vetoes on these maritime incidents or wars: Corfu Channel, 1947; Korean War; Arab-Israeli conflicts; India-Pakistan, 1971; Rhodesia; Falklands/Malvinas.[739] In some cases, Council agenda items have been withdrawn, or the problem has disappeared with time.[740] Time has been a critical factor in some, but not all, modern conflicts; the Arab-Israeli Six-Day War and the 1971 India-Pakistan conflict are two examples where military

action was over within weeks.[741] Even though the Council may be "organized ... to function continuously,"[742] perhaps with the most modern telecommunications facilities, the relatively rapid pace of events can outstrip deliberation, debate and resolution negotiations and drafting.[743]

Whether the Council can consider a matter depends on discretion of UN Members (whether Council members or not), countries that are not UN Members, the General Assembly, or the Secretary-General, in bringing matters involving international peace and security to the Council's attention. The Council can initiate its own investigation, but that involves discretion before acting on a resolution.[744] The Secretary-General could perhaps report through his or her inherent power as head of the UN Secretariat.[745] And while this list may seem impressive, there is nothing to stop individual States from attempting to settle a dispute by means other than Council action, perhaps by negotiations with agreement that the issue not be presented to the Council, or referral to a regional organization, the latter of which occurred during the Cuban Missile Crisis.[746]

The implications of a veto may have influenced the relative strength of resolutions. For example, the Korean War resolutions were only recommendatory in nature.[747] More recently, however, the Council has demonstrated the capacity to approve decisions under Articles 25 and 48, at least where permanent members concur with the action, must abstain,[748] or choose to abstain.[749] The latter has occurred occasionally in situations related to armed conflict or the potential for armed conflict.[750]

A more serious problem has been the language of resolutions. Obviously, if a resolution recommends certain action, that course is optional with UN Members. There have been many affecting the law of naval warfare.[751] Equally obviously, if the Council "decides" that a State "shall" take certain action, that resolution is mandatory. There have been few of these.[752] Is a resolution "calling upon" Members mandatory? Respectable authority has differed on the point,[753] and the record of compliance is mixed. For example, the United Kingdom complied when called upon to interdict tankers during the Rhodesia transition,[754] but the record is equally clear that Iran largely ignored Council calls during the Tanker War, perhaps until forced to comply by outside pressures.[755] (To be sure, Iran accepted Resolution 598 after prior Iraqi acceptance of it, with a resulting ceasefire.[756] Iraq's "acceptance" record of these resolutions was better,[757] but "accepting" them connoted their nonmandatory nature to the belligerents. In the near term, immediately after passage of a call for action, about the only sure method is to observe what States do with the call for action and whether they appear to respond out of a sense of legal obligation. This choice, like Council decisions that are clearly mandatory under the Charter, is not an option for a military commander.[758] A commander must await the executive decision to comply with the call, and how Council calls for action and decisions will be implemented, since they are frequently imprecise,

and deliberately so, as the Council is addressing a congery of over 180 countries with widely varying resources.

Since the UN's earliest days Council resolutions have been involved with maritime and law of naval warfare issues.[759] Although nearly all of these resolutions have not carried the binding authority of decisions under Articles 25 and 48, they do have a sort of "soft law" weight, which when implemented over an undetermined amount of time, may ripen into custom, the oldest source of international law.[760] Moreover, to the extent that the Council can act in relative concert and in confidence that there will be no veto threat, the future may see more strongly worded resolutions that are nonmandatory in nature, or decisions that bind all UN Members. The result in the future is that these resolutions, general as they often are, may dictate the content of naval warfare in the case of Council decisions, or be informed by it, much as self-defense considerations may be informed by the content of naval warfare.[761]

*2. Making the Rules and Stating the Principles: The General Assembly*

The Charter gives the General Assembly only recommendatory powers in the international peace and security arena, and then only to the extent that the Council is not seized of a matter.[762] Two practices have developed: recommendations under the Uniting For Peace (UFP) Resolution, and concurrent action with the Security Council.

*a. The UFP Resolution.* When the Soviet Union returned to the Council and began vetoing[763] resolutions connected with the UN Command in Korea's prosecuting that war, the United States led passage of the UFP Resolution, which provides that if the Council,

> because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security . . . where there appears to be a threat to the peace, breach of the peace, or act of aggression, the . . . Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including, in the case of a breach of the peace or act of aggression, the use of armed force when necessary, to maintain or restore international peace and security.

The Resolution also established a Collective Measures Committee (CMC) to report to the Assembly.[764] On at least five occasions after the Korean War, the Council resolved to call emergency Assembly sessions, or refer claims to it. Egypt's nationalizing the Suez Canal (1956), revolt in Hungary (1956), Lebanon (1958), the Congo crisis (1960), and the India-Pakistan war (1971).[765] Although it was argued that UFP was not legitimate under the Charter, most find for its legality; East

and West have invoked it in referring disputes from the Council to the Assembly.[766]

UFP was employed in several cases. Assembly Resolution 498 found the PRC had committed aggression during the Korean War.[767] Resolution 500 recommended a weapons and strategic materials embargo directed at the PRC and North Korea.[768] Resolution 997, voted by the Assembly during Britain, France and Israel's 1956 Suez Canal intervention, did not determine that a threat to or breach of the peace had occurred but did note that these States' forces had penetrated, or were operating against, Egyptian territory. They were urged to withdraw forces and cease hostilities.[769]

Castenada, Higgins and others have analyzed these situations, along with those in Hungary and the Congo.[770] Castenada argues for development of a new customary law arising from acquiescence of UN Members.[771] Whether these five examples of conflict can amount to a new found custom is, of course, highly debatable. Castenada formulates this system of rules from the UFP experience; it is typical of arguments for Assembly lawmaking:

1. The... Council, having determined that there is a threat to the peace, a breach of the peace, or an act of aggression, may recommend the adoption of enforcement measures, including the use of armed force, on behalf of the United Nations, and directed against states or de facto governments, without following the procedures and observing the requirements established in Chapter VII of the Charter for... armed force. This means that members can make available to the Council armed forces in accordance with procedures different from the special agreements contemplated in Article 43; that plans for the use of such armed forces need not be drawn up with the assistance of the Military Staff Committee, as provided in Article 46; and that the strategic direction of armed forces made available for enforcement action need not necessarily be the responsibility of the... Committee, as set forth in Article 47.
2. The... Assembly can recommend, when there is lack of unanimity among the Permanent Members..., and when there has arisen in the Assembly's opinion a threat to the peace, breach of the peace, or act of aggression, the adoption of enforcement measures, including... armed force in the event of an armed attack or an act of aggression, on behalf of the United Nations and directed against states or de facto governments, also without observing the procedures and requirements of Chapter VII for... armed force.
3. Both the... Council and the... Assembly may decide, without a previous determination that a threat to or breach of the peace or an act of aggression exists, to create a United Nations military force to carry out nonenforcement functions, without complying with... Chapter VII for the use of armed force; and they may recommend—but may not legally require—that members contribute contingents to establish it. The functions of a United Nations Force may range from mere observation and supervision to the undertaking of typically military operations, such as engaging in battle with armed groups for... destroying them as combat units, as occurred in the Congo.

> Up to the present [1969] there has not been a single instance in the practice of the United Nations that could serve as a legal basis for a new rule authorizing the... Assembly to recommend the use of armed force, without the legal support of the Uniting for Peace Resolution, even for nonenforcement purposes.
>
> .....
>
> The legal effect of the new rule, per se, is the broadening of the competence of both the Council and the Assembly to act in a manner different from that originally contemplated in the Charter. The degree to which this competence was enlarged is indicated by the three principles suggested above. It is possible to speak of a legal effect because there has been a modification of a pre-existent legal situation, although, from a different point of view, the change in the competence of the organs constitutes not the effect but the very content of the new rule created by the practice of the Organization.
>
> The second effect is of a diverse nature. Actually, it is a question here of a legal effect directly produced by the resolutions adopted by the... Council or... Assembly on the basis of the customary rule created by their practice, rather than a direct effect of that rule as such. This effect consists in the temporary suspension of the Charter obligation of members to refrain from the use of force against any state, in conformity with Article 2(4). That certain Council or Assembly recommendations concerning the use of force should have as an effect the suspension of the Charter obligation not to use it, is a consequence of the new rule created by the practice of the organs.[772]

While this statement is useful, it is submitted that Castenada errs in two respects. First, it remains clear after the 1990-91 Gulf War that the Council may also "decide" on the use of force and authorize its agent—the Coalition in the Gulf War—to proceed.[773] Moreover, it is highly questionable whether the Assembly may "decide"—in the sense of the Charter, Articles 25 and 48—on anything, such that States would be compelled to obey its commands.[774] If the Castanada view is accepted, that States' acquiescence is enough to create a customary norm, that may be true.[775] However, that is not what the Charter says, and any international agreements that conflict with the Charter are trumped by the latter.[776] Treaties, of course, have been a regular feature of peacekeeping operations, whether under UFP authority or the Council.[777]

Moreover, most commentators and courts have said recommendatory resolutions can only restate or evidence customary law. Even Castenada has this view for declaratory resolutions.[778] The Assembly has promoted many LOAC-related norms through the years; some state rules of law, some do not (at least according to some countries), and some are purely aspirational.[779]

*b. Concurrent Action with the Council.* In several cases the Assembly and the Council have issued resolutions during crises or conflicts.[780] Where a Council decision [781] adopts a norm stated in an Assembly or Council recommendation, it becomes a binding rule of law. Where a nonbinding Council resolution adopts such a norm, it is further evidence of customary law, unless, of course, the original

resolution declared custom, in which case the Council resolution also restates a customary rule.[782]

*c. Appraisal for the Tanker War.* The Council was seized of the Iran-Iraq war from the beginning; therefore, the Assembly had no jurisdiction over the conflict.[783] However, countries involved in a Council-seized conflict may try to bring matters before the Assembly, which should reject consideration of them.[784]

The Assembly did promote projects whose subject is applicable to the Tanker War, notably the Third UN Conference on the Law of the Sea (UNCLOS III) which created the LOS Convention.[785] The same procedure was followed for the Conventional Weapons Convention and its Protocols, a product of ICRC conferences.[786] The Council, by citing and incorporating by reference freedom of navigation, the law of armed conflict, and occasionally specific treaties, *e.g.*, the 1925 Geneva Gas Protocol or the 1949 Geneva Conventions,[787] thereby gave further evidence of these agreements or customary law as norms. Since no binding Article 25 or 48 decisions incorporated them, these bodies of law did not become mandatory norms, but Council citation increased the strength of their applicability. Although the issue is not free from doubt, Resolution 598 may have clarified the debate as to the status of Article 40-based resolutions calling for action, which may be binding if the views of the US Secretary of State and other foreign ministers are correct.[788]

*3. The Constitutive Process of Decisionmaking in the Charter Era.*

Sub-Parts B.1 and B.2 of this Chapter have sketched development of norms of conduct by the Council and the Assembly. This Sub-Part examines the methodology of implementation of these norms by the Organization and by regional organizations, also contemplated by the Charter.

*a. Implementation: Original Intent and Trends.* The Charter contemplates that UN Members will agree to make armed forces, assistance and facilities, including rights of passage, available to the Council so that it can maintain international peace and security.[789] These agreements have not materialized.[790] The Charter also provides for a Military Staff Committee (MSC) to plan for applying armed force when the Council directs. The MSC consists of permanent Council members' chiefs of staff and would have strategic direction of forces at Council disposal.[791] Owing to the Cold War and other factors such as the lack of Article 43 agreements, the MSC atrophied.[792]

Alternatives to the Charter system have been suggested [793] or implemented. One was the "agency" principle, by which the Council has requested a State or a group of States to take leadership and command of an operaton on the Council's behalf. The United States had this role in Korea, the United Kingdom for Rhodesia, and a Coalition in the 1990-91 Gulf War.[794] UFP-based operations have used a

Collective Measures Committee for data reporting and dissemination.[795] Some peacekeeping operations have been given to the Secretary-General for leadership.[796] In interdiction/embargo operations for Rhodesia, South Africa, and Iraq in the 1990-91 Gulf War, the Council appointed a Committee to review these processes.[797]

No peacekeeping forces were active in the Gulf area during the 1980-88 war; UNIIMOG served after the ceasefire and until the 1990-91 Gulf War.[798] The Secretary-General reported on the conflict, at Council direction, but did not administer forces.[799] Neither the Council nor the Assembly authorized forces' intervention similar to the situation in Korea, Rhodesia or Kuwait. The Iran-Iraq conflict and its Tanker War component were governed by traditional inter-State relations and the law of self-defense.

*b. Regional Arrangements Under the Charter.* Article 52 permits regional arrangements or agencies to deal with matters relating to maintaining international peace and security "appropriate for regional action." Members of these arrangements or agencies should "make every effort to achieve pacific settlement of local disputes" through these institutions before referring claims to the Council. The Council must encourage developing pacific settlement of regional disputes through these institutions, whether a matter is referred to the Council or a regional institution first.[800] The Council can use these arrangements or agencies for enforcement under Council authority.[801] It must be kept informed of action taken "or in contemplation" by regional institutions, as distinguished from post-attack reporting required in self-defense situations.[802]

What constitutes an Article 52 regional arrangement or agency has not been resolved; the Arab League,[803] the OAS[804] and the Organization of African Unity (OAU)[805] qualify.[806] Not all regional organizations are Article 52 dispute resolution agencies; those whose function is self-defense get authority from Article 51's inherent right of collective self-defense provision.[807] There has been use of Article 52 as an alternative to Council or Assembly dispute resolution. For example, the United States referred the Cuban Missile Crisis issue to the OAS, obtained a resolution denouncing introduction of the missiles, and proceeded with quarantine. As Article 54 requires, the Council was notified.[808] A regional organization resolution was also used in the Grenada crisis.[809]

Four organizations, one with Article 52 status (the Arab League),[810] the GCC, which may have that status,[811] the WEU,[812] and the ICO,[813] which may also have that status, were involved in the Tanker War. Although hampered from time to time by internal dissension, the Arab League Summits' resolutions condemned freedom of navigation violations and urged resolution of the conflict by the parties. The Arab League governor-general appeared before the Council in connection with debate on Council Resolution 552, brought by the GCC States,

complaining of attacks on freedom of navigation to and from their ports.[814] The GCC played an active role in the war, evolving from an internal security organization to promoting joint action for mutual security.[815] The WEU, concerned with European security, was cover for several States' Gulf maritime operations.[816] The ICO attempted to serve as a mediator, particularly through GCC support.[817]

Other regional organizations that could be said to have dispute resolution capability today, *e.g.*, the European Community,[818] passed resolutions but were not involved because the Tanker War occurred outside their geographic competence.[819] Other governmental organizations not enjoying Article 52 status, *e.g.* the Group of Seven, also passed resolutions in connection with the war.[820] None of these made law for the conflict, but their "soft law" status further evidences the strength of claims they advanced, *e.g.*, freedom of navigation in the Gulf.

*c. The Work of Nongovernmental Organizations and the Tanker War.* The principal nongovernmental organization contributing to the law of the Tanker War was the International Committee of the Red Cross (ICRC), a Swiss corporation that sponsored conferences leading to 1977 Protocols I and II to the 1949 Geneva Conventions.[821] The ICRC also sponsored conferences leading to adoption of the Conventional Weapons Convention and its protocols in 1980.[822] The Security Council cited to the law of armed conflict generally and to the Geneva Conventions specifically,[823] the work of the ICRC was cited in a Council resolution.[824] Early in the war Iran accepted and Iraq rejected a proposal to move, under the Red Cross or UN flag, 70 ships caught in the Shatt by opening hostilities.[825] The standards of ICRC-sponsored treaties had impacted norms applicable to the war, regardless of citation by the Council.[826]

The International Transport Workers Federation (ITF), International Chamber of Shipping (ICS) and the International Shipping Federation (ISF) expressed concerns over attacks on merchant shipping, and these were transmitted to belligerents by the UN Secretary-General.[827]

## Part C. Maritime Neutrality in the Charter Era [828]

"There is nothing new about revising neutrality; it has undergone an almost constant process of revision in detail," Jessup concluded in 1936.[829] He also believed that

> . . . nothing could be more fallacious than the attempt to test the application of rules of neutrality by the principles of logic. Since they are products of compromise and of experience, logic has found practically no place in their development and cannot properly be used in their application.[830]

Over half a century into the Charter era, little would change these observations. New considerations have appeared,[831] including the Charter itself; the process of

analyzing the law of neutrality defies a straightforward, positivist, black-letter approach. Indeed, principles of neutrality for maritime warfare have been seen to be less rigid, from an historical perspective, than those for air or land warfare.[832]

Some assert that neutrality is in "chronic obsolescence."[833] A major reason, according to those who say that future applications of the law of neutrality will be minimal, is the argument that the Charter has ended the rights and duties of the old law of neutrality.[834] Another argument is that since the Charter has outlawed war,[835] therefore there can be no state of war, and therefore there is no need for a law of neutrality.[836] (The latter position might be considered in light of the Pact of Paris (1928), which outlawed aggressive war.[837] World War II began a decade later.)

Many others, reflecting State practice and claims in the Charter era, have maintained that the law of neutrality continues to exist. The *San Remo Manual* recognizes maritime neutrality.[838] The 1992-96 International Law Association Conferences received reports from its Committee on Maritime Neutrality, and the 1998 ILA conference accepted the Committee's final report.[839] Individual researchers assert that neutrality remains a valid legal concept, albeit modified by the impact of the Charter and other considerations.[840]

Like the reports of Mark Twain's passing, accounts of the demise of neutrality in the Charter era have been greatly exaggerated, as the ensuing analysis demonstrates.

The law of neutrality before World War II and the Charter era has been traced in detail by Jessup, his associates and others,[841] more analysis is needlessly repetitive. However, two groups' research during 1919-39 is worthy of note, particularly for their collection and summary of State practice. They had considerable impact on State practice as the war widened but before it became global in 1941 with entry of the United States and other American countries into the war.

*1. Neutrality, 1928-41, and in the Charter Era; "Non-Belligerency"*

In 1928 the Pact of Paris was concluded. Subject to later agreements such as the Charter, the Pact remains in force today.[842] The understanding concerning the inherent right of of self-defense under the Pact applies in the Charter era and can be claimed today, subject to principles of necessity, proportionality, and for anticipatory self-defense, a situation admitting of no other alternative.[843] Neutrality principles also carried forward into the Charter era, subject to modification by Charter law and the usual processes of change in the law Jessup saw in 1936.[844]

The Pact did not address the neutrality issue, although other agreements contemporaneous with it stated the term without defining it,[845] except for the Havana Convention on Maritime Neutrality, with eight American countries party, including the United States,[846] and the five-State 1938 Nordic Rules of Neutrality,[847] not a formal treaty but published in the *LNTS* series.[848]

The ILA 1934 meeting approved the *Budapest Articles of Interpretation* of the Pact of Paris. They provide in part:

(1) A signatory State cannot, by denunciation or non-observance of the Pact, release itself from its obligations thereunder.
(2) A signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.
(3) A signatory State which aids a violating State thereby itself violates the Pact.
(4) In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of International Law, do all or any of the following things:—
    (a) Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade, etc.;
    (b) Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent;
    (c) Supply the State attacked with financial or material assistance, including munitions of war;
    (d) Assist with armed forces the State attacked.
(5) The signatory States are not entitled to recognise as acquired de jure any territorial or other advantages acquired de facto by means of a violation of the Pact.
(6) A violating State is liable to pay compensation for all damage caused by a violation of the Pact to any signatory State or to its nationals.
(7) The Pact does not affect such humanitarian obligations as are contained in general treaties....[849]

Although some States [850] and commentators [851] said when the *Articles* were approved that no State had adopted them as policy, in 1941 the US Congress heard former Secretary of State Stimson's testimony on the pending Lend-Lease Bill; he interpreted the Articles as an authoritative statement of the law.[852] He echoed views of Secretary of State Cordell Hull and Attorney General Robert H. Jackson on the point, that since Axis nations had breached the Pact of Paris, the United States could resort to self-defense.[853] Besides self-defense, under the *Budapest Articles* States could adopt a status of nonbelligerency, *i.e.*, decline to observe neutrality toward a Pact violator. States could supply a State that was a target of a Pact violator with "financial or material assistance, including munitions of war."[854] (Put differently, Pact parties could engage in reprisals involving force or other modalities or retorsions. In the Charter era, reprisals involving use of force by States not party to a conflict are inadmissible.[855] In the pre-Charter era assisting victims of aggression or armed attacks was styled as nonbelligerency, an intermediate step between neutrality and belligerency.)

The Lend-Lease Bill was enacted.[856] Congress, by enacting Lend-Lease in this context, can be said to have stated US practice at that time,[857] and the *Budapest Articles* as part of that practice. It is submitted that when the Allies and other neutrals

accepted Lend-Lease through bilateral agreements, they ratified and accepted this practice.[858] The 1940 UK-US destroyers-for-bases agreements [859] were also examples of the United States' assuming nonbelligerent status.[860] These, however, were only bilateral arrangements, although the US general pro-Allied stance was then apparent.[861]

The United States was not the only country to assume a nonbelligerency posture during 1939-45. For example, Norway's November 1939 charter arrangement for 1.5 million tons of tankers with Britain[862] favored the United Kingdom against the Axis. Others officially or unofficially adopted policies tending to favor one side or the other, sometimes before becoming belligerents *(e.g.,* Italy, which supported Germany, or American States participating in US Lend-Lease agreements before declaring war)[863] and in other cases staying out of the war but keeping nonbelligerent status *(e.g.,* Spain).[864] This World War II practice tends to add support for recognizing nonbelligerency as an intermediate position, under international law, between neutrality and belligerency.

The ILA was not the only group of scholars in the interwar years with a view that there could be gradations or stages between belligerency and neutrality. The 1939 draft Harvard Aggression Convention differentiated among aggressors; defending and co-defending States, entitled to all rights of self-defense; and "supporting States," entitled to discriminate against an aggressor by other than armed force. A supporting State was entitled to "rights which, if it were neutral, it would have against a belligerent." An aggressor retained its duties to those entitled to neutrality status. Other States would have had these rights under Articles 12 and 13:

> A State which is not an aggressor, a defending State, a co-defending State, or a supporting State, does not, in its relations with the aggressor, have the duties which, if it were neutral, it would have to a belligerent, but, against the aggressor, it has the rights which, if it were a neutral, it would have against a belligerent.
>
> .....
>
> Subject to ... Article 7 and 8, a State which is not an aggressor, a defending State, a co-defending State, or a supporting State, has, in its relations with a defending State, a co-defending State or a supporting State, the duties which, if it were neutral, it would have to a belligerent; and has against those States the rights which, if it were a neutral, it would have against a belligerent.[865]

The *Comment* to the "supporting State" definition elaborates on the term in the Draft Convention:

> ... "[S]upporting State" is used in a special way. A "supporting State" might give to a defending State even greater assistance than was given by a "co-defending State" but it would do so without use of armed force.
>
> The action taken by a supporting State to assist a defending State would take the form of some kind of discrimination against the aggressor or in favor of the defending

> State. The State may take such action and assume such status for a variety of reasons but presumably its reasons will include a desire to deter, restrain or even perhaps to punish an aggressor. The discriminatory action may take the form of economic or financial embargoes directed against the aggressor. It might be restricted to a withdrawal of diplomatic and consular representatives from that State or to participation in the determination that the State violated its obligation not to resort to force. It might not take the form of any measures directly *against* an aggressor but might rather be in the form of aid—financial, economic or otherwise—to the defending State.

Recitations of State and League of Nations practice demonstrates that there was support among States, great and small, for the form of nonbelligerency not involving direct use of force.[866] In effect, the Draft Convention's definition of supporting State comes close to the armed neutralities of the Seventeenth and Eighteenth Centuries and the Napoleonic Wars when neutrals cooperated to get cargoes through.[867] This was also almost precisely the circumstance of the United States in the destroyers-bases deal,[868] its convoy operations in the North Atlantic before entry into World War II,[869] and Lend-Lease.[870] It was the US posture during the Tanker War when it convoyed neutral merchantmen to and from Kuwait.[871] The same was true for States other than belligerents that accompanied or escorted merchantmen flying flags of States other than the belligerents, regardless of who was the aggressor during the Tanker War.[872] At least one commentator has stated that the *Budapest Articles* principle of aid against an aggressor, or its correlative of supporting State action under the Draft Convention, applies in the Charter era.[873]

Most recent commentators say there is no intermediate position between belligerency and neutrality, *i.e.,* there is no legal foundation, or perhaps need, for nonbelligerency. Unlike the Harvard Draft Convention view, nonbelligerents can claim no rights from that status.[874] However, the problem may lie more in defining neutrality, according to Tucker. If neutrality is defined as non-participation in hostilities, *i.e.,* as a belligerent or nonbelligerent, a non-participant neutral incurs belligerent responses only when, and to the extent, favoritism is shown. Belligerents can respond by non-force reprisals or retorsions.[875] If it is assumed that the United States and others connected with Gulf commerce in the Tanker War favored one belligerent over the other, (*e.g.,* Iraq over Iran), Iran could impose proportional non-force reprisals after due notice and opportunity for correction necessary in the situation. Iraq could do the same, and either could employ retorsions too.[876] Iran could not, even under this theory of neutrality, move straightway, without notice, to forcible response, *e.g.,* attacks on and destruction of neutral shipping.[877]

Besides the US position before entry into World War II and its stance during the Iran-Iraq war, nearly every conflict of reasonable duration during the Charter era has involved situations of nonbelligerency in maritime warfare. This was true for the Korean War,[878] with its UN law overtones. It was also true for the Arab-Israeli

conflicts.[879] The India-Pakistan conflicts were less clear on the point.[880] The United States materially assisted the United Kingdom in the Falklands/Malvinas war, supplying fuel and intelligence; the United States and other countries, through economic sanctions, also indirectly assisted the United Kingdom.[881] Moreover, if the view is taken that negative preferences for one belligerent over another, *e.g.*, cutting off arms supplies to one side as opposed to aiding one belligerent while embargoing the other, amounts to nonbelligerency, during the Tanker War many States had nonbelligerent status: France, most of the Arab States, and the USSR. The United Kingdom, with its 1987 export credit agreement with Iraq despite its asserting even-handed strict neutrality, might be said to fall into this category.[882]

Regardless of the commentators' position, the record of armed conflicts since World War II has been that if the confrontation is of any length, States may declare and practice strict neutrality, declare neutrality and act as nonbelligerents, or do nothing, perhaps ignoring (or being unaware of) the situation.[883] The law of neutrality has been applied in the Charter era, perhaps not consistently, and claims for a right to act as a nonbelligerent, *i.e.*, favoring one or more belligerents at the expense of others, persist.

Is nonbelligerency a violation of the law of neutrality, or a status without legal standing between the traditional roles of neutrality and belligerency? The response today lies not in the traditional analyses, stretching back centuries, but in the developing norms under the Charter. The old principles of neutrality have been modified by the advent of the Charter.[884] The same is true for nonbelligerency, where an overlay of Charter law helps define these situations and can give them legitimacy, not as an exception to traditional rules of neutrality, whether stated in treaties or custom, but as application and interpretation of the Charter.[885]

Responses to aggressors can include proportional reprisals not involving use of force and retorsions, and States that are not belligerents whose interests have been damaged by belligerent action can invoke these, along with state of necessity.[886] These alternatives remain as options in the Charter era, and taking such actions could demonstrate favoritism for one belligerent because of actions taken against the other. In effect, the actor State would have the appearance of being a nonbelligerent by so acting.

Examples from recent conflicts illustrate the point. During the Falklands/Malvinas War, States in Europe attempted to isolate Argentina economically, most likely in violation of international obligations. These reprisal actions were justified against the aggressor in that war. If actions of the United States and other countries supplying economic assistance, intelligence and other information to the United Kingdom would be deemed unlawful,[887] those actions were also appropriate nonforce reprisals under Rio Pact mutual security for Argentina's violation of territorial integrity. Governments' actions to convoy, escort or offer protection

to neutral ships not carrying warfighting/war-sustaining goods to belligerent ports during the Tanker War[888] were retorsionary in nature. These were unfriendly acts directed toward a belligerent thought to have violated international law.

In essence, the principles of law applicable to the intermediate status between belligerency and neutrality need not necessarily depend on development of a customary practice recognized as law however the trend may seem to have been since 1939 and continuing into the Charter era, or upon resolution of the debate among the commentators. The Charter-governed norms apply to fill the void to permit non-force reprisals and retorsions by neutrals that might have evoked claims of nonbelligerency before 1945, neutrals that retain an inherent right of self-defense. Moreover, principles of treaty-based informal self-defense arrangements, which also continue in the Charter era, permit responses by States not party to a conflict involving use of force, provided other criteria, *e.g.*, necessity and proportionality, are met.[889] One problem with informal self-defense arrangements, like the problem of aid to a country which is a target of aggression, is the stance the purported aggressor may take. If the purported aggressor says, rightly or wrongly, that the target is the aggressor, then the aiding State may subject itself to claims, and worse, of aiding the aggressor. Another problem with relatively clandestine material aid, or with informal self-defense, is notice. Although security treaties sometimes are not published, many are, and all can see who is aligned with whom. This is not the case with clandestine aid to a target or informal collective self-defense agreements. These kinds of transactions carry with them the same kinds of risks of misinterpretation and accusations when States act pursuant to them without notifying other States of the reasons for their actions. States so acting must take these factors into account when assisting target States pursuant to these modalities.

*2. The Law of Neutrality in the Context of UN Action Under the Charter*

Sub-Part C.1 has demonstrated that neutrality, primarily as practiced in the Nineteenth Century, has been modified in the Charter era, although the general concept of neutrality remains. The further question is the impact that UN actions, particularly by the Security Council, may have on this corpus of law. As recited earlier, decisionmaking options under the Charter, and practice under the Charter, demonstrate that there has been and will be ample room for claims of neutrality or nonbelligerency.

First, although the Council may make legally-binding decisions under Articles 25 and 48 of the Charter, and therefore may obligate UN Members under Articles 41-42 to take action that might be inconsistent with traditional neutrality principles, the Council also may make nonbinding "call[s] upon" Members under Articles 40-41. It also may make nonbinding recommendations under Articles 39-40. These recommendations have no more force of law, unless they restate custom,

general principles or treaty-based norms, than General Assembly recommendations under Articles 10-11, 13 and 14. [890]

Thus, Council decisions may compel a State to behave inconsistently with traditional neutrality practice, either in requiring what would otherwise be belligerent acts or in restricting rights traditionally enjoyed by neutrals.[891] Article 50, invoked by the Council for States affected by the Council-directed embargo of Iraq during the 1990-91 Gulf War,[892] allows it to consult with States finding themselves with "special economic problems" arising from carrying out Council-decided preventive or security measures. Thus even if Jordan and like-status States would have lost some or all of their rights and duties as neutrals through initial Council decisionmaking in that war, an Article 50 reprieve could have restored some or all of these rights and duties. Council action under Article 50 could result in greater rights, or lesser duties, than under the traditional law of neutrality.

Second, Council decisions when first taken may include exemptions that would, in effect, allow reversion to traditional neutrality law. For example, sea and air embargoes against Iraq in the 1990-91 war and against the former Yugoslavia beginning in1991 had exemptions for medical supplies, humanitarian supplies, and foodstuffs notified to the Council's Sanctions Committee, which includes representatives from all Council members.[893] To that extent, and except when otherwise controlled by other effects of Council decisions—*e.g.*, the Committee—the traditional law of neutrality would apply to such shipments. This exception has been most apparent when the Council has decided to embargo only a single commodity—*e.g.*, petroleum, weapons or military equipment [894]—followed by recommendations on, calls for, or decisions on, enforcement. In that situation the law of the resolution would apply to selected commodities, while neutrality rules would be in force as to other goods if armed conflict is involved. Thus far that situation has not arisen. The classic case was Rhodesia (1965) which did not involve international armed conflict, and only selective enforcement as to one commodity, petroleum.[895] As to commodities not stated in a selective Council decision, neutrality principles would apply. If Article 42 measures approve use of force for some circumstances but not for others, and use of force is appropriate in those other circumstances, the law of neutrality will apply in those circumstances.[896] For example, if the Council decides on an air-land campaign against an aggressor, with no decision on maritime aspects of the crisis, the maritime law of neutrality applies to maritime aspects of the situation to the extent that the Council decision's impact does not overlap into maritime issues. An example might be air flights over the seas. If an air-land related resolution is in force, it would apply to ocean overflights to and from the affected State, except as to purely maritime-oriented flights, *e.g.*, helicopter resupply from ship to ship.

The third point is the relative infrequency of application of mandatory Council decisions. Of the hundreds of crises since 1945 that have involved a potential for

armed conflict or actual conflict and which could be said to risk a "threat to the peace, breach of the peace, or act of aggression,"[897] mandatory Council decisions have governed only a handful.[898] In terms of the potential for or actual warfare at sea, six crises have produced Council decisions: Rhodesia (1965), the Gulf War (1990-91), the disintegration of Yugoslavia (1991), Angola (1992), Liberia (1992) and Haiti (1993).[899] Even the Korean War evoked only Council calls or recommendations for action before the USSR vetoes, and thereafter General Assembly recommendations under the UFP Resolution.[900] To be sure, some calls for action and recommendations were well-supported,[901] but they did not carry the force of decisional law. When the Council approves other than decisions, resulting resolutions, although confessedly highly persuasive and authoritatively stated from political and policy perspectives, are nonetheless recommendatory as a matter of law. In the latter case—the overwhelming bulk of resolutions the Council has voted to date—there has been and will be full opportunity for the law of neutrality to operate. Widespread compliance with calls for action or recommendations could eventually mature into custom, but it is doubtful whether State practice under them would be of sufficient duration,[902] assuming States accept the action as law. (Sanctions practice against Iraq and the former Yugoslavia may be candidates for congealment into custom, however.) In any event, neutrality principles would exist between the precipitating event, *e.g.*, breach of the peace, and Council action.[903]

Even if the Council decides on action, the enforcement mechanism has not been the Military Staff Committee and special forces the Charter contemplates.[904] Rather, it has often used an agency principle, choosing a State or group of States to respond to the crisis, with one nation perhaps chosen for a leadership role—the United States for Korea, the United Kingdom for Rhodesia, and a coalition for the 1990-91 Gulf War.[905] In these situations agent State(s) might be involved in enforcing the law of neutrality, even though there are overarching Council resolutions. Such was the case for Korea, where the US-declared blockade involved observing neutral vessel rights to visit nearby USSR ports and a right of USSR warships to proceed to North Korean ports.[906] In recently-ordered embargo operations, the Council has not designated a leader, resulting in confusion.[907]

The Security Council's Tanker War resolutions fell into the first and third categories of exceptions, *i.e.*, no State including the belligerents was obligated to obey a Council resolution, except through calls for action, demands, or recommendations. Thus the principles of neutrality had full potential play for that war. Other conflicts, particularly the ongoing situation that began with the Gulf War of 1990-91 and disintegration of the former Yugoslavia, demonstrate that gaps in Council decisions, or its methodology of taking action, leave copious opportunities for applying neutrality principles. These principles may well not be the same as those before the Charter era, since actions in individual and collective self-defense must be factored in, but neutrality as a concept continues to exist.

Moreover, the Council appears to have approved *sub silentio* the concepts of neutrality and perhaps nonbelligerency as well. International agreements concluded since 1945, including the 1949 Geneva Conventions, the most widely accepted multilateral treaties of any,[908] have continued to use the terms "neutral" and, more rarely, "nonbelligerent."[909] These conventions were cited by the Council during the Tanker War, and again during the 1990-91 Gulf War.[910] The Council referred to "states not party to the hostilities" in Tanker War Resolution 552.[911] Furthermore, there is nothing in practice under the Charter to indicate that earlier conventions dealing with neutrality are invalid under the Charter.[912] To the extent that earlier treaties have crystallized into custom,[913] they exist in that mode as a valid source of law.[914]

*3. Appraisal of Neutrality in the Charter Era*

Undeniably neutrality as a general concept has as much vitality today as in the pre-Charter era. The claim, that there is a customary right to assert an intermediate status of nonbelligerency between traditional neutrality and belligerency, may have been strengthened since 1945. The precedents in some cases are almost identical with those in the last two centuries. Even if nonbelligerency cannnot be asserted as a customary norm, the overlay of principles of retorsion, reprisals not involving use of force, and state of necessity, apply to support actions at variance with a practice of strict neutrality in the traditional sense. Because of options under the Charter for nonbinding resolutions by the Security Council and perforce the General Assembly, the potential for exceptions even with a binding Council decision, and the relative scarcity of Article 25/48 Council decisions, the opportunity for claims of neutrality—perhaps modified by the new nonbelligerency of the Charter era—remains large. "Far from being moribund, these traditional rights [of neutrality and self-defense] apply logically in conditions of limited wars"—the type of conflicts that have beset the planet since 1945—"even more rigorously than in conditions of total war."[915]

## Part D. Sources of the Law, Principles of the Law of Treaties and Treaty Succession

This Chapter has integrated Charter interpretation principles, notably the supremacy of the Charter over treaties,[916] the problem of custom or general principles of law contrary to the Charter,[917] and the possibility that parts of the Charter may restate *jus cogens* norms, however that concept may be defined.[918] This Part examines principles of the law of treaties and treaty succession, with a closer review of the effect of war on treaties generally, and the relationship between the LOS Convention and the law of armed conflict.

*1. Principles of the Law of Treaties and Treaty Succession*

Principles of treaty interpretation,[919] treaty succession,[920] and acquiescence in or objection to custom [921] have been noted. The possibility of coercion, *e.g.*, threat or use of force contrary to Article 2(4) of the Charter, to which might be added various forms of error or corruption,[922] has been cited.[923] (If a treaty is negotiated in connection with a State's aggression in violation of the Charter, *i.e.*, an armistice or surrender by the aggressor, coercion principles do not apply.[924] Economic coercion, *e.g.* sanctions imposed as nonforce reprisal or retorsion, does not invalidate a treaty either.[925] If the Security Council decides on sanctions, or calls for them, Charter law also trumps a target State's economic coercion claims.)[926]

Other assertions of the inapplicability of treaties can arise because of claims of material breach,[927] impossibility of performance,[928] or fundamental change of circumstances.[929] Desuetude [930] and state of necessity [931] may vitiate a treaty. In the view of some, unequal treaties [932] can also negate a treaty's effectiveness.

A treaty may be subject to severability. Part of it may remain in force, part may be suspended, part may be terminated, all may be suspended, or all may be terminated, depending on the nature of the treaty's terms.[933]

Against these must be balanced the principle of *pacta sunt servanda*—treaties should be observed.[934] Moreover, even though a treaty may not be in force, perhaps because a State is not a party to it, it may restate a customary rule or a general principle of law.[935] These analyses must be considered in addition to the factoral approach for sources of law.[936] Whether these doctrines, *e.g.*, fundamental change of circumstances, apply to a given situation, is determined in the United States by the executive and not the courts.[937] In general, a military commander should refer these matters to an operational law specialist, who can check with higher authority; however, commanders should be aware of these doctrines' implications.

*2. War and Termination or Suspension of Treaty Obligations*

The Vienna Convention on the Law of Treaties takes no position on the effect of war on treaties;[938] the issue is left to customary rules.[939] War might possibly raise a claim of fundamental change of circumstances,[940] or perhaps other bases, *e.g.*, impossibility of performance.

Treaties establishing an international organization, such as the United Nations, are not affected by conflicts of the parties.[941] States may suspend a treaty's operation when they exercise the inherent right of individual or collective self-defense in accordance with the Charter.[942] If complying with a Council resolution dealing with action on threats to the peace, breaches of the peace or acts of aggression conflicts with a treaty or a treaty requirement, States may suspend or end the treaty's operation to the extent treaty performance is incompatible with the resolution.[943] The Institut de Droit International has stated that an aggressor shall not terminate or suspend operation of a treaty if it would benefit thereby.[944]

There is no general rule as to when or which treaties continue in operation during armed conflict.[945] A treaty may be subject to severability in this context, *i.e.*, all of it may remain in force, part may be suspended, part may be terminated, all may be suspended, or all may be terminated.[946] Treaties may provide for continued operation during war; the Chicago Convention explicitly says so.[947] Because of their nature or purpose, some treaties are regarded as operative during armed conflict, those governing humanitarian law or neutrality being prime examples.[948] In other cases, *e.g.*, the Treaty of Rome or NAFTA, a treaty may be suspended during armed conflict or when a State's vital national interests are at stake.[949] A treaty may declare it does not apply during war.[950] As noted above, these principles may well be subject to the Charter's clause paramountcy.[951]

### *3. The LOS Conventions and the Law of Armed Conflict: "Other Rules" Clauses* [952]

The 1958 and 1982 LOS Conventions [953] include clauses, sometimes overlooked in analysis or commentary, stating the rights under these treaties are subject to "other rules of international law"[954] as well as terms in the particular convention. For example, LOS Convention, Article 87(1), which declares high seas freedoms, adds that "Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law." The overwhelming majority of commentators—including the International Law Commission, a UN General Assembly agency of international law experts [955]—has stated that the Conventions' other rules clauses refer to the law of armed conflict,[956] a component of which is the law of naval warfare. Provisions such as Article 88 of the 1982 Convention state a truism, *i.e.*, the high seas are reserved for peaceful purposes.[957] However, high seas usage can be subject to the LOAC, when Article 87(1)'s other rules clause is read with Article 88. As in the case of the 1958 Conventions,

> That provision does not preclude . . . use of the high seas by naval forces. Their use for aggressive purposes, which would . . . violat[e] . . . Article 2(4) of the Charter . . . , is forbidden as well by Article 88 [of the 1982 Convention]. See also LOS Convention, Article 301, requiring parties, in exercising their rights and p[er]forming their duties under the Convention, to refrain from any threat or use of force in violation of the Charter.[958]

This analysis is buttressed by the Charter's trumping clause; no treaty, including the LOS conventions, can supersede the Charter.[959] The peaceful purposes language in Article 88 and other Convention provisions cannot override Charter norms, such as those in Article 2(4), but also those in Article 51, *i.e.*, the inherent right of individual and collective self-defense.[960] Of course, naval forces of States not involved in armed conflict may use the oceans for military purposes, although

these forces may be restricted in some maritime zones, *e.g.*, the territorial sea.[961] The other rules clauses in the LOS conventions come into force for States engaged in armed conflict.

To the extent that the LOS conventions recite customary norms—and such is the case for the High Seas Convention [962] and the LOS Convention's navigational articles [963]—the other rules clauses are part of custom and are therefore in force for countries not party to one or the other of the Conventions. For those States party to the 1958 Conventions or LOS Convention, the customary status of the other rules clause is doubly in force.[964] The LOS conventions may inform, *i.e.*, give content to gaps in the LOAC, much as the law of self-defense may be informed by the LOAC. The law of the sea also can inform the content of Charter law, *e.g.*, Security Council resolutions.[965]

The conclusion is inescapable that the 1958 Conventions' other rules clauses, carried forward into the 1982 Convention, means that these treaties' terms are subject to the law of armed conflict, of which the law of naval warfare is a part. Since the High Seas Convention, parts of the other 1958 Conventions and the 1982 Convention's navigational articles are part of customary law,[966] the other rules clause is also part of customary law governing oceans law during armed conflict. Moreover, the other rules clauses can also inform, *i.e.*, give content to, Charter law, *e.g.*, Council resolutions and the law of self-defense.[967]

## Part E. Conclusions

The UN Charter has been invoked in many armed conflicts since the Charter was signed in 1945. In some ways this has changed options available to States. Under the majority view, a State cannot use reprisals involving use of force during time of peace.[968] The doctrine of necessity, *i.e.*, a State may take what action it deems necessary for self-preservation, may be of questionable validity today.[969] Article 103 of the Charter declares that all treaties are subject to it; whether customary law is equally subject to the Charter is open to question.[970] The Charter condemns armed attacks and aggression, and Article 51 permits self-defense against armed attacks and *aggression armee*, in the French text.[971] This permits responses for attacks on merchant ships at sea, including those sailing independently, as most do.[972] The Charter also permits the Security Council to make binding decisions that have the force of treaty law for UN Members.[973] The Council and the General Assembly may also call upon States for action, or recommend it; these resolutions have no intrinsic force but may restate law, and practice under them may develop into custom.[974]

Article 51 preserves the inherent right of individual and collective self-defense; these options have the same content and scope today as they did before World War II.[975] States may respond in individual or collective anticipatory self-defense, so long as the response is necessary, proportional and admitting of no other option, as

perceived by the decisionmaker at the time of response.[976] States may also react, individually or collectively, in self-defense to attack or aggression, *i.e.*, after the attack or aggression has occurred, so long as the response is necessary and proportional.[977] States also may respond with retorsions, *i.e.*, action that is unfriendly but lawful, or they may reply with reprisals not involving use of force.[978] Rather than requesting Security Council action, States may also employ regional organizations to maintain international peace and security.[979]

Besides Charter standards, an independent, customary norm of the right to self-defense exists alongside Article 51. [980] The right to self-defense may have *jus cogens* status today.[981] Collective self-defense may be asserted through bilateral or multilateral treaties, but nothing in the Charter forbids more informal arrangements.[982] If Article 51 supersedes, through Article 103, treaty norms, *e.g.* those in the law of armed conflict, any Article 51 response should receive its content from the LOAC.[983] By parity of reasoning, any self-defense claims based on custom and not on Article 51 as part of a treaty, *i.e.*, the UN Charter, should also receive their content based on the LOAC.[984]

Besides the appealing symmetry of logic behind this approach, there are practical policy reasons for following law of armed conflict standards in any self-defense claim. These are illustrated by the Tanker War.

First, both Iran and Iraq claimed the other was guilty of aggression and that therefore the response was in self-defense. Even today, despite the opinion of some States through their reactions that Iran was the aggressor, the issue remains unresolved, and may remain unresolved for a long time. However, the peripheral legal consequences flowing from the initial acts by these States in 1980—*e.g.*, attacks on merchant ships—had impact on third States, who had only one known standard to observe, *i.e.*, the LOAC. Ultimately, only one State, Iran or Iraq, was guilty of aggression, and only one State, Iran or Iraq, could legitimately claim self-defense. The aggressor was bound by LOAC standards.[985] Since the issue was and is in doubt, the only standard for measuring self-defense was the LOAC. This was how the United States behaved with respect to destruction of *Iran Ajr* and the oil platforms and in convoy operations. The *Iran Ajr* crew was repatriated, following humanitarian law standards; oil platforms occupants were warned and given an opportunity to leave, parallelling Hague IX.[986]

Second, this approach is congruent with the longstanding rule, in place long before the Charter, that humanitarian law treaties or those governing neutrality remain in effect during war.[987] As a theoretical matter, given Charter supremacy under Article 103, a State could act under Article 51 independently of these norms. The Security Council held the view that these standards should be observed, regardless of who had a legitimate self-defense claim, in its resolutions condemning attacks on civilian centers, merchant ships and in citing the Geneva Conventions and the Geneva Gas Protocol.[988] Any self-defense claim should be conditioned by

LOAC standards and humanitarian law standards in particular, whether that self-defense claim is based on Article 51 as treaty law or whether it is grounded in custom. The policy, public relations and practical considerations are obvious; that is what States and people expect today, regardless of the niceties of legal analysis.

Third, observing LOAC treaty norms in the context of Article 51, treaty-based self-defense claims is consistent with the policy of *pacta sunt servanda*, itself a policy of the Charter, Article 2(2).[989]

The law of neutrality remains in full force and vigor in the Charter era, albeit perhaps conditioned by Charter law in given situations. For example, a Security Council decision could alter traditional contraband rules.[990] Practice of States since World War II calls to mind the historic claims for the intermediate state of nonbelligerency, between neutrality and belligerency, although whether this has ripened into custom is an open question. It could be said that this practice amounts in some cases to informal collective self-defense, which is permitted under the Charter. In other situations a debate remains as to whether international law recognizes an intermediate status between belligerency and neutrality. Most countries, including the United States, say that there is no intermediate stage of non-belligerency.[991]

Charter considerations apart, decisionmakers must continue to take into account traditional principles of sources of law, treaty interpretation including the impact of war, and treaty succession.[992] The LOS conventions' other rules clauses mean that the conventions are subject to the law of armed conflict.[993]

## NOTES

1. *See, e.g.*, McDOUGAL & FELICIANO chs. 1, 4; McDOUGAL, LASSWELL & CHEN chs. 1, 4-5; MYRES S. McDOUGAL *et al.*, LAW AND PUBLIC ORDER IN SPACE ch. 1 (1963); McDougal *et al.*, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 258-300, 403-15 (1967); Moore, *Prolegomenon*, n. I.35, 668-72; Suzuki, *The New*, n. I.35, 22-30; Walker, *Sea Power*, n. I.35, 308.

2. *See e.g.* McDOUGAL *et al.*, LAW AND PUBLIC ORDER, n. 1, 94-95; McDOUGAL & BURKE 36; McDOUGAL, LASSWELL & CHEN 161-62; *see also* Myers S. McDougal, *The Hydrogen Bomb Tests*, 49 AJIL 357-58 (1955); McDougal, *et al.*, *Theories*, n. I.35, 202-03; *McDougal et al.*, *The World*, n. 1, 256-57; Moore, *Prolegomenon*, n. I.35, 667; Suzuki, n. I.35, 19, 30-34; Walker, *Sea Power*, n. I.35, 309.

3. *Id.* at 309; *see also* McDougal, *The Hydrogen*, n. 2, 357-58.

4. McDOUGAL, LASSWELL & CHEN 465.

5. *See, e.g.*, nn. II.215 and accompanying text.

6. *See, e.g.*, nn. II.391, 414-19, 477-82 and accompanying text.

7. *See generally* PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

8. *Cf.* McDougal & Feliciano 339-40; NWP 1-14M Annotated ¶ 5.1 n.4 & fig. A5-1; NWP 9A Annotated ¶ 5.1 n.3 & fig. SF5-1.

9. *See generally* Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 RCADI 9 (1994).

10. UN Charter, art. 103; *see also* Nicaragua Case, 1984 ICJ 440; Vienna Convention, art. 30(1); SIMMA 1119-23; Francis Deak, *Neutrality Revisited, in* TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C.

JESSUP 137, 143 (Wolfgang Friedmann *et al.* ed. 1972). The later-in-time rule of Vienna Convention, art. 59, states the same principle as to the Charter and pre-1945 treaties, but UN Charter, art. 103, says the Charter supersedes later treaties as well. To the extent that the Charter, and actions pursuant to it, would be considered customary law, undoubtedly the later custom would triumph on inconsistent customary obligations under the older treaties. Nicaragua Case, 1986 ICJ at 31-38, 91-135. Customary Charter law would also weight heavily in the balance under traditional source analysis, *e.g.*, ICJ Statute, art. 38(1) and RESTATEMENT (THIRD) §§ 102-03, as to "new," post-Charter custom, whether derived from contrary State practice or from, *e.g.*, restatements in international agreements or resolutions of international organizations. To the extent that Charter-stated norms have ascended to *jus cogens* status, they prevail. Commentators differ widely on the scope of *jus cogens*. *See generally* Vienna Convention, art. 64; T.O. ELIAS, THE MODERN LAW OF TREATIES 177-87 (1974); 1 OPPENHEIM §§ 2, 642, 653; RESTATEMENT (THIRD) §§ 102 r.n. 6, 323 cmt. b, 331(2), 338(2); SINCLAIR 17-18, 85-87, 94-95, 160, 184-85, 218-26, 246 (Vienna Convention, art. 64 considered progressive development in 1984); SIMMA 1118-19; GRIGORII I. TUNKIN, THEORY OF INTERNATIONAL LAW 98 (William E. Butler trans. 1974); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary Law*, 172 RCADI 219, 262-63 (1981); John N. Hazard, *Soviet Tactics in International Lawmaking*, 7 DENV. J. INT'L L. & POL. 9, 25-29 (1977); Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 RCADI 1, 64-69 (1978); Walker, *Integration and Disintegration* 60, 63; Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995). Nicaragua Case, 1986 ICJ at 100-01 held UN Charter, art. 2(4) was customary law having the character of *jus cogens*.

11. Nicaragua Case, 1986 ICJ 94. The decision has stimulated considerable criticism. Louis B. Sohn, *The International Court of Justice and the Scope of the Right of Self-Defense and the Duty of Non-Intervention*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 869 n.1 (Yoram Dinstein *et al.* ed. 1989). For a sampling, which as Sohn notes are mostly concerned with the interplay of fact and law in the case, *see, e.g.*, American Society of International Law, Resolution of the Annual Meeting, *Business Meeting*, 1986 ASIL PROC. 1332, 134-37; Panel, *World Court Jurisdiction and U.S. Foreign Policy in Latin America*, *id.* 321; *Editorial Comments*, 1985 *id.* 79; *Observations on the International Court of Justice's November 26, 1984 Judgment on Jurisdiction and Admissibility in the Case of Nicaragua v. United States of America*, *id.* 423; *Nicaragua v. United States: Constitutionality of U.S. Modification of ICJ Jurisdiction*, *id.* 682; Panel, *Legal and Political Issues in the Central American Conflict*, *id.* 40; Panel, *Should the United States Reconsider Its Acceptance of World Court Jurisdiction?*, *id.* 95; C.M. Chinkin, *Third-Party Intervention Before the International Court of Justice*, 80 AJIL 495 (1986); Lloyd N. Cutler, *Some Reflections on the Adjudication of the Iranian and Nicaragua Cases*, 25 VJIL 432 (1985); Anthony A. D'Amato, *The United States Should Accept by a New Declaration, the General Compulsory Jurisdiction of the World Court*, 80 AJIL 331 (1986); Michael J. Glennon, *Nicaragua v. United States: Constitutionality of U.S. Modification of ICJ Jurisdiction*, 79 *id.* 373 (1985); Keith Highet, *Evidence, the Court and the Nicaragua Case*, 81 *id.* 1 (1987); Highet, *Review Essay*, *id.* 287 (1987); Highet, *You Can Run But you Can't Hide—Reflections on the U.S. Position in the Nicaragua Case*, 27 VJIL 551 (1987); Christopher C. Joyner & Michael A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 *id.* 621 (1985); Jeanne J. Kirkpatrick, *Law and Reciprocity*, 1985 ASIL PROC. 59; Letter to the Editor-in-Chief, 80 AJIL 942 (1986); Harold G. Maier, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 *id.* 77 (1987); John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 *id.* 43 (1986); Moore, *The Secret War in Central America—A Response to James P. Rowles*, 27 VJIL 273 (1987); Patrick M. Norton, *The Nicaragua Case: Political Questions Before the International Court of Justice*, *id.* 459 (1987); W. Michael Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AJIL 128 (1986); James P. Rowles, *"Secret Wars," Self-Defense and the Charter—A Reply to Professor Moore*, *id.* 968 (1986); Craig L. Scott & Gary L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 *id.* 57 (1986).

12. By contrast, the US position was that the law of armed conflict (LOAC) should be applied during the conflict. *See* n. II.84.

13. GOODRICH *et al.*; RUTH B. RUSSELL & JEANETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945 (1958) are the best general contemporary accounts; *see also* SIMMA 2-23. Revisionist analyses, *e.g.*, ROBERT C. HILDEBRAND, DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS (1990) have appeared, now that classified documents and private papers have been opened.

14. GOODRICH *et al.* ix summarizes practice through January 1, 1966. SIMMA's trend studies run through late 1993; *see also* Repertoire of Practice of the Security Council; Repertory of Practice of United Nations Organs; and Yearbook of the United Nations. GOODRICH *et al.* ix.

15. *See* McDougal, *The Hydrogen*, n. 2, 357-58.

16. UN Charter, Preamble; *see also* SIMMA 45-48.

17. GOODRICH *et al.* 650; SIMMA 157-58. *See also* UN Charter, art. 110; GOODRICH *et al.* 648-49; SIMMA 1191-95. *Id.* art. 4 declares procedures by which new Members are admitted. *See also* GOODRICH *et al.* 85-96; SIMMA 158-75.

18. *Compare* S.C. Res. 552 (1984), *in* WELLENS 473, *with* UN Charter, Preamble. Resolution 552 condemned Iranian attacks on commercial shipping en route to and from Gulf Cooperation Council ports during the Tanker War. *See also* n. II.258 and accompanying text.

19. GOODRICH *et al.* 21; *cf.* SIMMA 48.

20. *Id.*, referring to UN GAOR, 5th Sess., 1st Comm., 362d mtg. ¶ 21 (Oct. 13, 1950); *id.* 300th plen. mtg., ¶¶ 91-92 (Nov. 2, 1950), which approved the General Assembly's Uniting for Peace Resolution, G.A. Res. 377 (1950), *in* 45 AJIL SUPP. 1 (1951) (UFP Resolution); *see also* SIMMA 48 and G. A. Res. 378, Duties of States in the Event of Outbreak of Hostilities, *in* KEY RESOLUTIONS 2.

21. Friendly Relations Declaration, *in* 9 ILM 1292 (1970); *see also* SIMMA 48.

22. JORGE CASTENADA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 81-116 (Alba Amoia trans. 1969) (Korean war, 1957 Arab-Israeli war, Rhodesia). For another analysis of the UFP Resolution, *see generally* Walter L. Williams, Jr., *Neutrality in Modern Armed Conflicts: A Survey of the Developing Law,* 90 MIL. L. REV. 9, 15 (1980).

23. *E.g.,* Definition of Aggression, *in* 69 AJIL 480, 483 (1975), incorporating by reference Friendly Relations Declaration. The AJIL Definition of Aggression version omits *id.*, art. 3(d):

> Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2 [of the Resolution], qualify as an act of aggression.
>
> ...
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State....

*Compare* Definition of Aggression, art. 3, 69 AJIL at 482, *with, e.g.,* the version in JULIUS STONE, CONFLICT THROUGH CONSENSUS 186, 188 (1977), or the draft version in UN General Assembly Special Committee on the Question of Defining Aggression, *Report of the Working Group,* UN Doc. A/AC.134/L.46, at 4 (1974), *in* 13 ILM 710, 713 (1974). The error has crept into secondary sources, *e.g.,* AHMED M. RIFAAT, INTERNATIONAL AGGRESSION 321, 324 (1974).

24. GOODRICH *et al.* 28, citing Doc. 644, I/1/34(1), 6 UNCIO 446-47 (1945); *see also* RUSSELL & MUTHER, n. 13, 911.

25. GOODRICH *et al.* 20; SIMMA 48.

26. *Id.* 25-26; Certain Expenses of the United Nations, 1962 ICJ 151, 213-15 (Fitzmaurice, J., sep. opin.). SIMMA 50-52 does not assign any priority to UN Charter, art. 1(1).

27. UN Charter, art. 1(1).

28. GOODRICH *et al.* 28; *compare* UN Charter, art. 1(1), *with id.*, arts. 2(7), 5, 39, 41-42, 50; *see also* n. 14 and accompanying text.

29. GOODRICH *et al.* 28, citing Doc. 644, n. 24, 453.

30. UN Charter, art. 2(1); *see also* SIMMA 73-74. National sovereignty, although diminished and eroded in some situations, remains a fundamental principle of international law. LOS Convention, art. 157(3); Vienna Convention, preamble; S.S. Lotus (Fr. v. Turk.), 1927 PICJ (ser. A), No. 10, at 4, 18; S.S. Wimbledon (UK v. Ger.), 1923 *id.*, No. 1, at 15, 25; Friendly Relations Declaration, *in* 9 ILM 1292 (1970); U.N. Secretary-General, *An Agenda for Peace: Report of the Secretary-General on the Work of the Organization,* UN Doc. A/47/277, S/24111 (1992), *in* 31 ILM 956, 959 (1992); MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 21-23 (Brian Chapman ed., 3d ed. 1977); BRIERLY 45-49; BROWNLIE, INTERNATIONAL LAW ch. 13; MCNAIR 754-66; GOODRICH *et al.* 36-40; RESTATEMENT (THIRD), Part I, ch. 1, *Introductory Note,* 16 &17; SIMMA 79-87; R.P. Anand, *Sovereign Equality of States in International Law,* 197 RCADI 9, 22-51 (1986); Boutros Boutros-Ghali, *Empowering the United Nations,* FOREIGN AFF. 89, 98-99 (Winter 1992); Jonathan I. Charney, *Universal,* n. I.32, 530; Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law,* 92 RCADI 1, 49-50 (1957); Louis Henkin, *International Law: Politics, Values and Functions,* 216 *id.* 9, 46, 130 (1989); Oscar Schachter, *International Law in Theory and Practice,* 178 *id.* 9, 32 (1982); Humphrey Waldock, *General Course on Public International Law,* 106 *id.* 1, 156-72 (1962).

31. *See* nn. 47-157 and accompanying text.

32. UN Charter, art. 1(2); *see also* SIMMA 53.

33. GOODRICH *et al.* 29-32; RUSSELL & MUTHER, n. 13, 810-13. Views on the existence and scope of self-determination vary. *See generally* Advisory Opinion on Namibia, 1971 ICJ 14, 31; Western Sahara, 1975 ICJ 12, 31-35, *id.* 116, 121-22 (Dillard, J., sep. opin.); Friendly Relations Declaration, *in* 9 ILM 1292 (1970); Helsinki Accords, Principle 8, 14 ILM 1292, 1295 (1975); BROWNLIE, INTERNATIONAL LAW 595-98; 1 OPPENHEIM §§ 85, 274; Rupert Emerson, *Self-Determination,* 65 AJIL 459 (1971); Robert Rosenstock, *The Declaration of Principles of International Law*

*Concerning Friendly Relations: A Survey, id.* 713, 730-33 (1971); *Self-Determination, in* SIMMA 56-72; Eisuke Suzuki, *Self Determination and World Public Order,* 16 VJIL 779 (1976).

34. *E.g.,* UN Charter, art. 1(2).

35. G.A. Res. 1514 (1960), elevated by, *e.g.,* S.C. Res. 232 (1966), ¶ 4, *in* WELLENS 128.

36. GOODRICH *et al.* 31-32.

37. Covenant on Civil & Political Rights, art. 1; Covenant on Economic, Social & Cultural Rights, art. 1.

38. G.A. Res. 1573 (1960), *in* KEY RESOLUTIONS 177.

39. GOODRICH *et al.* 32.

40. *See* Walker, *State Practice* 141.

41. S.C. Res. 202, 217 (1965); 221, 232 (1966); 253 (1968); 277, 288 (1970); 314, 318, 320 (1972); 333 (1973); 388 (1976); 409 (1977); 437 (1978); 460 (1979); 463 (1980), *in* WELLENS 125-50; *see also* nn.—and accompanying text.

42. *See* Walker, *State Practice* 142-43.

43. *See* n. 37 and accompanying text.

44. *See generally, e.g.,* nn. II.218, 251 and accompanying text.

45. S.C. Res. 540 (1983), *in* WELLENS 451; *see also* nn. II.216-18 and accompanying text.

46. S.C. Res. 552 (1984), *in* WELLENS 473; *see also* nn. II.251-60 and accompanying text.

47. GOODRICH *et al.* 41-42, citing *inter alia* Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 2, 62 Stat. 1681, 700, 21 UNTS 77, 95 (Rio Treaty); Charter of the Organization of American States, Apr. 30, 1948, art. 20, 2 UST 2394, 2420, 119 UNTS 3, 58; amended by Protocol, Feb. 27, 1967, art. 6, 21 *id.* 607, 662; Protocol, Dec. 5, 1985, 21 ILM 529 (1985) (OAS Charter); North Atlantic Treaty, n. II.437, art. 1, 63 Stat. 2242, 34 UNTS 244; Treaty on Friendship, Co-operation & Mutual Assistance, May 14, 1955, arts. 3-4, 219 UNTS 3, 28 (Warsaw Pact), abrogated by Protocol, July 1, 1991; *cf.* BOWMAN & HARRIS 196 (11th Cum. Supp. 1995). *See also* RUSSELL & MUTHER, n. 13, 657-59. Not all countries, including the United States, are party to the 1985 OAS Protocol. BOWMAN & HARRIS 177 (11th Cum. Supp. 1995). For an OAS Charter composite text, *see* 33 ILM 985 (1995).

48. GOODRICH *et al.* 42-43; *see also* nn. II.437-45 and accompanying text.

49. S.C. Res. 479 (1980), *in* WELLENS 449 (calling on Iran, Iraq to refrain from any further use of force and to settle their dispute by peaceful means and in conformity with principles of justice and international law); *see also, e.g.,* these resolutions in the Arab-Israel conflicts, S.C. Res. 44 (1948), 344 (1973), 350 (1974), *in id.* 633, 682, 685; the India-Pakistan conflicts, S.C. Res. 211, 215 (1965), *in id.* 428, 430; the Falklands-Malvinas war, S.C. Res. 502 (1982), *in id.* 594; Walker, *State Practice* 133-38, 143-45, 153-54.

50. GOODRICH *et al.* 43.

51. UN Charter, art. 2(4), incorporating by reference *id.*, art. 1. For analysis of Article 2(4)'s antecedents and the drafting of Article 2(4), *see* BOWETT, SELF-DEFENCE ch. 2; BROWNLIE, USE OF FORCE 3-116; GOODRICH *et al.* 44-45; RUSSELL & MUTHER, n. 13, 110-12, 161-63, 456-57, 672-75; SIMMA 109-11; David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views,* 1991 DUKE J. COMP. & INT'L L. 57, 58-68.

52. BOWETT, SELF-DEFENCE 31-32; BROWNLIE, USE OF FORCE 113; GOODRICH *et al.* 45-46; MCDOUGAL & FELICIANO 232-41; STONE 262-63; Gamal Moursi Badr, *The Exculpatory Effect of Self-Defense in State Responsibility,* 10 GA. J. INT'L & COMP. L. 1, 10-14 (1980); Linnan, *Self-Defense,* n. 51, 68-69; Claude Humphrey Meredith Waldock, *The Regulation of Force by Individual States in International Law,* 81 RCADI 496-99 (1952). *See also Addendum to the Eighth Report on State Responsibility,* UN Doc. A/CN.4/318/ADD. 5-7, *in* 2(1) Y.B. INT'L L. COMM'N 13, 51-70 (1980), collecting other commentators' views.

53. *See* nn. 158-630 and accompanying text.

54. BOWETT, SELF-DEFENCE 29; BROWNLIE, USE OF FORCE 113; PHILIP C. JESSUP, A MODERN LAW OF NATIONS 135, 168 (1956); MCNAIR 216-18; Grigorii I. Tunkin, *Co-Existence and International Law,* 95 RCADI 1, 63-66 (1959). Nicaragua Case, 1986 ICJ 98-102, might be construed to go further, *i.e.,* to elevate it to *jus cogens* status, as Tunkin, *International Law in the International System,* 147 RCADI 98 (1975) seems to do.

55. GOODRICH *et al.* 48-49 present the issue.

56. BOWETT, SELF-DEFENCE ch. 6 (discounting including "economic aggression" within the definition); GOODRICH *et al.* 48; ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 176 (1963); MCDOUGAL & FELICIANO 193-96.

57. *E.g.*, OAS Charter, n. 47, arts. 16-17, 2 UST 2394, 119 UNTS 56, as amended by Protocol, n. 47, art. 5, 21 UST 622 (separate provisions denouncing economic or political coercion and condemning forcible occupation of territory).

58. ELIAS, n. 10, 170-76; SINCLAIR 177-81; Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AJIL 495, 532-35 (1970); *but see* LUNG-FONG CHEN, STATE SUCCESSION RELATING TO UNEQUAL TREATIES 42-49 (1974) (arguing for including economic or political pressure as grounds for treaty invalidity). Some States have tried to reinsert economic coercion by reservation or declaration; this has been opposed vigorously. SINCLAIR 65-68.

59. *Compare* Vienna Convention, art. 52, *with* Vienna Convention on Law of Treaties Between States & International Organizations, Mar. 20, 1986, art. 52, 25 ILM 543, 572 (1986) (voiding treaties procured by force or threat of force in violation of the Charter's international law principles). The latter treaty is not in force but may restate customary law in some respects. BROWNLIE, INTERNATIONAL LAW 11-13; 1 OPPENHEIM §§ 9 at 28, 10 at 33.

60. GOODRICH *et al.* 49-50; MCDOUGAL & FELICIANO 194-95 nn.165-69.

61. *See* n. 69 and accompanying text; Jordan J. Paust & Albert Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AJIL 410 (1974) seem to have a contrary view.

62. Definition of Aggression, 13 ILM 710 (1974); *see also* 2 BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION 1-53 (1976); RIFAAT, n. 23, ch. 15; STONE, CONFLICT, n. 23; Bengt Broms, *The Definition of Aggression*, 154 RCADI 299, 315-87 (1978).

63. Charter of Economic Rights & Duties, G.A. Res. 3281 (1974), *in* 69 AJIL 484 (1974) (also referred to as New International Economic Order or NIEO).

64. President Harry S. Truman, U.S. Participation in the U.N.: Report to Congress for the Year 1950, at 107 (1950), *in* 5 WHITEMAN 740. *See also* GOODRICH *et al.* 44-45; 298-99, citing RUSSELL & MUTHER, n. 13, 670-72.

65. *Compare* Definition of Aggression, n. 62, art. 1, 13 ILM 712, *with* UN Charter, art. 2(4). "State" includes groups of States and is used without prejudice to recognition issues or whether a State is a UN Member. *Explanatory Note*, 13 ILM 713.

66. Definition of Aggression, n. 62, art. 2, 13 ILM 713.

67. *Id.*, art. 3, 13 ILM 713-14.

68. *Id.*, art. 4, 13 ILM 714.

69. *Id.*, art. 5(1), 13 ILM 714. *Id.*, art. 7, 13 ILM at 714, says nothing in the Definition prejudices the right to self-determination, freedom and independence in the Friendly Relations Declaration. The latter does state, *inter alia*: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State... to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind." Friendly Relations Declaration, 9 ILM 1295 (1970). Although *id.* ¶ 3, 9 ILM 1297, declares that "The principles of the Charter... embodied in this Declaration constitute basic principles of international law...," whether economic coercion is a Charter principle is open to question particularly when it had been rejected by the Vienna Convention negotiators and by subsequent practice under that Convention. *See* n. 59 and accompanying text. Law-stating resolutions, *e.g.*, Friendly Relations, are no more than evidence of a source of international law. Assembly resolutions are not binding in and of themselves. UN Charter, arts. 10-11, 14; BROWNLIE, INTERNATIONAL LAW 14, 698-99; GOODRICH *et al.* 125-27, 144; 1 OPPENHEIM § 16; RESTATEMENT (THIRD) § 103(2)(d) & r.n.2; SIMMA 236-40.

70. *Compare* NIEO, n. 63, art. 32, 69 AJIL 493, *with* Friendly Relations Declaration, 9 ILM 1295.

71. Texas Overseas Petrol. v. Libyan Arab Repub., 17 ILM 1, 28-31 (Arb. 1978).

72. *See* n. 60 and accompanying text.

73. Charter practice supports either argument. HIGGINS, THE DEVELOPMENT, n. 56, 207-08.

74. Corfu Channel (UK v. Alb.), 1949 ICJ 3, 36.

75. S.C. Res. 242 (1967), *in* WELLENS 669; *see also* Walker, *State Practice* 133-38.

76. S.C. Res. 540 (1983), *in* WELLENS 451; S.C. Res. 552 (1984), *in* WELLENS 473 (also calling on States to respect territorial integrity of States not party to conflict); *see also* nn. II.216-18, 250-59 and accompanying text.

77. S.C. Res. 221, ¶¶ 4-5 (1966), *in* WELLENS 127; *see also* Walker, *State Practice* 142-43.

78. Definition of Aggression, n. 62, arts. 1, 3, 13 ILM 713-14, is largely concerned with aggression against land territory, but the catchall art. 4, *id.* at 714, covers floating territorial jurisdiction situations. For discussion of the "floating territorial" principle, *see* RESTATEMENT (THIRD) §§ 402, cmt. h & r.n.4; 502(2), cmt. d & r.n.3.

79. *See* n. 20 and accompanying text.

80. *See* nn. 96-97 and accompanying text.

81. UN Charter, art. 51, 59 Stat. 1031, 1076. (English, French language versions; emphasis added).

82. *See* nn. 207-88 and accompanying text.

83. Sohn, *The International Court,* n. 11, 872-73. Linnan, *Self-Defense,* n. 51, 69 n.56, characterizes the language variance as "slightly different." Aggression can connote actions that do not involve force or the threat of the use of force, while "armed attack" has only one meaning.

84. UN Charter, art. 111.

85. GOODRICH *et al.* 651; SIMMA 32-33, 1197-98 differs from this position.

86. GOODRICH *et al.* 343.

87. Linnan, *Self-Defense,* n. 51, 79-84; *but see* SIMMA 30. The Convention can only be a guide, since it does not apply to treaties, *i.e.,* the Charter, ratified before the Convention went into force. Vienna Convention, art. 4. The same is true for Vienna Convention on Law of Treaties Between States & International Organizations, n. 59, art. 4, 25 ILM 548.

88. Vienna Convention, arts. 31-32.

89. SINCLAIR 114-15, listing three schools of thought.

90. Jimenez de Arechaga, n. 10, 42.

91. *E.g.,* MYRES S. MCDOUGAL *et al.,* INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967); *but see* Gerald Fitzmaurice, *Vae Victis, or Woe to the Negotiators,* 65 AJIL 358 (1971). SIMMA 35 says that "The interests and intentions of the founders remain secondary. Instead, the organizational purpose and the interests of the actual members gain the constitutive and decisive legal power and are the primary means for the solution of textual divergences."

92. Jimenez de Arechaga, n. 10, 43.

93. *Id.* 43-44.

94. *See* nn. 207-88 and accompanying text.

95. Vienna Convention, arts. 31(3)(b), 31(3)(c).

96. Nicaragua Case, 1986 ICJ 102-03.

97. *Compare* UN Charter, art. 1(1), 59 Stat. 1068, *with id.,* art. 51, 59 Stat. 1076 (French version).

98. "State" can mean a group of States and States that are not UN Members. Definition of Aggression, n. 62 art. 1 & explan. note, 13 ILM 713. For analysis of the Resolution, *see generally* DINSTEIN ch. 5; 1-2 FERENCZ, DEFINING, n. 62; RIFAAT, n. 23; STONE, CONFLICT, n. 23; Broms, *The Definition,* n. 62, 299.

99. Some Nuremberg judgments characterized the threat of force as an act of aggression. 2 FERENCZ, n. 62, 27-30, citing *inter alia* Case 11, United States v. von Weizsaeker (Ministries Case), 14 Tr. War Crimes Before Nuremberg Milit. Trib. Under Control Council L. No. 10, at 314, 332; Broms, *The Definition,* n. 62, 341-44.

100. Definition of Aggression, n. 62, art. 2, 13 ILM 713; *see also* 2 FERENCZ, n. 62, 31-33; Broms, *The Definition,* n. 62, 344-47 (*prima facie* culpability rule a compromise).

101. Definition of Aggression, n. 62, art. 3, 13 ILM at 713. Some reprinted versions of art. 3 omit art. 3(d); *compare id. with* versions *in* 69 AJIL 482 (1975) and RIFAAT, n. 23, 324; *see also* n. 23 and accompanying text.

102. Nicaragua Case, 1986 ICJ 103, citing Definition of Aggression, art. 3(g), 13 ILM 713; DINSTEIN 130 (citing no authority but saying art. 3 is codified custom); Broms, *The Definition,* n. 62, 385-88, writing earlier, did not say Article 3 restates custom. Broms chaired the UN committee that drafted the Definition. 2 FERENCZ, n. 62, 50-53, does not suggest that Article 3 has passed into customary law. Definition critics argue that it does not state custom. *See, e.g.,* STONE, CONFLICT, n. 23, ch. 9. Draft Code of Crimes Against Peace and Security of Mankind, art. 12, adopted Definition principles in 1988, but *Report of the International Law Commission on the Work of its Fortieth Session,* UN Doc. A/43/10 (1988), *in* 1988 Y.B. INT'L L. COMM'N 1, 71-73 (1990), says *inter alia* that Article 3 was "an instrument intended

to serve as a guide" to the Security Council. There was no agreement on what might be included in a penal code. It may be, therefore, that Dinstein may be wide of the mark in including all of Definition, art. 3, as custom. Many provisions undoubtedly are. For commentary on the Nicaragua Case and its impact on the LOAC, *see* W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 78-98 (1992).

103. Definition of Aggression, n. 62, art. 4, 13 ILM 714. DINSTEIN 195-96 notes use of "armed attack" in the Hostage Case, n. II.12, 1980 ICJ 29, 42; *see also* Nicaragua Case, 1986 *id.* 292 (Schwebel, J., dissenting). Unless the language, "invasion or attack . . . of the territory of another State, or any military occupation," in Definition of Aggression, art. 3(a), 13 ILM 713, or the expression in *id.*, art. 3(d), 13 ILM 713, concerning "attack . . . on the land . . . forces . . . of another State" (US Marines were among the US nationals held) includes this situation, assault on the US embassy, was a nonenumerated act of aggression contemplated by *id.*, art. 4, 13 ILM 714. RIFAAT, n. 23, 267, doubts whether the Council, charged by the Definition with defining acts of aggression, could denounce acts not involving use of force under the Definition, since Art. 1 is restricted to acts involving the use of force. It is submitted that the Council may also act on situations not involving use of force that are threats to the peace or breaches of the peace under the Charter. *See* UN Charter, arts. 25, 31-42, 48, 50, 103; STONE, CONFLICT, n. 23, 144; *see also* nn. 10, 651-62 and accompanying text.

104. The drafters meant to include this at Japan's insistence. Broms, *The Definition,* n. 62, 350-51, 365.

105. However, unless they have surrendered, enemy warships may be attacked on the high seas and in territorial waters of their flag State, belligerent allies or the enemy. *See* Definition of Aggression, art. 3(d), 13 ILM 713 ("attack... on the... sea... forces"), supporting the view that neutral warships may not be attacked in territorial waters; *see* also Parts IV.B.1, IV.B.4, IV.C.4, IV.D.1, IV.D.3, IV.D.5, V.C.1, V.J.3, which *inter alia* recite the principle that a neutral warship has a right of self-defense if attacked in neutral waters or on the high seas.

106. However, unless they have surrendered, enemy warships may be attacked on the high seas and in territorial waters of their flag State, belligerent allies or the enemy. *See* Parts IV.B.1, IV.B.4, IV.C.4, IV.D.1, IV.D.3, IV.D.5, V.C.1, V.J.3, which *inter alia* recite the principle that a neutral warship has a right of self-defense if attacked in neutral waters or on the high seas.

107. DINSTEIN 197-98, citing Broms, *The Definition,* n. 62, 351.

108. DINSTEIN 198, citing W.J. Fenrick, *Legal Limits on the Use of Force by Canadian Warships Engaged in Law Enforcement,* 18 CYBIL 113, 125-45 (1980). Dinstein adds that a US self-defense claim in the *Mayaguez* seizure was misplaced, citing Jordan J. Paust, *The Seizure and Recovery of the Mayaguez,* 85 YALE L.J. 774, 791, 800 (1976). *But see* n. 137 and accompanying text.

109. *Compare* DINSTEIN 197-98 *with* Broms, *The Definition,* n. 62, 350-51, 365.

110. RIFAAT, n. 23, 272; STONE, CONFLICT, n. 23, 166; *see also* LOS Convention, art. 111; High Seas Convention, art. 23; 1 BROWN 135-38, 258-59; 3 Nordquist ¶¶ 111.1-111.9(i); 2 O'CONNELL, LAW OF THE SEA 1075-93 (hot pursuit).

111. UN GAOR, 6th Comm., 1477th mtg., UN Doc. A.C.G.SR.1477, at 71 (1974) (remarks of Mr. Steel, UK delegate); *see also* STONE, CONFLICT, n. 23, 117.

112. *Compare* DINSTEIN 198; Paust, n. 108, 795, 800, asserting US self-defense measures after *Mayaguez*'s seizure were not justified. DINSTEIN 184 seems to contradict himself by saying, "At times, an armed attack *[i.e.,* an act of aggression] occurs beyond the boundaries of all States [as when a]... battleship sinks a vessel [type unspecified] on the high seas." In 1965 Burundi characterized unjustified boarding and seizing of ships as aggression. UN Doc. A/AC.914, at 3 (1965), cited *in* BENGT BROMS, THE DEFINITION OF AGGRESSION IN THE UNITED NATIONS 83 (1968). *See also* n. 108.

113. DINSTEIN 129; RIFAAT, n. 23, 270.

114. Besides liners, which are protected under customary law, so long as they are not carrying warfighting or war-sustaining goods or persons, *e.g.,* troops, these classes of merchant ships, even if flying an enemy flag, are likewise protected: hospital ships; small craft used for coastal rescue operations and other medical transports; cartel ships; vessels on humanitarian missions; ships carrying cultural property under special protection; scientific research or environmental protection vessels; coastal traders; coastal fishing ships; vessels designed or adapted exclusively for response to pollution incidents in the marine environment; ships that have surrendered; life rafts and life boats. They may lose protection if not used in their normal role, do not submit to identification and inspection when required, intentionally hamper combatant movements or do not obey orders to stop or move out of the way when required. NWP 1-14M Annotated ¶ 8.2.3; NWP 9A Annotated ¶ 8.2.3; SAN REMO MANUAL ¶¶ 47-48; *see also* Parts V.B.1, V.C.1, V.J.2, V.J.3.

115. For an example of how worldwide communications route and reroute merchant ships as they sail independently, *see* Dominant Navig. Ltd. v. Alpine Shipping Co., 1982 AMC 1241 (Bauer, Arnold & Berg, arbs.).

116. Definition of Aggression, n. 62, arts. 2, 4, 13 ILM 713-14.

117. *Id.*, arts. 2, 3(c), 13 ILM 713.

118. NWP 1-14M Annotated ¶¶7.7.4, 7.10; NWP 9A Annotated ¶¶7.7.4, 7.9; SAN REMO MANUAL ¶¶ 146(f), 151.

119. For analysis of blockade, *see* Parts V.E., V.J.3.

120. Definition of Aggression, n. 62, art. 4, 13 ILM 714.

121. *E.g.*, Convention for Definition of Aggression, July 3, 1933, art. 2(3), 147 LNTS 67, 71-73 ("the aggressor in an international conflict shall ... be ... the first to ... attack ... the ... vessels or aircraft of another State"), which Iran ratified; Convention for Definition of Aggression, July 4, 1933, art. 2(3), 148 *id.* 211, 215 (same); Convention for Definition of Aggression, July 5, 1933, Lith.-USSR, art. 2(3), 148 *id.* 79, 83 (same); Balkan Entente, Feb. 9, 1934, Protocol-Annex, 153 *id.* 153, 157; *see also* BROMS, THE DEFINITION, n. 112, 26-27; RIFAAT, n. 23, 91-93; ANN VAN WYNEN THOMAS & A.J. THOMAS, THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 19-20 (1972); Broms, *The Definition*, n. 62, 312-14.

122. *See, e.g.*, Treaty of Non-Aggression & Pacific Settlement of Disputes, Jan. 21, 1932, Fin.-USSR, art. 1(2), 157 LNTS 393, 396-97 (general policy statement). League of Nations Covenant, art. 10, denounced aggression generally without defining it, as does Saavedra Lamas Treaty, Oct. 10, 1933, 49 Stat. 3363, 3375, 163 LNTS 393, 405; *see also* BROMS, THE DEFINITION, n. 112, 23-25; RIFAAT, n. 23, 91-93; Broms, *The Definition*, n. 62, 312-14, for analysis of these and similar agreements.

123. *Compare* Saadabad Pact, July 8, 1937, art. 4, 190 LNTS 21, 25 ("The following shall be deemed acts of aggression: ... attack ... on ... vessels or aircraft of another State"), to which Iran and Iraq were original parties, *with* Convention for Definition of Aggression, July 3, 1933, art. 2(3), n.107, to which Iran was an original party; *see also* BROMS, THE DEFINITION, n. 112, 27; RIFAAT, n. 23, 91-92, 94-95.

124. STONE 34, quoting 5 League of Nations Records of the Conference for the Reduction and Limitation of Armaments, Ser. D, at 31 (1933); *compare* Definition of Aggression, n. 62, arts. 3-4, 13 ILM 713-14. The 1933 USSR proposal was reintroduced during the UN study and is part of the Definition of Aggression preparatory works. MCDOUGAL & FELICIANO 144, 168; STONE 46-47, 111, 115; STONE, CONFLICT, n. 23, *passim*; THOMAS & THOMAS, THE CONCEPT, n. 121, 34.

125. Vienna Convention, art. 31(1); RESTATEMENT (THIRD) § 325(1) & cmts. a, b; SINCLAIR 119-26.

126. *See generally* A.N. Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-Owned Ships: Need for an Admiralty Foreign Sovereign Immunities Act*, 57 TULANE L. REV. 1274, 1286, 1289-90 (1983).

127. Letter of US Department of State Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlman, May 19, 1952, 26 Bulletin 984, 985 (1952) (Tate Letter).

128. *Id.*. In 1920 the US Congress passed the Suits in Admiralty Act, 46 USC §§ 741-52 (1994), allowing suits against the government for claims arising out of US owned or operated commercial vessels; the Public Vessels Act, *id.* §§ 781-90 (1994), allowing claims for damage done by Navy or Coast Guard ships, followed in 1925. Congress enacted the Foreign Sovereign Immunities Act, 28 *id.* §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11 (1994), declaring immunities of foreign government-owned ships and superseding case law and the Tate Letter, in 1976; the Act has been amended since then. *See generally* SCHOENBAUM §§ 17-1, 17-3.

129. *See* n. 115 and accompanying text.

130. Harvard Draft Convention on Aggression, 33 AJIL SUPP. 819, 827 n.1 (1939).

131. *Id.*, art. 1(c), 33 AJIL SUPP. 827 (defining aggression without elaborating examples); *id.*, art. 1(h), 33 AJIL SUPP. 827 (defining vessel to include aircraft). Although the Comment to art. 1(h) is unenlightening, art. 1(c)'s citing of some of the agreements, nn. 121-22, shows the Harvard drafters were aware of the distinction and chose a broad "vessel" definition to include merchantmen. Draft Convention internal evidence supports this view. *See, e.g.*, art. 2, Comment, 33 AJIL SUPP. 886 ("hostility" to warships); art. 3, Comment, *id.* 886-87 ("warship" capture of "vessel"); art. 10, Comment, *id.* 902 (capture of "ship," further reference to "battleships").

132. Act of Chapultepec, Mar. 6, 1945, Part I(3), 60 Stat. 1831, 1839; Rio Treaty, n. 47, art. 9, 62 *id.* 1702, 21 UNTS 99; *but see, e.g.*, Treaty of Brotherhood & Alliance, Apr. 14, 1947, Iraq-Transjordan, art. 5, 23 UNTS 147, 156-58, appearing to take the prewar USSR position; *see also* nn. 121-22 and accompanying text.

133. *See* nn. 121-23 and accompanying text.

134. Vienna Convention, arts. 34-38; BROWNLIE, INTERNATIONAL LAW 11-15, 622-25; 1 OPPENHEIM §§ 10, at 28; 11, at 32-36; 583; 589; 626-27; RESTATEMENT (THIRD) §§ 102(3) & cmts. f, i; 324; SINCLAIR 98-106.

135. Walker, *State Practice* 137.

136. O'CONNELL, INFLUENCE OF LAW 86-87, 87-86; 2 O'CONNELL, LAW OF THE SEA 1099.

137. 1975 DIGEST 13-15, 423-26, 766, 777-83, 879-86; Thomas E. Behuniak, *The Seizure and Recovery of the S.S. Mayaguez: A Legal Analysis of United States Claims*, 82 MIL. L. REV. 41 (1978), 83 *id.* 59 (1979); Christopher Greenwood, *Comments in* DEKKER & POST 212, 214; Eleanor McDowell, *Contemporary Practice of the United States Relating to International Law*, 69 AJIL 861-63, 874-79 (1975); *U.S. Recovers Merchant Ship Seized by Cambodian Navy*, 72 Bulletin 719 (1975); Walker, *State Practice* 146. Greenwood 214, analogizes The Red Crusader (Den. v. UK), 35 ILR 485 (Comm'n of Enquiry, 1982) in the same category as the *Mayaguez* seizure. The *Crusader* case facts are different, however, in that the UK flag trawler was fired on, hit and visited, and crewmen were detained briefly, on grounds of its fishing on the Danish side of a Denmark-UK treaty line, for which Denmark conceded liability. Denmark withdrew charges of interference by *H.M.S. Troubridge* in the Danish warship's returning *Crusader* crew to their trawler; the Commission of Enquiry found that the Royal Navy made every effort to avoid recourse to violence between the Danish ship and the trawler, such "attitude and conduct [being] impeccable." 35 ILR 500. There was no self-defense claim, but as Greenwood notes, the incident is some evidence to support a view that States may use force to defend individual merchantmen—even single small fishing ships—flying their flag.

138. US interests beneficially owned *Hercules*, a tanker. The Supreme Court of the United States reversed Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 423-24 (2d Cir. 1987) on sovereign immunity grounds. 488 US 428 (1989). *See also* Walker, *State Practice* 153-55. Although cases have secondary source or evidentiary status for deriving international law, they can restate or reinforce customary norms. ICJ Statute, arts. 38(1), 59; BROWNLIE, INTERNATIONAL LAW 19-24; 1 OPPENHEIM § 13; RESTATEMENT (THIRD) § 103.

139. Richard R. Baxter, *Treaties and Custom*, 129 RCADI 25, 99-101 (1970).

140. ICJ Statute, art. 38(1); BROWNLIE, INTERNATIONAL LAW 24-25; 1 OPPENHEIM ¶ 14; RESTATEMENT (THIRD) ¶ 103.

141. STONE 34, quoting 5 League of Nations, n. 124; *see also* n. 122 and accompanying text.

142. STONE 211, quoting draft Act Relating to the Definition of the Aggressor, 1933.

143. *See* nn. 130-31 and accompanying text.

144. BOWETT, SELF-DEFENCE, ch. 11; BROWNLIE, USE OF FORCE, chs. 19-22; MCDOUGAL & FELICIANO 61-62, 143-216, NICHOLAS NYIRI, THE UNITED NATIONS' SEARCH FOR A DEFINITION OF AGGRESSION (1989); THOMAS & THOMAS, THE CONCEPT, n. 121; S.M. Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, 136 RCADI 411 (1972) were concerned with broader policy perspectives and not narrow definitional issues.

145. *But see* DINSTEIN 197-98 citing *inter alia* Broms, *The Definition*, n. 62, 351; *see also* n. 95 and accompanying text.

146. *E.g.*, THOMAS & THOMAS, n. 121, 15, recall that under the last century's defensive alliances, "any first attack might constitute an aggression obligating other contracting states . . . to come to the assistance of any state attacked who was also a contracting party." That absolute position has changed with the Charter era, although UN Charter, art. 51 preserves the inherent right of individual and collective self-defense. *See also* nn. 289-302 and accompanying text.

147. Broms, *The Definition*, n. 62, 351.

148. MCDOUGAL & FELICIANO 148-206; STONE *passim*; STONE, CONFLICT, n. 23, *passim*. DINSTEIN 129, citing Broms, *The Definition*, n. 62, 346, makes the graphic point that a few stray bullets across a border cannot be invoked as aggression: "[R]esponsibility for a war of aggression may be incurred by the target State, should it resort to comprehensive force in over-reaction to trivial incidents."

149. *See* nn. 485-579 and accompanying text. For anticipatory self-defense, recognized by the United States and many States, a third limitation is there must be no means for deliberation. *See* nn. 586-616 and accompanying text. Some objects are disproportionate *per se*, *i.e.*, are not targets in any case. *See* nn. 580-85 and accompanying text.

150. *See* nn. 592-616, 646-49 and accompanying text.

151. *See* nn. II. 338-41, 459-65 and accompanying text.

152. *See* nn. 617-30 and accompanying text.

153. GOODRICH *et al.* 41.

154. UN Charter, art. 2(3).

155. GOODRICH *et al.* 42.

156. *See* nn. 47-49, 652 and accompanying text.

157. SIMMA 99; *see also* nn. 61-69 and accompanying text.

158. *See* nn. 81-86 and accompanying text.

159. UN Charter, art. 111; *see also* nn. 85-86 and accompanying text.

160. Treaty for Renunciation of War as an Instrument of National Policy, Aug. 28, 1928, arts. 1-2, 46 Stat. 2343, 2345-46, 94 LNTS 57, 63 (Pact of Paris; also known as Kellogg-Briand Pact or Briand-Kellogg Pact).

161. US identical notes to Australia *et al.*, June 23, 1928, 22 AJIL SUPP. 109 (1928). The Secretary had made nearly *verbatim* but unofficial remarks April 23, 1928 at an American Society of International Law annual meeting. *Address of the Honorable Frank B. Kellogg*, 1928 ASIL PROC. 141, 143. For acceptances of the US position, *see, e.g.*, 1928(1) FRUS 107-24. *See also* Secretary Kellogg telegram to US Ambassador to France Myron T. Herrick, June 20, 1928, *id.* 90, 91; Sohn, *The International Court*, n. 11, 872-75; Henry L. Stimson, *The Pact of Paris: Three Years of Development*, 11 FOREIGN AFF. i, vii-viii (Special Supp. 1932).

162. UK note to the United States, May 19, 1928, 1928(1) FRUS 66, 67.

163. BROWNLIE, USE OF FORCE 236-37; *see also* 5 HACKWORTH 144-45. Most say the US action was "authentic and binding commentary on and interpretation of the... [Pact of Paris.]" ROBERT H. FERRELL, PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND PACT 192-200 (1968); *see also* ALEXANDROV 58; 3 HYDE ¶ 596A, 1683; DAVID HUNTER MILLER, THE PEACE PACT OF PARIS: A STUDY OF THE BRIAND-KELLOGG TREATY 111 (1928); Philip Marshall Brown, *The Interpretation of the General Pact for the Renunciation of War*, 23 AJIL 374, 377-78 (1929); *but see* Quincy Wright, *The Interpretation of Multilateral Treaties*, *id.* 94, 104 (1929); Wright, *The Meaning of the Pact of Paris*, 27 *id.* 39, 43 (1933).

164. S.S. Lotus (Fr. v. Turk.), 1927 PCIJ, Ser. A, No. 10, at 4, 18-19; *see also* S.S. Wimbledon, 1923 *id.*, Ser. A, No. 1, at 15, 25.

165. *E.g.*, LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8-10 (1995).

166. *See* UN Charter, art. 2(1) (United Nations is "based on the sovereign equality of all its Members"); *see also* n. 30.

167. *See* nn. 87-97 and accompanying text.

168. Nicaragua Case, 1986 ICJ 102-03.

169. Sohn, *The International Court*, n. 11, 872-73; *see also* Linnan, *Self-Defense*, n. 51, 63-64.

170. BOWETT, SELF-DEFENCE ch. 9; MCDOUGAL & FELICIANO 140-43; Waldock, *The Regulation*, n. 52, 451; *compare, e.g.*, Badr, *The Exculpatory*, n. 52, 10-14.

171. Definition of Aggression, n. 62, art. 3(g), 13 ILM 713-14.

172. Nicaragua Case, 1986 ICJ 103.

173. *See* n. 83 and accompanying text.

174. Definition of Aggression, n. 62, art. 3(c), 13 ILM 713; *see also* Parts V.E, V.J.3.

175. *Cf.* Definition of Aggression, n. 62, art. 4, 13 ILM 714; *see also* BROMS, THE DEFINITION, n. 112, 150.

176. Nicaragua Case, 1986 ICJ 104.

177. *Id.* 543 (Jennings, J., dissenting); *id.* 331-47 (Schwebel, J., dissenting).

178. *Id.* 94, 103; *see* nn. 586-90 and accompanying text.

179. ICJ Statute, arts. 38(1), 59; *see also* RESTATEMENT (THIRD) § 103.

180. Definition of Aggression, n. 62, art. 6, 13 ILM 714.

181. 2 FERENCZ, n. 62, 45-46; Broms, *The Definition*, n. 62, 358.

182. *See* nn. 591-616, 646-49 and accompanying text.

183. *Cf.* Vienna Convention, arts. 31(3)(b), 31(3)(c), 31(4); *see also* nn. 80-81 and accompanying text.

184. Jimenez de Arechaga, n. 10, 46.

185. This brings us almost full circle for Article 51 analysis to treaty interpretation methods advocated by MCDOUGAL *et al.*, INTERPRETATION, n. 91, and decried by Fitzmaurice, *Vae Victis*, n. 91, and perhaps SINCLAIR 114.

186. *Compare* UN Charter, ch. VII, *with Dumbarton Oaks Proposals for the Establishment of a General International Organization*, ch. VIII § 13, *in* RUSSELL & MUTHER, n. 13, 1019, 1024-26.

187. Verbatim Minutes of 9th Preliminary Session, June 25, 1945, Doc. 1210, P/20 (1945), 1 UNCIO 612, 620 (1945), approving Report of the Rapporteur of Commission I to Plenary Session, June 24, 1945, Doc. 1179, I/9(1), 6 *id.* 245, 247 (1945). Commission I had approved the Report of the Rapporteur of Committee 1 to Commission I, June 13, 1945, Doc. 944, I/1/34(1), *id.* 446, 459. *See* Verbatim Minutes of 5th Meeting of Commission I, June 24, 1945, Doc. 1187, I/13, *id.* 202, 204 (emphasis added), as McDOUGAL & FELICIANO 235-36 note. BOWETT, SELF-DEFENCE 182 seems to infer that other Committees also considered the matter, but the Conference history shows these Committees were concerned with collective self-defense issues. *See* RUSSELL & MUTHER, n. 13, 688-706.

188. Nicaragua Case, 1986 ICJ 102-03.

189. *See, e.g.*, HANS KELSEN, THE LAW OF THE UNITED NATIONS 797-98 (1950); 2 OPPENHEIM ¶ 52aa, at 156; Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AJIL 872, 878 (1947); Robert W. Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 29-30 (1951).

190. TIF 430-31(status of Czechoslovakia, USSR, Yugoslavia in doubt because of treaty succession issues); *see also* Symposium, *State Succession;* Walker, *Integration and Disintegration.*

191. *See* nn. 160-63 and accompanying text.

192. *See* nn. 160-63 and accompanying text. For States not participating in the conference that produced the Pact, *see* TIF 430-31, the published understandings as preparatory works are equally binding unless acceding States reject them. RESTATEMENT (THIRD) § 313 cmt. g; *Report of the International Law Commission on the Work of Its Eighteenth Session*, UN Doc. A/6309/Rev. 1 (1966) (ILC Rep.), *in* 1966(2) Y.B. INT'L L. COMM'N 169, 172, 223, rejecting Territorial Jurisdiction of International Commission of the River Oder, 1929 PCIJ, Ser. A, No. 23, at 5, 41 (Aug. 2, 1929 Order) (preparatory work for disputed articles of Treaty of Versailles, June 28, 1919, 225 CTS 188, not admissible because three States did not participate in conference producing treaty). Since the *Report* is available as part of the Vienna Convention, this interpretation binds parties to the Convention. As a later authoritative statement, it prevails over River Oder. ICJ Statute, art. 38(1)(d); RESTATEMENT (THIRD) § 103.

193. The Convention applies to agreements concluded after it enters into force for a party. Vienna Convention, art. 4. However, to the extent the Convention restates custom, it may be used to analyze the Pact of Paris, n. 160. BROWNLIE, INTERNATIONAL LAW 11-15; 1 OPPENHEIM §§10, at 28; 11, at 33; RESTATEMENT (THIRD) § 102(3) & cmt. i, r.n.5.

194. *See* nn. 161-62 and accompanying text.

195. Other correspondence occurred well before signature. *See* nn. 161-62 and accompanying text.

196. It went into force July 24, 1929; the US ratification was in January 1929. 2 BEVANS 732.

197. Gerald Fitzmaurice, *Law and Procedure of the International Court of Justice, 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BYBIL 203, 273 (1957); *see also* D.W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 *id.* 67, 72-73 (1976). Earlier commentators said the Pact self-defense notes were reservations if they would be deemed to interpret it. *See* n. 163 and accompanying text.

198. *See* n. 163 and accompanying text (Kellogg, Stimson).

199. *See* nn. 168, 189 and accompanying text.

200. *See* n. 163 and accompanying text.

201. *See* n. 160 and accompanying text.

202. *See* nn. 98-110 and accompanying text.

203. ICJ Statute, art. 38(1); RESTATEMENT (THIRD), §§ 102-03.

204. *See* nn. 10, 54 and accompanying text.

205. *See generally* Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT'L & COMP. L. 767, 823-27 (1997).

206. *Cf.* ICJ Statute, art. 38(1); RESTATEMENT (THIRD), §§ 102-03.

207. *See* nn. 79-95, 167-79 and accompanying text.

208. Jean Combacau, *The Exception of Self-Defence in U.N. Practice*, *in* ANTHONY CASSESSE, THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9, 25 (1986).

209. S.C. Res. 487 (1981), *in* WELLENS 441. Commentators continue to debate the legitimacy of Israel's anticipatory self-defense claim for the raid. *See, e.g.*, ALEXANDROV 159-65; TIMOTHY L.H. McCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR ch. 10 (1995); Combacau, n. 208, 17, 34 n. 23.

210. S.C. Res. 22 (1947), *in* WELLENS 34.

211. Corfu Channel (UK v. Alb.), 1949 ICJ 4, 30-31.

212. Waldock, *The Regulation,* n. 52, 500; *see also* ALEXANDROV 122-23; BROWNLIE, USE OF FORCE 285.

213. ALEXANDROV 123; BRIERLY 424.

214. Corfu Channel, 1949 ICJ 34-35; *see also* ALEXANDROV 123-24; BRIERLY 424-27; MCCORMACK, n. 209, 133-34; Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law,* 95 RCADI 5, 172 (1957); Waldock, *The Regulation,* n. 52, 500-02.

215. ALEXANDROV 122.

216. Albania entered the United Nations in 1955. *Cf.* S.C. Res. 109 (1955), *in* WELLENS 847.

217. *See* nn. 168, 189 and accompanying text.

218. *See generally* S.C. Res. 42-44, 46, 48-50, 53-54, 56-57, 59-62, 66 (1948); 72-73 (1949); 89 (1950), *in* WELLENS 632-45; ALEXANDROV 125-27.

219. *See generally* S.C. Res.38-39, 47, 51 (1948), *in* WELLENS 415-20; ALEXANDROV 127-29.

220. S.C. Res. 82-85 (1950), *in* WELLENS 325-26.

221. UFP Resolution, n. 20; *see also* CASTENADA, n. 22, 81-116, tracing the Resolution's influence in Assembly practice; Juraj Andrassy, *Uniting for Peace,* 50 AJIL 563 (1956).

222. *See generally* Edwin C. Hoyt, *The United States Reaction to the Korean Attack: A Study of the Principles of the United Nations Charter as a Factor in American Policy-making,* 55 AJIL 45 (1961).

223. S.C. Res. 95 (1951), *in* WELLENS 648; *see also* ALEXANDROV 130-31; HIGGINS, THE DEVELOPMENT, n. 56, 213; Combacau, n. 208, 21; Walker, *State Practice* 133-35.

224. HIGGINS, THE DEVELOPMENT, n. 56, 213-15; 2 OPPENHEIM, § 231, at 547; STONE 643-44. The issue arose during the Tanker War; *see* nn. II.491-92 and accompanying text. *See also* Parts V.E., V.J.5.

225. US Secretary of State John Foster Dulles news conference remarks, Feb. 5, 1957, 36 Bulletin 306 (1957).

226. *See generally* 3 WHITEMAN 1092-94; Leo Gross, *Passage Through the Suez Canal of Israel-Bound Cargo and Israel Ships,* 51 AJIL 530, 538-40, 559 (1957).

227. 3 WHITEMAN 1092; Gross, *Passage,* n. 226, 561.

228. ALEXANDROV 190-91; *see also* BOWETT, SELF-DEFENCE 15, 104; BROWNLIE, USE OF FORCE 297.

229. CABLE 186; 1 EDWIN B. HOOPER *et al.,* THE UNITED STATES NAVY AND THE VIETNAM CONFLICT 351 (1976); Walker, *State Practice* 134.

230. In 1958 Iceland unilaterally extended its zone limit from 4 to 12 miles. Regulations Concerning Fishing Limits Off Iceland, June 30, 1958, *quoted in* 4 WHITEMAN 1157-58. A 7-nation conference including Britain protested, announcing they would continue to fish in the 8-mile belt. Britain said it would send armed escorts to protect UK flag trawlers if necessary on July 4. *Id.* at 1160, *quoting* N.Y. TIMES, July 21, 1958, 12. The Royal Navy began to intervene to protect UK trawlers and crews, although other fishermen stayed outside the 12-mile limit. Iceland Ministry of Foreign Affairs, *British Aggression in Icelandic Waters* 5-13 (June 1959), *quoted in* 4 WHITEMAN 1163-69. UK trawlers voluntarily withdrew from the disputed area in 1960 pending the ongoing Geneva conference on the law of the sea. *Id.* 1174, citing US UK Embassy dispatch to US State Department, Apr. 29, 1960; N.Y. TIMES, May 13, 1960, 3; *id.* Aug. 12, 1960, 2. The conference broke up, disagreeing over breadth of the territorial sea. Robert D. Powers & Leonard R. Handy, *How Wide the Territorial Sea?, in* FRANKLIN 304. Exchange of Notes, Mar. 11, 1961, Ice.-UK, 397 UNTS 275, settled the Cod War.

231. ALEXANDROV 191-92; BROWNLIE, USE OF FORCE 297-98.

232. O'CONNELL, THE INFLUENCE 38-39, 123; 2 O'CONNELL, LAW OF THE SEA 805-06; 4 WHITEMAN 1157-58, *reprinting* US Ambassador to France Amory Houghten to Secretary of State Dulles, Jan. 26, 1958; US Embassy to France telegram to Dulles, Nov. 6, 1959; Christian Science Monitor, Dec. 28, 1960, 2; 10 KEESING 15277 (1956); 11 *id.* 16080, 16184 (1957); Anna van Zwanenberg, *Interference with Ships on the High Seas,* 10 ICLQ 785, 791 (1961); 2 von Heinegg, 100-01; Walker, *State Practice* 141; Robert C. F. Reuland, Note, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction,* 22 VAND. J. TRANSNAT'L L. 1161, 1218 (1989).

233. Combacau, n. 208, 19, 27, 35 n.36, 37 n.83; *see also* Walker, *State Practice* 145-46.

234. *See* nn. 289-302, 308-26 and accompanying text.

235. Combacau, n. 208, 27, 35 n.39, 37-38 nn.84-90.

236. S.C. Res. 228 (1966), *in* WELLENS 658.

237. S.C. Res. 265 (1969), *in id.* 673.

238. S.C. Res. 262 (1968); 270 (1969); 279-80, 285 (1970); 313, 316-17 (1972); 332, 337(1973); 347 (1974); 425 (1978); 509, 515-18, 520 (1982), *in id.* 755-62, 764, 766-68.

239. *See generally* Combacau, n. 208, 23.

240. *Id.* 19, 35 n.35.

241. CHAIM HERZOG, THE WAR OF ATONEMENT: OCTOBER 1973, at 263-64 (1975).

242. Agreement Concerning Claims Arising from Damage to United States Ship "Liberty," Dec. 15 & 17, 1980, Israel-US, 32 UST 4434, 1268 UNTS 33; CABLE 31, 75, 119, 194-95; JAMES ENNES, ASSAULT ON THE LIBERTY (1980); O'CONNELL, THE INFLUENCE 127; Walter L. Jacobsen, *A Juridical Examination of the Israeli Attack on the Liberty,* 36 NAV. L. REV. 1 (1986).

243. O'CONNELL, THE INFLUENCE 70-71, 83, 127-29.

244. *See generally* TREVOR AMBRISTER, A MATTER OF ACCOUNTABILITY: THE TRUE STORY OF THE *PUEBLO* AFFAIR (1970); EDWARD BRANDT, THE LAST VOYAGE OF THE PUEBLO (1969); CABLE 25-32, 34, 63, 69, 86,195-96; DANIEL V. GALLERY, THE *PUEBLO* INCIDENT (1970); O'CONNELL, THE INFLUENCE 5-7, 65; F. CARL SCHUMAKER, JR. & GEORGE C. WILSON, BRIDGE OF NO RETURN: THE ORDEAL OF THE *U.S.S. PUEBLO* (1971).

245. *See generally* D.K. PALIT, THE INDO-PAKISTAN WAR 1971, at 145 (1972); P. SHARMA, THE INDO-PAKISTAN MARITIME CONFLICT, 1965: A LEGAL APPRAISAL (1970); 2 von Heinegg, 30; Walker, *State Practice* 143-44.

246. Panel, n. II.84, 171 (Lagoni remarks), referring to G. A Res. 2162 (1966), UN GAOR, 21 st Sess., UN Doc. A/6316 (1967).

247. Fred Greene, *The Indian-Pakistan War and the Asian Power Balance,* 25 NWC REV. 16 (No. 3, 1973). A US Navy task force to facilitate evacuating US nationals from Bangladesh, formerly East Pakistan, arrived after hostilities were over. PALIT, n. 245, 144-50; 2 von Heinegg, n. II.177, 31; Walker, *State Practice* 145. The task force may have been deployed to deter India from "pushing to extremes" its victory over Pakistan. The USSR deployed an anti-carrier group. CABLE 198-99.

248. O'CONNELL, THE INFLUENCE 86-87; 2 O'CONNELL, LAW OF THE SEA 1099; Walker, *State Practice* 144-45.

249. The United States resupplied Israel by air. CABLE 200; 2 von Heinegg 29; Walker, *State Practice* 137.

250. Fisheries Jurisdiction (UK v. Ice.), 1972 ICJ 12 (interim measures); 1973 *id.* 3; 1974 *id.* 4 (merits); CABLE 199-200.

251. Theodor Meron, *The Fishermen's Protective Act: A Case Study in Contemporary Legal Strategy of the United States,* 69 AJIL 290 (1975). The efficacy of the Act, 22 USC §§ 1971-80 (1994), is limited by a broader view the United States has taken of offshore jurisdictional claims, *e.g.,* for the EEZ through the Fisheries Conservation and Management Act, 16 *id.* §§ 1801-02 (1994), unless a seizure otherwise violates international law as recognized by the United States. A further proviso may broaden Act coverage. *See* Steven J. Burton, *The 1976 Amendments to the Fishermen's Protective Act,* 71 AJIL 740 (1977).

252. D.P. O'Connell, *International Law and Contemporary Naval Operations,* 44 BYBIL 18, 73-75 (1970).

253. ROACH & SMITH 79.

254. Dennis Mandsager, *The U.S. Freedom of Navigation Program: Policy, Procedure, and Future, in* LIBER AMICORUM 113. My destroyer, *U.S.S. Hyman,* sailed these waters during a 1960-61 Mediterranean Sea deployment; the territorial sea limit then was generally 3 miles, and we were close enough to Africa to have the Commanding Officer point out the sandy shores of World War II battles (Benghazi, Tobruk).

255. CABLE 152, 206, 209; CASPER WEINBERGER, FIGHTING FOR PEACE 124-25 (1990); D.R. Neutze, *The Gulf of Sidra: A Legal Perspective,* 108 PROCEEDINGS 26 (No. 1, 1982); W. Hays Parks, *Crossing the Line,* 112 *id.* 40 (No. 11, 1986); Robert E. Stumpf, *Air War with Libya, id.* 42 (No. 8, 1986).

256. *See* nn. 112-15 and accompanying text.

257. Combacau, n. 208, 15-16, 19. *See* nn. IV.360 and accompanying text for analysis of FON in the LOS context.

258. *See generally* HAYES, NAVY RULES, n. II.341; O'CONNELL, INFLUENCE OF LAW 169-80; Duncan, n. II.341; Grunawalt, *The JCS*, n. II.341; Roach, *Rules of Engagement*, n. II.341; Shearer, *Rules of Engagement*, n. II.341. *See* nn. II. 341-49, 391, 452-53 and accompanying text for descriptions of Tanker War ROE.

259. S.C. Res. 502, 505 (1982), *in* WELLENS 594-95; *see also* Combacau, n. 208, 19, 35-36 n.48; James F. Gravelle, *The Falklands (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 5 (1985); Walker, *State Practice* 153-55. An OAS resolution urged belligerents to cease hostilities within the region the Rio Treaty, n. 47, defines, and to refrain from any act that might affect inter-American peace and security. The OAS advocated a truce and peaceful settlement. OAS Resolution I, Serious Situation in the South Atlantic, Apr. 28, 1982, OAS Doc. OEA/Ser.F/II.20, Doc. 28/82 rev. 3 (1982), *in* 21 ILM 669 (1982). The European Community suspended imports from Argentina. E.C. Council Regulation 877/82 Suspending Imports of All Products Originating in Argentina, Apr. 16, 1982 O.J. (L 102) 1, E.C.S.C. Council Decision 82/228/ECSC Suspending Imports of All Products Originating in Argentina, Apr. 16, 1982, *in id.* 547-48 (1982), extended May 18, 1982, *id.* at 549-50. The United States suspended military exports, security assistance and export credits to Argentina. *Statement Concerning Assistance to and Sales to Argentina*, *id.* 682-84. An OAS resolution took an anti-UK and US position on May 29, 1982. *Id.* 672-74. The EC and US measures were rescinded in June and July 1982. *Id.* 1210. *See also* John Norton Moore, *The Inter-American System Snarls in Falklands War*, 76 AJIL 830 (1982), arguing the OAS action was *ultra vires*. For accounts of the war, *see* 3 CORDESMAN & WAGNER 283-361; Harry D. Train III, *An Analysis of the Falkland/Malvinas Islands Campaign*, 41 NWC REV. 33 (No. 1, 1988).

260. 3 CORDESMAN & WAGNER 242-44; MAX HASTINGS & SIMON JENKINS, THE BATTLE FOR THE FALKLANDS 105, 119, 124-25, 133, 143, 147, 157 (1983); MARTIN MIDDLEBROOK, OPERATION CORPORATE: THE FALKLANDS WAR 97-98, 126 (1985).

261. HASTINGS & JENKINS, n. 260, 147, 157; MIDDLEBROOK, n. 260, 151; Fenrick, *The Exclusion*, n. II.109, 109-12; Howard S. Levie, *The Falklands Crisis and the Laws of War*, *in* ALBERTO R. COLL & ANTHONY C. AREND, THE FALKLANDS WAR: LESSONS FOR STRATEGY, DIPLOMACY AND INTERNATIONAL LAW 64-65 (1988); Levie, *Means and Methods of Combat at Sea*, 14 SYRACUSE J. INT'L L. & COM. 727, 735-38 (1988); Vojtech Mastny, *The Soviet Union and the Falklands War*, 36 NWC REV. 46, 49 (No. 3, 1983).

262. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 US 428, 431-33 (1989), *rev'g* 830 F.2d 421, 423 (2d Cir. 1987); Sally V. Mallison & W. Thomas Mallison, *Naval Targeting: Lawful Objects of Attack*, *in* Robertson 241, 269.

263. 3 CORDESMAN & WAGNER 260; 2 O'CONNELL, LAW OF THE SEA 1112.

264. 3 CORDESMAN & WAGNER 250-51, 334, 336.

265. S.C. Res. 549 (1983), *in* WELLENS 451.

266. *See* nn. II.88, 200, 227, 298, 303-05, 344-49, 368, 370, 391-95, 410, 451, 469-70, 522 and accompanying text.

267. UN Charter, arts. 25, 48, 51. S.C. Res. 598 (1987), *in* WELLENS 454, invoked UN Charter, arts. 39-40 and called on parties to end the war; it was hortatory, not mandatory as a decision would have been. *See also* nn. II. 376-78, 405, 414-18, 454, 479, 482, 489, III. 651-62 and accompanying text.

268. *See* nn. II.89, 102-03, 109-10, 141-42, 199-201, 240, 255, 288, 301, 411, 420, 447, 520 and accompanying text. For further analysis of these and other wartime zones, *see* Parts V.F, V.J.6.

269. S.C. Res. 540, 552 (1984), *in* WELLENS 451, 473; *see also* nn. II.216-18, 251-59 and accompanying text; Chapter VI.

270. Combacau, n. 208, 32.

271. *See* nn. 160-63, 190-206 and accompanying text.

272. S.C. Res. 661 (1990), *in* WELLENS 528; *see also* Walker, *Crisis Over Kuwait* 30-34.

273. UN Charter, art. 27; *see also* GOODRICH *et al.* 227-29; SIMMA 463-67.

274. *See generally* GOODRICH *et al.* 215-31.

275. UN Charter, art. 2(1); *see also* n. 30 and accompanying text.

276. UN Charter, arts. 33(1) 36-41; *compare* the effects of mandatory decisions under *id.*, arts. 25, 48; *see also* nn.—and accompanying text.

277. UN Charter, arts. 10-12, 14; *see also* n. 69 and accompanying text.

278. UN Charter, art. 35(1), authorizing States to bring a dispute to the Assembly's attention, subject to *id.*, art. 12(1)'s primacy rule. The Assembly may also bring disputes to the Council's attention. *Id.*, art. 11(3). *See also* GOODRICH *et al.* 270-77; SIMMA 527-31.

279. This occurred during the 1990-91 Gulf War. The Council had been seized of the crisis since the August 1990 invasion. *Cf.* S.C. Res. 660 (1990), *in* WELLENS 527. The Assembly steering committee rejected Iraq's attempt to bring the matter before it in November 1990. Walker, *Crisis Over Kuwait* 34.

280. *See* n. 69 and accompanying text.

281. G. A. Res. 378, n. 20.

282. G.A. Res. 380 (1950), *in* KEY RESOLUTIONS, 10.

283. Friendly Relations Declaration, 9 ILM 1292 (1970).

284. Other aspects of the Declaration are in similar vein, *e.g.*, "Nothing in the foregoing paragraphs [relating to nonintervention] shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security." States have a duty to "co-operate with other States in the maintenance of international peace and security." The Declaration elaborates on the territorial integrity and sovereign equality of States, closing by reciting a disclaimer, "Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of [Members] under the Charter or the rights of peoples under the Charter taking into account the elaboration of these rights in this Declaration. . . . The principles of the Charter . . . embodied in this Declaration constitute basic principles of international law[.]" *Id.*, 9 ILM 1295-97.

285. *See* n. 281 and accompanying text. The Assembly has approved measures related to self-defense, *e.g.*, its 1951 call for embargo on war materials and petroleum shipped to the PRC during the Korean War, but there was no attempt to define, expand or limit the concept except by inference. Practice under this resolution, if the embargo had continued long enough, could have ripened into custom. RESTATEMENT (THIRD), §103 & cmt. c. On the embargo, *see* Howard J. Taubenfeld, *International Actions and Neutrality*, 47 AJIL 377, 393-94 (1953).

286. Panel I, n. II.84, 171 (Lagoni remarks), referring to G.A. Res. 2162 (1966), UN GAOR, 21 st Sess., UN Doc. A/6316 (1967).

287. G.A. Res. 37/37 (1982), *in* 83 Bulletin 80 (Jan. 1983); *see also* Jeane J. Kirkpatrick, *Call for Soviet Withdrawal from Afghanistan*, id. 78.

288. G.A. Res. 38/7 (1983), UN GAOR, 38 th Sess., Supp. No. 47, UN Doc. A/38/47 (1983). The United States said this was a lawful action under UN Charter, art. 52. *See* John Norton Moore, *Grenada and the International Double Standard*, 78 AJIL 145, 154-59 (1984); *see also* Christopher C. Joyner, *Reflections on the Lawfulness of Invasion*, *id.* 131, 135-37, 142 (1984).

289. George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, LIBER AMICORUM ch. 15, 31 CORNELL INT'L L.J. 321 (1998) analyzes these developments.

290. North Atlantic Treaty, n. II.437, arts. 5-6, 63 Stat. at 2243-44, 34 UNTS at 246, as modified by Protocol, n. II.437, art. 2, 3 UST 44, 126 UNTS 350; *see also* n. II.437 and accompanying text.

291. *See* n. II.437 and accompanying text.

292. Security Treaty, Sept. 1, 1951, art. 4, 3 UST 3420, 3423, 131 UNTS 83, 86 (ANZUS PACT), Suspended for New Zealand Sept. 1, 1986; *see also* JACOB BERCOVITCH, ANZUS IN CRISIS (1988); FRANK P. DONNI, ANZUS IN REVISION (1991); THOMAS DURRELL-YOUNG, AUSTRALIAN, NEW ZEALAND, AND UNITED STATES SECURITY RELATIONS, 1951-1986 (1992); W. DAVID MCINTYRE, BACKGROUND OF THE ANZUS PACT, chs. 9-10 (1995); MICHAEL C. PUGH, THE ANZUS CRISIS, NUCLEAR VISITING AND DETERRENCE (1989); TREVOR R. REESE, AUSTRALIA, NEW ZEALAND AND THE UNITED STATES: A SURVEY OF INTERNATIONAL RELATIONS, chs. 2, 4 (1969); J.G. STARKE, THE ANZUS TREATY ALLIANCE (1965); TIF 350; W. Keith Jackson & James W. Lamare, *The ANZUS Conflict and New Zealand Politics*, *in* INTERNATIONAL CRISIS AND DOMESTIC POLITICS 53 (Lamare ed. 1991); Jock Phillips, *New Zealand and the ANZUS Alliance: Changing National Self-Perceptions*, *in* AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES: INTERNAL CHANGE AND ALLIANCE RELATIONS IN THE ANZUS STATES 183 (Richard W. Baker ed. 1991); James N. Rosenau, *Peripheral International Relationships in a More Benign World: Reflections on American Orientations Toward ANZUS*, *in id.* 203.

293. *See* nn. II.52-54, 84, 127-29, 133, 135-39, 207, 220, 242-43, 249, 285, 287, 306, 315-16, 326-27, 330-31, 350, 362, 374, 418-19, 427-28, 442, 475, 534-35 and accompanying text.

294. Warsaw Pact, n. 47, arts. 3-4, 219 UNTS 28; *see also* NEIL FODOR, THE WARSAW TREATY ORGANIZATION: A POLITICAL AND ORGANIZATIONAL ANALYSIS (1990); J.P. JAIN, DOCUMENTARY STUDY OF THE WARSAW PACT 1-39 (1973); Mark Kramer, *The Soviet Union and Eastern Europe: Spheres of Influence*, *in* NGAIRE WOODS, EXPLAINING INTERNATIONAL

RELATIONS SINCE 1945 ch. 5 (1996). The Pact dissolved in 1991. Protocol, Mar. 31, 1991, *in* BOWMAN & HARRIS 196 (11th Cum. Supp. 1995).

295. *See* nn. II.93-95, 184-85, 192-94, 248, 256, 283-84, 405, 478, 538 and accompanying text.

296. Arab Joint Defence Treaty, n. II.31, to be distinguished from the treaty establishing the Arab League, Pact of League of Arab League States, n. II.31; *see also* n. II.31 and accompanying text.

297. *See* nn. 303-07 and accompanying text.

298. SIMMA 706.

299. *See* nn. 308-36 and accompanying text.

300. BOWETT, SELF-DEFENCE 205.

301. *See* Walker, *Anticipatory*, n. 289, Part III.

302. MCDOUGAL & FELICIANO 248-53, in effect adopting the second theory of BOWETT, SELF-DEFENCE 202-05; *id.* 205-07; KELSEN, THE LAW, n. 189, 792; and STONE 245 believed the right of collective self-defense did not extend to a State wishing to associate itself in defending a State already acting in self-defense. Bowett's first theory, that the right of collective self-defense is based on the right of a "protector" of a group, *i.e.*, a family, perhaps family servants, was also rejected by him. BOWETT 200-02. Nevertheless, the theme has been seen in UN practice where the "agency" principle has been used. *Cf.* Walker, *Crisis Over Kuwait* 49.

303. GOODRICH *et al.* 357.

304. *Id.* 356; *see, e.g.*, RUSSELL & MUTHER, n. 13, 102-09, 229-34, 472-76, 555-56, 693-706.

305. *See* nn. II.21-27, 159-72, 187-88, 192, 208-09, 218, 248, 251-59, 262-63, 290-94, 315, 330, 382, 415, 478, 508, 534, 543-45 and accompanying text.

306. *See, e.g.*, nn. II.382, 386 and accompanying text.

307. *See also* n. II.31 and accompanying text.

308. GOODRICH *et al.* 357, citing early UN General Assembly committee and plenary session meetings.

309. *E.g.*, Rio Treaty, n. 47, art. 3, 62 Stat. at 1700, 21 UNTS 95; WEU Treaty, n. II.388, art. 4, 19 UNTS 57, as modified by WEU Protocol I, n. II.437, art. 3, 211 *id.* 346; North Atlantic Treaty, n. II.437, art. 5, 63 Stat. 2249, 34 UNTS 246; Arab Joint Defence Treaty, n. II.31, art. 2, 157 BFSP 669-70, 49 AJIL SUPP. 51 (1955); ANZUS Pact, n. 292, art. 4, 3 UST at 3423, 131 UNTS 86 (no explicit statement, *see also* sources n. 292); Southeast Asia Collective Defense Treaty, with Protocol, Sept. 8, 1954, art. 4, 6 UST 81, 83, 209 UNTS 28, 30 (SEATO Treaty); Warsaw Pact, n. 47, art. 4, 219 UNTS 30, abrogated by Protocol, Mar. 31, 1991, BOWMAN & HARRIS 196 (11th Cum. Supp. 1995). The Arab Joint Defence Treaty, nominally covering the Gulf area, was never invoked because of internal dissension and perhaps other reasons. *See* nn. II.93-99, 184-85, 192-93, 248-58, 283-84, 405, 477, 538 and accompanying text. The SEATO Treaty was defunct by 1980, as was Pact for Mutual Co-operation, Feb. 24, 1955, 233 UNTS 199 (Baghdad Pact). Iraq withdrew from the Pact before 1980. LESZEK BUSZYNSKI, SEATO: THE FAILURE OF AN ALLIANCE STRATEGY chs. 1-2 (1983); ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, THE BAGHDAD PACT: ORIGINS AND POLITICAL SETTING (Feb. 1956); STARKE, n. 292, 221-26; George Modelski, *SEATO; Its Function and Organization, in* MODELSKI, SEATO: SIX STUDIES 8-45 (1964); Brian Holden Reid, *The "Northern Tier" and the Baghdad Pact, in* THE FOREIGN POLICY OF CHURCHILL'S PEACETIME ADMINISTRATION 1951-55, at 159-74 (John W. Young ed. 1988); Margaret Muryani Manchester, The Tangled Web: The Baghdad Pact, Eisenhower, and Arab Nationalism chs. 1-3 (1994) (unpublished Ph.D. dissertation, Clark University) (on file, Naval War College Library).

310. *See* nn. 220-22, 281-84 and accompanying text.

311. UN Charter, arts. 10-12, 14; *see also* n. 69 and accompanying text.

312. *See* nn. 284-85 and accompanying text.

313. Mutual Defense Treaty, Oct. 1, 1953, Repub. of Korea-US, 5 UST 2368, 238 UNTS 199; Mutual Defense Treaty, Dec. 2, 1954, Repub. of China-US, with US reservations, 6 *id.* 433, 248 UNTS 213, which the United States denounced in 1979 when the PRC was recognized. *See generally* Goldwater v. Carter, 444 US 996 (1979); J.A.S. GRENVILLE & BERNARD WASSERSTEIN, THE MAJOR INTERNATIONAL TREATIES SINCE 1945, at 109-13 (1987).

314. STARKE, n. 292, 98-99; *see also* nn. 292, 309 and accompanying text.

315. *See* nn. 802-20 and accompanying text.

316. Proclamation No. 3504, 3 CFR 232 (1959-63), referring to S.J. Res. 230, Pub. L. No. 87-733, 76 Stat. 697; October 23, 1962 resolution passed under Rio Treaty, n. 47, arts. 6, 8, 62 Stat. 1701, 21 UNTS 97, 99. *See also* ABRAM

CHAYES, THE CUBAN MISSILE CRISIS (1974); ROBERT W. DIVINE, THE CUBAN MISSILE CRISIS (1971); LOUIS HENKIN, HOW NATIONS BEHAVE 279-306 (1979); ROBERT KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS (1969); 10 WHITEMAN 8-20, 874; Chayes, *Law and the Quarantine of Cuba,* 41 FOREIGN AFF. 550 (1963); Carl Q. Christol & C.R. Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962,* 56 AJIL 525, 527 (1963); W. Thomas Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law,* 31 GEO. WASH. L. REV. 355, 387-88 (1962); W. Thomas Mallison & Sally V. Mallison, *A Survey of the International Law of Blockade,* 102 PROCEEDINGS 44, 49-50 (No. 2, 1976); Brunson MacChesney, *Some Comments on the "Quarantine" of Cuba,* 57 AJIL 592, 593 (1963); Joseph B. McDevitt, *The UN Charter and the Cuban Quarantine,* 17 JAG J. 71 (1963); Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense,* 57 AJIL 557 (1963); McNeill, *Neutral Rights,* n. II. 354, at 633: John A. Meeker, *Defensive Quarantine and the Law,* 57 AJIL 515 (1963); William O. Miller, *Collective Intervention and the Law of the Charter,* NWC REV. 71 (Apr. 1970); Miller, *Law of Naval Warfare, id.* 35 (Feb. 1972); Covey C. Oliver, *International Law and the Quarantine of Cuba: Hopeful Prescription for Legal Writing,* 57 AJIL 373 (1963); Walker, *State Practice* 141-42; Quincy Wright, *The Cuban Quarantine,* 57 AJIL 546, 554-56 (1963).

317. *E.g.,* McDougal, *The Soviet-Cuban,* n. 316.

318. A.V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea, in* Robertson 109, 128, 137.

319. *See* nn. 233-34 and accompanying text.

320. North Vietnam and some commentators maintained the conflict was a civil war. *See generally* STANLEY KARNOW, VIETNAM: A HISTORY (1983); HENKIN, HOW, n. 316, 303-12; Richard R. Baxter, *Jus in Bello Interno: The Present and Future Law, in* LAW AND CIVIL WAR IN THE MODERN WORLD 518 (John Norton Moore ed. 1974); Office of Legal Adviser, US Department of State, *The Legality of United States Participation in the Defense of Vietnam, in* 1 THE VIETNAM WAR AND INTERNATIONAL LAW 583 (Richard A. Falk ed. 1968).

321. Republic of Viet-Nam, *Decree on Sea Surveillance,* Apr. 27, 1965, 4 ILM 461 (1965), published the original Market Time defense zone. 2 EDWARD J. MAROLDA & OSCAR P. FITZGERALD, THE UNITED STATES NAVY AND THE VIETNAM CONFLICT 518 (1986); 2 O'CONNELL, LAW OF THE SEA 1097-99, 1122-23; O'CONNELL, THE INFLUENCE 176-77, 325; Fenrick, *Legal Aspects,* n. II 501, 256; Fenrick, *Military Objective,* n. II.202, 18; James A. Hodgman, *Market Time in the Gulf of Thailand, in* FRANK UHLIG, VIETNAM: THE NAVAL STORY 308 (1986); R.L. Schreadly, *The Naval War in Vietnam, 1950-1970, in id.* 274, 280-7. RVN and US naval forces interdicted southbound North Vietnamese military traffic; the RVN also operated a Junk Force, not part of its navy, to assist the operation. The Force performed other military tasks and in 1965 was incorporated into the RVN navy. 2 MAROLDA & FITZGERALD 118-20, 228-30, 309.

322. In 1965 the US Joint Chiefs of Staff had considered and rejected a blockade of North Vietnam as being a belligerent act. 2 MAROLDA & FITZGERALD, n. 321, 118-20; Bruce A. Clark, *Recent Evolutionary Trends Concerning Naval Interdiction of Seaborne Commerce as a Viable Sanctioning Device,* 27 JAG J. 160 (1973); Ulrik Luckow, *Victory Over Ignorance and Fear: The U.S. Minelaying Attack on North Vietnam,* 35 NWC REV. 17 (No. 1, 1982); Frank B. Swayze, *Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam,* 29 JAG J. 143 (1977).

323. 2 MAROLDA & FITZGERALD, n. 321, 320-25; 18 KEESING 25338 (1972).

324. Lane C. Kendall, *U.S. Merchant Shipping and Vietnam, in* UHLIG, n. 321, 482, 491, 499-500.

325. O'CONNELL, THE INFLUENCE 110; Fenrick, *Military Objective,* n. II.202, 256.

326. BOWMAN & HARRIS 196; BUSZYNSKI, n. 309, ch. 6.

327. *See, e.g.,* nn. II. 81, 95, 112-40, 159-71, 182, 194-98, 242-47, 249, 263, 267-68, 284-87, 294, 319-20, 419-20, 475-78 and accompanying text.

328. This war was not the only example of unilateral or multilateral assistance without a formal defense treaty. *E.g.,* there was unilateral US aid to Israel and other countries' assistance to Arab States during the Arab-Israeli wars. *See* nn. 249, 253, 259 and accompanying text.

329. *See* nn. 828-89 and accompanying text.

330. *See* nn. II.21-27, 60, 84, 93-94, 157, 159-72, 186-88, 192, 208-09, 218, 248, 251-60, 262-63, 271, 283-84, 290-94, 315, 321, 330, 375, 378, 382, 405, 415, 437, 477-79, 508, 534, 538, 541-45 and accompanying text.

331. *See* n. II.456 and accompanying text.

332. *See* nn. II.447, 470 and accompanying text.

333. SIMMA 706; *see also* nn. II.167, 415 and accompanying text.

334. *See, e.g.,* nn. II.112-14, 313, 475-76 and accompanying text.

335. *See, e.g.,* nn. II.83, 124, 126-28, 196-98, 242-47, 285-87, 316-20, 418-19; *See also* House Select Committee to Investigate Covert Arms Transactions with Iran and Saudi Arabia, H.R. Rep. No. 433, 100th Cong., 1st Sess. (1987); Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, S. Rep. No. 216 (1987); Report of the President's Special Review Board (Tower Commission Report) (1987).

336. *See* nn. II.269, 360, and accompanying text.

337. *See* nn. 308-28 and accompanying text.

338. *See generally* Walker, *Crisis Over Kuwait* (agreements negotiated by US Secretary of Defense Dick Cheney, later Security Council resolutions).

339. UN Charter, arts. 25, 48, 51, 103; *see also* nn. 10, 350-56, 652-62 and accompanying text.

340. *See generally* SAN REMO MANUAL 68; Walker, *Maritime Neutrality* 142-48.

341. *E.g.,* NWP 1-14M Annotated ¶¶ 7.1-7.2.2; NWP 9A Annotated ¶¶ 7.1-7.2.2 (US position).

342. *See* n. 259 and accompanying text.

343. *See generally* Walker, *Anticipatory,* n. 289.

344. *See generally id.,* Parts I-III for examples uncovered in research on treaties from 1815-1945.

345. *E.g.,* CABLE reports hundreds of maritime incidents since 1914; the actors most assuredly had other nations' informal backing in some of these. The historical record, 1815-1914, must have more. Many are shrouded in diplomatic reports, *e.g.,* FRUS, or in detailed historical accounts; other recent examples probably are unpublished due to national security considerations.

346. While the Covenant of the League of Nations, art. 18, required League Members to submit all agreements for publication, this requirement was soon ignored. FERRELL, n. 163, 54-61. Countries, *e.g.* the United States, not League Members, were under no international obligation to submit treaties for League publication or to publish them in national series, although, *e.g.,* the United States did publish most of its international agreements in the *Statutes at Large* or the *Executive Agreement Series.* Most League Members did, but there were exceptions, particularly as war clouds loomed in the late Thirties, and the League collapsed. *See* Walker, *Anticipatory,* n. 289, Part II. UN Charter, art. 102 admonishes Members to submit treaties for registration; a consequence for nonfulfilment is that an unregistered treaty cannot be invoked before a UN organ, *e.g.,* the Security Council or the ICJ. *See* GOODRICH *et al.* 610-14; SIMMA 1103-16. Security agreements are often not published. RESTATEMENT (THIRD) § 312 r.n.5 (1987). *See also* 1 USC § 112a(b) (1994). National legislation may require publication of agreements or notifying the national legislature of all international agreements. *See e.g., id* § 112b (1994).

347. Before the coming of the Covenant, treaties were often not published. Even so, their terms were leaked as an "engine . . . of publicity." A.J.P. TAYLOR, THE STRUGGLE FOR MASTERY IN EUROPE: 1848-1918, at 264 (1954). Many but not all agreements between 1648 and 1920 have been reprinted in the Consolidated Treaty Series. Walker, *Anticipatory,* n. 289, Part I reports some of the few omissions.

348. Governments publish NOTMARs and NOTAMs for many purposes, including routine warnings of navigation hazards, *e.g.,* floating derelicts, extinguished navigation aids, *etc.,* besides warnings of high seas military exercises; war, exclusion or defense zones; warnings of other countries' proclamations of zones; or self-defense actions that might be taken upon approach of aircraft or ships, as the United States and other nations published them during the Tanker War. *See* nn. II.89-90, 101, 141-42, 176, 224, 288, 305, 311, 346-48, 420, and accompanying text.

349. *See* n. 348 and accompanying text.

350. UN Charter, art. 51; *see also* SIMMA 676-77.

351. Nicaragua Case, 1986 ICJ at 105, 121.

352. *Id.* at 96-99.

353. UN Charter, art. 51.

354. *See* nn. 308-22 and accompanying text.

355. Combacau, n. 208, 15-16.

356. HIGGINS, THE DEVELOPMENT, n. 56, 207.

357. United States v. Araki, Judgment of Int'l Mil. Trib. for the Far East (Nov. 4-12, 1948), *in* 1 The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.) 29 April 1946-12 November 1948, at 382

(B.V.A. Roling & C.F. Ruter eds. 1977); Nuremberg Judgment, 1 Tr. Maj. War Crim. Before Int'l Mil. Trib. 208, 218-22, 41 AJIL 205, 207 (1947), citing US Secretary of State Daniel Webster letter to UK Ambassador Lord Alexander B. Ashburton, Aug. 6, 1842, 2 MOORE 411-12; Webster letter to UK Minister Henry S. Fox, Apr. 24, 1843, *in* THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS 58, 67 (Kenneth E. Shewmaker ed. 1983) (Caroline Case); *see also* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AJIL 82 (1938); Walker, *Anticipatory*, n. 289, LIBER AMICORUM 385-86, 31 CORNELL INT'L L.J. 357-59. Treaties negotiated from 1815 through 1945 had recognized a right of anticipatory self-defense. *See id.* 366-81, 31 CORNELL INT'L L.J. 325-51.

358. *Compare, e.g.*, Nicaragua Case, 1986 ICJ 347 (Schwebel, J., dissenting); ALEXANDROV 296; BOWETT, SELF-DEFENCE 187-93; BROMS, THE DEFINITION, n. 112, 127; HANS KELSEN, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 27 (NAV. WAR C. INT'L L. STUD., v. 49, 1957); MCCORMACK, n. 209, 122-24, 238-39, 253-84, 302; MCDOUGAL & FELICIANO 232-41; 1 OPPENHEIM § 127; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 152-55 (1991); JULIUS STONE, OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HOPES 3 (1974); THOMAS & THOMAS, THE CONCEPT, n. 120, 61-65; George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, 39 NWC REV. 69-70 (May-June 1986); Christopher Greenwood, *Remarks, in* Panel I, n. II.84, at 160-61; Linnan, *Self-Defense*, n. 51, 65-84; Lowe, *The Commander's*, n. 318, 127-30; James McHugh, *Forcible Self-Help in International Law*, 25 NWC REV. 61 (No. 2, 1972); Rein Mullerson & David J. Scheffer, *Legal Regulation of the Use of Force, in* BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA 93, 109-14 (Lori Fisler Damrosch *et al.* ed. 1995); John F. Murphy, *Commentary on Intervention to Combat Terrorism and Drug Trafficking, in* LORI FISLER DAMROSCH & DAVID J. SCHEFFER, LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 241 (1991); W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects, in id.* 25, 45; Horace B. Robertson, Jr., *Contemporary International Law: Relevant to Today's World?*, 45 NWC REV. 89, 101 (Summer1992); Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World, in* LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT 43, 62-80 (NAV. WAR C. INT'L L. STUD., v. 67, Alberto Coll *et al.* ed. 1995); Waldock, *The Regulation*, n. 52, 496-99 (anticipatory self-defense permissible as long as principles of necessity observed); Walker, *Anticipatory*, n. 289 (anticipatory collective self-defense), *with, e.g.*, BROWNLIE, USE OF FORCE 257-61, 275-78, 366-67; DINSTEIN 182-89 (no right of anticipatory self-defense under UN Charter, art. 51, but there may be a right under customary international law); HENKIN, INTERNATIONAL LAW, n. 165, 121-22; JESSUP, A MODERN LAW, n. 54, 166-67; O'CONNELL, THE INFLUENCE 83, 171; RIFAAT, n. 23, 126; SIMMA 675-76; Tom Farer, *Law and War, in* 3 CYRIL E. BLACK & RICHARD A. FALK, THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 30, 36-37 (1971); Yuri M. Kolosov, *Limiting the Use of Force: Self-Defense, Terrorism and Drug Trafficking, in* BEYOND CONFRONTATION 233, 235; Kunz, *Individual*, n. 189, 878; Rainer Lagoni, *Remarks, in* Panel, n. II.84, 162; Tucker, *The Interpretation*, n. 189, 29-30; *see also* Tucker, *Reprisals and Self-Defense*, 66 AJIL 586 (1972) (States may respond only after being attacked). DINSTEIN 184-90 says a right of "interceptive" self-defense exists; *see* nn. 374-377 and accompanying text.

359. *E.g.*, the United States claims a right of anticipatory self-defense. NWP 1-14M Annotated ¶¶ 4.3.2-4.3.2.1; NWP 9A Annotated ¶¶ 4.3.2.-4.3.2.1. Iran recognized a right of reactive self-defense during the Tanker War; this was the USSR view. *See* n. II.370 and accompanying text; Kolosov, *Limiting*, n. 358, 234.

360. *Compare, e.g.*, ALEXANDROV 296 (although anticipatory self-defense appropriate, Israel could not claim it in Iraqi nuclear reactor raid) *with* MCCORMACK, n. 209, 122-44, 238-39, 253-84, 302 (anticipatory self-defense appropriate, Israel rightly claimed it for raid).

361. *Compare, e.g.*, Israel's claim of a right of anticipatory self-defense for the raid, ALEXANDROV 296; MCCORMACK, n. 209, 122-44, 238-39, 253-84, 302, *with* S.C. Res. 487 (1981), *in* WELLENS 441-42, adopted unanimously, *i.e.*, including the United States. *Cf.* UN Charter, arts. 23(1), 27. The United States adheres to a right of anticipatory self-defense. NWP 1-14M Annotated ¶¶ 4.3.2-4.3.2.1; NWP 9A Annotated ¶¶ 4.3.2-4.3.2.1; *see also* n. 359 and accompanying text. The US vote to condemn Israel meant that although anticipatory self-defense was a legitimate response, the Israeli action was not an appropriate exercise of that right under the circumstances.

362. UN Charter, art. 51; *see also* nn. 158-206 and accompanying text.

363. The parties declared it was not an issue. Nicaragua Case, 1986 ICJ 103.

364. *Compare, e.g.*, 1 D.P. O'CONNELL, INTERNATIONAL LAW 25 (1970) (favoring anticipatory self-defense) *with* O'CONNELL, THE INFLUENCE 83, 171 (then-current naval thinking was leaning toward the reactive view). *Compare* KELSEN, COLLECTIVE, n. 358, 27 (anticipatory self-defense permitted), *with* KELSEN, THE LAW, n. 189, 791-93 (only reactive self-defense permitted).

365. *Cf., e.g.*, GOODRICH *et al.* 342-53; *Addendum to the Eighth Report on State Responsibility*, 1980 2(1) Y.B. INT'L L. COMM'N 13, 66-70, UN Doc. A/CN.4?318/ADD.5-7. MCCORMACK, n. 209, 122, says Goodrich *ET AL.* are among those with a reactive view because of a statement *in id.* 353, but reading *id.* 342-53 for UN Charter, art. 51, seems to have *id.* straddling the fence. SAN REMO MANUAL ¶ 3, Commentary 3.2 says the MANUAL takes no position.

366. BOWETT, SELF-DEFENCE 187, citing UN Doc. AEC/18/Rev. 1, at 24 (1946).

367. BOWETT, SELF-DEFENCE 187, citing General Assembly debates.

368. *Id.*

369. Definition of Aggression, arts. 3(c), 3(e), 13 ILM 713.

370. *Id.*, art. 4, 13 ILM 714; *see also* nn. 98-152 and accompanying text for further analysis of the Resolution.

371. *See* nn. 80-86 and accompanying text.

372. DINSTEIN 130 says all of Definition of Aggression, art. 3, 13 ILM 713, may be custom, and this would include blockade. Not all would go so far. *See* n. 102 and accompanying text. Many have considered blockading coasts as aggression in the League and Charter eras. Treaties listing acts of aggression include blockade. *See, e.g.*, Convention for Definition of Aggression, July 3, 1933, art. 2(4), 147 LNTS 67, 256-57; Convention for Definition of Aggression, July 4, 1933, art. 2(4), 148 *id.* 211, 215; Balkan Entente, Feb. 9, 1934, Protocol-Annex, 153 *id.* 153, 157; Convention for Definition of Aggression, July 5, 1933, Lith.-USSR, art. 2(4), *id.* 79, 83; Saadabad Pact, July 8, 1937, art. 4, 190 *id.* 21, 25. UN Charter, art. 42, lists blockade as an option the Security Council may choose if nonforce alternatives are inadequate, an inference being that blockade is not open to UN Members unless in self-defense or with Council approval. Blockade was consistently in the USSR drafts enumerating acts of aggression. JULIUS STONE, AGGRESSION AND WORLD ORDER 34-35, 46-77 (1958); STONE, CONFLICT, n. 23, chs. 2-3.

373. *See* nn. 358-361 and accompanying text.

374. DINSTEIN 190, citing Joyner & Grimaldi, n. 11, 659-60.

375. DINSTEIN 190.

376. *Id.* 190-91. STONE, CONFLICT, n. 23, 58, 199 n.3; Rosalyn Higgins, *The Attitude of Western States Toward Legal Aspects of the Use of Force, in* CASSESSE, n. 208, 435, 443, characterize Israel's action as anticipatory self-defense.

377. DINSTEIN 191; *see also* BEN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 90 (1983); nn. 617-30 and accompanying text.

378. *Compare* S.C. Res. 487 (1981), *in* WELLENS 441, *with* DINSTEIN 47, 186-87.

379. *See also* nn. 242-43 and accompanying text.

380. *See* n. 243 and accompanying text.

381. *See* nn. 243, 248 and accompanying text.

382. *See* nn. 259-64 and accompanying text.

383. *See* nn. II.338-41 and accompanying text.

384. The same is true for some missile attacks. *Eilat* sank after two waves of them, and *Stark* survived two Exocet missiles; *Sheffield* may have been lost more due to her construction than the missiles. *See* nn. II.338-42, III.243, 259-64.

385. *Cf.* Philip C. Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 AJIL 98 (1954); Myres S. McDougal, *Peace and War: Factual Continuum with Multiple Legal Consequences*, 49 *id.* 63 (1955); *see also* James Russell Lowell, *The Present Crisis* (1844), in 1 JAMES RUSSELL LOWELL, POETICAL WORKS 185, 190 (1890).

386. Horace B. Robertson, *Modern Technology and the Law of Armed Conflict at Sea, in* Robertson 362; Robertson, *New Technologies and Armed Conflicts at Sea*, 14 SYRACUSE J. INT'L L. 699 (1988) argues persuasively that it is futile to legislate weapons control through treaties because treaties will nearly always be irrelevant before the ink is dry.

387. Custom, although perhaps uncertain in parameters, has inherent flexibility and is likely to be a dominant future source of law. W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CAL. W. INT'L L.J. 133 (1987); *see also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 3-10 (1989). The law of naval warfare is mostly custom-based. SAN REMO MANUAL 61-62. Moreover, custom is not subject to treaty rules of construction, *e.g.*, breach, fundamental change of circumstances, impossibility, *etc. See* nn. 927-29 and accompanying text.

388. *See* nn. 357-65 and accompanying text.

389. *Id.*

390. *See* nn. 485-96, 521-28 and accompanying text.

391. US UN Acting Permanent Representative Herbert S. Okun letter to President of UN Security Council, Apr. 14, 1986, UN Doc S/18016/Rev. 1 (1986), quoted *in* 80 AJIL 632 (1986); Feature: *U.S. Exercises Right of Self-Defense Against Libyan Terrorism*, 86 Bulletin 1-23 (June 1986); Geoffrey M. Levitt, *Intervention to Combat Terrorism and Drug Trafficking, in* DAMROSCH & SCHEFFER, n. 358, 224, 226-27, 230. Commentators differed on the legality of the strikes, as they had on the Vietnam War. Mullerson & Scheffer, nn. 358, 99.

392. Although specific events are cited, refer to Part II.B for the full factual context.

393. *See* n. II.88 and accompanying text.

394. S.C. Res. 479 (1980), *in* WELLENS 449; *see also* n. II.96 and accompanying text.

395. UN Charter, arts. 25, 48; *see also* n. 652 and accompanying text.

396. For analysis of war zones, defensive sea zones and similar ocean areas in terms of area, duration, notice, *etc.*, *see* Part V.F; *see also* nn. II.89, 103-04, 109-10, 141-42, 199-201, 240, 255, 288, 301, 411, 420, 447, 520 and accompanying text.

397. LOS Convention, art. 2; Territorial Sea Convention, art. 1; *see also* Parts IV.B.4 and V.D.3 for analysis in the LOS context.

398. *See* n. 309 and accompanying text.

399. *See* nn. II.21-27 and accompanying text.

400. *See* nn. II.31, III.309 and accompanying text.

401. Arab Joint Defence Treaty, n. II.31, art. 2, 157 BFSP 669-70, 49 AJIL SUPP. 51; *see also* nn. 309, 400 and accompanying text.

402. UN Charter, arts. 2(4), 51; Definition of Aggression, art. 3(f), 13 ILM 714; nn. 50-157 and accompanying text.

403. *See* nn. 591-616 and accompanying text.

404. *See* nn. 485-585 and accompanying text.

405. *Id.*

406. *See* nn. II.21-27, 84, 159-72, 186-87, 192, 208-09, 218, 248, 251-59, 262-63, 290-94, 315, 330, 415, 478, 508, 532, 543-45 and accompanying text.

407. *See* nn. 308-36 and accompanying text.

408. *See* n. II. 80 and accompanying text.

409. *See* nn. 308-36 and accompanying text.

410. *See* nn. II.103, 201 and accompanying text.

411. Definition of Aggression, art. 3(d), 13 ILM 713; *see also* nn. 98-152 and accompanying text.

412. Definition of Aggression, art. 4, 13 ILM 714; *see also* nn. 103, 116, 120 and accompanying text.

413. *See* Parts V.C.3, V.C.5, V.J.3.

414. Iraq's navy was bottled up in the Shatt al-Arab for the duration of the war; her new frigates sat out the war in Italy, where they had been built. *See* n. II.130 and accompanying text. Iraq could not conduct traditional maritime visit and search operations. Iran had a navy that was significant in size for Gulf operations. Both belligerents had land-based air attack capability.

415. *See* n. II.177 and accompanying text.

416. *See* n. II.177 and accompanying text.

417. *See* Parts V.B.-V.D and V.J.2-4.

418. UN Charter, art. 103; S.C. Res. 514, 522 (1982), 540 (1983), *in* WELLENS 450-51; *see also* nn. II.189, 216-17, III. 10 and accompanying text.

419. UN Charter, arts. 51, 103; S.C. Res. 479 (1980), 552 (1984), 582, 588 (1986), 598 (1987), 612, 619-20 (1988), 631, 642 (1989), 651, 671, 676 (1990), 685 (1991), *in* WELLENS 449-50, 452-60, 473-74; *see also* nn. II.96, 258, 300, 308, 377, 455, 486, 487, III. 10 and accompanying text.

420. The United States published the warnings within days after releasing its report on the US Marine headquarters building bombing at Beiruit International Airport in 1983. *See* nn. II.224-27 and accompanying text.

421. *See* n. II.229 and accompanying text. The United Kingdom had declared a similar defensive bubble during the Falklands/Malvinas War. *See* nn. 259-64 and accompanying text.

422. UN Charter, arts. 51, 103; *see* nn. 10, 158-288 and accompanying text.

423. *See* Parts V.F.1.b–V.F.1.c, V.F.5, V.J.6.

424. *See* n. II.360 and accompanying text.

425. *See* nn. II.295, 361 and accompanying text.

426. *See* n. II.298 and accompanying text.

427. *See* nn. II.296-97 and accompanying text.

428. *See* n. II.299 and accompanying text.

429. *See* n. II.306 and accompanying text.

430. This was the UK and apparently the French view. Other States, including the United States, saw the Tanker War as a traditional war, to which LOAC principles applied. *See* n. II.84 and accompanying text.

431. UN Charter, art. 103; *see also* n. 10 and accompanying text.

432. Nyon Arrangement, ¶¶ 1, 4-7, and Nyon Supplementary Agreement, ¶¶ 2-3, which also addressed attacks on merchantmen by submarines and surface ships, applied only to the Mediterranean Sea during the Spanish Civil War. The Nyon treaties permitted attacks on ships that attacked or might attack neutral merchant vessels and said nothing about the attacking ship's duties, referring to the London Protocol for standards. To that extent the Nyon treaties might be said to repeat whatever customary norms are in the London Protocol.

433. London Protocol, art. 22; *see also* Parts V.C.1, V.C.5, V.J.3 for analysis of the Protocol in the law of naval warfare context.

434. TIF 429-30; SCHINDLER & TOMAN 885.

435. Turkey acceded to the Protocol in 1937, SCHINDLER & TOMAN 885, long after the predecessor State, the Ottoman Empire, had been stripped of its Gulf territories through the League of Nations mandate system. The law of treaty succession could not apply to the GCC States; when Turkey became a Protocol party, these countries were not part of Turkey.

436. UN Charter, art. 103; *see also* n. 10 and accompanying text.

437. *See* n. 205 and accompanying text.

438. The SAN REMO MANUAL does not consider the Charter supremacy issue, noting some participants challenged a view that the Charter applies during armed conflict, arguing that *jus ad bellum* rules apply only until outbreak of an armed conflict. "Once a State became engaged in armed conflict, it was argued, that State was subject only to the [LOAC.] This is because the [LOAC] contains its own principles of necessity and proportionality," citing NWP 9A, Annotated ¶ 5.2. SAN REMO MANUAL ¶ 4, Commentary 4.3. All MANUAL participants accepted that "the fact that an act may be a necessary and proportionate measure . . . cannot justify it if it involves a violation of the laws of armed conflict." *Id.* ¶ 4, Commentaries 4.2(b), 4.3. If this means a Charter-based norm can be superseded by a norm based on a treaty governing the LOAC, however laudatory and beneficial to humanitarian standards the intention might be, the Commentary appears not to have taken UN Charter, art. 103 into account. If SAN REMO MANUAL, ¶ 4, Commentaries 4.2(b), 4.3 mean the LOAC recited in treaties should be the same as a norm developed under UN Charter, art. 51, much as necessity and proportionality are customary limitations on the inherent right of self-defense, nn. 485-585 and accompanying text, the MANUAL is correct on the point. Whether the Charter as a treaty can supersede custom is debatable, and to that extent the MANUAL is also correct. *See* n. 10 and accompanying text. If, on the other hand, Article 51 restates a *jus cogens* norm, n. 205 and accompanying text, then LOAC norms can inform but cannot supersede it. *See* n. 10 and accompanying text.

439. Commentators continue to debate the point. *Compare, e.g.,* MALLISON 106-23 (Protocol still a valid principle); Dieter Fleck, *Comments on Howard S. Levie's Paper: Submarine Warfare: With Emphasis on the 1936 London Protocol, in* Grunawalt 78, 83-84 (same); Howard S. Levie, *Submarine Warfare: With Emphasis on the 1936 London Protocol, in id.* 28, 59 (same, but States will find reasons to justify noncompliance); Sally V. Mallison & W. Thomas Mallison, *The Naval Practices of Belligerents in World War II: Legal Criteria and Developments, in id.* 87, 99-102 (Protocol still valid law, enhanced by Fourth Convention, art. 18[1] duty to search for survivors after battle at sea); Edwin I. Nowogugu, *Commentary, in* LAW OF NAVAL WARFARE 353, 363-64 (Protocol still valid law); Horace B. Robertson, Jr., *U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and Practice, in* Grunawalt 338, 343, 352-53 (same, but inapplicable in most circumstances) *with, e.g.,* STONE (Protocol violated in World War II, apparently

no longer the law); TUCKER 63-73 (same); W.J. Fenrick, *Comments on Sally V. and W. Thomas Mallison's Paper: The Naval Practices of Belligerents in World War II: Legal Criteria and Developments, in* Grunawalt 110, 116-18 (Protocol unworkable but should be incorporated in new principle of allowing attacks on neutral merchantmen if part of enemy war effort); Alex Kerr, *International Law and the Future of Submarine Warfare,* 81 PROCEEDINGS 1110 (Oct. 1955) (Protocol defunct); O'Connell, *International Law,* n. 252, 52 (Protocol no longer effective); James Service, *Targeting Realities: Platforms, Weapons Systems and Capabilities, in* Grunawalt 231, 238-40 (modern weapons systems make literal Protocol compliance unworkable; if observed, Protocol would in effect prolong a war). NWP 9A Annotated ¶ 8.2.2.2, at 8-10, 8-12 says the Protocol continues to apply to surface ships but must be interpreted in light of current technology, and enemy merchantmen may be attacked and destroyed with or without warning if "integrated into the enemy's war-fighting/war-sustaining effort and compliance with the... Protocol would, under the circumstances..., subject the surface warship to imminent danger or otherwise preclude mission accomplishment." *Id.* ¶ 8.3.1 applies these principles to submarine attacks, but *id.* ¶ 8.4 does not as to air attacks. *Id.* ¶¶ 7.5.1-7.5.2 say neutral ships acquire enemy character if they take direct part in hostilities on an enemy's side or operate directly under enemy control, orders, charter, employment or direction. *See also* NWP 1-14M Annotated ¶¶ 7.5.1-7.5.2, 8.2.2.2, 8.3.1, 8.4; Parts V.D, V.J.4.

440. *See* Nicaragua Case, 1986 ICJ at 92-93. UN Charter, art. 2(6) requires the United Nations to "ensure that states... not Members... act in accordance with [the] Principles [of the Charter] so far as may be necessary for the maintenance of international peace and security." Although the Security Council and the General Assembly have not referred to Article 2(6), their resolutions have declared law applicable to all States. Most commentators say Article 2(6) does not bind non-Members to Charter law. Vienna Convention, art. 38; GOODRICH *et al.* 58-60; SIMMA 134-39; *contra,* KELSEN, THE LAW, n. 189, 107. Article 2(6) is almost a dead letter today, since nearly all countries, Switzerland being a notable exception, are UN Members. However, the Nicaragua Case recognition of the possibility of an independent, parallel custom means that, unless Article 51 is given *jus cogens* status, there may be a different customary norm competing with, and perhaps offsetting, the Charter-based norm. If the independent norm has *jus cogens* status, it may negate the Charter norm. *See* n. 10 and accompanying text.

441. SAN REMO MANUAL ¶¶ 60(g), 67(f); *compare* NWP 1-14M Annotated ¶¶ 8.2.2.2, at 8-10, 8-12; NWP 9A Annotated¶¶ 8.2.2.2, at 8-10, 8-12.

442. SAN REMO MANUAL ¶¶ 61, 68, referring to *id.* ¶¶ 38-46; *compare* NWP 1-14M Annotated ¶ 8.1.1; NWP 9A Annotated ¶ 8.1.1.

443. SAN REMO MANUAL ¶¶ 47-52.

444. *Id.* ¶¶ 60(c), 60(g), 67(d); *compare* NWP 1-14M Annotated ¶¶ 7.5.1-7.5.2; 8.2.2.2, at 8-12; NWP 9A Annotated, ¶¶ 7.5.1-7.5.2; 8.2.2.2, at 8-12.

445. Protocol I, preamble; SAN REMO MANUAL, ¶ 6 & Commentary 6.1.The United States and other Gulf naval powers had the view that the Tanker War was a war in the traditional sense and that the LOAC, of which the law of naval warfare is a part, applied. *See* n. II.84 and accompanying text. Chapter III concentrates on Charter principles; Chapter V addresses LOAC principles. *See* Parts V.A.–V.D., V.F.2, V.F.5, V.G, V.J.1–V.J.4, V.J.6–V.J.7 for analysis of these attacks.

446. *Cf.* nn. II.97, 192 and accompanying text.

447. *See* nn. II.97, 192-93 and accompanying text.

448. *See, e.g.,* nn. II.295, 344, 346-49, 350, 359, 361 and accompanying text.

449. *See* n. II.146 and accompanying text.

450. *See* nn. 207-88, 308-36 and accompanying text.

451. *See, e.g.,* nn. II.384, 437-40, 442, 454-56 and accompanying text.

452. *See* II.368-70 and accompanying text.

453. *See n.* II.430 and accompanying text.

454. *See* nn. II.393-399 and accompanying text.

455. *See* n. II.469 and accompanying text.

456. *See* n. 391 and accompanying text.

457. *See* nn. II.394-96, 469 and accompanying text.

458. *See* n. II.449 and accompanying text.

459. *See* n. II.447 and accompanying text.

460. *See* nn. 308-36 and accompanying text.

461. *See* n. II.412 and accompanying text.

462. *See* nn. 308-36 and accompanying text.

463. *See* n. II.386 and accompanying text.

464. *See* nn. 308-36 and accompanying text.

465. *See* nn. II.391-92 and accompanying text.

466. *See* n. II.393-95 and accompanying text.

467. *See* n. II.430and accompanying text.

468. *See* n. II.363 and accompanying text.

469. *See* nn. II.338-40 and accompanying text.

470. *See* nn. II.367 (warning shots), II.410 and accompanying text.

471. *See* nn. II.364, 373, 391, 400, 406, 410-13, 434, 446, 463-64, 468-70, 472, 520 and accompanying text.

472. *See* nn. II.459-68 and accompanying text.

473. *See* nn. II.339, 468 and accompanying text.

474. *See, e.g.,* n. II.410 and accompanying text.

475. Necessity, proportionality and other qualifications of the right to self-defense are analyzed at nn. 485-590 and accompanying text.

476. *See* Parts V.A.–V.D., V.F.2, V.F.5, V.G, V.J.1–V.J.4, V.J.6–V.J.7

477. UN Charter, art. 2(1); S.S. Lotus (Fr. v. Turk.), 1927 PCIJ, Ser. A, No. 10, at 4, 18; *see also* n. 30 and accompanying text.

478. *See* nn. 272-76, 282, 292 and accompanying text.

479. *See* nn. 485-590 and accompanying text.

480. *Id.*

481. *Id.*

482. *See* nn. II.437-42, 454-56 and accompanying text.

483. *See* nn. II.437-41 and accompanying text.

484. *See* nn. II. 446-53 and accompanying text.

485. *See* n. 357 and accompanying text.

486. Legality of Threat of Nuclear Weapons, 1996 (1) ICJ 226, 245; Nicaragua Case, 1986 ICJ 94; NWP 1-14M Annotated, ¶ 4.3.2; NWP 9A Annotated ¶ 4.3.2; RESTATEMENT (THIRD) § 905(1)(a) & cmt. c, r.n. 3; SAN REMO MANUAL ¶ 3 & Commentary 3.3. NWP 1-14M Annotated ¶ 4.3.2.1 departs from NWP 9A Annotated, stating that in today's world of modern lethal weapon systems, the Caroline Case formula for necessity, n. 357 and accompanying text, is too restrictive. Commentators have criticized the Caroline Case formula as outmoded. *See, e.g.,* MCDOUGAL & FELICIANO 217-18; Lowe, *The Commander's,* n. 318, 127-30; Mallison & Mallison, *Naval,* n. 261, 263; Abraham D. Sofaer, *Terrorism, The Law, and the National Defense,* 126 MIL. L. REV. 89 (1989). Others continue to espouse this aspect of anticipatory self-defense, however. *See generally* nn. 356-57 and accompanying text. For this reason, and because NWP 1-14M Annotated was not published until after the Tanker War, analysis proceeds on the basis that the Caroline Case formulation of necessity was part of anticipatory self-defense requirements for the conflict.

487. SAN REMO MANUAL ¶ 4.

488. *See* nn. 591-616 and accompanying text.

489. *See* nn. 646-49 and accompanying text.

490. Many States protested belligerents' actions during the Tanker War, and the belligerents protested actions by their opponent or third States. *See, e.g.,* nn. II.177, 225, 234, 333, 379, 432-33, 492 and accompanying text.

491. *E.g.,* the United States settled with Iraq for the *Stark* claims and with Iran for the Airbus tragedy. *See* nn. II.339, 468 and accompanying text.

492. The United States invoked ICJ jurisdiction to resolve the Iran hostage situation, Hostage Case, n. II.12, and Iran claimed against the United States for the Rostum attack and the Airbus tragedy, the latter being settled. *See* nn. II.395, 432-34, 468 and accompanying text.

493. *E.g.*, a State could keep a "ledger [for] an aggression of pin-prick attacks" and respond proportionally to all in the future. DINSTEIN 226; Roberto Ago, *Addendum to Eighth Report on State Responsibility*, UN Doc. A/CN.4/318 & Add. 1-4 1979(2)(1) Y.B. INT'L L. COMM. 13, 69-70 (1981). Responding with force in self-defense that seems disproportionate to the latest prick carries a risk that a target of the response or others may argue the response is disproportionate and therefore an aggressive armed attack by the pricked State. DINSTEIN 225. "Genuine on-the-spot reaction [closes] the incident." *Id.* 214. This is wiser than accumulating them for future action, as Israel appears to have announced for SCUD attacks on it during the 1990-91 Gulf War. Whether a State collects such hurts for future action, or whether it approves immediate response, notice must be given clearly to the other State and the general international community to avoid counterclams of aggression, *etc.* If a response could be construed to apply to more than one prick, and is intended for a particular harm, that too should be underscored. The United States did this in the *Sea Isle City* response. *See* nn. II.394-98 and accompanying text.

494. *E.g.*, the 1979-80 hostage situation involved several strategies: judicial and military (*i.e.*, the aborted Tehran raid), Hostage Case, n. II.12, 1980 ICJ 3; diplomacy and claims resolution through arbitration, Declarations of Algeria Concerning Commitments and Settlement of Claims by the United States and Iran with Respect to Resolution of the Crisis Arising Out of Detention of 52 U.S. Nationals in Iran, with Undertakings & Escrow Agreement, Jan. 19, 1981, TIAS ——, *in* 20 ILM 224 (1991); economic, *cf.* Dames & Moore v. Regan, 453 US 654 (1981). Dames also shows that strategies may be carried out in different arenas. The case was litigated in the US national courts, as distinguished from judicial strategies in the ICJ Hostage Case, and by different levels of participants, *i.e.*, private litigants invoking US courts' jurisdiction to attach Iranian assets, some in private hands and some State-owned. States were parties in the Hostage Case. *Cf.* ICJ Statute, art. 34.

495. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984); *see also* DINSTEIN 202-03 who, *id.* 244-45, would inject a "beyond reasonable doubt" standard for armed bands crossing a border, perhaps reflecting Definition of Aggression, n. 62, art. 3(g), 13 ILM 714, cautionary language. Even if a heightened standard is appropriate to counter such aggression, it is not a requirement for responding to other acts of aggression.

496. SAN REMO MANUAL ¶ 3, Commentary 3.3.

497. *Id.* ¶ 4, Commentary 4.3.

498. *Cf. id.*, citing NWP 9A Annotated ¶ 5.2, restating LOAC standards. *See also id.* ¶ S6.2.5.2, which says US military tribunals have applied the same rules for a military necessity defense to individuals and nations. Military necessity allows measures necessary to compel an enemy's submission but does not permit destruction of life and property beyond the necessities of war. *See* 3 HYDE § 655; MCDOUGAL & FELICIANO 72, 528; NWP 1-14M Annotated ¶ 5.2; STONE 352.

499. UN Charter, art. 103; *see also* n. 10 and accompanying text, particularly as to the potential role of customary norms in superseding the Charter.

500. *See* n. 205 and accompanying text.

501. BROWNLIE, USE OF FORCE 305; DINSTEIN 214; *see also* Nyon Arrangement; Nyon Supplementary Agreement.

502. *See* nn. II.348, 350-52, 359, 361-62, 382, 393, 435, 437, 446-53, 471, 494, 498 and accompanying text.

503. These acts might violate incidents at sea agreements (INCSEA), however, and give rise to a diplomatic claim. *See* nn. IV.19, IV.22 and accompanying text.

504. DINSTEIN 190; *see also* nn. 374-77 and accompanying text.

505. *See* n. 378 and accompanying text.

506. *See* Bunn, n. 358, 69-70.

507. *See* STONE 352-53.

508. *See* nn. II.74-80 and accompanying text.

509. *See* nn. II.143, 178-79, 201-03, 215, 234-40, 248-60, 263, 269, 272-74, 288-89, 295, 300, 312, 323-24, 337, 343, 362, 364, 373, 376, 378, 386, 93-94, 400, 403, 406, 412-13, 420-21, 429, 434, 446-53, 463-64, 470, 520-21 and accompanying text.

510. *See* n. 493 and accompanying text.

511. *See* nn. 617-30 and accompanying text.

512. McDOUGAL & FELICIANO 230.

513. Nicaragua Case, 1986 ICJ 94; McDOUGAL & FELICIANO 231-41, citing *inter alia* T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 118 (2d ed. 1897); 1 JOHN WESTLAKE, INTERNATIONAL LAW 300 (1904); NWP 1-14M Annotated ¶ 5.2; NWP 9A Annotated ¶ 5.2; SAN REMO MANUAL ¶¶ 3, Commentary 3.3; 4, Commentary 4.3; Georg Schwarzenberger, *The Fundamental Principles of International Law*, 87 RCADI 195, 334 (1955). McDOUGAL & FELICIANO continue analysis by criticizing commentators' narrow views, *e.g.*, Kunz, *Individual*, n. 189, on self-defense's scope in the Charter era, but regardless of a position taken on scope, necessity qualifies all self-defense claims.

514. *See* nn. II.224-27, 305, 345-47 and accompanying text.

515. *See* nn. 521-85 and accompanying text.

516. *See* nn. II.368-72 and accompanying text.

517. *See* nn. II.264, 336, 354-55, 357, 374, 384-87, 437-42, 454-56 and accompanying text.

518. In 1992 Iran sued the United States in the ICJ for the attacks on the oil platforms; in 1997 the Court held for jurisdiction. *See* nn. II.432-34 and accompanying text.

519. *See* n. II.459-76 and accompanying text.

520. *See* nn. 253-55 and accompanying text.

521. Legality of Threat of Nuclear Weapons, 1996 (1) ICJ 245; Nicaragua Case, 1986 ICJ 94. Commentators agree, whatever their view on anticipatory self-defense or if the restrictive Caroline Case formulation of necessity is a component of anticipatory self-defense. *See, e.g.*, BOWETT, SELF-DEFENCE 269; BROMS, THE DEFINITION, n. 112, 129-30; DINSTEIN 202-03; McDOUGAL & FELICIANO 241-44; NWP 1-14M Annotated ¶ 4.3.2; NWP 9A Annotated ¶ 4.3.2; RIFAAT, n. 23, 127; RESTATEMENT (THIRD) § 905(1)(b) & cmt. d, r.n. 2; SAN REMO MANUAL ¶ 3 & Commentary 3.3; Ago, n. 493, 69-70; Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *in* INTERNATIONAL LAW, n. 11, 273, 274; Waldock, *The Regulation*, n. 52, 463.

522. NWP 1-14M Annotated ¶ 4.3.2; NWP 9A Annotated ¶ 4.3.2; SAN REMO MANUAL ¶ 4.

523. DINSTEIN 129; *see also* SAN REMO MANUAL ¶¶ 3, Commentary 3.3; 4, Commentaries 4.1, 4.4-4.5.

524. DINSTEIN 225-26; HIGGINS, THE DEVELOPMENT, n. 55, 201; Ago, n. 492, 69-70.

525. DINSTEIN 225-26; RIFAAT, n. 22, 270-71.

526. DINSTEIN 215.

527. SAN REMO MANUAL ¶ 3, Commentary 3.3.

528. UN Charter, art. 103; *see also* nn. 10, 205 and accompanying text.

529. McDOUGAL & FELICIANO 228, 241-44.

530. *Id.* 244; SAN REMO MANUAL ¶ 3, Commentary 3.3.

531. *See* nn. II.368-72 and accompanying text.

532. *See* nn. II.429-333 and accompanying text.

533. Ago, n. 493, 69; *see also* McDOUGAL & FELICIANO 242; Christopher Greenwood, *Report II: The Effects of the United Nations Charter on the Law of Naval Warfare* 15-16 (1991), unpublished paper presented at International Institute of Humanitarian Law Round Table, Bergen, Norway, Sept. 1991 (copy in author's file).

534. Waldock, *The Regulation*, n. 52, 464.

535. DINSTEIN 232. He adds a parenthetical "(despite any ultimate lack of proportionality)" after *id.* Since he follows with Ago, n. 493, 69 ("It would be mistaken . . . what matters is the result to be achieved by the 'defensive' action and not the terms, substance and strength of the action itself"), DINSTEIN 232 cannot be understood to mean that in all-out war proportionality goes overboard. What he undoubtedly means is that the key is not proportionality of response in terms of reaction force(s) but proportionality in terms of result achieved, *i.e.*, "stopping or preventing the infringement." Ago 69; Waldock, *The Regulation*, n. 52, 464.

536. DINSTEIN 233.

537. *Id.* 234, citing Kunz, *Individual*, n. 189, 876.

538. *Accord*, SAN REMO MANUAL, ¶¶ 3, Commentary 3.3; 5, Commentary 5.1; *but see id.* ¶ 5, Commentary 5.2.

539. DINSTEIN 234.

540. MCDOUGAL & FELICIANO 231-32, citing Judgment of International Military Tribunal for the Far East 964-66, 976-78, 994-95; *see also* n. 357 and accompanying text.

541. DINSTEIN 234, citing S.H. Amin, *The Iran-Iraq Conflict: Legal Implications*, 31 ICLQ 167, 186 (1982).

542. *Cf.* UN Charter, art. 2(4), requiring respect for States' territorial integrity; *see also* nn. 47-157 and accompanying text.

543. *See* nn. II.97, 192 and accompanying text.

544. *See* nn. II.378, 484-502 and accompanying text.

545. *Cf.* O'CONNELL, THE INFLUENCE 65; Greenwood, *Self-Defence*, n. 521, 273; Greenwood, *Report*, n. 533, 20-27.

546. Greenwood, *Self-Defence*, n. 521, 277; *see also* nn. 259-64 and accompanying text.

547. O'CONNELL, THE INFLUENCE 65; *see also* n. 244 and accompanying text.

548. Iraq had ordered frigates in Italy; they were being built there as the war started. They sat out the war there. *See* n. II.130 and accompanying text.

549. MCDOUGAL & FELICIANO 242; Ago, n. 493, 69; Greenwood, *Report*, n. 533, 16; Waldock, *The Regulation*, n. 52, 464.

550. *See* n. 259 and accompanying text.

551. *See* nn. 591-616 and accompanying text.

552. The Korean War and the 1990-91 Gulf War are notable exceptions. *See* nn. II.501-14, III.220-22, 281-84, 310-13 and accompanying text.

553. *See* nn. 220-22, 281-84, 310-13 and accompanying text.

554. *See* nn. 235-43, 249 and accompanying text.

555. *See* nn. 259-64 and accompanying text.

556. *See* nn. 245-48 and accompanying text.

557. *See* n. 550 and accompanying text.

558. *See* nn. 533-38 and accompanying text.

559. UN Charter, arts. 2(1), 2(3); *see also* nn. 30, 47-157 and accompanying text.

560. *See* Walker, *Crisis Over Kuwait* 30 n. 27.

561. SAN REMO MANUAL ¶¶ 3, Commentary 3.3 refutes this view; *see also* nn. 546-51 and accompanying text.

562. *See* n. II.457 and accompanying text.

563. *See* nn. II.224-17 and accompanying text.

564. *See* nn. II.367 (warning shots), 410 and accompanying text. The United States had concerns over attacks from Iranian speedboats. *See* nn. II.364, 373, 391, 400, 406, 410-11, 434, 446, 463-64, 468-70, 472, 520 and accompanying text.

565. *See* nn. II.144, 177, 274-78, 422-23 and accompanying text.

566. *See* nn. II.491-92 and accompanying text.

567. *Cf.* nn. II.178, 201-02, 234-40, 248, 250-59, 263-64, 269, 272, 288-89, 295, 300, 304, 319, 334-35, 338-40, 355-58, 364, 368, 373-74, 376-78, 391-92, 400, 406, 412-13, 420-21, 424, 429-31, 434, 446, 459-64, 468, 469, 518-23 and accompanying text.

568. *See* nn. II.115-16, 178, 231, 258, 309, 334, 336, 358, 393, 401, 406, 434 and accompanying text.

569. UN Charter, art. 2(4); *see also* nn. 45-157 and accompanying text.

570. UN Charter, art. 51; *see also* nn. 158-288 and accompanying text.

571. *See* nn. II.92, 103, 111-15, 121, 143, 178-83, 207, 210-14, 216, 232-35, 239-40, 279-80, 288, 306, 310, 313, 457, 473-76 and accompanying text.

572. *See* nn. II.210-14 and accompanying text.

573. *See* nn. II.368-72 and accompanying text.

574. *See* nn. II.393-402 and accompanying text.

575. *See* nn. 546-51 and accompanying text.

576. *See* nn. II.391-92. 429-33, 459-68 and accompanying text.

577. *See* nn. II.338-40 and accompanying text.

578. *See* nn. II.459-68 and accompanying text.

579. *See* nn. 546-51 and accompanying text.

580. *See* nn. 591-616 and accompanying text.

581. Corfu Channel (UK v. Alb.), 1949 ICJ 5, 22.

582. Now restated *inter alia in* LOS Convention, art. 38; *see also* nn. IV.522-619, V.70-71 and accompanying text.

583. *See generally, e.g.,* SAN REMO MANUAL ¶¶ 47-66; *see also* Parts V.C, V.D and V.G.

584. Protocol I, preamble; SAN REMO MANUAL, ¶ 6 & Commentary 6.1; *see also* nn. 485-579 and accompanying text.

585. UN Charter, arts. 51,103; *see also* n. 10 and accompanying text.

586. *See* n. 357 and accompanying text.

587. *See* nn. II.224, 305, 345-47, 391-92, 429-33, III. 420-23, 464, 514 and accompanying text. The same might be said about anticipatory self-defense incidents in Libya-US confrontations. *See* nn. III. 389-91 and accompanying text.

588. *See* nn. 414-17 and accompanying text.

589. *See* nn. II.277, 282, 288, 295, 297, 306 and accompanying text.

590. *See* nn. II.459-68, III. 475, 519, 578 and accompanying text.

591. Higgins, *The Attitude,* n. 376, 444.

592. Ago, n. 493, 39.

593. *E.g.,* Gabeikovo-Nagymaros Project (Hung. V. Slovak.), 1997 ICJ 7, 54; Nicaragua Case, 1986 *id.* 127; Friendly Relations Declaration; BOWETT, SELF-DEFENCE 13; BRIERLY 401-02; BROWNLIE, USE OF FORCE 281; GOODRICH *et al.* 340-47; HIGGINS, THE DEVELOPMENT, n. 56, 217; 2 OPPENHEIM §§ 43; 52a, at 152-53; SIMMA 105; STONE 286-87; Ago, n. 493, 42; Roberto Barsotti, *Armed Reprisals, in* CASSESSE, n. 207, 79; D.W. Bowett, *Reprisals Involving Recourse to Armed Force,* 66 AJIL 20 (1972); Higgins, *The Attitude,* n. 376, 444; Tucker, *Reprisals,* n. 358, 586-87; *cf.* NWP 1-14M Annotated ¶ 6.2.3; NWP 9A Annotated ¶ 6.2.3; *contra,* DINSTEIN 215-26; LAWRENCE T. GREENBERG *et al.,* INFORMATION WARFARE AND INTERNATIONAL LAW 26-27 (1997).

594. NWP 1-14M Annotated ¶ 6.2.3.1, at 6-18; NWP 9A Annotated ¶ 6.2.3.1, at 6-19.

595. Corfu Channel (UK v. Alb.), 1949 ICJ 35; *see also* HIGGINS, THE DEVELOPMENT, n. 55, 216-17.

596. HIGGINS, THE DEVELOPMENT, n. 56, 7-18; Higgins, *The Attitude,* n. 376, 444-45; *see also, e.g.,* S.C. Res. 111 (1956), *in* WELLENS 653.

597. Friendly Relations Declaration, n. 69.

598. Higgins, *The Attitude,* n. 376, 445.

599. *Id.,* citing *inter alia* 1 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING 221-27 (1970); Richard B. Lillich, *Economic Coercion and the International Legal Order, in* Lillich, ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER 73 (1979); Paust & Blaustein, n. 61.

600. Air Service Agreement Between France & United States (Fr. v. US), 18 UNRIAA 417, 446 (Arb. 1978); Ago, n. 493, 43.

601. *See* nn. 259-64 and accompanying text.

602. Responsibility of Germany for Acts Committed After 31 July 1914 & Prior to Portugal's Entry into the War (Port. v. Ger.), 2 UNRIAA 1037, 1047, 1056-57 (Arb. 1930) (Cysne Case); Ago, n. 493, 45-46.

603. Ago, n. 493, 41, citing Responsibility of Germany for Acts Committed in Portuguese Colonies in the South of Africa (Port. v. Ger.) (Naulilaa Arbitration), 2 UNRIAA 1012, 1025-26 (Arb. 1928) (Naulilaa Arbitration); Cysne Case, n. 602; *see also* NWP 1-14M Annotated ¶ 6.3.2.1; NWP 9A Annotated ¶ 6.2.3.1; Higgins, *The Attitude,* n. 376, citing Naulilaa Arbitration.

604. *See* Parts V.A.1, V.C.1, V.E.1, V.F.1.b, V.F.2, V.G.2–V.G.3, V.J.1, V.J.3, V.J.5–V.J.7.

605. *See* nn. 580-85 and accompanying text.

606. UN Charter, arts. 25, 48, 103; Ago, n. 493, 43-44; *see also* n. 552 and accompanying text.

607. UN Charter, art. 50, invoked by Jordan and other States during the 1990-91 Gulf War. *See* Walker, *Crisis Over Kuwait* 37-38. *See also* GOODRICH *et al.* 341-42; SIMMA 659-61.

608. UN Charter, art. 103; *see also* n. 10 and accompanying text.

609. Ago, n. 493, 44 n. 194; *see also, e.g.,* S.C. Res. 418 (1977), 558 (1984), 569 (1985), 591 (1986), *in* WELLENS 98, 227-28, 230 (embargo on arms sales to South Africa, followed by prohibition on UN Members' buying South African arms, *etc.;* Members urged to adopt measures, *e.g.,* suspending new investment, prohibiting South African coin sales, restricting sports and cultural relations, suspending guaranteed export loans, prohibiting new contracts for nuclear facilities and computer equipment sales to South African army, police, *etc.*). A US response, after issuing executive orders, was Comprehensive Anti-Apartheid Act of 1986, 22 USC §§ 5001-5117 (1988). *See also* Nico Schrijver, *The Use of Economic Sanctions by the UN Security Council: An International Law Perspective, in* INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT 123, 131-32 (Harry H.G. Post ed. 1994).

610. CABLE 63, 107-09, 193, noting an initial General Assembly resolution; O'CONNELL, THE INFLUENCE 137-38, 174-75, referring to S.C. Res. 221 (1965), 232 (1966), *in* WELLENS 127-28; 16 KEESING 22525 (1968). After Zimbabwe became independent, S.C. Res. 460 (1979), *in* WELLENS 148, ended the embargo and other restrictions. US executive orders complied with Council resolutions, but Congress later exempted US chrome ore exports, which under the US later-in-time construction rule took priority over Council resolutions and executive orders. Exec. Order No. 11322, 3 CFR 243 (1967 Compil.); Diggs v. Schultz, 470 F.2d 461, 465-67 (D.C. Cir. 1972). Later legislation, 22 USC § 287c (1994) and Act of Mar. 18, 1977, 91 Stat. 22, conformed the United States to the Council resolutions by removing the chrome ore exception. *See also* Schrijver, n. 609, 129-30.

611. UN Charter, art. 103, allows overriding agreements, *e.g.,* Fourth Convention, art. 23, if it had applied, perhaps through inference from Corfu Channel (UK v. Alb.), 1949 ICJ 15; *see also* nn. 580-85 and accompanying text. For analysis of contraband and blockade rules, *see* Parts V.C.4, V.D.3–V.D.4, V.E, V.J.3–V.J.5.

612. *See generally* Walker, *Crisis Over Kuwait* 30-40.

613. S.C. Res. 665 (1990), *in* WELLENS 530.

614. S.C. Res. 670 (1990), *in id.* 534.

615. *Cf.* Fourth Convention, cited *in* S.C. Res. 670 (1990), *in id.* 534.

616. S.C. Res. 666 (1990), *in* WELLENS 532.

617. This Sub-Part first appeared as Walker, *Anticipatory,* n. 289, LIBER AMICORUM 393, 31 CORNELL INT'L L.J. 370-74.

618. Nuremberg Judgment, n. 357, 218-22, 41 AJIL 207; United States v. Araki, n. 357, 382; *see also* McCormack, n. 208, 254-56; Walker, *Anticipatory,* n. 289, LIBER AMICORUM 385-86, 31 CORNELL INT'L L.J. 358; n. 357 and accompanying text.

619. *E.g.,* ALEXANDROV 163 appears to support his view that the 1981 Israeli raid on the Iraqi nuclear reactor could not be supported by self-defense because of a 1994 debate on imposing sanctions on North Korea rather than using force because of the danger of nuclear weapons. MCCORMACK, n. 209, 98-99, derides a claim Israel had been given a necessary guarantee of security under the US Star Wars program, developed later in the Reagan Administration, was a reason why it may not have been necessary for Israel to bomb the reactor. In both cases the supposed precipitating event occurred after the 1981 raid. Of course, there may have been security-guarded debates over North Korea before 1994, or security-covered Star Wars discussions in 1981 or earlier, but this is what the public record reveals as to these apparently anachronistic statements. The same kind of error-laden, after-the-fact justification or criticism can occur in self-defense situations, especially for anticipatory self-defense issues.

620. CARL VON CLAUSEWITZ, ON WAR 117-21 (Michael Howard & Peter Paret ed. & trans. 1976).

621. RESTATEMENT (THIRD), § 313 cmt. b analyzes declarations and understandings:

> When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation. Sometimes, however, a declaration purports to be an "understanding," an interpretation of the agreement in a particular respect. Such a . . . declaration is not a

> reservation if it reflects the accepted view of the agreement. But another contracting party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.
> In relation to a multilateral agreement, a declaration of understanding may have complex consequences. If it is acceptable to all contracting parties, they need only acquiesce. If, however, some contracting parties share or accept the understanding but others do not, there may be a dispute as to what the agreement means, and whether the declaration is in effect a reservation. In the absence of an authoritative means for resolving that dispute, the declaration, even if treated as a reservation, might create an agreement at least between the declaring state and those who agree with that understanding. See [RESTATEMENT (THIRD), § 313(2)(c), dealing with reservations] .... However, some contracting parties may treat it as a reservation and object to it as such, and there will remain a dispute between the two groups as to what the agreement means.

*See also* Vienna Convention, arts. 19-23, ILC Rep., n. 192, 189-90; Bowett, *Reservations,* n. 197, 69; nn. 192, 197 and accompanying text for reservations to multilateral agreements.

622. The United States may ratify Protocol II, but the Reagan Administration expressed serious reservations to Protocol I and did not ask Senate advice and consent for it. President Reagan transmittal letter to US Senate, Jan. 29, 1987; Secretary of State George P. Schultz letter of submittal to President Reagan, Dec. 13, 1986, *in* Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, S. Treaty Doc. 100-2, 100th Cong., 1st Sess. (1987), *in* 26 ILM 561 (1987).

623. Protocol I, art. 51. *Id.,* art. 51(2) and 51(5) prohibitions on attacks on civilians, absent other considerations such as those civilians who take up arms, restate customary law. AFP 110-31 ch. 14; BOTHE *et al.* 299 & n.3; NWP 1-14M Annotated ¶¶ 6.2.3.2 (noting protections also under Fourth Convention, art. 33), 11.2 n.4, 11.3; NWP 9A Annotated ¶¶ 6.2.3.2 (same),11.2 n.3, 11.3; 4 PICTET 224-29; SAN REMO MANUAL ¶ 39; STONE 684-732; Matheson, *Remarks* 423, 426; William G. Schmidt, *The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions,* 24 AIR FORCE L. REV. 189, 225-32 (1984); Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I,* 1 AM U.J. INT'L L. & POL. 117, 130-31 (1986). Civilians may not be used as human shields, nor may they be a subject of attacks intended to terrorize them, although otherwise legitimate attacks that may terrorize them are permissible. Specific intent to terrorize gives rise to liability. NWP 1-14M Annotated ¶¶ 11.2 (noting protections under Fourth Convention, arts. 28, 33), 11.3; NWP 9A Annotated ¶¶ 11.2 (same), 11.3; Hans-Peter Gasser, *Prohibition of Terrorist Attacks in International Humanitarian Law,* 1985 INT'L REV. RED CROSS 200; Hague Air Rules, art. 22; Matheson 426; Schmidt 227. Article 51 rules of distinction, necessity and proportionality, with the concomitant risk of collateral damage inherent in any attack, generally restate custom. BOTHE *et al.* 309-11, 359-67; FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 99-100 (1987); MCDOUGAL & FELICIANO 525; NWP 1-14M Annotated ¶¶ 5.2 & n.7, 8.1.2.1; NWP 9A Annotated ¶¶ 5.2 & n.6, 8.1.2.1; SAN REMO MANUAL ¶¶ 39-42 & Commentaries; STONE 352-53; W.J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare,* 98 MIL. L. REV. 91, 125 (1982) (questioning whether proportionality is an accepted customary norm); Matheson 426; *Results of the First Meeting of the Madrid Plan of Action Held in Bochum, F.R.G., November 1989,* 7 BSFHV 170-71 (1991); Schmidt 233-38; Solf 131; G.J.F. van Hegelsom, *Methods and Means of Combat in Naval Warfare,* 8 BSFHV 1, 18-19 (1992).

624. Protocol I, art. 52, states a general customary norm, except the prohibition on reprisals against civilians in art. 52(1), for which there are two views. *See generally* BOTHE *et al.* 320-27; COLOMBOS §§ 510-11, 524-25, 528-29; NWP 1-14M Annotated ¶¶ 6.2.3 & n.36, 6.2.3.2 (protection for some civilians from reprisals under Fourth Convention, art. 33), 8.1.1 & n.9, 8.1.2 & n.12; NWP 9A Annotated ¶¶ 6.2.3 & n.33, 6.2.3.2 (same), 8.1.1 & n.9, 8.1.2 & n.12 (US view that Protocol I, art. 52[1] "creates new law"); 2 O'CONNELL, LAW OF THE SEA 1105-06; 4 PICTET 131; PILLOUD, COMMENTARY ¶¶ 1994-2038; Matheson, *Remarks* 426; Frank Russo, Jr., *Targeting Theory in the Law of Naval Warfare,* 30 NAV. L. REV. 1, 17 n.36 (1992) (rejecting Protocol I, art. 52(2) applicability to sea warfare); Solf, *Protection,* n. 623, 131.

625. Protocol I, art. 57, whose rules of distinction, necessity and proportionality, with concomitant risk of collateral damage inherent in any attack generally restate custom. *See generally* BOTHE *et al.* 309-11; KALSHOVEN, CONSTRAINTS, n. 623, 99-100; MCDOUGAL & FELICIANO 525; NWP 1-14M Annotated ¶ 8.1.2.1 & nn.19-20; NWP 9A Annotated ¶ 8.1.2.1 & nn.19-20; SAN REMO MANUAL ¶¶ 39-42 & Commentaries; STONE 352-53; Fenrick, *The Rule,* n. 623, 125 (questioning whether proportionality accepted as custom); Matheson, *Remarks* 426; *Results,* n. 621, 170-71; Schmidt, *The Protection,* n. 623, 233-38; Solf, *Protection,* n. 622, 131; van Hegelsom, n. 622, 18-19.

626. Belgium Declaration, May 20, 1986, *in* SCHINDLER & TOMAN 706, 707; Italy Declaration, Feb. 27, 1986, *in id.* 712; the Netherlands Declaration, June 26, 1977, *in id.* 713, 714; UK Declaration, Dec. 12, 1977, *in id.* 717; *see also* BOTHE *et al.* 279-80, 310, 363; NWP 1-14M Annotated ¶ 8.1.2.1 & n.19; NWP 9A Annotated ¶ 8.1.2.1 & n.19.

627. Mine Protocol, Oct. 10, 1980, art. 2(4), as amended May 3, 1995, art. 2(6); Incendiary Weapons Protocol, Oct. 10, 1980, art. 1(3). The United States has ratified the Convention, Fragments Protocol, and the Mine Protocol; the

Incendiary Weapons Protocol is not yet in force for the United States. TIF 452. Protocol on Blinding Laser Weapons, May 3, 1995, 35 ILM 1218 (1996) has been negotiated; *id.* and Fragments Protocol have no such provisions. Commentators for the Mine and Incendiary Weapons Protocols say little about these provisions; they state the obvious. *See generally* Burrus M. Carnahan, *The Law of Land Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73 (1984); W.J. Fenrick, Comment, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, 19 CYBIL 229 (1981); Howard S. Levie, *Prohibitions and Restrictions on the Use of Conventional Weapons*, 68 ST. JOHN'S L. REV. 643 (1994); J. Ashley Roach, *Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?*, 105 MIL. L. REV. 1 (1984); Willam G. Schmidt, *The Conventional Weapons Convention: Implication for the American Soldier*, 24 AIR FORCE L. REV. 279 (1984). The United States declared it would not sign the Convention on Prohibition of Use, Stockpiling, Production & Transfer of Anti-personnel Mines & on their Destruction, Sept. 18, 1997, 36 ILM 1507 (1997). *See generally* William J. Clinton, *Remarks on Landmines and an Exchange with Reporters*, 33 Weekly Comp. Pres. Doc. 1356-59 (1997). Other States' actions indicate the Convention will go into force. The Clinton Administration pledged the United States will sign the Convention by 2006, but only if the Pentagon comes up with an alternate weapon, particularly for land mines in Korea. Steven Lee Myers, *Clinton Agrees to Land-Mine Ban, but Not Yet*, N.Y. TIMES, May 22, 1998, A3.

628. Table A5-1, *States Party to the Geneva Convention and Their Additional Protocols*, NWP1-14M Annotated, 5-24 lists 148 States party to Protocol I as of Oct. 15, 1997. The United States is not a party; *see* n. 622 . TIF 452 lists 56 countries party to the Conventional Weapons Convention as of Jan. 1, 1996. Most are parties to its Mine and Incendiary Weapons Protocols.

629. SAN REMO MANUAL ¶ 46(b) & Commentary 46.3; Second Protocol, art. 1(f); *see also* BEN CHENG, GENERAL, n. 377, 90; DINSTEIN 191; McDOUGAL & FELICIANO 220.

630. *See* n. 618 and accompanying text.

631. Corfu Channel (UK v. Alb.), 1949 ICJ 35; BOWETT, SELF-DEFENCE 10; BROWNLIE, USE OF FORCE 46-47; 1 OPPENHEIM § 126; HIGGINS, THE DEVELOPMENT, n. 56, 216; Ago, n. 493, 15-17. Legality of Threat or Use of Nuclear Weapons, 1996(1) ICJ 263, 266 (8-7 adv. op.), citing UN Charter, art. 51, could not decide whether a threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, where a State's very survival is at stake. Legality of Use by a State of Nuclear Weapons in Armed Conflict, *id.* 66, 84 declined to rule on a World Health Organization advisory opinion request on the same subject. Judge Schwebel, dissenting in the *Threat or Use* case, wrote: "[F]ar from justifying the Court's inconclusiveness, contemporary events rather demonstrate the legality of the threat or use of nuclear weapons in extraordinary circumstances." citing *inter alia* a 1990-91 Gulf War situation. *Id.* 311, 323. For analysis of the opinions and governments' reactions, *see generally* VED P. NANDA & DAVID KRIEGER, NUCLEAR WEAPONS AND THE WORLD COURT chs. 6-8 (1998).

632. Ago, n. 493, 15.

633. *Id.* 17, citing Schwarzenberger, *The Fundamental*, n. 512, 192, 343.

634. Ago, n. 493, 18. *See also* Gabcikovo-Nagymaros Project (Hung. v. Slovak.), 1997 ICJ 40-44 (customary law); Corfu Channel (UK v. Alb.), 1949 *id.* 35; M/V Saiga (St. Vincent & Grenadines v. Equat. Guinea), 38 ILM 1323, 1351-52 (Int'l Tribunal for L. of Sea 1999) (customary law); BOWETT, SELF-DEFENCE 10; BROWNLIE, INTERNATIONAL LAW 46-47; HIGGINS, THE DEVELOPMENT, n. 56, 216; Helsinki Principle 2.1; International Law Commission, Report of the Commission on the Work of Its Thirty-Second Session, *State Responsibility*, art. 33, *in* 1980 (2)(2) Y.B. INT'L L. COMM'N 26, 34 (1981); 1 OPPENHEIM § 126; 2 *id.* § 326; SAN REMO MANUAL ¶ 22; Schwarzenberger, *The Fundamental*, at 343.

635. *Compare, e.g.*, BOWETT, SELF-DEFENCE 10; BROWNLIE, USE OF FORCE 42-48 (no such doctrine exists), *with, e.g.*, BEN CHENG, n. 377, 31, 69; Ago, n. 493, 48-49; Schwarzenberger, *The Fundamental*, n. 513, 343; *cf.* 1 OPPENHEIM §§ 131 n.15, 354. However, in view of the ICJ and the LOS Tribunal opinions, n. 634, it is fairly clear that there is a customary doctrine of necessity today.

636. LOS Convention, art. 221; Intervention Convention, art. 1(1); *see also* 4 Nordquist ¶¶ 221.1-221.9(h); 2 O'CONNELL, LAW OF THE SEA 1006-08; nn. VI.163-72 and accompanying text.

637. 1 OPPENHEIM § 354; Ago, n. 493, 28-29. BROWNLIE, USE OF FORCE 376-77, 432 apparently approves intervention in this situation. *See also* 4 Nordquist ¶ 221.2; 2 O'CONNELL, LAW OF THE SEA 1006-08; nn. VI. 163-72 and accompanying text.

638. Russian Indem. (Russ. v. Turk.), Hague Ct. Rep. (Scott) 297 (Perm. Ct. Arb. 1912); Forests of Central Rhodope (Gr. v. Bulg.), 3 UNRIAA 1405 (Arb.), modified by parties' statements before League of Nations Council, 15 League of Nations O.J., No. 11 (Part 1), at 1432 (1934); French Co. of Venez. R.R. (Fr. v. Venez.), 10 UNRIAA 285, 353 (Arb. 1902); Oscar Chinn (UK v. Belg.), 1934 PCIJ, Ser. AB, No. 63, at 89, 112-14 (dictum) (Anziolotti, J., sep. opin.).

639. International Law Commission, n. 634, 34, 52; *compare* Ago, nn. 493, 51.

640. *See* nn. II.348, 412, 447-52, 469-70 and accompanying text.

641. Third Convention, arts. 12-13; Convention for Unification of Certain Rules of Law with Respect to Collision Between Vessels, Sept. 23, 1910, arts. 8, 11, 212 CTS 178, 183, not applicable to warships and State vessels. The United States is not a party to this treaty. *See also* NWP 1-14M ANNOTATED ¶ 3.2.1; 3 PICTET 128-42; n. IV.816 and accompanying text.

642. *See* nn. II.210-14 and accompanying text.

643. *See* nn. 424-25 and accompanying text.

644. *See, e.g.,* Walker, *Oceans Law* 185-86.

645. BRIERLY 399; WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW § 120 (A.Pearce Higgins ed., 8th ed. 1924); 2 HYDE § 588; FRITS KALSHOVEN, BELLIGERENT REPRISALS 27 (1971); 7 MOORE § 1090, citing HALL 367 (J.B. Atley ed., 5th ed. 1904); RESTATEMENT (THIRD) § 905 & r.n. 8; SIMMA 104; STONE 288-89; Waldock, *The Regulation,* n. 52, 458. Close reading of these sources indicates there is ambiguity in use of the term; there is a view that retorsion includes illegal acts responding to prior illegal acts, *see* RESTATEMENT (THIRD), and that retorsion can only mean an unfriendly response to a prior unfriendly act, and by inference not to a prior illegal act, *see* KALSHOVEN. The former kind of responses, *i.e.,* proportional illegal responses to a prior illegal act, have been included under reprisals. *See* nn. 591-616 and accompanying text. KALSHOVEN's limitation seems unfortunate and not in keeping with a Charter philosophy of resolving disputes by means other than law violation *(e.g.,* nonforce reprisals) or use of force. *See* UN Charter, art. 33; n. 655 and accompanying text. Allowing a State to respond to a potentially illegal aggressive pin-prick, rather than condemning the respondent to use of force in proportional self-defense, would also be in line with the necessity requirement. *See* nn. 493, 510 and accompanying text. In a given situation it might only be necessary to invoke a retorsion *(e.g.,* a high seas naval demonstration, 2 HYDE § 588, at 1659) rather than using force in, *e.g.,* the territorial sea.

646. HALL, n. 645, § 120; 7 MOORE § 1090; 2 OPPENHEIM § 135.

647. *See* nn. II.224-27, 305, 345-48 and accompanying text.

648. *See* nn. II.147, 295, 348, 350-55, 359, 361-62, 437-41, 446-56, 469-71, 494-95, 498 and accompanying text.

649. *See* nn. II.365, 379-81 and accompanying text. However, Iran's maneuvers in neutral territorial waters violated the law of the sea and those States' rights under UN Charter, art. 2(4); *see* n. II.365 and accompanying text and Parts IV.C and IV.D.3.

650. UN Charter, arts. 4(2), 16-17, 25, 85(1); *see generally* GOODRICH *et al.* 85-96, 514-18; SIMMA 165-70, 293, 295-317, 961-62; Namibia, 1971 ICJ 16, 37-38.

651. ICJ Statute, art. 38(1) and RESTATEMENT (THIRD) § 102 list treaties as a primary source for international law. The Charter is a treaty, 59 Stat. 1031, as amended Dec. 17, 1963, 16 UST 1134, 557 UNTS 143; Dec. 20, 1965, 19 *id.* 5450; Dec. 20, 1971, 24 *id.* 2225, and principles flowing from Council decisions pursuant to UN Charter, arts. 25, 48, 103 are treaty law binding on all UN Members that override all treaties. W. Michael Reisman, *The Constitutional Crisis in the United Nations,* 87 AJIL 83, 87 (1993).

652. *See generally* GOODRICH *et al.* 207-11, 334-37; SIMMA 410-15. Decisions must be approved by 9 of the 15 Council members, including all permanent members, *i.e.,* those holding veto power, *e.g.,* the United States. UN Charter, arts. 23(1), 27(3). *See also* GOODRICH *et al.* 192-94, 215-31; SIMMA 394-95, 434-67. UN Charter, art. 37(2) gives the Council authority to decide on or recommend action to resolve a dispute endangering international peace and security; *see also* GOODRICH *et al.* 284-87; SIMMA 553-56.

653. UN Charter, arts. 36(1), 37(1), 38; *see also* GOODRICH *et al.* 277-89; SIMMA 538-41, 547-52, 561-65.

654. UN Charter, arts. 39-40; *see also* GOODRICH *et al.* 293-310; SIMMA 606-21. It may encourage dispute resolution by a regional arrangement or agency. UN Charter, art. 52(3); GOODRICH *et al.* 360-64.

655. UN Charter, arts. 33(2), 40; *see also* GOODRICH *et al.* 263-65, 302-10. Under Article 40 the Council may state provisional measures and call upon countries to comply with them.

656. UN Charter, art. 41; *see also* GOODRICH *et al.* 311-14; SIMMA 625.

657. SYDNEY D. BAILEY & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 18-21, 236-37 (3d ed. 1998); CASTENADA, n. 22, 78-79; GOODRICH *et al.* 263, 306; SIMMA 546, 560, 564, 614, 620, 623-28, 513, *contra,* KELSEN, THE LAW, n. 189, 929.

658. UN Charter, arts. 39-51.

659. BAILEY & DAWS, n. 657, 268-71; SIMMA 612-14.

660. UN Charter, arts. 33-38; *see also* nn. 653-55 and accompanying text.

661. Namibia, 1971 ICJ 16, 52-54; *see also* BAILEY & DAWS, n. 657, 268-69; *compare* Vienna Convention, arts. 31-32; *see also* nn. 88-95 and accompanying text.

662. BAILEY & DAWS, n. 657, 263-67, discusses some of the possibilities.

663. SYDNEY J. BAILEY, THE PROCEDURE OF THE UN SECURITY COUNCIL 246 (2 nd ed. 1988); *see also* CASTENADA, n. 22, 78-81; *contra,* KELSEN, THE LAW, n. 189, 932.

664. S.C. Res. 82 (1950), *in* WELLENS 324.

665. *See* nn. 653-55 and accompanying text.

666. S.C. Res. 82 (1950), *in* WELLENS 324.

667. S.C. Res. 83 (1950), *in* id. 325.

668. S.C. Res. 84 (1950), *in id.* 324.

669. S.C. Res. 88 (1950), *in id.* 326. Although it "Resolve[d]" to remove the Korean matter from the agenda, S.C. Res. 90 (1951), *in id.* 327, was probably a decision. S.C. Res. 85 (1950), *in id.* 326, was recommendatory in its concern for civilian suffering in Korea.

670. *See* n. 763 and accompanying text.

671. *E.g.,* S.C. Res. 43, 46, 49 (1948), *in* WELLENS 633, 635.

672. S.C. Res. 50 (1948), *in id.* 636.

673. *Cf.* SAN REMO MANUAL ¶¶ 60(g), 67(f); NWP 1-14M Annotated ¶ 8.2.2.2; NWP 9A Annotated ¶ 8.2.2.2; *see also* Parts V.B–V.E and V.J.2–V.J.5.

674. S.C. Res. 54, 56, 62 (1948), *in* WELLENS 637-38, 641.

675. S.C. Res. 66 (1948), 73 (1949), *in id.* 642-43.

676. The only decisions confirmed the right of Arabs removed from their homes in the demilitarized zone to be returned to their homes. S.C. Res. 93, 95 (1951), *in id.* 646, 648.

677. S.C. Res. 95 (1951), *in id.* 648.

678. RESTATEMENT (THIRD) § 103 (2)(d) & r.n. 2; *see also* n. 69 and accompanying text.

679. S.C. Res. 101 (1953), *in* WELLENS 650.

680. S.C. Res. 106 (1955), *in id.* 651.

681. S.C. Res. 111 (1956), *in id.* 653.

682. S.C. Res. 171 (1962), *in id.* 657, referring to S.C. Res. 111 (1956), *in id.* 653.

683. S.C. Res. 228 (1966), *in* WELLENS 658.

684. *Compare* S.C. Res. 233 (1967), *in id.* 666, *with* S.C. Res. 82 (1950), *in id.* 324.

685. S.C. Res. 234-36 (1967), *in id.* 667.

686. S.C. Res. 237 (1967), *in id.* 668.

687. S.C. Res. 242 (1967), *in id.* 669.

688. S.C. Res. 248, 256 (1968), *in id.* 670-71.

689. S.C. Res. 265 (1969), *in id.* 673; *compare* S.C. Res. 248, n. 688.

690. S.C. Res. 338-39 (1973), *in* WELLENS 677; *compare* S.C. Res. 82 (1950), 233 (1967), *in id.* 324, 666.

691. *Introductory Note, id.* 441.

692. *Cf.* UN Charter, art. 35(1).

693. S.C. Res. 487 (1981), *in* WELLENS 441.

694. S.C. Res. 515 (1982), *in id.* 766.

695. G.A. Res. 2012 (1965), *in* 4 ILM 161 (1966).

696. G.A. Res. 2024 (1965), *in id.* 166 (1966); *see also* UN Charter, art. 10; n. 69 and accompanying text.

697. S.C. Res. 216 (1965), *in* WELLENS 126. Previously the Council, noting the Assembly resolutions, had "[r]equest[ed]" the UK government to act to prevent a unilateral independence declaration. S.C. Res. 202 (1965), *in id.* 125.

698. S.C. Res. 217 (1965), *in id.* 126, formulated by US UN Permanent Representative Arthur Goldberg, "was generally acceptable only because nobody was sure what it meant" with the ambiguous "in time" qualification. BAILEY, n. 663, 243. SIMMA 625 notes that Resolution 217 was nonmandatory because it did not invoke UN Charter, art. 41.

699. *See* Walker, *State Practice* 142-43.

700. S.C. Res. 221 (1966), *in* WELLENS 127.

701. JAMES CABLE, GUNBOAT DIPLOMACY 1919-1979, 60, 126-27, 242-43, 246 (2nd ed. 1981); O'CONNELL, THE INFLUENCE 137-38, 174-75; 16 KEESING 22525 (1968); Walker, *State Practice* 142-43.

702. States not UN Members (*e.g.*, Switzerland) were "[u]rge[d]" to act in accordance with the embargo provisions. S.C. Res. 232 (1966), *in id.* 128.

703. S.C. Res. 253 (1972), *in id.* 130; *see also* SIMMA 625.

704. The resolution again urged States not UN Members to comply with its terms. S.C. Res. 277 (1970), *in* WELLENS 133.

705. S.C. Res. 314 (1972), *in id.* 137, obviously aimed at, *e.g.*, the Byrd Amendment, exempting Rhodesian chrome ore imports from US legislation implementing the Council resolutions. S.C. Res. 320 (1972), *in* WELLENS 139, cited the US deviation and urged compliance. The United States abstained on Resolution 320. *See* WELLENS 140. In US law the Byrd exemption had force even though the United States was in default on its international obligations. Diggs v. Schultz, 470 F.2d 461, 465-67 (D.C. Cir. 1972). The chrome ore exception was removed by 1977 legislation. *See* 22 USC § 287c (1988) and Act of Mar. 18, 1977, 91 Stat. 11. In other respects the United States complied with Council resolutions. Exec. Order No. 11322, 3 CFR 243 (1967 Compil.).

706. S.C. Res. 333 (1973), *in* WELLENS 140.

707. S.C. Res. 388 (1976), *in* id. 142. S.C. Res. 409 (1977), *in id.* 143, forbade use or transfer of funds by Rhodesia or its offices or agents.

708. *Compare* nn. 695-707 and accompanying text *with, e.g.*, S.C. Res. 418 (1977) (arms embargo), 421 (1977) (appointment of reporting Committee), 569 (1982) (economic sanctions), 591 (1986) (expanded definition of arms, related material), *in id.* 218-19, 228, 230.

709. S.C. Res. 460 (1979), *in id.* 148.

710. *Cf.* UN Charter, arts. 10-11, 13-14; *see also* n. 69 and accompanying text.

711. *E.g.*, G.A. Res. 2283 (1968) *in* 7 ILM 1402 (1968); G.A. Res. 2379 (1968), *in id.* 1401 (1968).

712. *E.g.*, S.C. Res. 460, n. 709, citing G.A. Res. 1514, n. 35.

713. S.C. 209-11, 214-15 (1965), *in* WELLENS 427-30; *see also* nn. 245-46 and accompanying text.

714. S.C. Res. 307 (1971), *in* WELLENS 433; *see also* nn. 247-48 and accompanying text.

715. S.C. Res. 502 (1982), *in* WELLENS 594.

716. S.C. Res. 505 (1982), *in id.*

717. This includes resolutions establishing UNIIMOG (UN Iran-Iraq Military Observer Group), continuing it until the 1990-91 Gulf War, and dealing with post-ceasefire issues. There were less than a dozen Security Council resolutions passed during the war, 1980-88.

718. By then the Arab League and the European Community, regional organizations, had appealed to Iran and Iraq for a ceasefire. The Arab League is structured in two treaties, one for collective self-defense under UN Charter, art. 51, and the other as a regional arrangement under *id.*, art. 52. *See* nn. II.31, III. 800-17 and accompanying text.

719. S.C. Res. 479 (1980), *in* WELLENS 449; *see also* UN Charter, art. 33; nn. II.96, 99 and accompanying text.

720. *See* n. II.98 and accompanying text.

721. *See* n. II.96 and accompanying text.

722. *See* nn. II.153-56 and accompanying text.

723. S.C. Res. 514 (1982), *in* WELLENS 450.

724. S.C. Res. 522 (1982), *in* WELLENS 451. In September the Arab League had urged ending the war and complying with Council resolutions. Iran rejected the Saudi-sponsored peace plan. *See* nn. II.192-94.

725. S.C. Res. 540 (1983), *in* WELLENS 451. In approving the resolution, the USSR said it would firmly oppose armed intervention in the Gulf for any reason, including protecting freedom of navigation. The GCC supported the resolution, the first time it had gone on record supporting the freedom of navigation principle. The United States, supporting the resolution, reemphasized its freedom of navigation policy when Iran threatened to restrict Gulf shipping or to close the Strait of Hormuz. *See also* nn. II.216-18 and accompanying text.

726. An Arab League Summit the same month had strongly condemned attacks on Kuwaiti and Saudi tankers. *See* nn. II.250-56 and accompanying text.

727. *See* nn. II.252-55 and accompanying text.

728. S.C. Res. 552 (1984), *in* WELLENS 473. A GCC draft resolution would have branded Iran as an aggressor. *See* nn. II.258-59 and accompanying text.

729. S.C. Res. 582 (1986), *in* WELLENS 452; *see also* UN Charter, art. 33; n. II.300 and accompanying text.

730. S.C. Res. 588 (1986), *in* WELLENS 453; *see also* n. II.308 and accompanying text.

731. S.C. Res. 598 (1987), *in* WELLENS 454; *see also* UN Charter, art. 33; nn. II.376-77 and accompanying text.

732. *See* n. II.377 and accompanying text.

733. SIMMA 621; nn. II.378, 405, 414-15 and accompanying text.

734. *See* nn. II.425-28 and accompanying text.

735. S.C. Res. 612 (1988), *in* WELLENS 456.

736. *See* nn. II.482-83 and accompanying text.

737. S.C. Res. 619, 620 (1988); 631, 642 (1989), 651, 671, 676 (1990), 685 (1991), *in* WELLENS 456-60; *see also* nn. II.484-87 and accompanying text.

738. *See* Table *8: Vetoes in the Security Council, 16 February 1946-1 August 1997,* Table *9, Summary of Vetoes in the Security Council 16 February 1946-August 1997, in* BAILEY & DAWS, n. 657, 231-39. *See also id.* 201, 209-10.

739. Table 14: *Decisions and Vetoes by Security Council on Substantive Proposals Regarding Peace and Security, in* BAILEY, *n.* 663, 211; *see also id.* 209-10.

740. BAILEY, n. 663, 242.

741. *See* nn. 240, 247-48 and accompanying text.

742. UN Charter, art. 28(1); *see also* GOODRICH *et al.* 232-33; SIMMA 472-75.

743. As late as the 1990-91 Gulf War, technology available at the United Nations was less than robust. *See generally* Walker, *Maritime Neutrality* 161 n.35.

744. UN Charter, arts. 11(3), 32, 34, 99; *see also* GOODRICH *et al.* 127-29, 247-59, 265-70, 589-92; SIMMA 250-51, 515-21, 1048-57.

745. GOODRICH *et al.* 592-93.

746. UN Charter, arts. 33, 52; *see also* nn. 653, 800-20 and accompanying text.

747. *See* nn. 663-68 and accompanying text.

748. UN Charter, art. 27(3); *see also* BAILEY & DAWS, n. 657, 250-51; GOODRICH *et al.* 229-31; SIMMA 455-62.

749. BAILEY & DAWS, n. 657, 250-51; GOODRICH *et al.* 230-31; SIMMA 447-55.

750. *See, e.g.,* n. 705.

751. *See* nn. 664-68, 671-90, 694-707, 715-33 and accompanying text.

752. UN Charter, arts. 25, 48; *see also* nn. 700-07 and accompanying text.

753. *See* nn. 651-60 and accompanying text.

754. *See* nn. 700-01 and accompanying text.

755. *See* nn. II.98, 153-56, 216-18, 250-59, 378, 405, 414-15, III.5-6, 10-12, 18 and accompanying text.

756. *See* nn. II.482-83 and accompanying text. Iran also accepted UN good offices, and Iraq rejected them, early in the war for extricating 70 merchantmen trapped in the Shatt. *See* nn. II.153-56 and accompanying text.

757. *See* nn. II.153-54, 193-95, 377, III.6, 9 and accompanying text.

758. *See* nn. 651-60 and accompanying text.

759. *See* n. 751 and accompanying text.

760. *See* nn. 651-52 and accompanying text.

761. *See* n. 585 and accompanying text.

762. UN Charter, arts. 10-14; *see also* n. 69 and accompanying text.

763. *See* BAILEY & DAWS, n. 657, 232.

764. UFP Resolution, n. 20.

765. *See* S.C. Res. 119-20 (1956), 129 (1958), 157 (1960), 303 (1971), *in* WELLENS 31, 36, 69, 73, 432.

766. BAILEY, n. 663, 209, 264-65, (noting UK objections but saying sponsors' intention was that if the Council was unable to fulfil its primary responsibility, "the Assembly should be entitled to *recommend* enforcement measures," not order them, since UN Charter, art. 10 only allows nonmandatory Assembly recommendations); CASTENADA, n. 22, 81-88 (Resolution not valid legally but valid from a political point of view); HIGGINS, THE DEVELOPMENT, n. 56, 175; Tucker, *The Interpretations*, n. 189, 33-38.

767. G.A. Res. 498 (1951), *in* 13 WHITEMAN 575; *see also* CASTENADA, n. 22, 89-90.

768. G.A. Res. 500 (1951), UN GAOR, 5 th Sess., Supp No. 20A, at 2, UN Doc A/1775/Add.1 (1951); *see also* CASTENADA, n. 22, 90.

769. G.A. Res. 997 (1956), *in* 3 WHITEMAN 1112, "repeatedly condemned the Soviet [Hungarian] military intervention in strong terms," once invoking UN Charter, art. 2(4), urging USSR forces' withdrawal; CASTENADA, n. 22, 8-116; *see also* HIGGINS, THE DEVELOPMENT, n. 56, *passim*.

770. G.A. Res. 1127 (1956) "repeatedly condemned the Soviet [Hungarian] military intervention in strong terms," once invoking UN Charter, art. 2(4), urging USSR forces' withdrawal. CASTENADA, n. 22, 88-116; *see also* HIGGINS, THE DEVELOPMENT, n. 56, *passim*.

771. CASTENADA, n. 22, 104-16; *see also* HIGGINS, THE DEVELOPMENT, n. 56, 175; n.—and accompanying text.

772. CASTENADA, n. 22, 107-09 (footnotes omitted).

773. Walker, *Crisis Over Kuwait* 29-44.

774. UN Charter, arts. 25, 48; *see also* n. 652 and accompanying text.

775. *See* n. 69 and accompanying text.

776. UN Charter, art. 103; *see also* n. 10 and accompanying text.

777. *See generally, e.g.*, 1-4 HIGGINS, UNITED, n. 599; UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING (2d ed. 1990); *Peace-Keeping*, n. II.484, 565.

778. Western Sahara, 1975 ICJ 12, 31-33; Texas Overseas Petrol. v. Libyan Arab Repub., 17 ILM 1, 28-31 (Arb. 1977); CASTENADA, n. 22, ch. 17; RESTATEMENT (THIRD) § 103(2)(d) & cmt. c, r.n. 3; SCHACHTER, INTERNATIONAL LAW, n. 358, 85-94; n. 69 and accompanying text.

779. *See, e.g.*, Final Act of Diplomatic Conference on Reaffirmation & Development of International Humanitarian Law Applicable in Armed Conflicts, June 10, 1977, ¶ 1, SCHINDLER & TOMAN 605, 607-08.

780. *See, e.g.*, CASTENADA, n. 22, 88-100 (Korea, Congo); HIGGINS, THE DEVELOPMENT, n. 55, 222-37; *Peace-Keeping*, n. II.484, 577.

781. UN Charter, arts. 25, 48; *see also* n. 652 and accompanying text.

782. *See* n. 533 and accompanying text.

783. UN Charter, art. 12(1); S.C. Res. 582, ¶ 8 (1986), *in* WELLENS 452, 453; *see also* GOODRICH *et al.* 129-33; SIMMA 254-62.

784. *E.g.*, the General Assembly properly rejected Iraqi overtures during the 1990-91 Gulf War while the Council was seized of the issue. Walker, *Crisis Over Kuwait* 34.

785. G.A. Res. 3067 (1973), *in* 13 ILM 227 (1974). This was the procedure followed for the 1958 LOS Conventions. G.A. Res. 1105 (1957), *in* Franklin 255; *see also* Carl M. Franklin, *Introduction, in id.* 1, 2.

786. *Introductory Note* to Final Act of UN Conference on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, SCHINDLER & TOMAN 177.

787. *See* nn. 725, 729, 735 and accompanying text.

788. *See* n. 733 and accompanying text.

789. UN Charter, art. 43. *Id.*, art. 45 requires Members to have air force contingents available for urgent use. *Id.*, art. 44 provides that if a Member not represented on the Council is called on for forces, it would be allowed to participate in Council decisions concerning employment of its forces. *See also* GOODRICH *et al.* 317-29; SIMMA 636-43.

790. GOODRICH *et al.* 319-24; SIMMA 639, 648.

791. UN Charter, arts. 46-47; *see also* GOODRICH *et al.* 329-33; SIMMA 643-51.

792. GOODRICH *et al.* 324, 332; SIMMA 648.

793. Trygve Lie, the first UN Secretary-General, suggested a UN Guard Force recruited by the Secretary-General and placed at the disposal of the Council or Assembly. He later suggested an International Brigade for Korea and a UN Legion when the Assembly passed the UFP Resolution, n. 20. GOODRICH *et al.* 324-25; TRYGVE LIE, IN THE CAUSE OF PEACE 192-93 (1954); Stephen M. Schwebel, *A United Nations "Guard" and a United Nations "Legion,"* in WILLIAM N. FRYE, A UNITED NATIONS PEACE FORCE 195 (1957).

794. Walker, *Crisis Over Kuwait* 48-50.

795. CASTENADA, n. 22, 57, 60, 90, 93-94, 96.

796. HIGGINS, THE DEVELOPMENT, n. 56, 251-53.

797. *See* nn. 703, 708, and accompanying text.

798. *See* nn. II.484-87, III.21 and accompanying text.

799. The Secretary-General also attempted mediation and called on UN Members for new approaches. *See* nn. II.99, 190-91, 269, 376 and accompanying text..157

800. UN Charter, art. 52; *see also* GOODRICH *et al.* 355-64; SIMMA 683-722; nn. 303-07 and accompanying text.

801. UN Charter, art. 53; *see also* GOODRICH *et al.* 364-68; SIMMA 730-38, 748-50.

802. *Compare* UN Charter, art. 54 *with id.*, art. 51; *see also* GOODRICH *et al.* 368-69; SIMMA 753-57; nn. 350-56 and accompanying text.

803. Pact of League of Arab States, n. II.31. League members also belong to a regional self-defense organization authorized under UN Charter, art. 51. Treaty of Joint Defence & Economic Co-operation Between Arab States, with Military Annex, n. II.31. *See also* HASSOUNA, n. II.31, ch. 1; KHADDURI, THE GULF WAR, n. II.31, 140; MACDONALD, n. II.31; SIMMA 701; Bebr, n. II.31, 181; Khadduri, *The Arab League,* n. II.31; Walker, *Anticipatory,* n. 289, LIBER AMICORUM 388-89, 31 CORNELL INT'L L.J. 363-64; nn. II.31, III. 295-97, 307 and accompanying text.

804. OAS Charter, n. 47. Like the Arab League, the OAS Charter has a UN Charter, art. 51 regional self-defense arrangement, the Rio Treaty, n. 47. For history of inter-American relations in the Pan American Union, OAS and Rio Treaty contexts, *see generally* M. MARGARET BALL, THE OAS IN TRANSITION (1969); GORDON CONNELL-SMITH, THE INTER-AMERICAN SYSTEM (1966); GOODRICH *et al.* 358-62; SIMMA 699-700; O. CARLOS STOETZER, THE ORGANIZATION OF AMERICAN STATES (2d ed. 1993); ANN VAN WYNEN THOMAS & A.J. THOMAS, THE ORGANIZATION OF AMERICAN STATES (1963); Charles G. Fenwick, *The Inter-American Regional System: Fifty Years of Progress,* 50 AJIL 18 (1965); Walker, *Anticipatory,* n. 289, LIBER AMICORUM 387, 31 CORNELL INT'L L.J. at 360-61; *see also* n. II.47 and accompanying text.

805. Charter of Organization of African Unity, May 25, 1963, 479 UNTS 39; *see also* BOWMAN & HARRIS 277; GOODRICH *et al.* 356, 358, 362-63; SIMMA 700.

806. These have been considered for invitations to attend Assembly meetings. GOODRICH *et al.* 356-57.

807. *E.g.,* NATO; *see also* n. II.437 and accompanying text.

808. GOODRICH *et al.* 355-64.

809. Joyner, *Reflections*, n. 288, 135-38; Moore, *Grenada*, n. 288, 153-59; Kenneth W. Dam, US Deputy Secretary of State, Statement to House Committee on Foreign Affairs, Nov. 2, 1983, *extracted in* Marian Nash Leich, *Contemporary Practice of the United States Related to International Law*, 78 AJIL 200 (1984).

810. *See* nn. II.31, III.295-97, 307 and accompanying text.

811. SIMMA 706, *see also* nn. II.21-31, 80, 84, 159-71, III.298-99 and accompanying text.

812. SIMMA 706; *see also* nn. II.388-89, 437-45, 493, 539-40 and accompanying text.

813. The ICO, formed by Charter of the Islamic Conference Organization, n. II.157, is an inter-regional conference with 44 members in two continents, with dispute settlement authority. *Id.*, arts. 2(b), 12, 914 UNTS 111. SIMMA 706.

814. *See* nn. II.93-95, 184-85, 192-94, 248, 256, 283-84, 405, 477, 538 and accompanying text.

815. *See* nn. II. 21-31, 80, 84, 159-71, 543-45, III.298-99 and accompanying text.

816. *See* nn. II.388-90, 437-45, 493, 541-42, III.812 and accompanying text.

817. *See* nn. II.157, 170, 186, 208, 321, III.813 and accompanying text.

818. *See* nn. II.84, 93-94, 260, 271, 375, 378, 478-79, 541-42 and accompanying text.

819. The Community voted to support Britain in the Falklands/Malvinas war by suspending imports from Argentina during the conflict; this came within its regional competence. *See* n. 259 and accompanying text. The EC treaty arrangements have been concerned primarily with European economic integration. *See generally* Treaty for Establishment of the European Economic Community, Mar. 15, 1957, 298 UNTS 3 (Treaty of Rome); Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, *id.* 167, which followed the pattern of European Coal & Steel Community Treaty & Convention, Apr. 18, 1951, 261 *id.* 140; Treaty Establishing Single Council & Single Commission of the European Communities, Apr. 8, 1965, *in* 4 ILM 776 (1965); Single European Act, Feb. 17 & 28, 1986, 25 *id.* 506 (1986); Maastricht Treaty, n. II.437. The Maastricht Treaty has provisions for a common defense and foreign relations policy, although for now defense matters will be arranged through the WEU; *see* nn. II.388, 437 and accompanying text.. Maastricht Treaty, art. J, 31 ILM at 323-27; *see also* Declaration on Voting in the Field of the Common Foreign & Security Policy, Feb. 7, 1992, *id.* 369; Declaration on Practical Arrangements in the Field of the Common Foreign & Security Policy, Feb. 7, 1992, *id.* 370; Declaration on Use of Languages in the Field of the Common Foreign & Security Policy, Feb. 7, 1992, *id.* The Single European Act, art. 30, 25 *id.* at 517-18, also pledged EC members' support for formulating and implementing a European foreign policy. *See also* Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AJIL 659, 571-607 (1992); Walker, *Integration and Disintegration* 14-17. The Treaty of Amsterdam Amending Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. 1, now being circulated for ratification, may be a step backward in implementing a common foreign and security policy. *See generally* Daniel T. Murphy, *The European Union's Common Foreign and Security Policy: It Is Not Far from Maastricht to Amsterdam*, 31 VAND. J. TRANSNAT'L L. 871 (1998). If the Treaty of Amsterdam is ratified as expected, provisions of all the treaties will be renumbered. *See generally* Consolidated Version of Treaty on European Union & Consolidated Version of Treaty Establishing the European Communities, Mar. 25, 1957, Feb. 7, 1992, Oct. 2, 1997, *in* 37 ILM 56 (1998) (Consolidated Version); Youri Devuyst, *Introductory Note, id.*

820. *See* nn. II.84, 260, 378, 478-79 and accompanying text.

821. *Introductory Note*, SCHINDLER & TOMAN 605.

822. *Introductory Note, id.* 177.

823. *See* nn. II.216, 300, 308, 377, III.725, 729, 735 and accompanying text.

824. S.C. Res. 582 ¶ 4 (1986) (exchange of prisoners in cooperation with ICRC), *in* WELLENS 452, 453.

825. *See* nn. II.153-56, III.722 and accompanying text.

826. *See generally* Chapters V-VI.

827. National seafarer unions, in opposing arming merchantmen, also may have influenced national decisionmaking. *See* nn. II.269, 359 and accompanying text.

828. Portions of this Part were published as Walker, *Maritime Neutrality in the Charter Era* and were delivered as a paper *in* Panel on National Security at the 17th Annual Seminar, New National Perspectives on the Law of the Sea Convention, sponsored by the University of Virginia School of Law Center for Oceans Law and Policy, Washington, D.C., Mar. 19, 1993.

829. PHILIP C. JESSUP, NEUTRALITY: TODAY AND TOMORROW 156 (1936).

830. *Id.* 16, quoting PHILIP C. JESSUP & FRANCIS DEAK, NEUTRALITY: THE ORIGINS XIII-XIV (1935).

831. *E.g.*, MCDOUGAL & FELICIANO ch. 5; NILS ORVIK, THE DECLINE OF NEUTRALITY 1914-1941 ch. 6 (2d ed. 1971); Williams, n. 22, consider a multifactor approach to neutrality law and its place in the LOAC. More conventional analyses include, *e.g.*, BOWETT, SELF-DEFENCE ch. 8; BROWNLIE, USE OF FORCE *passim*; ERIK CASTREN, THE PRESENT LAW OF WAR AND NEUTRALITY ch. 3 (1954); COLOMBOS chs. 16-21; DINSTEIN, chs. 1.D, 6.D; JURG MARTIN GABRIEL, THE AMERICAN CONCEPTION OF NEUTRALITY AFTER 1941 (1988); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE chs. 13-14 (1959); 3 HYDE, Tit. K; KELSEN, THE COLLECTIVE, n. 358, 154-71; KELSEN, PRINCIPLES OF INTERNATIONAL LAW 154-73 (2d ed. Robert W. Tucker ed. 1967); NWP 1-14M Annotated, ch. 7; NWP 9A Annotated, ch. 7; 2 O'CONNELL, LAW OF THE SEA ch. 30; 2 OPPENHEIM, Part III; JOHN F.L. ROSS, NEUTRALITY AND INTERNATIONAL SANCTIONS: SWEDEN, SWITZERLAND AND COLLECTIVE SECURITY (1989); STONE chs. 13-19, 21; TUCKER chs. 6-12; Michael Bothe, *Neutrality at Sea*, ch. 6 *in* DEKKER & POST; Bothe, *Neutrality in Naval Warfare: What Is Left of Tradtional Law?*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 387 (Astrid J.M. Delisson & Gerard J. Tanja eds. 1971); Deak, *Neutrality*, n. 10, 137; Andrew Gioia, *Neutrality and Non-Belligerency*, *in* INTERNATIONAL ECONOMIC LAW, n. 609, 51; Gioia & Natalino Ronzitti, *The Law of Neutrality: Third States' Commercial Rights and Duties*, ch. 7 *in* DEKKER & POST; Mark W. Janis, *Neutrality*, ch. 6 *in* Robertson; Titus Komarnicki, *The Place of Neutrality in the Modern System of International Law*, 80 RCADI 395 (1952); J.F. Lalive, *International Organizations and Neutrality*, 24 BYBIL 72 (1972); McNeill, *Neutral Rights*, n. II.354; Patrick M. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L L.J. 249 (1976); Dietrich Schindler, *Transformations in the Law of Neutrality Since 1945*, *in* HUMANITARIAN LAW 367; Wiswall, *Neutrality*, n. II.295. 7 HACKWORTH ch. 24; 11 WHITEMAN ch. 33 give more modern digest treatment.

832. CASTREN, n. 831, 427.

833. Janis, n. 831, 148, citing NEILL H. ALFORD, JR., MODERN ECONOMIC WARFARE 326 (NAV. WAR C. INT'L L. STUD. v. 56, 1967); *see also* Norton, n. 831, 249, citing Richard R. Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Conference on Humanitarian Law*, 16 HARV. INT'L L.J. 1, 2 (1975) (Neutrality has had a "juridical half-life" since World War II.)

834. Janis, n. 831, 148, citing C.G. Fenwick, *Is Neutrality Still a Term of Present Law?*, 63 AJIL 102 (1969).

835. *Cf.* UN Charter, preamble, arts. 2(3)-2(4); *see also* nn. 47-157 and accompanying text.

836. GABRIEL, n. 831, 69; *see also* ORVIK, n. 831, 251-56.

837. Pact of Paris, n. 160, arts. 1-2, 46 Stat. at 2345-46, 94 LNTS at 63; *see also* nn. 160-63 and accompanying text.

838. *See* SAN REMO MANUAL 68, ¶¶ 13(d), 14-26, 29-32, 34-36, 67-71, 74-75, 86-88, 92-94, 99, 106, 109, 111, 113-16, 118-20, 122-24, 126-27, 130, 132-34, 146-58.

839. INTERNATIONAL LAW ASSOCIATION, International Committee on Maritime Neutrality, *Neutrality and Naval Warfare* (Michael Bothe, rptr.), *in* International Law Association, Report of the Sixty-Fifth Conference: Cairo, Egypt 163 (1993); INTERNATIONAL LAW ASSOCIATION, International Committee on Maritime Neutrality, *Neutrality and Naval Warfare* (Michael Bothe, rptr.) *in* International Law Association, Report of the Sixty-Sixth Conference: Buenos Aires, Argentina 570 (1994); INTERNATIONAL LAW ASSOCIATION, International Committee on Maritime Neutrality, *Neutrality and Naval Warfare* (Michael Bothe, rptr.; Wolff Heintschel von Heinegg, alt. rptr.), *in* International Law Association, Report of the Sixty-Seventh Conference: Helsinki, Finland 367 (1996); Helsinki Principles, completed at the 1998 ILA meeting in Taipei, Taiwan. For a critique of the Cairo report, *see* Walker, *Maritime Neutrality*.

840. *E.g.*, COLOMBOS § 759; MCDOUGAL & FELICIANO 197-436; 2 O'CONNELL, LAW OF THE SEA 1141-42; Bothe, *Neutrality at Sea*, n. 831, 205; Thomas A. Clingan, Jr., *Submarine Mines in International Law*, *in* Robertson 351, 352 (argument that neutrality no longer exists is specious); Gioia & Ronzitti, n. 831, 223; Lowe, *The Commander's*, n. 318, 134-38; McNeill, *Neutral Rights*, n. II.354, 642-43; Ronzitti, *The Crisis*, 6-12; Williams, n. 22, 47-48; Wiswall, *Neutrality*, n. II.295, 619. Even commentators arguing that the force of the law of neutrality has been greatly diminished do not say it has disappeared in the Charter era. *See, e.g.*, ALFORD, n. 833, 326; Janis, n. 831, 153; Norton, n. 831, 311.

841. *See, e.g.*, JESSUP, NEUTRALITY, n. 829; JESSUP & DEAK, n. 830; W. ALISON PHILLIPS & ARTHUR H. REEDE, NEUTRALITY: THE NAPOLEONIC PERIOD (1936); EDGAR TURLINGTON, NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW (1936).

842. *See* Pact of Paris, n. 160; UN Charter, art. 103; TIF 430-31; nn. 160-63, 837 and accompanying text.

843. *See* nn. 160-63 and accompanying text.

844. *See* n. 829 and accompanying text.

845. *E.g.*, Convention Relative to Treatment of Prisoners of War, July 27, 1929, arts. 69-70, 72-73, 77, 47 Stat. 2021, 2053-57, 118 LNTS 343, 385-86, superseded by Third Convention, arts. 4(b)(2), 10. The 1929 Convention also continued usage of the term as well as referring to "non-belligerents."

846. Convention on Maritime Neutrality; TIF 434. *See also* Convention Regarding Rights of Neutrals at Sea, July 22, 1854, 10 *id.* 1105, still in force among Nicaragua, Russia and the United States. TIF 431.

847. Stockholm Declaration.

848. Ove Bring, *Commentary, in* LAW OF NAVAL WARFARE 839, 841.

849. *Budapest Articles of Interpretation: Final Text*, arts. 1-7, *in* INTERNATIONAL LAW ASSOCIATION, Report of the 38th Conference 67-68 (1935).

850. *E.g.*, Lord Chancellor Viscount Sankey, *in* 95 Parl. Deb., H.L. (5th ser.) cols. 1007, 1043. On the other hand, Secretary of State Stimson took the opposite view then. *See* Stimson, *The Pact*, n. 161, vii-viii.

851. JESSUP, NEUTRALITY, n. 829, 121-23; Hersch Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, 20 TRANS. GROTIUS SOC'Y 178 (1935).

852. US Secretary of War Henry L. Stimson testimony, Jan. 29, 1941, *Hearings Before the House Committee on Foreign Affairs on H.R. 1776 Regarding the Lend-Lease Bill*, 77th Cong., 1st Sess. 89-90 (1941). Stimson, *The Pact*, n. 161, vii-viii, expressed the same view in 1932; Quincy Wright, *The Transfer of Destroyers to Great Britain*, 34 AJIL 680, 685-89 (1940), made an analogous argument after the 1940 destroyers-bases deal, citing *Budapest Articles*, n. 849, and the Harvard Draft Convention on Aggression, n. 130.

853. US Secretary of State Cordell Hull testimony, Jan. 15, 1941, *in id.* 9-10; Robert H. Jackson, *Address to the Inter-American Bar Association*, 35 AJIL 349 (1941).

854. *Budapest Articles*, arts. 4(b)-4(d), n. 849, 67.

855. *See* nn. 396-417 and accompanying text.

856. Lend-Lease Act, ch. 11, 55 Stat. 31.

857. BROWNLIE, INTERNATIONAL LAW 5, citing The Scotia, 81 US (5 Wall.) 170, 181-82 (1872). Most Lend-Lease agreements were not formalized until after the United States was at war with the Axis, but at least two were in force between the United States and countries at war with Axis States before then. Lend-Lease Agreement, Aug. 9, 1941, Neth.-US, 10 Bevans 140; Lend Lease Agreement, Nov. 21, 1941, Ice.-US, 58 Stat. 1455. Informal arrangements had undoubtedly already begun, *e.g.*, with Great Britain. *See* Preliminary Agreement, Feb. 23, 1942, UK-US, arts. 1-2, 56 *id.* 1433-34. *See also* Walker, *Anticipatory Collective Self-Defense, in* LIBER AMICORUM 379, 31 CORNELL INT'L L.J. at 347, referring to ROBERT H. SHERWOOD, ROOSEVELT AND HOPKINS: AN INTIMATE HISTORY 308, 310-11 (1950 rev. ed.) and an informal UK-US defense arrangement.

858. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, at 28. 2 *id.* § 292Aa, 639 says US practice was resurrected older custom that had not died out. The United States negotiated Lend-Lease agreements with States not at war with the Axis before it went to war. To the extent that these agreements benefited the United States after it was at war, and before the other State declared war, the other State became a nonbelligerent. Examples of nonbelligerent provisions included reciprocal commodity pledges and pledges to supply the United States with "defense articles, strategic or critical materials, or defense information." *See, e.g.*, Lend-Lease Agreement, Oct. 1, 1941, Brazil-US, 5 BEVANS 905, 906-07. The United States had Lend-Lease agreements with 36 countries, including the USSR. *See* 13 *id.* 64. As citing BEVANS indicates, some agreements were not published and were perhaps not available for consideration as practice until 1968-76, when 1-13 *id.* were published.

859. Exchange of Notes, Sept. 2, 1940, UK-US, 54 Stat. 2405, 203 LNTS 201, supplemented by Agreement Relating to Defense of Newfoundland, Mar. 27, 1941, UK-US, 55 *id.* 1560. BOWETT, SELF-DEFENCE 166 characterizes Lend-Lease and the destroyers-bases deal as violating international law in 1958 when he wrote. When viewed in the context of trends, particularly the law of self-defense as then stated, his view is not the law now, and BOWETT might have concluded differently in 1958 if all Lend-Lease agreements had been published then. *See* n. 589 and accompanying text.

860. MCDOUGAL & FELICIANO 425.

861. ORVIK, n. 831, 194-215.

862. *Id.* 587.

863. *See* nn. 857-58 and accompanying text.

864. CASTREN, n. 831, 450-51, listing Bulgaria, China, Hungary, Italy, Portugal, Romania, Spain and Turkey besides the United States, which pursued these policies, without stating which side Spain favored. Although Francisco Franco's Spain played both sides, throughout the war it supported the Axis, primarily Germany, providing ports for submarine support, infra-red, radar and sonar listening stations, the Blue Division for the USSR front, civilian labor in Germany, war material, credits and other services. These countries signed a Treaty of Friendship on March 31, 1939, and a Secret Protocol on February 12, 1943, which was not implemented; US Department of State, The Spanish Government and the Axis (1946); PAUL PRESTON, FRANCO: A BIOGRAPHY, chs. 13-21. Italy later joined the Axis as a cobelligerent.

865. Harvard Draft Convention on Aggression, arts. 1-2, 6, 10, 12-13.

866. *Id.*, Comment, 33 AJIL SUPP. 879-85 (1939). *See also id.*, Comment, 33 AJIL SUPP. 902 (1939). BOWETT, SELF-DEFENCE 161 says the Convention principles are *de lege ferenda*.

867. JESSUP, NEUTRALITY, n. 829, 7, 160-62, 181, referring to JESSUP & DEAK, n. 830, 44, 109, 117, 160; PHILLIPS & REEDE, n. 841, ch. 4. The United States was among the maritime powers recognizing the 1780 armed neutrality; that of 1800 collapsed with the Danish fleet's defeat. COLOMBOS §§ 700-01; 2 OPPENHEIM § 290. Bilateral treaties, no longer in force, restated these principles during the 19th century. *See, e.g.*, Treaty of Peace, Friendship, Commerce & Navigation, Dec. 12, 1828, Brazil-US, art. 22, 8 Stat. 390, 395; TIF 29.

868. Wright, *The Transfer*, n. 852, 689, cited the Convention for legitimacy of the destroyers-bases deal, n. 859 and accompanying text.

869. *See generally* 1 SAMUEL ELIOT MORISON, HISTORY OF UNITED STATES NAVAL OPERATIONS DURING WORLD WAR II: THE BATTLE OF THE ATLANTIC: SEPTEMBER 1939-MAY 1943, at 56-113 (1947).

870. *See* n. 857 and accompanying text.

871. *See* nn. II.350-56, 447, 470-71 and accompanying text.

872. *See* nn. II.359-62 and accompanying text.

873. CASTREN, n. 831, 434, 651.

874. TUCKER 199 n.5, citing STONE 383; CASTREN, n. 831, 452; Deak, *Neutrality*, n. 10, 153; Josef Kunz, *Neutrality and the European War 1939-1940*, 39 MICH. L. REV. 747-54 (1941).

875. TUCKER 199 n.5.

876. *See* nn. 591-616, 646-49 and accompanying text.

877. *See* nn. 593-94 and accompanying text.

878. *E.g.*, MCDOUGAL & FELICIANO 492, 499 (indirect aid to North Korea, PRC, the subjects of Security Council and General Assembly resolutions); Norton, n. 831, 263-67, 294.

879. Norton, n. 831, 257-62, 295-97, 298-301, 304-05; Ronzitti, *The Crisis* 4.

880. Norton, n. 831, 262-63. The short duration of the conflicts was a factor.

881. *E.g.*, E.C. Council Regulation, n. 259; E.C.S.C. Council Decision, n. 259; *Statement Concerning Assistance to and Sales to Argentina*, n. 259; 3 CORDESMAN & WAGNER 260-63, 270, 280-81, 331-32; *see also* n. 259 and accompanying text.

882. Gioia & Ronzitti, n. 831, 226-31.

883. For a record of other conflicts through 1975, *see* Norton, n. 830, 268-75 (Vietnam, 27 civil wars); *see also* CASTREN, n. 831, 452.

884. To the extent that these older treaty obligations conflict with Charter obligations, the Charter prevails. Deak, *Neutrality*, n. 10, 143, citing UN Charter, art. 103. The later in time rule states the same principle for newer agreements to assist an aggression victim with aid. Vienna Convention, art. 30. To the extent that the Charter, and action pursuant to it, is considered customary law, or perhaps jus cogens, later custom or *jus cogens* would trump an inconsistent earlier customary obligation or perhaps an older treaty. *See* n. 10 and accompanying text.

885. *See* n. 69 and accompanying text.

886. *See* nn. 591-649 and accompanying text.

887. *See* n. 259 and accompanying text.

888. *See* nn. II. 147, 295, 348, 350-55, 361-62, 437-41, 446-56, 469-71, 494-95, 498, III. 648 and accompanying text.

889. *See* nn. 485-590 and accompanying text.

890. Lalive, n. 831, 78-81; *see also* CASTREN, n. 831, 434; nn. 69, 651-52 and accompanying text.

891. UN Charter, art. 2(5); Quincy Wright, *The Outlawry of War and the Law of War*, 47 AJIL 365, 371-72 (1953). Permanently neutral countries have supported UN action. GABRIEL, n. 831, 132-33 (Swedish, Swiss economic aid and/or support during Korean War); ROSS, n. 831, chs. 7-9 (Swedish, Swiss actions against Rhodesia).

892. Jordan was the chief applicant, but 20 other States invoked UN Charter, art. 50. Schrijver, n. 609, 149-50; *see also* Walker, *Crisis Over Kuwait* 37-38.

893. *Compare* S.C. Res. 661 (1990) (Iraq embargo), *in* WELLENS 528, *with* S.C. Res. 757, 760 (1992), *in* 31 ILM 1453, 1461 (1992) (former Yugoslavia embargo). S.C. Res. 665 (1990), *in* WELLENS 530, called for enforcing the Iraq embargo. S.C. Res. 670 (1990), *in id.* 534, directed an end to civil air commerce with Iraq, except for humanitarian cargoes. S.C. Res. 787 (1992), *in* 31 ILM 1481 (1992), expanded on S.C. Res. 724 (1991), *in* WELLENS 51, and called on States to use individual and collective measures to halt inbound and outbound shipping to or from the former Yugoslavia. Economic sanctions have been imposed for the Angola, Haiti, Liberia, Libya and Somalia crises. A Sanctions Committee was appointed in all cases except Liberia. Schrijver, n. 609, 132-43, 151-54.

894. S.C. Res. 724 (1991), *in* WELLENS 51, decided on a limited embargo. The same procedure was followed for South Africa. S.C. Res. 418 (1977), 569 (1985), 591 (1986), *in id.* 218, 228, 230. Arms and other commodity embargoes were also imposed in the Angola, Haiti and Libya crises. Schrijver, n. 609, 129-32, 146-47; n. 708 and accompanying text.

895. Rhodesia also illustrates the interplay of General Assembly and Security Council resolutions. *See generally* O'CONNELL, THE INFLUENCE 137-38, 174-75; Schrijver, n. 609, 129-30; Walker, *State Practice* 142-43; nn. 695-707 and accompanying text.

896. CASTREN, n. 831, 435.

897. UN Charter, art. 39; *see also* nn. 651-56 and accompanying text.

898. "The unusual situation [contemplated by the Charter for applying the law of neutrality has] bec[o]me the rule.... The originally anticipated interstitual situation in which assumption of a neutral status might be permissible under the Charter has arisen ... in every international armed conflict of the last three decades[, 1945-75]." Norton, n. 831, 252.

899. *See* Shrijver, n. 609, 135-44; nn. 695-708, 893-95 and accompanying text.

900. *See* nn. 763-73 and accompanying text. Williams, n. 22, 15, seems to overemphasize importance of the UFP Resolution process as a law-promulgating mechanism; *see also* MCDOUGAL & FELICIANO 429-35.

901. *See* Taubenfeld, *International*, n. 285, 393-94 (relative success of General Assembly call for embargo against the PRC).

902. North Sea Continental Shelf (W.Ger. v. Den., W.Ger. v. Neth.), 1969 ICJ 4, 43 (North Sea Continental Shelf Cases); BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, at 30-31; RESTATEMENT (THIRD) § 102 cmt. b & r.n. 2.

903. CASTREN, n. 831, 433-34.

904. UN Charter, arts. 43-47. The MSC was a Cold War casualty. *See* nn. 789-96 and accompanying text.

905. Walker, *Crisis Over Kuwait* 48-50.

906. MALCOLM W. CAGLE & FRANK A. MANSON, THE SEA WAR IN KOREA 281-83, 299-300, 304, 353-57, 370-73 (1957); JAMES A. FIELD, HISTORY OF UNITED STATES NAVAL OPERATIONS: KOREA 42, 54, 58-59, 61, 126, 158, 349, 395, 444 (1962); Walker, *State Practice* 126.

907. *See, e.g.*, Michael R. Gordon, *In Test of Serbia Embargo, U.S. Presses to Seize a Ship*, N.Y. TIMES, Feb. 23, 1993. The UN command center for peacekeeping operations has been relatively spartan, running on a shoestring budget from the UN New York headquarters, although that could change. Nevertheless, when compared with modern national command centers, the Organization has a way to go and is likely to rely on the agency concept in the future. Gioia, *Neutrality*, n. 831, 14, says the Council cannot delegate powers to a single State. The record of Council practice appears to be otherwise.

908. *Cf.* TIF 428-29.

909. First Convention, art. 8 ("neutral powers"); Second Convention, arts. 11, 16 (same; also "neutral warship or a neutral aircraft"); Third Convention, arts. 4(b)(2), 10 ("neutral or non-belligerent powers," "neutral power"); Fourth Convention, arts. 4, 9 ("neutral," "belligerent"); *see also* 1 PICTET 86-98; 2 *id.* 78-82, 112-16; 3 *id.* 69-70, 121-22; 4 *id.* 45-51, 8-89. Moreover, Protocol I, arts. 2(a), 9(2), 22(2), 30(3), 37(1)(d), 39(1), 64(1) consistently uses phrases, *e.g.*, "neutral or other State not party to the conflict." *See also* Deak, *Neutrality* n. 10, 443; Norton, n. 831, 254-56. "Neutral"

or "neutrality" have been employed in post-World War II armistices and other settlements. *See, e.g.,* Agreement Concerning Military Armistice in Korea, July 27, 1953, arts. 36-50, 4 UST 234, 248-53; Temporary Agreement Supplementary to Armistice Agreement in Korea, July 27, 1953, ¶ 1, *id.* 346; Declaration on Neutrality of Laos, July 18, 1962, 14 *id.* 1105; Agreement on Ending the War & Restoring Peace in Viet-Nam, Jan. 27, 1973, art. 20, 24 *id.* 115, 130.

910. S.C. Res. 540 (1984), 598 (1986), 666, 670, 674, 678 (1990), 686 (1991), *in* WELLENS 451, 454, 531, 534-39, 540-42; *see also* Walker, *Crisis Over Kuwait* 36-37. The Council also cited to them during the Yugoslavia crisis. *See, e.g.,* S.C. Res. 764, 780 (1992), *in* 31 ILM 1465, 1476 (1992).

911. S.C. Res. 552 (1984), *in* WELLENS. 473.

912. Norton, n. 831, 256, analyzing UN Charter, art. 103, points out that the then current 1976 TIF still listed the 1907 Hague Conventions, replete with citations to neutrality, that the United States has ratified, and which is binding unless expressly superseded by later treaties. This is still the case. TIF 432-34. There have been few accessions since World War II. *See* LAW OF NAVAL WARFARE 93-95, 111-13, 129-30, 149-50, 173-74, 193-94, a compilation during the Tanker War. State succession to treaties may mean the Conventions have more applicability than the LAW OF NAVAL WARFARE lists would suggest. *See generally* Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.*

913. Nicaragua Case, 1986 ICJ at 31-38, 91-135; *see also* North Sea Continental Shelf Cases, 1969 ICJ 28-29, 36-45; Baxter, *Treaties,* n. 139, 36. Norton, n. 831, 256-57, argues that including neutrality rules in military manuals indicates the continued vitality of the concept. *See also* BROWNLIE, INTERNATIONAL LAW 5. However, manuals' disclaimer clauses tend to blunt or eliminate their impact as evidence of custom. *See, e.g.,* NWP 1-14M Annotated, at 1, 2; NWP 9A Annotated, *Preface.*

914. *See* nn. 606 and accompanying text.

915. O'CONNELL, LAW OF THE SEA 1142.

916. UN Charter, art. 103; *see also* n. 10 and accompanying text.

917. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03; *see also* n. 10 and accompanying text.

918. *See* n. 10 and accompanying text.

919. Vienna Convention, arts. 31-33; see also nn.88-95 and accompanying text.

920. *See generally* Symposium, *Treaty Succession*; Walker, *Integration and Disintegration.*

921. *See* n. I.33 and accompanying text.

922. Vienna Convention, arts. 48-52; Fisheries Jurisdiction (UK v. Ice.) 1973 ICJ 14; BROWNLIE, INTERNATIONAL LAW 243-45; ELIAS, n. 10, 166-67; Harvard Draft Convention on the Law of Treaties, art. 31, 29 AJIL SUPP. 657, 663 (1935); ILC Rep., n. 192, 243-46; 1 OPPENHEIM §§ 638-41; RESTATEMENT (THIRD), Part III, *Introductory Note* 147, § 338; SINCLAIR 17, 161, 172-73, 176-77; Herbert W. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice,* 68 AJIL 51, 62-63 (1974); Walker, *Integration and Disintegration* 61-62.

923. *See* nn. 58-59 and accompanying text.

924. Vienna Convention, art. 75; *see also* ILC Rep., n. 192, 268; 1 OPPENHEIM § 641, at 1292; Walker, *Integration and Disintegration* 63.

925. ELIAS, n. 10, 172-75; SINCLAIR 177-81; Kearney & Dalton, n. 58, 532-35; Walker, *Integration and Disintegration* 63.

926. UN Charter, art. 103; *see also* nn. 58-59 and accompanying text.

927. The breach must be material and go to the heart of the agreement. Vienna Convention, art. 60, reciting special rules for multilateral agreements; *see also* Gabcikovo-Nagymaros Project (Hung. V. Slovak.), 1997 ICJ 39 (art. 60 a customary norm); Jurisdiction of ICAO Council (India v. Pak.), 1972 *id.* 46, 67; Namibia, 1971 *id.* 4, 47; BROWNLIE INTERNATIONAL LAW 622-23; 1978 Digest § 4, 741, 767; ILC Report, n. 191, 253-55; MCNAIR ch. 36; 1 OPPENHEIM § 649; RESTATEMENT (THIRD) § 335; SINCLAIR, 20, 166, 188-90.

928. Impossibility of performance can be invoked where the destruction of a certain object of the treaty occurs. Vienna Convention, art. 61; *see also* Gabcikovo-Nagymaros Project (Hung. v. Slovak.), 1997 ICJ 39 (art. 1 a customary norm); BROWNLIE, INTERNATIONAL LAW 619; ELIAS, n. 9, 128-30; ILC Rep., n. 192, 255-56 (noting rarity of practice); 1 OPPENHEIM § 650; RESTATEMENT (THIRD) § 336 & cmt. c, r.n. 3; SINCLAIR 190-92; Walker, *Integration and Disintegration* 65-66. MCNAIR 685 does not recognize a separate doctrine, but some of his examples are impossibility situations and might be cited as such. Some treaties, *e.g.,* Treaty of Rome, n. 819, arts. 225-26, 298 UNTS at 88-89, require

renegotiation if unusual and unforeseen circumstances arise; *see also* Consolidated Version, n. 819, art. 299, *in* 37 ILM at 137; n. 819 and accompanying text.

929. Fundamental change of circumstances under the Vienna Convention is different from the older *rebus sic stantibus* doctrine. *See* Vienna Convention, art. 62; *see also* Gabcikovo-Nagymaros Project (Hung. v. Slovak.), 1997 ICJ 39 (art. 62 a customary norm); Fisheries Jurisdiction (UK v. Ice.), 1973 ICJ 3, 18 (same); BROWNLIE, INTERNATIONAL LAW 620-21; ARIE E. DAVID, THE STRATEGY OF TREATY TERMINATION ch. 1 (1975); ELIAS, n. 10, 119-28; ILC Rep., n. 192, 257-58; 1 OPPENHEIM § 651; RESTATEMENT (THIRD) § 336; SINCLAIR 20, 192-96; Gyorgy Haraszti, *Treaties and the Fundamental Change of Circumstances,* 146 RCADI 1 (1975); Oliver J. Lissitzyn, *Treaties and Changed Circumstances,* 61 AJIL 895 (1967); Walker, *Integration and Disintegration* 66-68. Some treaties have terms contemplating fundamental change of circumstances, *e.g.*, Treaty of Rome, n. 819, arts. 225-26, 298 UNTS at 88-89; *see also* Consolidated Version, n. 819, arts. 298-99, *in* 37 ILM 137; n. 819 and accompanying text.

930. Desuetude is the discontinuance of use of a treaty through an extended period of time. Mere time passage does not vitiate treaty obligations, however; treaty relationships have lasted for centuries. BROWNLIE, INTERNATIONAL LAW 617-18; McNair 516-18; SINCLAIR 163-64 (International Law Commission view that Vienna Convention, art. 54[b] covers desuetude); Richard Plender, *The Role of Consent in the Termination of Treaties,* 57 BYBIL 133, 138-45 (1986); Walker, *Integration and Disintegration* 72. For a US practice example, *see* 5 HACKWORTH § 506, at 302. Horace B. Robertson, Jr., *Commentary, in* LAW OF NAVAL WARFARE 161, 169-70 considers Hague IX, analyzed in Part V.G.1, to be in desuetude except for its military objective principles. Similarly, Hague Declaration (XIV) Prohibiting Discharge of Projectiles & Explosives from Balloons, Oct. 18, 1907, 36 Stat. 2439, might be considered in desuetude. Both remain in force for the United States. TIF 433-34.

931. The amorphous state of necessity doctrine, akin but different from military necessity, or the necessity component of self-defense, is similar to a claim of fundamental change of circumstances or impossibility; it focuses more on circumstances affecting existence of a State claiming excuse from nonperformance of a treaty. Walker, *Integration and Disintegration* 71; *see also* nn. 485-520, 631-44 and accompanying text.

932. BROWNLIE, INTERNATIONAL LAW 615-16; LUNG-FONG CHEN, STATE SUCCESSION RELATING TO UNEQUAL TREATIES 28-34 (1974); 1 OPPENHEIM § 641, at 1292; Ramond L. Buell, *The Termination of Unequal Treaties,* 1927 ASIL PROC. 90-91; Ingrid Detter, *The Problem of Unequal Treaties,* 15 ICLQ 1069 (1966); S. Prakash Sinha, *Perspective of the Newly Independent States on the Binding Quality of International Law,* 14 *id.* 121, 123-24 (1965); Walker, *Integration and Disintegration* 63-64.

933. Vienna Convention, art. 44; Harvard Draft Convention on the Law of Treaties, n. 922, art. 35(c), at 665; RESTATEMENT (THIRD) § 338 cmt. e; Walker, *Integration and Disintegration* 70.

934. UN Charter, art. 2(2); Vienna Convention, art. 26; Nicaragua Case, 1986 ICJ at 135-42; Texaco Overseas Petrol. Co. v. Libya, 17 ILM at 19; Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, UN Doc. A/CONF.80/31 (1978), preamble, *in* 17 ILM 1488 (1978); BROWNLIE, INTERNATIONAL LAW 616; ILC Rep., n. 192, 211; HANS KELSEN, PURE THEORY OF LAW 216 (Max Knight trans. 1967); 1 OPPENHEIM § 584; RESTATEMENT (THIRD) § 321; Wolfgang Friedmann, *The Uses of "General Principles" in the Development of Law,* 57 AJIL 279, 281 (1963); Harvard Draft Convention on the Law of Treaties, n. 922, art. 20, at 661; Tariq Hassan, *Good Faith in Treaty Formation,* 21 VJIL 443, 480-81 (1981); Walker, *Integration and Disintegration* 58.

935. BROWNLIE, INTERNATIONAL LAW 5, 13-14; 1 OPPENHEIM § 10, at 28; RESTATEMENT (THIRD) § 102(3) & cmt. f.

936. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03.

937. Trans World Airlines v. Franklin Mint Corp., 466 US 243 (1984); *see also* Charlton v. Kelly, 229 US 447, 474-75 (1913); Terlinden v. Ames, 184 US 270, 288, 290 (1902); United States ex rel. Saroop v. Garcia, 109 F.3d 165, 170-71 (3d Cir. 1997); RESTATEMENT (THIRD) §§ 326, r.n. 2; 336, r.n. 1.

938. Vienna Convention, art. 73; ILC Rep., n. 192, 267. Attempts to insert a provision failed during the Convention negotiations. Kearney & Dalton, n. 58, 557.

939. Briggs, *Unilateral,* n. 922, 51.

940. RESTATEMENT (THIRD) § 336 cmt. e & r.n. 4; *see also* n. 929 and accompanying text.

941. Institut de Droit International, *The Effects of Armed Conflicts on Treaties,* Aug. 28, 1985, art. 6, 61(2) Annuaire 278, 280 (1986); *id., Regulations Regarding the Effect of War on Treaties,* 1912, art. 2(1), *in* 7 AJIL 153 (1913); Walker, *Integration and Disintegration* 70.

942. Institut, *The Effects,* n. 941, art. 7, 280-82; Walker, *Integration and Disintegration* 70. If the inherent right of self-defense under UN Charter, art. 51, is considered a jus cogens norm, it supersedes treaty and customary norms.

Even if self-defense is not a *jus cogens* norm, *id.*, art. 103 declares that the Charter, which includes art. 51, trumps other treaties. *See* n. 10 and accompanying text.

943. Institut, *The Effects*, n. 941, art. 8, at 282; Walker, *Integration and Disintegration* 70. This restates the rule insofar as Council decisions under UN Charter, arts. 25, 48 are concerned. *See also* n. 652 and accompanying text.

944. Institut, *The Effects*, n. 941, art. 9, at 282; *see also* Vienna Convention, art. 75. This is a correlative of the UN Charter, art. 103 rule imposed on States complying with Security Council decisions; *see* n. 10 and accompanying text. An aggressor cannot compound advantage gained by being an aggressor by wriggling out of treaty obligations. The principle parallels those stating that a party causing a treaty breach, or conditions giving rise to claims of fundamental change of circumstances or impossibility, cannot assert these claims to suspend or end a treaty. Vienna Convention, arts. 60(1), 60(2)(b), 60(2)(c), 61(2), 67(2)(b); *see also* nn. 927-29 and accompanying text. *I.e.*, a party cannot benefit by its own wrong. Chorzow Factory (Pol. v. Ger.), 1927 PCIJ, Ser. A, No. 9, at 4, 31. Commentators reflect the uncertain law on the issue, *e.g.*, BROWNLIE, INTERNATIONAL LAW 616-17.

945. *See* nn. 938-44 and accompanying text.

946. Vienna Convention, art. 44; *see also* nn. 938-44 and accompanying text.

947. ICAO Convention, art. 89.

948. Institut, *The Effects*, n. 941, arts. 3-4, at 280; Institut, *Regulations*, n. 941, art. 5, 7 AJIL 154; 5 HACKWORTH § 513, at 383-84; 2 OPPENHEIM §§ 99(2), 99(5); Harvard Draft Convention on the Law of Treaties, n. 922, art. 35(a), at 664; Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 1993 INT'L REV. RED CROSS 94; G.G. Fitzmaurice, *The Judicial Clauses of the Peace Treaties*, 73 RCADI 255, 312 (1948); Cecil J.B. Hurst, *The Effect of War on Treaties*, 2 BYBIL 37, 42 (1921); *see also* Vienna Convention, art. 60(5); David Weissbrodt & Peggy L. Hicks, *Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict*, 1993 INT'L REV. RED CROSS 120; nn. 939-45 and accompanying text.

949. Treaty of Rome, n. 819, arts. 223-26, 298 UNTS at 88-89; North American Free Trade Agreement, Dec. 8-17, 1992, arts. 2102(1)(b)-02(c), 2204, TIAS—, *in* 32 ILM 289, 605, 702 (1993) (NAFTA). Potentially a hemispheric treaty, NAFTA is subject to General Agreement on Tariffs & Trade, Oct. 30, 1947, 61(5,6) Stat., 55-61 UNTS (GATT). NAFTA, art. 103(1), 32 ILM at 297. GATT, art. 21, 61(5) Stat. at A63, 55 UNTS at 266, is like NAFTA, art. 2102, 32 ILM at 699-700. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. 2, TIAS—, 33 ILM 1144 (1994), and General Agreement on Tariffs & Trade 1994, Apr. 15, 1994, arts. 1-2, TIAS—, 33 ILM 1154-55 (1994), modifying GATT, do not amend its provisions dealing with war, *etc. See also* Amelia Porges, *Introductory Note*, *id.* 1125 (1994). *See also* nn. 819, 928-29 and accompanying text; VI.76, 665 and accompanying text for NAFTA analysis in the maritime environmental law context.

950. *E.g.*, 1969 Civil Liability Convention, art. 3(1), supplemented by Protocol, Nov. 19, 1976, *in* 16 ILM 617 (1977); *see also* 2 HYDE § 550, 1555-56. Protocol to Convention on Civil Liability for Oil Pollution Damage, May 25, 1984, *in* 6 BENEDICT, Doc. 6-4A (1984 Civil Liability Convention Protocol); Protocol to Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, *in id.*, Doc.6-4B, will further modify the Convention; neither is in force for the United States. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. 2, TIAS—, 33 ILM 1144 (1994), and general Agreement on Tariffs & Trade 1994, Apr. 15, 1994, arts. 1-2, TIAS—, 33 ILM 1154-55 (1994), modifying GATT, do not amend its provisions dealing with war, *etc. See also* Amelia Porges, *Introductory Note*, *id.* 1125 (1994). *See also* nn. VI.14, 74 and accompanying text.

951. UN Charter, art. 103; *see also* n. 10 and accompanying text.

952. This analysis has been adapted from Walker, *Oceans Law* 190-92.

953. Chapter IV analyzes the law of the sea, Chapter V analyzes the LOS in the context of naval warfare issues raised during the Tanker War, and Chapter VI analyzes the LOS and the law of naval warfare in the context of the maritime law of the environment.

954. *Compare, e.g.*, LOS Convention, preamble, arts. 2(3) (territorial sea), 19, 21, 31 (territorial sea innocent passage), 34(2) (straits transit passage), 45 (straits innocent passage), incorporation by reference of arts. 19, 21, 31, 52(1) (archipelagic sea lanes passage), 58(1), 58(3) (EEZs), 78 (continental shelf; coastal State rights do not affect superjacent waters; coastal State cannot infringe or interfere with "navigation and other rights and freedoms of other States as provided in this Convention"), 87(1) (high seas), 138 (the Area), 303(4) (archeological, historical objects found at sea, "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature"), *with, e.g.*, High Seas Convention, art. 2; Territorial Sea Convention, art. 1. Two 1958 LOS conventions do not have other rules clauses but state they do not affect status of waters above as high seas in Continental Shelf Convention, arts. 1, 3; or other high seas rights in Fishery Convention, arts. 1-8.

955. The General Assembly elects the 34 ILC members from government nominees. The ILC drafted the 1958 LOS Conventions. HERBERT W. BRIGGS, THE INTERNATIONAL LAW COMMISSION (1969); BROWNLIE, INTERNATIONAL LAW 30-31; SCHACHTER, INTERNATIONAL LAW, n. 358, 66-69, 71-72; Briggs, *Reflections on the Codification of International Law by the International Law Commission and by Other Agencies,* 126 RCADI 233 (1969); R.Y. Jennings, *The Progressive Development of International Law and Its Codification,* 24 BYBIL 301, 310-29 (1947); Hersch Lauterpacht, *Codification and Development of International Law,* 49 AJIL 16 (1955); Shabtai Rosenne, *The International Law Commission,* 30 BYBIL 104 (1960).

956. ILC Report, n. 192, 267-68; 2 SCHWARZENBERGER 376-77; Boleslaw Boczek, *Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea,* 20 ODIL 359 (1989); Briggs, *Unilateral,* n. 922, 51; Christol & Davis, n. 316, 539-40; Davidson, n. II.332, 178; Fenrick, *Legal Aspects,* n. II.501, 245; Lowe, *The Commander's,* n. 318, 132; Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea,* 24 VJIL 809, 811 (1984); Ronzitti, *The Crisis* 15; Russo, *Neutrality at Sea,* n. II.112, 384; A.G.Y. Thorpe, *Mine Warfare at Sea—Some Legal Aspects of the Future,* 18 ODIL 255, 257 (1987); Wolfrum, n. II.332, 391-92. Apparent dissenters include 2 O'CONNELL, LAW OF THE SEA 1112-13, referring to *id.* 747-69 in the context of nationality of merchant ships; Luan Low & David Hodgkinson, *Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War,* 35 VJIL 405, 421 (1995), who discuss environmental protection obligations in the LOS context but say nothing about the clauses, although *id.* elliptically seems to recognize the principle; Okorodudu-Fubara, n. II.210,195-97; Elmer Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare: Report to the Committee on the Protection of Human Life in Armed Conflict of the Society for Military Law of War* 22-49a (July 1983) (manuscript in author's possession). 1 BROWN 280, recognizing similar other rules clauses pertaining to high seas rights, declares: "[F]reedom of the high seas must be exercised under conditions . . . in the Convention and by other unspecified rules of international law."

957. LOS Convention, art. 88. Area use is reserved for peaceful purposes; marine scientific research must be for peaceful purposes. *Id.,* arts. 141, 143(1), 147(2)(d), 155, 240(a), 242(1), 246(3). This analysis is not confined to art. 88. These conclusions apply to other peaceful purposes provisions in *e.g.,* Antarctic Treaty, Dec. 1, 1959, art. 1(1), 12 UST 794, 795, 402 UNTS 71, 72; Treaty on Principles governing Activities of States in Exploration & Use of Outer Space, Including the Moon & Other Celestial Bodies, Jan. 27, 1967, 18 *id.* 2410, 2413-14, 610 UNTS 205, 207 (Space Treaty); ENMOD Convention, art. 3(1); Convention on International Maritime Satellite Organization, Sept. 3, 1976, art. 3(3), 31 UST 1, 4 (INMARSAT Organization shall act exclusively for peaceful purposes); Agreement Governing Activities of States on the Moon & Other Celestial Bodies, Dec. 5, 1979, art. 3(1), 1363 UNTS 3, 22.

958. RESTATEMENT (THIRD) § 521, cmt. b, citing UN Charter, art. 2(4); UNCLOS, arts. 88, 301 and referring to RESTATEMENT (THIRD) § 905, cmt. g; *accord,* Legality of Threat of Nuclear Weapons, 1996 (1) ICJ 244; 3 Nordquist ¶¶ 87.9(i), 88.1-88.7(d); Russo, *Targeting,* n. 624, 8; *see also* Helsinki Principle 1.2; Boczek, *Peaceful,* n. 956; Oxman, *The Regime,* n. 956, 814; John E. Parkerson, Jr., *International Legal Implications of the Strategic Defense Initiative,* 116 MIL. L. REV. 67, 79-85 (1987). BIN CHENG, STUDIES IN INTERNATIONAL SPACE LAW 368, 413, 513-22, 528, 533, 650-52 (1997), arguing that the US and other States' view that the space treaties' peaceful purposes language means only a prohibition on aggression in space is wrong and that the treaties' peaceful purposes clauses mean no military use of space or space objects, concedes the clauses are not clear and need definition, perhaps in a future agreement. Nowhere, however, does Cheng consider the impact of UN Charter, art. 103 and the right of self-defense under *id.,* art. 51. *See also* n. 959 and accompanying text. Nor does he adequately analyze contrary authority construing other peaceful purpose clauses; *see* nn. 956-57 and accompanying text.

959. UN Charter, art. 103; *see also* n. 10 and accompanying text.

960. *Id.,* arts. 2(4), 51; *see also* nn. 47-590, 617-30 and accompanying text.

961. 3 Nordquist ¶ 87.1(i), citing LOS Convention, arts. 19(2)(b), 19(2)(f), 52(2) (innocent passage). High Seas Convention, art. 2, has been interpreted to include freedoms to undertake scientific research, to explore or exploit high seas subsoil resources and to test nuclear weapons. *See also* RESTATEMENT (THIRD) § 521 cmt. b; n. 958 and accompanying text.

962. Many but not all of the other 1958 LOS Conventions' terms reflect custom. *See* High Seas Convention, preamble, declaring it restates customary law; NWP 9A Annotated ¶ 1.1 at 1-2 n. 4; *cf.* 1 O'CONNELL, LAW OF THE SEA 385, 474-76.

963. NWP 1-14M Annotated Part I ¶ 1.1; RESTATEMENT (THIRD), Part V, *Introductory Note,* 3-5; *cf.* John Norton Moore, *Introduction* to 1 Nordquist xxviii; Bernard H. Oxman, *International Law and Naval and Air Operations at Sea,* in Robertson 19, 29; *see also* President Reagan, *United States Ocean Policy,* Mar. 10, 1983, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 14, 1983); *but see* 1 O'CONNELL, LAW OF THE SEA 48-49. O'Connell researched through 1978 using LOS Convention drafts but died before a final version was available. Ivan A. Shearer made changes and additions,

publishing before the Convention was signed. Shearer, *Editor's Preface* to *id.* vii. O'Connell's views may reflect views of the time before RESTATEMENT (THIRD) was published in 1987. In 1983 the United States claimed a 200-mile EEZ in accordance with the Convention. Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983). In 1988 it claimed a 12-mile territorial sea in accordance with the Convention. Proclamation No. 5928, 54 *id.* 777 (Dec. 27, 1988). For territorial sea and EEZ analysis, *see* Parts IV.B.2, IV.B.4, IV.B.6, IV.D.2–IV.D.4.

964. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03.

965. *See* nn. 725-28 and accompanying text.

966. *See* nn. 962-63 and accompanying text.

967. *See* nn. 158-590, 617-30 and accompanying text.

968. *See* nn. 593-94 and accompanying text.

969. *See* n. 631 and accompanying text.

970. *See* n. 10 and accompanying text.

971. *See* nn. 79-103 and accompanying text.

972. *See* nn. 104-57 and accompanying text.

973. *See* nn. 650-61 and accompanying text.

974. *See* nn. 69, 657 and accompanying text.

975. *See* nn. 158-590, 617-30 and accompanying text.

976. *Id.*

977. *Id.*

978. *See* nn. 591-616, 645-49 and accompanying text.

979. *See* nn. 303-307, 800-17 and accompanying text.

980. *See* nn. 168,199 and accompanying text.

981. *See* nn. 10, 202-06 and accompanying text.

982. *See* nn. 289-302, 308-36 and accompanying text.

983. *See* n. 438 and accompanying text.

984. *See* n. 440 and accompanying text.

985. *See* nn. 445-47 and accompanying text.

986. *See* nn. 448-68, V.677-78, VI.231-38 and accompanying text.

987. *See* n. 948 and accompanying text.

988. *See* nn. 10, 725, 729, 735, 823 and accompanying text.

989. *See* n. 934 and accompanying text.

990. *See* nn. V.697-709, VI.268-271 and accompanying text.

991. *See* nn. 828-915 and accompanying text.

992. *See* nn. 919-51 and accompanying text.

993. *See* nn. 951-67 and accompanying text.

# Chapter IV

# CLAIMS RELATED TO THE LAW OF THE SEA (LOS)

Since World War II, States have attempted to negotiate multilateral agreements to delimit boundaries and use of the Earth's oceans and seas. There have been successes and failures. In 1958 four treaties—the High Seas, Continental Shelf, Territorial Sea and Fishery Conventions—were signed at the Geneva UN Conference on the Law of the Sea and are now in force for ratifying States.[1] Two years later attempts to delimit the territorial sea failed at Geneva.[2] In 1982 another agreement, the UN Convention on the Law of the Sea (LOS Convention), a comprehensive treaty covering subjects of the 1958 conventions and other principles, *e.g.,* environmental protection, discussed in Chapter VI, was signed at Montego Bay, Jamaica after nearly a decade of negotiations; several principal actors, including the United States, elected not to sign due to problems with the Convention's deep seabed mining provisions. The LOS Convention is now in force, but not for the United States and an increasingly smaller number of countries.[3] Besides the LOS conventions, many other agreements, *e.g.,* the ICAO Convention,[4] impact LOS boundaries and ocean usage, not to mention State practice, the research of scholars,[5] and occasional judicial and arbitral decisions.

This Chapter analyzes LOS issues relating to the Tanker War under three principal topics: the relationship among the law of the UN Charter, the LOS and the law of armed conflict (LOAC), discussed in Part A. Part A also discusses issues related to treaty interpretation in these contexts. Part B analyzes LOS issues related to oceans use, and Part C discusses the status of vessels (merchantmen, warships, *etc.*) plying the oceans. A conclusion relates these claims to Tanker War issues in each Part, and a general conclusion, Part D, summarizes Tanker War LOS issues.

## Part A. The Charter, the LOS, and the Law of Armed Conflict (LOAC)

The rule for the relationship between the law of the UN Charter as a treaty and the LOS as stated in treaties is simple. The Charter prevails.[6] Similarly, to the extent that Charter norms or other norms have *jus cogens* status, these rules also prevail.[7] If an LOS norm is stated in a treaty, in custom or in general principles, and there is a conflicting customary or general principles norm parallelling the Charter as a treaty, the analysis is less clear. If traditional modes of thinking about sources of international law apply, a balancing process among these norms must be undertaken; it is conceivable that a non-Charter norm might prevail.[8] In terms of competition between the Charter and the LOS, however, this is largely a theoretical

issue, except insofar as the right of self-defense, other Charter norms, or mandatory decisions of the UN Security Council might supersede LOS treaty norms.[9]

*1. The LOS and the LOAC*

The relationship between the LOS and the LOAC and its component, the law of naval warfare (LONW), is somewhat clear but less well known.[10] Chapter III has discussed them in a context of general principles of UN Charter law and principles of treaty interpretation.[11] They are repeated here for convenience in interpreting the law of the sea.

The 1958 and 1982 LOS Conventions include clauses, sometimes overlooked in analysis or commentary, stating that rights under these agreements are subject to "other rules of international law" as well as terms in the particular treaty.[12] For example, LOS Convention, art. 87(1), which declares high seas freedoms, also says, "Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law." Four conclusions can be stated.

First, an overwhelming majority of commentators, including the International Law Commission, a UN General Assembly agency of international law experts,[13] state that the other rules clauses in the LOS Conventions refer to the LOAC,[14] which includes the law of naval warfare. Therefore, provisions such as LOS Convention, art. 88, state a truism: The high seas are reserved for peaceful purposes,[15] but high seas usage can be subject to the law of armed conflict, when Article 87(1)'s other rules clause is read with Article 88. As in the 1958 conventions,

> That provision does not preclude... use of the high seas by naval forces. Their use for aggressive purposes, which would... violat[e]... Article 2(4) of the [UN] Charter..., is forbidden as well by Article 88 [of the Convention]. See also LOS Convention, Article 301, requiring parties, in exercising their rights and p[er]forming their duties under the Convention, to refrain from any threat or use of force in violation of the Charter.[16]

This analysis is buttressed by the Charter's trumping clause; no other treaty can supersede the Charter.[17] Thus the peaceful purposes language in Article 88 and other LOS Convention provisions cannot override Charter norms, *e.g.*, Article 2(4), but also those in Article 51, *i.e.*, the inherent right of individual and collective self-defense.[18]

Second, there is no indication that the 1958 or 1982 LOS Convention drafters thought the other rules clauses referred to anything else, *e.g.*, to a customary law of the environment. As discussed in Chapter VI, international environmental law was a gleam in academics' and futurists' eyes when the 1958 Conventions were signed; there was only a patchwork of international agreements touching the subject.[19] There is no indication the International Law Commission, which drafted the 1958 treaties, considered environmental protection. By contrast, there was an

established body of law, discussed in Chapter V, dealing with armed conflict situations, including naval warfare, at the time. Since the 1982 LOS Convention carried over the same language, it must be presumed that the same meaning attaches to the other rules clauses.

Third, *e.g.*, other agreements dealing with protection of the maritime environment include clauses exempting, or partially exempting their application during armed conflict or similar situations. Some speak of war,[20] others of armed conflict or a need to protect vital national interests.[21] This includes the NAFTA.[22] This tends to confirm the view of applying the law of armed conflict as a separate body of law in appropriate situations. To the extent that treaties dealing with the maritime environment do not have such clauses,[23] such agreements must be read in the light of the LOS Conventions, which include such provisions. And to the extent that the 1958 LOS Conventions recite customary norms, and such is the case with the High Seas Convention,[24] applying the LOAC as a separate body of law in appropriate situations as a customary norm must also be considered with LOAC treaties and other sources[25] when analyzing these issues.

Fourth, principles of the law of treaties, *e.g.*, impossibility of performance;[26] fundamental change of circumstances;[27] desuetude, or lack of use of a treaty for a considerable time;[28] or war, the last applying only to parties to a conflict;[29] may suspend operation of international agreements during a conflict or other, similar emergency situations, or may terminate them. Outbreak of hostilities does not suspend or terminate humanitarian conventions or treaties governing neutrality designed to apply during armed conflict, however.[30] The other side of the coin is *pacta sunt servanda*,[31] *i.e.*, that treaties should be observed; a manifestation of this is that States signing treaties should not behave so as to defeat the treaties' object and purpose.[32] The often amorphous law of treaty succession[33] must be considered, particularly for older agreements, including those stating the LOAC, to the extent that those treaties are not part of customary law today. If these agreements restate custom, and are subject to treaty succession principles with respect to a particular country, that country is doubly bound.[34]

The conclusion is inescapable that the other rules clauses of the 1958 Conventions, provisions carried forward into the 1982 LOS Convention, mean that the LOS conventions' terms are subject to the LOAC, of which the law of naval warfare is a part. Since the High Seas Convention is generally considered a restatement of customary law,[35] its other rules clauses are part of the customary law governing oceans law during armed conflict. Moreover, since many States consider the LOS Convention's navigational articles, which often copy 1958 conventions' terms, customary law,[36] and since the navigational articles include other rules clauses, the case is strong that the LOS is governed by two bodies of rules: (1) the LOS as stated in the conventions, custom and subordinate treaties, *etc.*, in non-armed conflict situations; (2) the LOAC, including the LONW, where LOAC rules apply.

Iraq's claim that the Kuwait Regional Convention and its Protocol did not apply when it struck the Nowruz oil facilities[37] was without basis in law. Although the Convention might have been suspended between the belligerents, it continued to apply to relations between Iran, Iraq and third States, the latter of whom were not parties to the conflict, *i.e.*, belligerents.[38] To the extent the Nowruz attack resulted in damage, including environmental harm, to States not party to the conflict, Iraq violated the Regional Convention and perhaps other environmental norms.[39] Iraq might have claimed the Convention was suspended because of impossibility of performance,[40] or maybe fundamental change of circumstances,[41] but Iraq did not make these assertions.

*2. Relationship of the 1982 LOS Convention and Other LOS-Related Treaties*

Besides general rules of treaty construction applying to all international agreements,[42] the 1982 LOS Convention has special rules for its relationship as a treaty with the 1958 conventions and other treaties dealing with LOS issues.

For those States that are or become parties,[43] the 1982 LOS Convention will replace the 1958 conventions.[44] Article 311(2), the general supersession provision for the LOS Convention, declares that the Convention does not alter existing rights "which arise from other agreements compatible with this Convention" and which do not affect enjoyment of other parties' rights or performance of their obligations under the Convention.[45] States may also conclude agreements modifying or suspending operations of the LOS Convention, provided that the suspension or modification is not incompatible with effective execution of the object and purpose of the LOS Convention or its basic principles and do not affect enjoyment of other States' rights or performance of their obligations under the LOS Convention. States that intend to conclude such an agreement must notify other LOS Convention parties of their intentions and the modification or suspension for which it provides.[46] Rules for non-suspendable straits transit passage, and non-suspension of innocent passage in some straits,[47] are examples of LOS Convention provisions that no single State may undercut. Article 311(3) forbids two or more States bordering a strait from trying to suspend straits transit or innocent passage, as provided by the Convention, through a treaty, an example of treaty action the LOS Convention forbids.

The LOS Convention declares for its environmental norms in Part XII, which states many principles of maritime environmental law:

> 1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.

> 2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.[48]

This is a *lex specialis*, *i.e.* a special rule, for the LOS Convention, Part XII, the principal source for maritime environmental protection standards,[49] which the LOS Convention allows for this and other articles varying its basic rules.[50] The rule for no suspension of innocent passage for certain straits, *e.g.*, those between the high seas and a foreign State's territorial sea,[51] as distinguished from general innocent passage rules allowing suspension under certain circumstances,[52] is another example of *lex specialis*.

As in the case of the Charter, there is the possibility that a parallel but contradictory custom[53] or other source of law may develop alongside treaty-based norms.[54] The developing customary norm might be the same as, and thereby strengthen, the treaty norm.[55] If in opposition, custom can weaken or dislodge a treaty norm.[56] However, no treaty, and probably no custom, can supersede the Charter, mandatory norms developed under it,[57] or *jus cogens* norms.[58]

### *3. The 1982 LOS Convention and the Tanker War*

Bahrain and Iraq ratified the LOS Convention in 1985, and Kuwait in 1986; many other countries, *e.g.*, France and the UAE, were signatories, but other States with prominent roles in the Tanker War, *e.g.*, the United Kingdom and the United States, were not signatories or parties during the Tanker War.[59] Thus for some States there was an obligation not to defeat the object and purpose of the LOS Convention during at least part of the Tanker War.[60] These countries also had the duty to comply with customary norms, perhaps restated in the 1982 LOS Convention or the 1958 LOS conventions. Others were bound by the 1958 LOS conventions, *e.g.*, the United Kingdom and the United States.[61] These countries also had the obligation to comply with customary norms, perhaps restated in the 1958 conventions or the LOS Convention. Still other countries were not party to any LOS treaty; however, they were bound by customary rules the 1958 and 1982 conventions restate.[62] Most Persian Gulf coastal States were in the latter category. The ensuing analysis proceeds by analyzing and comparing the 1958 and 1982 LOS conventions as treaty law, to the extent that they applied as such, and seeks to supply customary rules where these are in accordance with or differ from the conventional law.

## Part B. Claims to Oceans Use

Because most armed conflicts in which merchant ships are involved have occurred on the high seas,[63] we begin[64] by examining merchant ships' and warships' status on the "great common."[65] This method takes the perspective of all seafarers

except those who sailed from Persian Gulf ports. Mariners, whether aboard merchant vessels or men of war, that approach the Gulf from the Indian Ocean must traverse the high seas before they encounter special regimes, *e.g.*, straits passage, the continental shelf, the contiguous zone, or the territorial sea. It is an analysis of derogation from the general to the specific, in terms of applicable law.

*1. Trends in Claims to Ocean Usages on the High Seas*

According to the High Seas Convention, the high seas include all parts of the sea (including subsurface water) not included in States' territorial or internal waters.[66] Beyond these broad exclusions, the LOS Convention, Article 88 says that the "high seas shall be reserved for peaceful purposes," which, as analyzed above, does not mean that navies cannot operate on the high seas. Stated as a positive rule, States may conduct naval operations on the high seas, subject to other LOS limitations, discussed below. Under Article 2(4) of the Charter, no State may use the high seas for aggressive purposes; this is in essence a cardinal principle of the Charter, along with the Article 51 inherent right to self-defense.[67] LOS Convention, Article 89 declares: "No State may validly purport to subject any part of the high seas to its sovereignty." The LOS conventions declare that every State may sail ships on the high seas under its flag,[68] and list certain rights, among others, with respect to the high seas:[69]

1. freedom of navigation;
2. freedom of overflight;[70]
3. freedom to lay submarine cables and pipelines;[71]
4. freedom of fishing;[72]
5. freedom to build artificial islands and other installations permitted by international law;[73]
6. freedom to conduct scientific research.[74]

Both agreements say all States must exercise these rights with reasonable, or due, regard for the interests of other States in their exercise of high seas rights.[75] The LOS Convention adds that high seas users must have due regard for others' rights in those parts of the sea-bed ocean floor and subsoil beyond national jurisdictional limits, *i.e.*, beyond the territorial sea, EEZ and continental shelf.[76] All States, whether landlocked or not, may sail ships flying their flag on the high seas. Warships and government ships on noncommercial service enjoy complete immunity on the high seas from other than the flag State.[77]

The clear trend, since the triumph of Hugo Grotius'[78] open seas theory over John Selden's closed sea concept,[79] has been for freedom of navigation, particularly the high seas. Another pattern of claims since Grotius' era has been, however, limitation of that right. Succeeding Parts of this Chapter examine trends in these limitations, looking landward.

*2. Trends in Claims of Restrictions on High Seas Rights: From Fisheries to the EEZ*

One class of claims on merchant vessels' and warships' rights to navigation on the high seas deals with coastal States' assertions to competence over belts of the high seas outward from the territorial sea for exclusive fishing rights. At first subject to conflicting claims, if not outright violence on the high seas, the issue has been largely resolved by treaties in many areas of the world. Historically the Gulf has been a primary source for pearls and there are offshore fishing areas.[80] More recently, agreements have attempted to regulate offshore fishing areas.[81] The US experience with fishing issues may point toward problems and solutions for the Gulf and its seaward fishing zones and EEZs in particular. "[T]he fishery question has been the focal point of the whole problem of territorial waters from its very beginning."[82] Riesenfeld wrote this in 1942; today doubtless he would amend this analysis to include EEZ-related claims.

*a. From Fishery Claims to Sovereignty Claims to the EEZ Concept.* The oldest claims for offshore use of the high seas surface and water column involve fishing, and from these came assertions of rights in offshore fishing zones, the continental shelf, and EEZs. However, ocean fishing "has never been an unfettered right,"[83] and, as will be seen, neither have continental shelf or EEZ claims. Although more of historical interest in some respects, fishing rights claims analysis develops this thesis, and this sub-Part starts by examining fishing rights claims in US practice.

The Treaty of Paris ending the American Revolution gave US fisherman access to the Grand Banks, other fishing areas off Newfoundland, the Gulf of St. Lawrence, the Newfoundland coasts and other coasts off British North America.[84] France also had fishing rights in the area.[85] These rights were not considered cession of territory;[86] therefore, no navigation rights were impaired. An 1818 British-US convention confirmed and refined fishing rights and liberties,[87] and this process continued in 1854.[88] The Treaty of Washington, in effect 1873-85, again confirmed these rights and approved reciprocal rights in US waters.[89] In 1906 British-US notes relating to purse seining off Newfoundland were exchanged;[90] this *modus vivendi* continued into 1912.[91] A 1908 bilateral treaty, providing for an International Fisheries Commission, resulted in authority for restricted halibut and lobster fishing in territorial waters.[92]

In 1909 the two countries agreed to submit issues related to fishing in waters northeast of the United States to arbitration.[93] The Permanent Court of Arbitration decided in Britain's favor with respect to regulating the fishing industry subject to the 1818 Convention[94] but held US fishermen could hire crews of non-inhabitants (*i.e.*, Newfoundlanders). Although US fishermen had to report to local authorities if they landed to dry or cure fish, they could fish in certain local

Newfoundland and Magdalen Islands waters.[95] A treaty later recited procedual rules and methods for future disputes that the Court had recommended.[96]

British-US bilateral agreements of 1923, 1930 and 1937, Britain acting for Canada for the latter two, established a Pacific coast International Fisheries Commission and regulated Pacific high seas halibut fishing.[97] Similar 1930 and 1956 agreements later protected sockeye salmon.[98]

In none of these fishing rights claims and counterclaims was there any assertion of a right to regulate merchant ship or warship navigation except with respect to taking fish. The same trend may be observed in claims to hunt seals in the North Pacific and Arctic Oceans.

Russian ukases of 1799 and 1821 gave the Russian-American Company Bering Sea whaling and fishing rights, along the northwest coast of America, and in other seas northeast of Russia. Russia also asserted a right to forbid approaches to Russian lands closer than 100 miles. After British and US protests, Russia-US and Britain-Russia treaties were ratified in 1824 and 1825.[99] The Russia-US agreement provided: "[I]n any part of the [Pacific] Ocean,... Citizens or Subjects of the high contracting Powers shall be neither disturbed nor restrained either in navigation, or in fishing, or in resorting to the coasts upon points which may not already have been occupied, for... trading with the Natives," subject to certain exceptions.[100] Reciprocal rights to fish and to trade with natives were given, except for sale of firearms, munitions of war and liquor.[101] The 1825 Britain-Russia treaty followed the pattern.[102]

The 1867 treaty selling Alaska to the United States ceded Russian land and water territory in North America, including the Aleutian Islands, to the United States.[103] Although US legislation implementing the treaty would seem to have asserted dominion over the Bering Sea,[104] an 1893 arbitral award held that only three marine miles offshore were subject to US sovereignty, and that US high seas seizures of British ships in the Bering Sea violated those ships' right of navigation.[105] The award established regulations for concurrent British-US jurisdiction over fur seal fishing in Bering Sea high seas areas.[106] British and US legislation confirmed the award's regulations in 1894.[107] Nothing in the award or a treaty establishing the tribunal claimed to impair high seas navigation.[108]

Other governments' reactions to the 1893 regulations were mixed, but the only admitted claim of control related to seal fishing.[109] In 1894, a Russia-US *modus vivendi* confirmed reciprocal policing rights for regulating seal fishing.[110] In 1902, pursuant to a protocol,[111] an arbitrator found for the United States in the *Cape Horn Pigeon* case, where a Russian cruiser seized and detained a US-flag fishing vessel on the high seas when the Russian naval commander "had been in error in his suspicions that the bark was engaged in an illicit pursuit, and the Russian Government offered to pay a proper indemnity...."[112] Similarly, in the *James Hamilton Lewis, C.H. White* and *Kate and Anna* claims, where Russian seizures had been attempted on

the high seas for possible illegal fishing in Russian territorial waters, the award went to the United States. The arbitrator noted that absent a treaty there was no jurisdiction for Russian naval commanders to seize US-flag vessels.[113] The significance of these awards is that even as to seal fishing, which occurs when seals migrate on the open sea, there was no claim to restrict freedom of navigation beyond a territorial sea without international agreement.

A 1911 Britain-Japan-Russia-US agreement, limiting North Pacific high seas fur seal fishing, did not restrict navigation rights in these waters.[114] A decade later, a treaty regularizing the Spitsbergen Archipelago's status under Norwegian sovereignty declared fishing and hunting rights[115] but imposed no limitations on freedom of navigation; its Article 3 assured "nationals of all... Parties equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories; subject to the observance of local laws and regulations, they [might] carry on... maritime and commercial operations on a footing of absolute equality." Transit rights were subject to Norwegian most-favored-nation treatment.[116] Bilateral fishing agreements between the World Wars followed the same pattern of limiting fishing operations while expressly not restricting the general freedom of navigation or not mentioning it at all.[117]

The 1931 and later multilateral conventions regulating whaling, although applying in territorial waters and on the high seas,[118] imposed no limits on navigational use of these waters.

During the 1930's and until the outbreak of World War II, the United States expressed concern to Japan over depletion of Pacific salmon fisheries near Bristol Bay, Alaska; initial proposed solutions included extension of the US traditional three-mile territorial sea limit.[119] During the war the United States considered linking territorial sea expansion (and therefore possible restriction of freedom of navigation) with limitations on fishing based on the continental shelf below the water column.[120] Eventually the linkage idea was discarded,[121] and a US Fisheries Proclamation (September 28, 1945) asserted national jurisdiction to establish fisheries conservation zones in high seas areas contiguous to US coasts, either for US fishermen's exclusive use or by international agreement with other States, with assurance that the United States would recognize other States' proclamations on a reciprocal basis. However, "[t]he character as high seas of the areas in which such conservation zones [were] established and the right to their free and unimpeded navigation [was] in no way thus affected."[122]

Despite these trends, three South American countries—Chile, Ecuador and Peru (CEP States)—took a claim to possible assertion of a 200-mile fisheries zone a step further, first by decrees in 1947 and 1950.[123] The August 18, 1952 Declaration of Santiago on the Maritime Zone followed, proclaiming, "[E]ach [State] possesses sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast." The

Declaration added: "[It] shall not be construed as disregarding the necessary restrictions on the exercise of sovereignty and jurisdiction imposed by international law to permit the innocent and inoffensive passage of vessels of all nations through the zone. . . ."[124] In 1954 the CEP States formalized the Declaration with a Supplementary Agreement to consult to uphold the 200-mile territorial sea, including determining action to be taken if force were used against them.[125] The United States protested the executive decrees,[126] and a 1953 Ecuador-US agreement on fishery relations noted "differences in views" on the territorial sea.[127] The international response to these expansive claims was immediate and strong. An Ecuadoran proposal, similar to the Declaration, was subjected to such "sweeping modifications" that its impact was negated at the 1954 Inter-American Conference.[128] Negotiations in 1955 led nowhere, and the 200-mile Santiago Declaration territorial sea belt, linked with fishing rights claims, remained in effect although protested by the United States.[129] By 1958, however, the CEP States had agreed to separate the territorial sea width and fishing control jurisdiction issues. Ecuador, *e.g.*, continued to adhere to the 200-mile Declaration jurisdiction but asserted only a 12-mile territorial sea. In 1966, however, Ecuador's presidential proclamation claimed a 200-mile territorial sea; the United States does not recognize this claim. Other claims exceeding LOS Convention limits persist; these too have been protested.[130]

The USSR, as successor to the tsarist regime with its propensity to claim wide territorial sea jurisdiction through asserting fishing control,[131] distinguished between territorial sea claims and fisheries regulation jurisdiction. A 1927 Soviet ordinance asserted a 12-mile defensive limit of territorial waters; a 1935 ordinance claimed a 12-mile fishing regulation jurisdiction.[132] Repeating a pattern of an earlier agreement,[133] the USSR concluded the Barents Sea Pact with the United Kingdom in 1956, permitting fishing by UK vessels up to three miles from the Barents Sea coast.[134] Following a decree restricting Sea of Okhotsk, western Bering Sea and other contiguous North Pacific waters salmon fishing,[135] the USSR signed a bilateral agreement with Japan to regulate salmon fishing in these waters.[136] As in the Barents Sea Pact, the treaty omitted territorial sea claims with a right of excluding shipping.

Thus it was entirely consistent with customary international law that the 1958 Fishery Convention implicitly recognized an unimpeded right of navigation in high seas areas potentially subject to fisheries conservation. Apart from treaty obligations, special interests and rights of coastal States, and special Convention provisions, all States have a right to fish on the high seas.[137] States must adopt provisions for their nationals who fish on the high seas, and must negotiate agreements with other users of high seas fisheries or arbitrate differences. Coastal States are deemed to have special interests in areas off their shores.[138] This agreement does not limit high seas navigation except insofar as fishing regulation is involved. The High Seas Convention, proclaiming separate high seas navigation and fishing

freedoms,[139] confirms this principle. The Territorial Sea Convention declares that passage is not innocent in the territorial sea if fishermen do not observe published coastal State regulations on territorial sea fishing.[140] Coastal States may pass laws to prevent and punish infringement of customs, fiscal, or health regulations in their contiguous zone or territorial sea; these rules may also impact offshore fishing.[141]

Decades after 1958 witnessed assertions of wider exclusive offshore fishing zones, two Cod Wars between Iceland and the United Kingdom, and an ICJ decision holding that custom had crystallized into allowing coastal States to claim an exclusive 12-mile offshore fishing zone.[142] The 1976 US Fishery Conservation and Management Act, declaring a regulatory regime for a 200-mile area from territorial sea baselines and otherwise proclaiming a national right to regulate all but highly migratory fish species, did not assert a right to regulate high seas navigation.[143] Although Title II provided for foreign fishing pursuant to existing or future agreements,[144] no later US treaty has impinged on general overflight or navigation rights in fishing zones. In the Persian Gulf area, Iran proclaimed a 50-mile exclusive fishing zone in the Gulf of Oman and to the limits of its continental shelf boundary in 1973.[145] The next year Saudi Arabia established an exclusive fishing zone with median lines as boundaries with other countries.[146]

The LOS Convention continues a theme of generally free navigation access to high seas fishing areas, but largely in the context of a claimed EEZ. Allowing the possibility of a 200-mile EEZ, the LOS Convention declares for general high seas freedoms including navigation and overflight, subject to a coastal State's right to explore and exploit natural resources of the water column, the seabed and subsoil; to establish artificial islands, installations and structures; to scientific research; and to protecting and preserving the coastal environment.[147] The LOS Convention EEZ is subject to the treaty's regime of peaceful uses of the high seas, invalidity of sovereignty claims for the high seas, navigation rights, status of ships, visit and search, hot pursuit, rights to lay submarine cables and pipelines, and suppression of slavery, piracy, the drug traffic and unauthorized broadcasting, as well as "other pertinent rules of international law," *i.e.* the law of armed conflict.[148] As in the Fishery Convention, States with competing interests must give due regard to other States' interests.[149] This principle parallels the 1974 *Fisheries Jurisdiction Case*.[150] Although it has been argued that the LOS Convention does not allow military exercises in the EEZ, and some States have claimed a right to bar military activities,[151] it is submitted that the LOS Convention reference to high seas freedoms includes a right to use an EEZ for military exercises, subject to due regard for coastal State interests.[152] Even those who argue against this position concede that the LOS Convention permits unimpeded EEZ overflight.[153]

Islands capable of human habitation or economic life can have an EEZ, but rocks, low-tide elevations and human-made offshore installations such as oil

derricks, *etc.*, cannot.[154] In those cases the EEZ is measured from shore baselines. A State's EEZ proclamation, while asserting regulatory rights over a 200-mile band of the sea and its bottom, cannot claim a right to regulate navigation outside the territorial sea. The presumption is that high seas freedoms prevail, subject to requirements of due regard for coastal State jurisdiction and sovereignty validly asserted, and, in appropriate situations, the LOAC, and in all cases the law of the Charter.[155] High seas freedoms also prevail in high seas fishing areas as well, subject to principles of due regard for others' high seas freedoms and, in appropriate situations, the LOAC, and in all cases the law of the Charter.[156] The LOS Convention EEZ formula is customary law.[157]

*b. Conclusions.* Claims to use ocean resources, whether in the water column or on the seabed, may have begun as attempts to encroach upon the great common of high seas navigation rights.[158] Episodic proclamations have claimed sovereignty since then.[159] However, today international law firmly declares merchantmen's and warships' rights to navigate those potentially resource-rich areas, subject to coastal States' rights to regulate activity that might impair those resources, *e.g.*, environmental damage, and subject to other limitations on high sea navigation, *e.g.*, peaceful use.[160] Fishing zones and general EEZs are subject to high seas freedoms for purposes of overflight and navigation by warships and merchant vessels alike. Warships and merchantmen must, however, have due regard for coastal State interests in the EEZ.[161]

*c. High Seas Fisheries, EEZs, Pipelines, Freedoms of Navigation and Overflight, and the Tanker War.* Among Persian Gulf States, Iran claimed a 50-mile fishery zone off its coasts, subject to median line boundaries in the Gulf. Qatar proclaimed a 200-mile fishery zone, and the UAE were among 80 States claiming an EEZ.[162] However, Iran is among four States forbidding foreign military exercises in her EEZ, a derogation unlawful under the LOS that the United States has protested. (Iran asserted this claim in 1993; it is not relevant for this analysis.)[163]

Insofar as the high seas parts of Gulf fishery zones or EEZs are concerned, there appears to be no record of impairment of usage by neutrals during the Tanker War. Belligerents and neutrals alike owed neutrals due regard for those neutrals' exercise of EEZ or fishing zone rights.[164] To be sure, there is evidence of attacks on dhows, *i.e.*, possibly fishing vessels operating in a proclaimed zone, on offshore oil facilities and on vessels that may have been servicing installations in a zone.[165] Since these incidents are concerned as much with attacks on a ship engaged in navigation in the Gulf, analysis of the legitimacy of the attacks appears in Chapters III and V. Iraq attacked Iranian offshore installations, including pumping stations and other facilities. Iran attacked Iraqi facilities but also neutral countries' installations.[166] Insofar as these were a belligerent's attacks on its opponent, the LOAC

applied through the LOS other rules clauses, by then a customary as well as a treaty norm. On the other hand, attacks on neutrals' facilities were violations of the UN Charter, art. 2(4).[167] Chapter V discusses legitimacy of these attacks from an LOAC perspective; Chapter VI examines them in the context of the law of the maritime environment.[168] Although pipelines necessarily led from the shores of Gulf States, *e.g.,* Kuwait and Iran, to these countries' offshore pumping stations, there were no reports of attacks on the pipelines or any other submarine pipelines during the Tanker War.

The United States responded to Iranian attacks on US-flagged tankers by destroying Iranian offshore platforms that were a source of the attacks and which may have been sites of legitimate EEZ activity under the LOS.[169] This was a legitimate act of self-defense under Article 51 of the Charter; whether seen as a *jus cogens*-protected right or as trumping the LOS.[170] As explained in Chapter V, the attacks were also proportional under the law of naval warfare;[171] since there apparently was no appreciable environmental damage resulting from the attacks, no claim of environmental derogation was at stake.[172] Thus to the extent that the attacks might not have enjoyed primacy as a *jus cogens* norm of the inherent right to self-defense or as a superior treaty norm under Charter Article 103, the United States had a customary right to respond in self-defense under the law of naval warfare, which as part of the LOAC applied under the circumstances in derogation of LOS norms through the other rules clauses of the LOS conventions, which are now customary law as well.[173] In terms of behavior toward Gulf States not parties to the conflict, *i.e.,* those that had proclaimed neutrality, the United States and other maritime powers that sent naval forces to the Gulf owed due regard for coastal State operations and installations in proclaimed EEZs or fishing zones.[174] There is no evidence the United States or other powers did not show due regard for proclaimed EEZs or fishing zones; *i.e.,* there do not appear to have been LOS violations pertaining to fishing zones or EEZs.

When the United States and other neutral countries launched aircraft, fixed-wing or helicopters, whether on training flights or to support protection of shipping, those aircraft were entitled to high seas freedom of overflight as long as due regard[175] was given high seas freedoms and rights of neutrals and belligerents alike. As between neutral air forces and other high seas users, neutral or belligerent, the law of the sea governed, subject to the LOAC.[176] When Iran attacked those aircraft, they or surface naval forces operating with them were entitled to respond in proportional self-defense.[177]

Neutral warships also had freedom of navigation on the high seas of the Gulf, subject to their obligation to give due regard[178] to other countries' high seas rights and freedoms, whether the other country was a neutral or a belligerent. As in the case of high seas overflights, the LOS governed, subject to the LOAC.[179] When neutral surface naval forces engaged in freedom of navigation or naval maneuvers

(also legitimate under the law of the sea),[180] were attacked, by fire from belligerents' aircraft or by belligerent surface naval forces, those surface naval forces could respond immediately in proportional self-defense. Thus it was lawful for the United States to attack Iranian aircraft, surface naval forces, and minelaying forces, *e.g., Iran Ajr,* in self-defense. It was also lawful to remove mines laid in the high seas as a self-defense measure.[181] Just because a neutral did not respond immediately in self-defense, as in the case of the *Samuel B. Roberts,* did not mean that a right of response did not exist.

Belligerents also had rights of freedom of navigation and overflight. It was legitimate, *e.g.,* for Iran to conduct naval exercises on the high seas, as well as in its territorial waters, with due regard for others' high seas rights and freedoms, but not in the Strait of Hormuz so as to obstruct or block navigation.[182] It was legitimate for both belligerents to exercise freedom of overflight, as long as they gave due regard[183] for neutrals' high seas rights, on the way to attack targets of an opponent. Belligerents' exercise of high seas freedoms, like the exercise of these freedoms by neutrals, were qualified by the requirement that belligerence give due regard[184] for neutrals' exercise of these freedoms. Belligerents' conduct under the LOS was also qualified by the LOAC and other States' rights of proportional self-defense[185] where it applied.[186] Thus Iran's Airbus had a right to overfly the Gulf as a civil airliner. US forces, engaged in a surface and air naval action with Iranian speedboats at the time, were exercising a right of self-defense. If the *U.S.S Vincennes* honestly (but mistakenly) believed the Airbus was an attacking Iranian aircraft, and that a short-range surface-to-air missile was a proportional self-defense response, then the tragic shootdown was legitimate under self-defense principles. US compensation to victims of the accident was made *ex gratia,* as was Iraqi compensation for the *Stark* attack, *i.e.,* there was no admission of fault by the United States.[187] (There is nothing unusual about *ex gratia* payments; defendants in civil lawsuits include such a clause in settlement agreements every day, to the effect that any payment or other performance is not an admission of fault. Payment in either case does not admit liability.)

### 3. *The Regime of the Continental Shelf in the Persian Gulf*

Claims relating to the offshore adjacent seabed and its subsoil began in the nineteenth century with assertions of national jurisdiction over subterranean mines; these claims occasionally went beyond what a coastal State claimed for a territorial sea.[188] Other early assertions of rights to the adjacent waters' seabed and subsoil related to claims to fishing rights, and these also sometimes went beyond territorial sea claims.[189] Early writers disagreed as to whether the seabed surface beyond a territorial sea was equivalent to the high seas or appurtenant to the adjacent land and subject to effective occupation "subject only to no unreasonable interference in the free use of the high seas above."[190] Great Britain claimed prescriptive rights

for offshore pearl fisheries near Ceylon (Sri Lanka) and in the Persian Gulf, and there were Australian and Tunisian claims to offshore sedentery fisheries, partly based on municipal law.[191] The only known early treaty dividing a continental shelf was the 1942 UK-Venezuela agreement for exploiting oil resources between Trinidad and Venezuela in the Gulf of Paria. The parties disclaimed claims to high seas rights or to passage or navigation rights.[192]

*a. Developments Since World War II.* Contemporaneous with publishing a fisheries jurisdiction claim,[193] the United States issued another executive proclamation in 1945,[194] asserting jurisdiction and control over natural resources of the subsoil and seabed of the continental shelf beneath the high seas off the United States. The claim was subject to international agreements with adjacent nations "in accordance with equitable principles," and, equally importantly, the proclamation unequivocally asserted, "The character as high seas of the waters above the continental shelf and their right to free and unimpeded navigation are in no way thus affected." Although national security had been advanced during World War II State Department considerations of the proclamation,[195] it asserted use and conservation of shelf natural resources and "self-protection compel[ling] the coastal nation to keep close watch over activities off its shores... necessary for utilization of these resources" as rationales for the claim.[196] The US Congress passed the Outer Continental Shelf Lands Act (OCSLA)[197] and the Submerged Lands Act in 1953.[198] OCSLA specifically provides that the Act should not be construed to affect high seas fishing and navigation rights.[199]

A spate of continental shelf claims followed.[200] While most States followed the US lead in not asserting jurisdictional rights over high seas areas to control navigational or passage rights, a handful did claim, or would seem to have claimed, such:[201] Argentina;[202] the CEP States, Chile,[203] Ecuador[204] and Peru,[205] culminating in the Declaration of Santiago;[206] El Salvador;[207] Honduras;[208] Mexico.[209] In each of the latter cases the United States and other countries protested claims of jurisdiction or right to regulate high seas freedoms, navigation or passage.[210] As late as 1985 Chile and Ecuador asserted claims beyond 200 miles, which the United States protested.[211]

During the early postwar era, Saudi Arabia and the United Kingdom, on behalf of certain Persian Gulf sheikdoms, proclaimed sovereignty over offshore continental shelves but only for exploitation purposes.[212] In 1955 Iran proclaimed a continental shelf for the Gulf and the Gulf of Oman, but it did not purport to affect superjacent waters or other States' installation of submarine cables.[213] Iraq also claimed a continental shelf without a reservation like Iran's.[214] Other Gulf States (Bahrain, Dubai and Sharjah of the UAE, Kuwait, Oman, Qatar) had continental shelf claims and negotiated boundary treaties for these rights.[215] Nevertheless, all Gulf States—Bahrain (1949, when under UK protection; 1958, 1971), Iran (1955,

1958, 1968, 1969, 1971, 1974, 1975), Iraq (1957), Kuwait (1949, when under UK protection; 1965, 1968), Oman (1972, 1974), Qatar (1949, when under UK protection; 1965, 1969), Saudi Arabia (1949, 1958, 1965, 1968), States of the UAE (1949, when under UK protection; 1968, 1969, 1971, 1975)—have asserted offshore seabed rights by unilateral proclamation (*e.g.*, those of 1949) or by agreement with opposite or adjacent countries. These treaty-defined areas end at an agreed meeting line in mid-Gulf for the most part or extend the coastal boundary seaward.[216]

The Continental Shelf Convention resolved definitional, dimensional and jurisdictional issues erupting after the US and other proclamations or treaties.[217] The shelf is defined as adjacent submarine seabed and subsoil outside the territorial sea, to a depth of 200 meters or beyond that where superjacent waters' depth permit natural resources exploitation. Islands can have a continental shelf.[218] Agreements must determine opposite States' boundaries; absent a treaty, the median line is the boundary, "unless another boundary is justified by special circumstances." Similarly, agreements were to determine adjacent States' shelf boundaries, without which the line was to be "determined by. . . the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."[219] In 1965 the *Restatement (Second), Foreign Relations* accepted Convention principles.[220] The 1969 *North Sea Continental Shelf Cases*, however, concluded that the Convention's "special circumstances" rules had not yet crystallized into custom, in a controversy not covered by the Convention—being not between adjacent or opposite States—and where one State was not then a treaty party.[221]

Although a coastal State has sovereign rights to explore and exploit shelf natural resources, which include both living and non-living resources,[222] "rights of the coastal State. . . do not affect the legal status of the superjacent waters as high seas, or. . . the airspace above these waters."[223] Article 5(a) underscores this, declaring: "[E]xploration of the. . . shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea[.]" Exploration or exploitation cannot interfere with fundamental oceanographic or other scientific research whose results will be published.[224]

Certain special continental shelf uses—submarine cables or pipelines, artificial installations, tunnelling—are subject to special rules.[225] The High Seas Convention declares the rights to lay submarine cables and pipelines are high seas usage rights, but that they are subject to the principle that these freedoms, and others recognized by general principles of international law, must be recognized by States with "reasonable regard to the interests of other States in their exercise of the freedom of the high seas."[226] This is also a customary rule of international law.[227] The Convention says that a coastal State many not impede other States' submarine cable or pipeline laying, subject to the coastal State's rights to take reasonable

measures for exploiting its continental shelf and exploitation of the shelf's natural resources.[228] This is in effect a restatement of the High Seas Convention "reasonable regard" principle in the context of the continental shelf and pipelines or cables that might cross the shelf. Similarly, the Shelf Convention provides that exploring the shelf or exploiting its resources "must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication." "[I]nstallations or devices [permitted on the shelf], nor the safety zones around them, may be established where interference may be caused to the use of recognized sea lanes essential to international navigation."[229] Subject to these limitations, coastal States may build, maintain or operate installations and other devices necessary to explore and exploit their shelf's natural resources. Coastal States may establish safety zones of up to 500 meters around these installations and devices and take, within these zones, measures necessary for their protection. All ships must respect these zones, which do not have the status of islands and therefore do not have a territorial sea around them. Coastal States must give due notice of installation construction and maintain permanent means to warn of their presence. Abandoned or disused installations must be removed.[230]

The LOS Convention made few changes relevant to high seas rights and freedoms issues. High seas navigation and other rights are not affected by a State's continental shelf declaration of sovereign rights to explore and exploit its shelf; the superjacent water and air space are not affected, as in the Conventions, and a coastal State cannot unduly interfere with these high seas rights and freedoms.[231] The 200 meter depth-exploitability criteria were changed to a flat 200 nautical mile limit, the EEZ limit,[232] or the continental margin, whichever is greater, with a maximum 350-mile seaward extension.[233] The seabed and subsoil formula remained the same.[234] Opposite and adjacent State claims must be resolved by "agreement on the basis of international law, as referred to in Article 38 of the [ICJ] Statute... to achieve an equitable solution." (Disputes relating to treaties already in force will be determined by the treaties' terms.) If there is no agreement, LOS Convention dispute resolution procedures must be used.[235]

Coastal State exploration and exploitation rights are the same under the LOS Convention, and the same exploitable resources are listed.[236] The 1958 treaty, however, placed the burden on scientific research installations or equipment to stay out of "established international shipping lanes" and to display appropriate warning signals to ensure safety at sea.[237] Research must not "unjustifiably interfere with other legitimate uses of the sea... and shall be duly respected in the course of such uses."[238] The LOS Convention sets forth a full range of potential claims relating to conservation, environmental control and research for all ocean areas; these will be examined separately insofar as they pertain to Tanker War issues.[239]

As in the Shelf Convention, the LOS Convention provides for special uses of the continental shelf: submarine cables and pipelines, artificial islands and similar structures, drilling and tunneling.[240]

In 1969 the ICJ had been reluctant to declare Continental Shelf Convention Articles 6(1) and 6(2) as declaring custom for shelf boundaries;[241] by 1984, however, a Court panel in the *Gulf of Maine* case said the LOS Convention continental shelf provisions could "be regarded as consonant at present with general international law."[242] The United States has protested a few States' legislation or proclamations, *e.g.*, Chile and Ecuador, that extend jurisdiction beyond LOS Convention limits.[243]

***b. Conclusions.*** Thus, subject to obligations to avoid interfering unduly with shelf exploration or exploitation, or to exercise safety at sea, the right of warships and merchant vessels to navigate the high seas water column covering the continental shelf continues unabated by the LOS Convention, whether binding as a treaty or reflecting custom for nonparties, aberrations such as the Santiago Declaration, unilateral pronouncements or perhaps some treaties[244] to the contrary notwithstanding. Moreover, there is nothing in the law of the sea conventions to bar a coastal State from using its continental shelf for placing its military installations there. First, since a proclaimed shelf is subject to the coastal State's sovereignty for purposes of exploration and exploitation, the coastal State has the inherent right of self-defense under the Charter to defend those interests.[245] Second, to the extent that the LOAC, which includes the law of naval warfare, might apply to a situation, those bodies of law are separate from the LOS.[246] The relationship between belligerents' operations in waters above a neutral's proclaimed continental shelf, or to use a neutral's shelf for emplacement of weapons directed against an opposing belligerent, is more complex; this is analyzed in Chapter V.[247]

The Seabed Arms Control Treaty forbids placing nuclear weapons, or other weapons of mass destruction, on the seabed and ocean floor beyond 12 miles from the baseline from which the territorial sea is measured.[248] The treaty does not define weapons of mass destruction, nor does it cover weapons in the water column, as long as they are not tethered to the bottom, or other weapons, *e.g.*, conventional mines, that are not weapons of mass destruction. There are opposing positions on the point, but the foregoing appears to be the better view.[249] From the LOS perspective, all the coastal State obtains with a proclaimed continental shelf is the right to explore and exploit it for purposes stated in the law of the sea; the shelf is not subject to an unlimited sovereignty claim. LOS freedoms apply to the water column; in any event other States' Charter rights to self-defense and LOAC options are separate from LOS principles.[250] The Treaty recognizes the difference by stating that its terms do not support or prejudice positions under the Territorial Sea Convention and other aspects of the law of the sea.[251] Those placing such devices must have due regard for a coastal State's continental shelf rights, however.[252]

*c. The Continental Shelf in the Persian Gulf and the Tanker War.* The Persian Gulf is a relatively narrow, shallow body of water.[253] For all practical purposes, there is no deep seabed in the sense of the Continental Shelf Convention or the LOS Convention. There is no Area within the meaning of the LOS Convention. Since it is a basin without any continental slope or deep seabed, theoretically the Gulf has no continental shelf.[254] There are no reports of excessive claims with respect to Gulf States' offshore sea floor claims. Disputes over offshore islands continue, however.[255]

Insofar as the high seas parts of these offshore areas (which in a sense can be considered continental shelves) are concerned, there appears to be no record of belligerents' impairing usage by neutral coastal States during the Tanker War. Belligerents and neutrals alike owed neutrals due regard for those neutrals' exercise of continental shelf rights.[256] To be sure, there is evidence of attacks on dhows, *i.e.*, possibly vessels operating above a proclaimed shelf, or other vessels that may have been servicing installations on a shelf.[257] Since these incidents are concerned as much with attacks on a ship engaged in navigation in the Gulf, analysis of the legitimacy of the attacks appears in Chapters III and V. Iraq attacked Iranian offshore installations that may have been connected with shelf operations, including pumping stations and other facilities.[258] Because these were attacks by a belligerent upon its opponent, the law of armed conflict applied through operation of the LOS other rules clauses, by then a treaty and customary norm.[259] Chapter V discusses legitimacy of these attacks from an LOAC perspective, and Chapter VI examines them in the context of the developing law of the maritime environment.[260]

The United States responded to Iranian attacks on US-flagged tankers by destroying Iranian offshore platforms that were a source of the attacks and which may have been connected with shelf activities legitimate under the LOS.[261] This was a legitimate act of self-defense under Article 51 of the Charter, whether seen as a *jus cogens*-protected right or as trumping the LOS.[262] As explained in Chapter V, the attacks were also proportional under the law of naval warfare;[263] since there was no appreciable environmental damage resulting from the attacks, no environmental derogation claim was at stake.[264] Thus to the extent the attacks might not have enjoyed primacy as exercise of a *jus cogens* norm of the inherent right of self-defense or as a superior treaty norm under Article 103 of the Charter, the United States had a customary right to respond in self-defense under the law of naval warfare, which as part of the LOAC applied under the circumstances in derogation of law of the sea norms through the other rules clauses of the LOS conventions, which are now customary law as well.[265] In terms of behavior toward Gulf States not parties to the conflict, *i.e.*, those which had proclaimed neutrality, the United States and other maritime powers that sent naval forces to the Gulf owed due regard for their operations and installations in proclaimed continental shelves.[266] There is no evidence that the United States or other powers did not do

so; *i.e.*, there appears to have been no violations of the law of the sea as it pertained to continental shelves in the Gulf.

*4. The Territorial Sea and the Contiguous Zone*

Commentators have traced States' claims to territorial seas from the Middle Ages through the 1958 LOS conference, the 1958 conventions, the unsuccessful attempts to establish a limit in 1960 and thereafter.[267] Aside from examining general claims patterns, with particular examination of the 1958 Conventions and 1982 LOS Convention, those waters will not be navigated again. This Part also reviews principles of the contiguous zone. Claims going beyond the territorial seas, apart from the contiguous zone, however measured and for whatever purpose, have been addressed in previous parts, and that material will not be repeated here either.

*a. Analysis: From a Three-Mile Rule to a Twelve-Mile Norm Under the 1982 LOS Convention.* ". . . [B]y 1926, the three-mile limit was in every sense a rule of international law," according to the commentators.[268] However, even in the early part of this century there were exceptions.

The trend had begun with Great Britain's Customs Consolidation Act of 1876, which asserted a one-league belt of waters in which England claimed a right to visit and search all vessels.[269] "Of all the factors influencing the growth of the three-mile rule—treaties, laws, court decisions, and writings of the experts—the. . . Act. . . probably went the furthest in establishing the three-mile limit as a rule in the law of nations."[270] (At the time, of course, Brittania ruled the waves, not only in terms of merchant fleet tonnage, but also because of the Royal Navy.) Two years later Britain asserted criminal jurisdiction over only one league of coastal waters in the Territorial Waters Jurisdiction Act.[271] The United States had claimed a three-mile territorial sea in 1793, when US Secretary of State Thomas Jefferson wrote the British and French ministers to the United States.[272] A year later Congress passed legislation asserting criminal jurisdiction; the United States had become the first country to formally claim three miles.[273] To be sure, the rest of the nineteenth century saw conflicting claims that spilled over into the twentieth century,[274] but by 1901 the United States had formally reaffirmed three miles as its territorial sea.[275] Its short-lived Naval War Code of 1900 had similarly asserted a three-mile limit for armed conflict situations.[276] Other States, bowing to British diplomatic pressure, began to redefine their territorial belt as three miles.[277] Arbitrations and prewar treaties seemed to point the way to universal acceptance of the norm.[278] However, before 1926 there remained substantial dissent. Hague Convention VIII (1907) forbade laying mines within three miles of a neutral's coast, but the Second Hague Peace Conference failed to agree on a uniform general rule for naval warfare situations.[279] Just before and during World War I important maritime powers, *e.g.*, France, Italy, Russia, and other States asserted claims to

more than three miles.[280] And although the International Law Association had modified its stance by 1924 to opt for a three-mile limit,[281] the Institute of International Law declared for the same limit but added that "International usage may justify the recognition of an extent greater or less . . .."[282] In 1927 the influential *Harvard Research Draft* supported a similar basic three-mile limit with an adjacent band of the high seas subject to customs, navigation, health or police regulations, "or for [a State's] immediate protection."[283] The 1930 First Act of the League of Nations Conference for the Codification of International Law could not agree on a limit.[284] Iran claimed a 6-mile territorial sea in 1934, recognizing a right of innocent passage for warships, including submarines navigating on the surface, except for vessels in a state of war, in which case the law of maritime neutrality would apply. Iran also reserved the right to prohibit foreign ships from entering certain territorial waters, *i.e.,* "closed zones," for national security reasons.[285]

Bilateral agreements between the United States and its major trading partners, 1924-30, to assist in US national prohibition law enforcement, carefully divided between those nations agreeing with the United States on the three-mile limit and those which reserved their position on the issue.[286]

After World War II certain Latin American States tried to fold claims for a wide continental shelf and EEZ into a territorial sea of the same breadth; the claims were protested.[287] The Soviet bloc and the People's Republic of China asserted 12-mile territorial sea claims during 1950-60.[288] In 1951 the United Kingdom conceded Norway's historic claim to a four-mile limit in the *Fisheries Case,* which resolved a method of determining baselines.[289] In 1949 Saudi Arabia declared a 6-mile territorial sea as part of its sovereignty.[290] In 1955 the Philippines, and in 1957 Indonesia, asserted a 12-mile territorial belt around their archipelagoes.[291] In 1958 Saudi Arabia expanded its territorial sea claim to 12 miles.[292] The 1958 Territorial Sea Convention failed to settle on a limit for the territorial sea, but declares coastal State sovereignty over the belt of coastal waters and airspace.[293] The next year Iran claimed a 12-mile territorial sea.[294]

The Convention does, however, allow coastal States to declare a contiguous zone of up to 12 miles, subject to opposite States' agreeing on a dividing line (in the absence of which the median line from baselines forms the division), for: preventing infringement of its customs, fiscal, immigration or health regulations within its territory or territorial sea, and for punishment of infringements of these regulations committed within its territory or territorial sea.[295] The contiguous zone is part of the high seas outside of the territorial sea under the Territorial Sea Convention.[296] Thus in the case of the United States, which had a 3-mile territorial sea in 1958, the outer 9 miles of its 12-mile contiguous zone[297] were high seas. The High Seas Convention provides for a right of hot pursuit from the zone if coastal State authorities have reason to believe a foreign ship has violated its customs, fiscal, immigration or health laws in the coastal State's territory or territorial sea.[298] Iran

had proclaimed a 12-mile "zone of maritime supervision" when a 6-mile territorial sea was claimed in 1934; the claim was amended in 1959 to assert a 12-mile territorial sea.[299] Saudi Arabia had claimed a 6-mile contiguous zone for "maritime surveillance" relating to security, navigation and fiscal matters beyond its 6-mile coastal sea in 1949; this was expanded to a 12-mile contiguous zone, coincident with the Territorial Sea Convention limit, in 1958. However, just before the 1958 UN LOS Conference, Saudi Arabia expanded its contiguous zone to 18 miles and its territorial sea to 12 miles.[300]

The Convention establishes methods for measuring baselines for the territorial sea,[301] and declares rules for innocent passage through the territorial sea. All States' ships enjoy a right of innocent passage through the territorial sea, subject to the Convention's other principles. Passage means navigation through the territorial sea for traversing that sea without entering internal waters, for proceeding to internal waters, or for making for the high seas from internal waters. Passage includes stopping and anchoring, but only incident to ordinary navigation or if necessary because of *force majeure* or distress. Passage is innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State." Such passage must take place in conformity with the Convention and "other rules of international law." Foreign flag fishing vessel passage is not considered innocent if these vessels do not observe published coastal State regulations designed to prevent these vessels from fishing in the territorial sea. Submarines must navigate on the surface and show their flag,[302] unless a State consents to submerged transit; no State has done so publicly.[303] Aircraft do not have a right of innocent passage above the territorial sea,[304] unless allowed to do so by the coastal State; most coastal States have agreed to allow commercial aircraft overflight, but not necessarily military or other State aircraft.[305] Coastal States may not hamper innocent passage and must give appropriate publicity to dangers to navigation within their territorial seas of which they have knowledge.[306] However, surface warships enjoy a right of innocent passage.[307]

Coastal States may act to prevent passage that is not innocent. For ships proceeding to internal waters, a coastal State may take necessary steps to prevent breaches of conditions to which admission of those ships to those waters is subject. Subject to a provision related to straits passage declaring that there can be no suspension of international straits passage, a coastal State may, without discrimination among foreign-flag vessels, suspend temporarily innocent passage of these vessels in specified areas of its territorial sea if the suspension is necessary for protection of the coastal State's security, and only after the suspension has been published.[308] How long a temporary suspension may be imposed is not clear, but it cannot be factually permanent.[309] Foreign-flag vessels in innocent passage must conform to coastal State regulations enacted in conformity with the Convention and "other rules of international law," as well as regulations relating to transport

and navigation.[310] The Convention also provides for charges on merchant ships and criminal and civil jurisdiction over merchantmen.[311] All of the foregoing applies to government ships operated for commercial purposes, and all but the civil jurisdiction rules apply to government ships operated for non-commercial purposes. The Convention does not affect government ships' immunities enjoyed under the Convention or "other rules of international law."[312] If a warship does not comply with a coastal State's regulations on territorial sea passage and disregards a request for compliance, the coastal State may require that warship to leave the territorial sea.[313]

A 1960 conference failed to resolve the issue of the width of the territorial sea; debate centered around a 6 or 12-mile belt, and a compromise of a 6-mile territorial sea coupled with a 6-mile fishing zone failed by one vote.[314] The 1965 *Restatement (Second)* cautiously says that "A state does not violate the rights of another state by setting the breadth of the territorial sea at three nautical miles,"[315] but otherwise generally confirms Convention principles.[316] Whether the Iranian and Saudi claims as of 1980 to 12-mile territorial seas were legitimate is debatable,[317] but by the end of the war they were in the clear majority.

The 1982 LOS Convention declares a 12-mile belt as the maximum claim over which a coastal State may claim sovereignty, including its airspace, seabed and subsoil.[318] The LOS Convention adopts Territorial Sea Convention baselines measuring methodology, adding provisions for low-tide elevations, mouths of rivers and reefs, and states that offshore installations and artificial islands are not permanent harbor works in determining baselines near ports.[319] The *Restatement (Third)* takes the LOS Convention position on breadth of the territorial sea,[320] noting that some countries, including the United States at that time (1987), might claim less than 12 miles.[321]

In 1958, 9 of 75 coastal States had claimed a 12-mile territorial sea; 2 claimed over 12, and 45 asserted the traditional 3-mile limit. By 1965 26 of 85 coastal States claimed a 12-mile sea, 3 claimed over 12, and 32 claimed a 3-mile limit. A decade later the figures were: of 116 coastal nations, 54 claimed a 12-mile sea, 20 claimed more than 12 miles, and only 28 clung to the 3-mile limit. Within a year of the beginning of the Tanker War (1980) the numbers were: of 131 coastal States, 76 claimed a 12-mile limit, 25 claimed more, and 23 held to a 3-mile limit.[322] This was the trend as delegates began negotiating the 1982 LOS Convention in the Seventies. It continued as a trend as the Tanker War began in 1980.

Besides permitting a 12-mile territorial sea claim,[323] the 1982 LOS Convention copies the Territorial Sea Convention contiguous zone provisions; its breadth has been expanded to 24 miles.[324] The LOS Convention provides that at least the outer 12 miles of a declared contiguous zone are subject to high seas freedoms of navigation and overflight if a coastal State has declared a 12-mile territorial sea. If the littoral State has a territorial sea of less than 12 miles, it may declare a contiguous

zone of up to 24 miles, with the balance of the zone retaining high seas freedoms.[325] The coastal State's right of hot pursuit from its contiguous zone under the LOS Convention follows High Sea Convention principles.[326] The LOS Convention adds a new provision, permitting States to control traffic in archaeological or historical objects found at sea, stating a presumption that these objects' removal from a contiguous zone without coastal State approval results in an infringement within coastal State territory or territorial sea of its contiguous zone-related laws.[327]

In 1983 the US *Oceans Policy Statement* recognized the rights of other States in waters off their coasts, as reflected in the LOS Convention, on the basis of reciprocity, *i.e.,* if a coastal State recognized the US' and other countries' rights and freedoms in the waters of the coastal State. The United States would exercise and assert its navigation and overflight rights and freedoms on a worldwide basis consistent with the balance of interests reflected in the Convention. The United States would not acquiesce in other States' unilateral acts designed to restrict the international community's rights and freedoms in navigation, overflight and other related high seas uses. The United States continued to claim a 3-mile territorial sea, however.[328] The result was that the United States would recognize other countries' valid claims under the 1982 LOS Convention navigational articles.[329] In that year, of 139 coastal States, 79 claimed a 12-mile territorial sea, the number claiming over 12 miles had declined to 20, and those claiming a 3-mile limit stood at 25.[330] In 1987 the *Restatement (Third)* recognized a 12-mile territorial sea.[331] The next year the United States claimed a 12-mile territorial sea in accordance with the LOS Convention.[332]

By 1989 the number of States claiming a 3-mile limit had declined to 10, among them Bahrain, Qatar and the UAE; a decade later it was down to 4. By 1989 Iran, Iraq, Kuwait and Saudi Arabia had joined the United States and 103 other States in proclaiming a 12-mile territorial sea.[333] Whether a State was party to the LOS Convention or not, and many 12-mile claimants were by 1997, it is fairly safe to say the 12-mile limit had become a customary norm by the end of the Tanker War (1988), and more certainly so a decade later.[334] A few countries—19 in 1989 and 15 in 1997—continued to assert territorial sea claims greater than 12 miles.[335] These were the subject of US and others' diplomatic protests.[336]

New rules for innocent passage was another major change between the Territorial Sea Convention and the LOS Convention. The basic right of innocent passage, the meaning of passage, and the rule that submarines must navigate on the surface unless there is coastal State consent that they remain submerged, remain the same, as do rights of protection for the coastal State, principles for charges for traversing the territorial sea and criminal and civil jurisdiction applicable to all ships, and the statement that with certain exceptions in the treaty, the Convention does not affect immunity of warships and government ships operated for non-commercial purposes. The rule—that if a warship does not comply with coastal State regulations

on territorial sea passage and disregards a request for compliance made to it, a coastal State may require that warship to leave the territorial sea—was also retained, the Convention adding that the offending war vessel must leave "immediately."[337]

Principal innovations in the LOS Convention deal with defining innocent passage; laws and regulations a coastal State may impose relating to innocent passage; providing for sea lanes, traffic separation schemes, foreign nuclear-powered ships and vessels carrying nuclear or other inherently dangerous or noxious substances; a coastal State's duties; definition of a warship; and flag State responsibilities for damage caused by a warship or a government ship operated for non-commercial purposes.

As in the Territorial Sea Convention, the LOS Convention declares that passage is innocent so long as it is not prejudicial to the coastal State's peace, good order or security. Such passage must take place in conformity with the Convention "and with other rules of international law,"[338] referring to the law of armed conflict.[339] The LOS Convention enumerates activities during passage considered "prejudicial to the peace, good order or security" of the coastal State:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any manner in violation of the principles of international law embodied in the Charter of the United Nations;
(b) any exercise or practice with weapons of any kind;
(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
(d) any act of propaganda aimed at affecting the defence or security of the coastal State;
(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device;
(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary [*i.e.*, health] laws and regulations of the coastal State;
(h) any act of wilful and serious pollution contrary to [the] Convention;
(i) any fishing activities;
(j) the carrying out of research or survey activities;
(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
(l) any other activity not having a direct bearing on passage.[340]

Most commentators say the list is exclusive.[341] As under the Territorial Sea Convention, submarines transiting the territorial sea must navigate on the surface and show their ensign,[342] and innocent passage does not include a right of overflight.[343]

A coastal State may adopt regulations, in conformity with the Convention and "other rules of international law," *i.e.*, the LOAC,[344] relating to innocent passage through the territorial sea with respect to safety of navigation and regulation of maritime traffic; protection of navigational aids and facilities and other facilities

or installations; protection of cables and pipelines; conservation of the sea's living resources; prevention of infringement of the coastal State's fisheries laws; preservation of the coastal State's environment and prevention, reduction and control of pollution of the coastal State; marine scientific research and hydrographic surveys; and prevention of infringement of the coastal State's customs, fiscal, immigration or health laws. These laws do not apply to foreign ship design, construction, manning or equipment unless the laws give effect to "generally accepted international rules or standards." The coastal State must publicize these laws. Foreign ships in innocent passage must comply with these laws and all generally accepted international regulations relating to prevention of collisions at sea.[345] The Convention list of regulations is "exhaustive and inclusive."[346]

The Convention allows coastal States to require foreign ships exercising the right of innocent passage to use sea lanes and traffic separation schemes, where necessary for navigational safety. Tankers, nuclear-powered vessels and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to these sea lanes. A coastal State must indicate these sea lanes and separation schemes on publicized charts.[347] Foreign nuclear-powered vessels and ships carrying nuclear or other inherently dangerous or noxious substances must carry documents and observe special precautionary measures established for them by international agreements while in innocent passage.[348]

The LOS Convention modified the coastal State's duties and obligations with respect to innocent passage. Besides declaring that a coastal State may not hamper innocent passage in form or fact, the Convention stated that in particular, in applying the Convention or regulations adopted in conformity with the Convention, a coastal State may not "(a) impose requirements on foreign ships which have the practical effect of denying or impairing... innocent passage; or (b) discriminate in form or fact against ships of any State or against ships carrying cargoes to, from or on behalf of any State." As in the 1958 Convention, a coastal State must publicize any danger to navigation, of which it has knowledge, in its territorial sea. A coastal State may suspend innocent passage temporarily in specified areas of its territorial sea if suspension is necessary for protecting its security. This suspension may take effect only after it has been published.[349]

If a warship or other non-commercial government vessel does not comply with legitimate coastal State regulation concerning innocent passage, the flag State bears responsibility for any loss or damage to the coastal State resulting from this non-compliance.[350]

Despite Territorial Sea Convention and LOS Convention articles according a right of warship unnanounced and unimpeded innocent passage,[351] as of 1989, 43 States, including Iran, claimed a right to control foreign-flag warship entry into their territorial seas, requiring prior authorization or permission, prior notice, or

limits on numbers present at one time.[352] Twenty-six States, including Iraq and Oman, specifically recognized the right of warship innocent passage.[353]

By 1996 57 States had claimed contiguous zones of 4 to 24 miles, including Bahrain, Iran, Iraq, Oman, Qatar, Saudi Arabia and the UAE.[354] Although the Congress considered in 1991-92 legislation to extend the US contiguous zone to 24 miles, it failed to pass.[355] In 1999, however, the United States proclaimed a 24-mile contiguous zone, as reflected in the LOS Convention. The US proclamation stated that high seas freedoms, *e.g.*, of navigation and overflight, apply in the zone and that the proclamation did not alter US or other States' rights and duties in the US EEZ.[356] Two countries bordering the Persian Gulf were among 18 States asserting a right to include protecting national security interests; Iran did so in 1993 and Saudi Arabia at some earlier date. The United States and other countries have protested most of these claims as not being within rights permitted under the Territorial Sea Convention or the LOS Convention.[357] These general security claims might be contrasted with the US defense zones of the early part of this century, which limited or temporarily excluded navigation.[358] The latter, promulgated decades before standards were stated in the LOS conventions, would still pass muster in most cases.

The rules for baselines determinations are virtually the same under the 1958 and 1982 conventions.[359] However, the measurement of them has caused numerous diplomatic protests and US FON operations,[360] the principal problem being declarations of straight baselines under the Territorial Sea Convention and the LOS Convention.[361] If a country claims a territorial sea and a contiguous zone or other area, *e.g.*, an EEZ, fishing zone or continental shelf based on erroneous calculation of baselines pushing lines toward the high seas, the result may be that these areas' outer boundaries will encroach on what should be high seas under the 1958 or 1982 conventions. There have been numerous cases where States have protested erroneous assertions of straight baselines.[362] Of over 75 States and their dependencies in a 1996 list, 4 countries bordering the Persian Gulf, Iran, Oman, Saudi Arabia and the UAE, had baselines the United States considered miscalculated. However, only those of Iran, Oman and Saudi Arabia were declared before or during the Tanker War.[363] Since the Persian Gulf is so narrow, its coastal States when asserting claims to the continental shelf, *etc.*, have been forced to divide sovereignty or jurisdiction among them,[364] and the only issues related to erroneous baseline claims involve territorial sea and contiguous zone claims that may be excessive. If these claims were excessive, the result could be that a Persian Gulf coastal State might claim policing authority[365] in a contiguous zone area that is subject only to high seas law, such law perhaps being limited by legitimate EEZ, continental shelf, *etc.*, claims considerations.[366] Similarly, a territorial sea claim that extends too far into the high seas could result in claims by the coastal State of improper activity in the disputed waters, with a counterclaim by the State of the

flag of, *e.g.*, a transiting warship that the area is high seas for navigational and other purposes, although perhaps limited by legitimate continental shelf, *etc.*, claims considerations.

*b. Conclusions.* A US movement toward ratifying the 1982 LOS Convention may mean that tangles of claims resulting from Territorial Sea Convention deficiencies will gradually be eliminated. However, issues of warship innocent passage, excessive baseline claims, excessive territorial sea and contiguous zone claims and disputes over whether the LOS Convention lists of activities for declaring passage prejudicial to coastal State peace, good order or security is exclusive, will continue to fuel debate on the meaning of the LOS Convention as it applies to the territorial sea and contiguous zone.

*c. The Territorial Sea, the Contiguous Zone, and the Tanker War.* There were few LOS issues related to territorial sea or contiguous zone passage during the Tanker War. Although Iran purported to restrict the right of warship innocent passage in her territorial sea, there is no record of any incidents arising during the Tanker War; Iran's claim to assert national security as a basis for contiguous zone jurisdiction came over a decade after the conflict.[367] There is no record of Saudi Arabia's claim of national security for her contiguous zone[368] figuring in the war. Although many Persian Gulf States began the war with territorial seas of less than 12 miles, by the end of the conflict most had asserted a 12-mile belt as the 1982 LOS Convention and customary law allow, and two (Iraq, Oman) had explicitly said warships were entitled to innocent passage like merchantmen.[369] Saudi Arabia proclaimed a safety corridor through her and GCC States' territorial sea, presumably with those States' authorization, to facilitate tanker traffic; there was nothing in the law of the sea forbidding this. Indeed, the LOS Convention allows establishment of sea lanes and traffic separation schemes. Similarly, Iran was free under the LOS to direct coastal convoying of its ships in its territorial sea as a means of controlling territorial sea traffic lanes and traffic separation. However, these convoys were subject to Iraqi attack under the LOAC if they were carrying war-fighting or war-sustaining goods, *e.g.*, oil.[370]

Two aspects of Iranian naval maneuvers deserve mention, however. When Iran conducted naval maneuvers in Saudi territorial waters,[371] Iran committed a clear violation of the LOS Convention[372] and a violation of the more general standard of the Territorial Sea Convention, *i.e.*, which forbids "Passage. . . prejudicial to the peace, good order or security of the coastal State."[373] Given the Iranian track record by then, these maneuvers were clearly prejudicial to Saudi Arabia under both the LOS Convention and the Territorial Sea Convention. The maneuvers, depending on their nature, also may have violated the law of naval warfare,[374] applicable under the other rules clauses of the Territorial Sea Convention and the LOS

Convention.[375] On the other hand, to the extent that Iran proposed to conduct naval maneuvers in its own territorial sea, whether part of territorial waters permitted under the LOS or high seas included within an excessive claim due to erroneous baseline claims,[376] such military activity was allowable; its territorial sea was under Iranian sovereignty.[377] Only if Iran coupled these maneuvers with closure of its territorial sea more than temporarily, without equal treatment of all seafarers, or without notice[378] was Iraq's protest[379] justified. The record does not show that any of this was the case. However, to the extent Iranian maneuvers may have affected traffic through the Strait of Hormuz, which was nearby, different criteria, *i.e.,* those for straits passage, were involved.[380]

*5. Access to Ports, Roadsteads and Internal Waters*

"Among writers, the better line of authority supports the view that as a point of law, foreign merchant vessels in port are subject to the local jurisdiction.... On the other hand,... [other authorities] indicate that there are exemptions from the local jurisdiction as a matter of right, and not merely as a matter of courtesy or comity."[381] Similarly, territorial waters and ports are, "as a rule, open to men-of-war as well as to merchantmen of all nations, provided they are not excluded by special international treaties or special Municipal Laws of the littoral States."[382] Nevertheless, "[t]he status of the waters in ports, harbors, roadsteads, and the mouths of rivers is... different from that of the waters of the maritime belt...; for the former are national or internal, and the latter territorial."[383] While Oppenheim's treatise made these statements before the LOS conventions were negotiated, they are still true. Modern port facilities are much more complex today,[384] but principles governing access to them are similar.

The ensuing analysis examines the general right of access to internal waters (a collective term for ports, roadsteads, rivers and canals) for warships and merchant vessels under the law of the sea. Particular claims for protection of values (*e.g.,* power, through attempts to assert jurisdiction over ships) will be noted. The geographic arena for analysis ends, however, at the water's edge; no attempt will be made to explore manipulation of the wealth or other processes through devices such as customs duties, or access to the land through immigration.

*a. Analysis.* Principles of relatively exclusive coastal State control of the territorial sea apply to internal waters. They are part of the State's sovereign territory.[385] Internal waters have been variously defined and titled,[386] and in some cases national legislation whose primary impact is from the sea, *e.g.,* the US Inland Rules of the Nautical Road,[387] governing signals and lights for transiting US navigable waters, may require compliance while in coastal State territorial seas.[388] The principal concern here is the arena of port facilities, "a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking;"[389]

roadsteads; and access to these, as through the territorial sea, internal waters and navigable rivers. "Internal waters," for purposes of this study, are, as stated in the Territorial Sea Convention, "Waters on the landward side of the baseline of the territorial sea;"[390] this is also the 1982 LOS Convention definition.[391] Since the outermost permanent harbor works forming an integral part of a harbor system are part of the coast,[392] and the coast is the fundamental baseline,[393] waters on the other side of the line are internal waters. Roadsteads, if normally used for loading, unloading and anchoring ships, and if wholly or partly outside the territorial sea's outer limit, are included in the territorial sea.[394] Thus roadsteads within the territorial sea and extending outward into the high seas create a jurisdictional "bulge"[395] in favor of the littoral State. On the other hand, if a roadstead is partly within territorial and internal waters, the baselines approach[396] operates to split it into two parts. The LOS Convention adds that offshore installations and artificial islands are not considered permanent harbor works[397] and therefore are not part of the territorial sea. Since the baseline division for rivers flowing into the sea is a straight line across the mouth,[398] all landward river waters are internal in nature, except rivers forming a boundary or rivers declared open to all traffic by treaty.[399] The Shatt al-Arab is an example of such a waterway.[400]

Early nineteenth century State practice permitted receiving, during peacetime,

> vessels of all countries into... ports, to whatever party belonging, and under whatever flag sailing, pirates excepted, requiring of them only the payment of the duties, and obedience to the laws while under their jurisdiction without adverting to... whether they had committed any violation of the allegiance or laws obligatory on them in the countries to which they belonged,. . . in assuming such a flag, or in any other respect.[401]

That is still the rule today.[402]

*Schooner Exchange v. McFaddon* restated the customary right of foreign warships to enter ports in time of peace unless local law closed the ports.[403] Customary law once stated that during war enemy warships can be kept from ports by force, *e.g.,* blocking access by obstructions that result in also barring neutral merchant traffic, but such obstructions should "be retained only as long as needed for belligerent purposes."[404] If a channel for nonbelligerent shipping was left open, with designated hours for travel, then customary principles would be satisfied.[405] Today the LOS Convention allows closure of the territorial sea on a temporary basis, without discrimination in form or fact among foreign ships, if suspension is necessary to protect a coastal State's security and if the coastal State publishes notice of closure.[406] Territorial sea closure under these circumstances necessarily implicates closure of a port within the territorial sea and those on the internal waters side of the line.[407] The coastal State and the flag State of a transiting warship or merchantman retain their self-defense rights under these circumstances, the

coastal State its territorial interests and the vessel's flag State its interests in the ship.[408]

The 1982 Convention also follows prior rules in the 1965 Transit Trade Convention governing landlocked States, *i.e.*, those countries that have no seacoast, the Territorial Sea and High Seas Conventions,[409] and the 1921 Freedom of Transit Convention,[410] and principles in the GATT, art. V.[411] Landlocked States have rights of access to and from the sea to exercise their rights under the law of the sea, including transit through countries (transit States) whose territory a landlocked State must use to access the sea. Landlocked and transit States must agree on terms of transit through bilateral, multilateral or regional agreements.[412] Landlocked and transit States may agree upon overland pipelines in place of rail, road or water transport.[413] Vessels flying a landlocked State flag must be treated equally in maritime ports.[414] Transit States, "in the exercise of their full sovereignty over their territory,... have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part [of the LOS Convention] shall in no way infringe their legitimate interests."[415] The Transit Trade Convention declares that it does not prescribe belligerents' and neutrals' rights and duties during war, saying that it continues in force during wartime "so far as such rights and duties [of belligerents and neutrals] permit." The Convention is also subject to the Charter.[416] The LOS Convention and the 1958 LOS conventions achieve the same result through application of the other rules clauses, which declare that the law of armed conflict applies in certain situations.[417] To the extent that Trade Transit Convention, the LOS Convention and High Seas or Territorial Sea Convention provisions coincide, they reinforce customary law on the subject of access of landlocked States.[418]

The LOS Convention prevails over the Territorial Sea Convention for parties to the LOS Convention;[419] however, as noted above, many of its provisions are similar to or identical with the 1958 Convention, and therefore should be given similar or identical application. The LOS Convention also provides that it does not alter States' rights and obligations arising from other treaties compatible with it if they do not affect enjoyment of other States' rights and obligations under the Convention,[420] nor does the Convention affect international agreements expressly permitted or preserved by it.[421] Moreover, the LOS Convention must be considered in connection with other sources.[422] Similarly, the Territorial Sea Convention does not affect treaties already in force[423] and must be considered in connection with custom and other sources.[424] Therefore, examination of past trends in the law, with particular emphasis on US practice, is appropriate.

States have exercised the option stated in *Schooner Exchange*[425] to limit entry of foreign warships, particularly during times of crisis. In 1805, seven years before *Exchange*, the US Congress authorized the President to forbid entrance of a foreign armed vessel or its master upon proof that a trespass, tort or spoilation had been

committed, or that vessels trading in US commerce had been interrupted or vexed. The legislation expired in 1807.[426] In that year President Thomas Jefferson excluded British vessels by proclamation because of the *Chesapeake* affair.[427] In 1820 Congress forbade warship entry into all but designated major commercial ports except in distress situations. The legislation expired two years later.[428] During the Civil War President Abraham Lincoln directed that foreign warships would be treated on the basis of reciprocity accorded US warships abroad.[429] (By 1878, however, the United States had declared an open-ports policy, reserving the right to ask foreign warships to leave if the law of nations or US treaties required departure).[430] Other States continued to claim exclusionary or regulatory rights,[431] and by 1909 the United States, through the Navy Department General Board, could except certain ports from warship visits. Otherwise, no permission was required.[432]

Besides customary claims of merchant ships' right to enter another State's ports to load or unload cargo, the United States and other nations have concluded bilateral agreements (for the United States, often in the form of peace, amity or friendship, commerce and navigation (FCN) treaties), usually guaranteeing reciprocal rights. The first for the United States came in 1778 with France,[433] and the trend continued through the next two centuries. Warships were occasionally given access on the same terms as merchantmen. Often warships were not mentioned; sometimes they were given restricted access. Coastal trading, *i.e.,* cabotage, was nearly always reserved for port State ships. Many agreements included most favored nation (MFN) clauses,[434] which grants all favors granted to others in the past or future, to other States.[435] Other States have negotiated similar networks.[436] In some situations, *e.g.,* China, entry was restricted to designated Chinese ports, with nothing said about Chinese vessels trading in US ports.[437] There is nothing in the record of the latter treaties to indicate that these agreements restricted entry for national security reasons; undoubtedly national policies of exclusion of foreigners generally, and foreignors' ideas, were behind the Asian exclusion policies. If one accepts the view that these "many hundreds of bilateral treaties"[438] create a customary right,[439] then by the early twentieth century a right of entry founded in custom existed, at least for merchantmen.[440] The 1982 LOS Convention would exclude MFN clause applicability to agreements with landlocked States for goods and people transiting countries to and from the sea.[441]

In 1898 an Institute of International Law resolution had provided that "As a general rule access to ports. . . is presumed to be open to foreign vessels."[442] By 1928 the Institute had changed its resolution to read, "as a general rule access to ports. . . is open to foreign vessels."[443] Lowe, citing the rapporteur for the Institute, asserts the 1928 formulation was *de lege ferenda.*[444] Nonetheless, if the proposition is accepted that the hundreds of bilateral agreements, and practice under them by 1928, amounted to custom, which under traditional analysis when coupled with a

bilateral agreement between contending States overrides the secondary source of publicists,[445] then today there is a basic right of peacetime entry.

The 1923 Convention and Statute Concerning Regime of Maritime Ports provided for free and equal access of all vessels, public and private, to parties' ports, subject to equality of usual port charges.[446] The Convention does not apply "to warships or vessels performing police or administrative functions, or... exercising any kind of public authority, or... vessels which for the time being are exclusively employed for... Naval, Military or Air Forces of a State."[447] The Convention also does not apply to fishing vessels, their catch, or cabotage.[448] The Statute does not require admitting passengers or goods where health, security or municipal laws forbid such.[449] States may suspend equality of treatment, but this is subject to World Court review.[450] An "emergency affecting the safety of the State or the vital interests of the country may, in exceptional cases, and for as short a period as possible, involve a deviation from" equal treatment.[451] Nor does the Convention prescribe belligerents' and neutrals' wartime duties, although the Convention "continue[s] in force in time of war so far as such rights and duties permit."[452] These latter clauses are consistent with the LOS Convention and Territorial Sea Convention suspension and their "other rules" clauses.[453] If they are not, the LOS Convention clause paramount[454] or the later in time treaty construction rules[455] would give primacy to the other rules clauses. The Ports Convention is also subject to the Charter and the right of self-defense.[456] By 1999, 42 States were party, including Iraq since 1929; treaty succession principles may move the total up.[457]

The 1921 Barcelona Convention and Statute Concerning Freedom of Transit has similar terms for vessel transit across the territory of its parties,[458] which includes the territorial sea and inland waters. As of 1999 there were 33 parties, none of which bordered the Persian Gulf; many are also Ports Convention parties.[459] The Barcelona Convention is subject to the same considerations, *e.g.*, the Charter, as the Ports Convention.[460]

The 1963 Mar del Plata Convention pledges parties' best efforts "to prevent unnecessary delays to vessels, passengers, crews, cargo and baggage in [administering] laws relating to immigration, public health, customs and other provisions relative to arrivals and departures of vessels."[461] The OAS Inter-American Port and Harbor Conference is charged with adopting standards and recommended practice for signatory States.[462] If a State cannot comply, it must notify the OAS General Secretariat immediately.[463] Although the Convention does not distinguish between merchant ships and warships, its language appears to relate more to the former. No rules for suspension of territorial sea innocent passage, warships or armed conflict are stated, but under principles of treaty interpretation applicable to the Territorial Sea Convention and the LOS Convention, the latter's suspension provisions and other rules principles, as a matter of custom and treaty law, apply.[464] Likewise, the Charter applies in self-defense situations.[465] Presently 12

American States are party to this regional treaty, including the United States.[466] To the extent its principles are consistent with the general LOS, the Convention reinforces them.[467]

The 1965 Convention on Facilitation of International Maritime Traffic repeats Mar del Plata pledges[468] but excludes warships and pleasure yachts from coverage.[469] Allowing better treatment under national law or other treaties, the Convention also permits "temporary measures. . . necessary to preserve public morality, order and security or to prevent the introduction or spread of diseases or pests affecting public health, animals or plants." Matters for which the Convention does not provide are subject to national laws.[470] No specific provisions declare when territorial sea innocent passage may be suspended, or the effect of armed conflict, but under principles of treaty interpretation applicable to the Territorial Sea Convention and the LOS Convention, these rules as treaty and customary law apply.[471] Likewise, the Charter applies in self-defense situations.[472] Eighty States, including Iran and Iraq, are party to the Convention, Iraq's accession dating from 1976.[473] To the extent the Convention's principles are consistent with the general LOS, they reinforce them.[474]

The results of arbitral awards are consistent with LOS principles. The Saudi Arabia-ARAMCO arbitration (1958) confirmed that "according to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require."[475] The *Kronprins Gustaf Adolf* arbitration, considering Sweden-US bilateral agreements,[476] noted the right of policing outbound wartime traffic stated in the treaties derogated from a general right of free navigation to and from ports, also recited in the bilaterals.[477]

In 1945 Hyde said that there was a corresponding obligation upon each maritime power not to deprive foreign vessels of commerce of access to all of its ports.[478] Similarly, the Institute of International Law returned to the subject in 1957, declared for free access of commercial vessels, save in exceptional circumstances "imposed by imperative reasons. . . . [I]t is consistent with general practice. . . to permit free access to ports and harbors by such vessels."[479] Colombos thus aptly summarized competing claims for ports in 1967:

> (i) in time of peace, commercial ports must be left open to international traffic. The liberty of access to ports granted to foreign vessels implies their right to load and unload their cargoes; embark and disembark their passengers. . . . Freedom for foreign vessels to enter the ports of a State implies the right to load and unload goods; (ii) no port can ever be shut against a foreign ship seeking shelter from tempest or compelled to enter it in distress; (iii) purely military ports may be closed to all foreign warships or merchant vessels on the ground of justifiable precaution; (iv) entry of ships of war even into commercial ports may be subjected to certain restrictions both as regards the number of vessels allowed to enter and the length of their stay.[480]

Whiteman took essentially the same position in 1965.[481] The *Restatement (Second), Foreign Relations* said in 1965 that "In the case of vessels not in military service, the ports of a state are open to their visit without any prior notification, except where the state has expressly provided otherwise."[482] For military vessels, the *Restatement* said "notification of an intended visit is customary. It is not necessary that the coastal state expressly communicate... its consent to the visit.... [T]hat it does not expressly prohibit the visit is sufficient consent."[483] Although comments and reporters' notes for these *Restatement* sections do not support these propositions, it is clear the *Restatement* drafters saw a general right of entry under international law for merchant ships and warships, subject to advance notice for the warship and a right of exclusion otherwise, presumably by international agreement or special notice from the littoral State, as in the case of quarantine for plague. O'Connell says there is no general port access right, arguing that if a State opens its ports, it must open them to all merchantmen, subject to usual rules pertaining to health, *etc.* A State may close its port or ports but must do so as to all ships.[484]

The *Restatement (Third)* takes no clear position on warship entry: "In general, maritime ports are open to foreign ships on condition of reciprocity,... but the coastal state may temporarily suspend access in exceptional cases for imperative reasons, such as the security of the state or public health."[485] The reporters' note does not mention warships, being content to say that "States may impose.. special restrictions on certain categories of ships[,]" citing Convention on Liability of Operators of Nuclear-Powered Ships and New Zealand's barring US nuclear-powered ships, *i.e.,* US warships, from its ports.[486] The likely *Restatement* position appears to be that merchantmen have an unfettered right to enter foreign ports, subject to principles of temporary closure for security and other reasons, and that there is a presumption that warships may also enter but subject to permission from the coastal State. (The *Restatement (Third)* is very clear, however, in saying that warships have a right of innocent passage,[487] as distinguished from right of entry into port without coastal State permission.)

Recent United States bilateral agreements involving some former Soviet bloc States and the People's Republic of China (PRC) may evidence a trend toward less open access. Agreements with the PRC, Poland and the former USSR all provide for advance notice—24 hours to four days—with respect to any merchant vessel wishing to enter port.[488] The agreements do not apply to warships or fishing vessels.[489] By clear implication, permission to enter any party's port requires advance notice and permission.

The PRC and USSR Agreements designate ports for entry in each country, the PRC agreement stating that the list is subject to review. Notably absent from the lists are major ports related to defense installations—*e.g.,* in the former USSR, Petropavlovsk and Vladivostok; in the United States for the former USSR, Charleston, South Carolina; all Rhode Island ports; Norfolk, Virginia area; San

Diego, California; Pearl Harbor, Hawaii. However, some ports with nearby defense facilities are included: in the former USSR, Murmansk, Arkhangel'sk, Odessa, Leningrad (now St. Petersburg), Yalta, among 40 ports open; in the United States, Seattle and Newport, Rhode Island among ports open to the PRC.[490]

These recent bilaterals reflect the present status of competing claims today for voluntary access to ports. There is a general right of access to ports for merchant ships to discharge or load cargo in time of peace. To the extent that the former USSR-US and PRC-US bilateral agreements list ports and thereby deny merchant vessels under their flags access to others without reason, the agreements could be said to violate general international law. However, because these are bilateral treaties establishing special or local rules between States,[491] affecting only them, there is no violation of international law. Special State interests—*e.g.*,quarantine to protect health, customs inspection to prevent smuggling, barring warships to ensure national security—may override the general claim of access for reasonable periods of time, and perhaps forever in the case of warships. For example, a quarantine exclusion could be imposed during the epidemic. Strict customs enforcement, during an actual or anticipated influx of illicit goods, might be required for years, *e.g.*, in narcotics trafficking. Ships considered dangerous because of cargo (*e.g.*, liquid natural gas, LNG) or propulsion system (*e.g.*, nuclear power), may be regulated as to access. Ports might be barred to some or all foreign merchant or war vessel traffic because of national security concerns for greater or lesser periods of time, ranging from an indeterminate period of low-intensity conflict through defined periods of actual war to a few hours needed for critical fleet or other evolutions. Relief through access for vessels in distress or driven in by *force majeure* remains a universal right with few, if any, restrictions.[492]

Thus voluntary access to ports by merchantmen stands as a right, with exceptions depending on temporary circumstances such as incidence of infectious disease necessitating quarantine precautions, or, in the situation of relative intensity of security interests ranging from low-level conflict (*e.g.*, the now-concluded Cold War) to all-out protective exclusivity (*e.g.*, for vital military installations or during a hot war) for military ships. However, the right of foreign-flag military vessels to a right of innocent passage, qualified as, *e.g.*, in the case of submarines, as distinguished from port calls, remains a cardinal rule of international law.[493]

Thus far voluntary port entry has been considered; international law also provides principles for entry in distress or due to *force majeure*. As Colombos stated in his 1967 summary of principles on ports entry,[494] a general claim of right of entry for all vessels has been recognized for situations of entry in distress or due to *force majeure*. "If a ship is driven in by storm, carried in by mutineers, or seeks refuge for vital repairs or provisioning, international customary law declares that the local state shall not take advantage of its necessity," Jessup wrote in 1927.[495]

The customary claims developed through court decisions, at least as early as 1803 in England[496] and 1809 in the United States.[497] French courts applied a similar principle.[498] By 1820 the principle had been echoed in US legislation.[499] The United States and other States began to include clauses in bilateral agreements, often FCN treaties with MFN clauses,[500] as a further assertion of the unqualified right of entry due to *force majeure* or distress from the eighteenth century onward. Early treaties often added enemy or piratical attacks as reasons to grant safe haven; agreements frequently pledged repair facilities availability or return of pirate-seized goods.[501] These treaties usually were the same as those permitting free or qualified entry into ports, or were in agreements touching upon such rights.[502] The treaties did not discriminate against warships, and *Schooner Exchange* considered immunity of a French privateer, the *Balaou*, driven into Philadelphia by bad weather.[503] Legal opinions within the British and US governments, instructions to their representatives and diplomatic correspondence of the era, further confirm that the bilaterals did, and do, articulate custom.[504] Nineteenth century arbitrations took the same position.[505] Current commentators also recognize the principle.[506]

> Ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. This long recognized duty. . . permits assistance entry into the territorial sea or under certain circumstances aircraft without [coastal State permission]. . . to engage in *bona fide* efforts to render emergency assistance to those in danger or distress at sea. This right applies only when the location of the danger or distress is reasonably well known. It does not extend to entering the territorial sea or [its] airspace to conduct a search. Efforts to render assistance must be undertaken in good faith and not as a subterfuge.[507]

Prudence would suggest notifying the coastal State if possible, perhaps through national communications, and if the situation warrants and national notification is not possible, notification by the entering vessel or aircraft.[508]

***b. Conclusions.*** The Territorial Sea Convention and 1982 LOS Convention contributed little that is new to principles governing access to and from inland waters and ports, *etc.* The principal points of change or difference are that States can use their rights to temporarily suspend access to ports and inland waters through the LOS conventions' provisions for temporary suspension of innocent passage through the territorial sea,[509] and there is a stated right of transit for landlocked States to and from the sea, subject to agreement with transit States and those State's rights to protect their "legitimate interests."[510] The LOS conventions' provisions are subject to the LOAC, which includes the law of naval warfare, through the other rules clauses in particular situations, whether the LOS conventions articulate treaty or custom based norms.[511] Other general treaty suspension doctrines, *e.g.*, impossibility of performance, fundamental change of circumstances or

armed conflict,[512] might apply. UN Charter principles, *e.g.*, the right of self-defense, which trump treaty and perhaps customary norms, might apply.[513]

*c. The Tanker War and Access to and from Inland Waters and Ports.* Iraq became a *de facto* landlocked State early in the Tanker War, when Iran seized all of its coasts and effectively closed the Shatt al-Arab.[514] However, no obligations under the LOS Convention [515] arose because of closure by armed conflict; the LOS Convention phrase "no sea-coast"[516] means no physical sea-coast. Thus although States like Jordan, Kuwait, Saudi Arabia, Syria and Turkey negotiated transport of Iraqi goods, including Iraqi-originated oil to finance the war, through their territories by road, air and pipeline means,[517] there was no obligation under the law of the sea to conclude these agreements. To the extent that these materials contributed to the Iraqi war effort, and the LOS might be deemed to have applied, the LOAC governed through the conventions' other rules clauses.[518] Any LOAC obligation was also subject to objection on grounds of treaty suspension: impossibility, fundamental change of circumstances and war. [519]

On the other hand, Iran's attempts to disrupt neutral traffic to and from neutral Gulf ports[520] violated general LOS principles of access to ports. Besides being a violation of UN Charter, Article 2(4) insofar as the attacks violated or threatened neutrals' territorial integrity or political independence, the Security Council passed a resolution condemning this action.[521] The resolution was thus supportive of well-established law.

*6. Passage Through International Straits: The Strait of Hormuz*

A major Tanker War issue was passage through international straits,[522] *e.g.*, the Strait of Hormuz, a choke point vital for transporting oil from the Persian Gulf.[523] This sub-Part examines straits passage under the law of the sea, with particular emphasis on that waterway.

Before the LOS Convention negotiations, the law of the sea was unsettled as to rights governing straits passage. The Territorial Sea Convention provides that "There shall be no suspension of the innocent passage of foreign ships through straits. . . used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state,"[524] thus tying most straits passage to concepts of territorial sea innocent passage and declared nonsuspendable by Convention Article 16(4) in most cases.[525] In 1965 the *Restatement (Second), Foreign Relations* declared that innocent passage in straits between one high seas area and another high seas area "or the territorial sea of another state" could not be suspended.[526]

At the same time other LOS issues were emerging. For example, territorial sea claims asserted sovereignty beyond the traditional three-mile limit;[527] questions arose as to the meaning of innocent passage under the Convention, particularly

with respect to military aircraft and warships;[528] States began claiming EEZs, for which the 1958 Conventions stated no general rules;[529] and States began asserting special status for archipelagic waters. Broadened territorial sea claims by Iran and the UAE, plus Iranian claims to Abu Musa and the Tunis and Iranian and Omani baseline assertions, implicated the Strait of Hormuz during the Tanker War.[530]

The law of the sea as stated in large part in the 1982 Convention responds to these trends, recognizing six types of international straits and restoring the customary law of international straits:[531]

(1) straits used for international navigation and not completely overlapped by the territorial sea;
(2) straits used for international navigation connecting the high seas or an EEZ with the territorial sea of another country;
(3) straits used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ;
(4) straits used for international navigation and connecting one part of the high seas or an EEZ with another part of the high seas or an EEZ, where the strait is formed by an island of the State bordering the strait and the mainland of that State;
(5) straits used for international navigation and governed by treaties; or
(6) straits used for international navigation in archipelagic waters.

The Strait of Hormuz, connecting the Gulf with the Indian Ocean, today is in category (3).[532] To place the law governing the Strait of Hormuz in perspective, it may be useful to examine briefly the principles governing other kinds of straits, *i.e.*, Cases (1)-(2), (4)-(6).

*a. Straits Connecting High Seas or EEZ Areas.*

Case (1). If a strait connecting a high seas area or EEZ with another high seas area or EEZ has a corridor of high seas completely through it, *i.e.*, there is a band of navigable water over which no coastal State has claimed a territorial sea throughout the strait, that band of water is subject to the high seas LOS regime. High seas freedoms of overflight, navigation, *etc.*, subject to high seas users' obligations to observe due regard for others' exercise of freedom of the seas, apply.[533] Nearly 50 of these straits existed in 1989 because littoral countries had not claimed as much as they might for their territorial seas under the LOS Convention,[534] *i.e.*, 12 miles or 24 miles at a strait's narrowest point if both coastal States claimed 12 miles.[535] Only 25 existed in 1997.[536] The 1989 list included the Bahrain-Qatar Passage, and perhaps waters around Abu Musa Island in the Gulf.[537] (Iran occupied Abu Musa before the beginning of the Tanker War,[538] and whether the island is considered part of the UAE or Iran, there are enough waters around it and the Greater and Lesser Tunbs to support claims of high seas passage around them, between either

Iran or the UAE.)[539] There are 60 straits where the narrowest passage is greater than 24 miles, none of which are in the Gulf, except for the possibility of waters around Abu Musa.[540] Case (1) might be resolved differently by a strict reading of the Territorial Sea Convention and its nonsuspendable innocent passage regime for all straits except those covered by prior treaty,[541] with attendant problems of defining innocent passage under the Convention.[542] The 1958 Conventions also do not address EEZ issues. The LOS Convention resolves the Case (1) issue; if a high seas route with similar convenience with respect to navigational and hydrographical characteristics exists in the strait, straits passage special rules do not apply. General rules for, *e.g.*, freedom of navigation or overflight, apply.[543] If the high seas or EEZ corridor is not of similar convenience in navigational or hydrological characteristics, transit passage principles apply.[544] Before expanded territorial sea claims became admissible, the Strait of Hormuz would have fit within Case (1); its narrowest breadth is about 22 miles.[545]

**Case (2).** Where a strait connects high seas or EEZ waters with a coastal State's territorial waters, the territorial sea innocent passage regime applies,[546] except that the right of innocent passage is not suspendable.[547] The Bahrain-Saudi Arabia Passage is among these "dead-end" straits.[548] Here the LOS Convention coincides with the Territorial Sea Convention, except for the new LOS Convention innocent passage definition and the 1958 Conventions' omission of EEZ rules.[549] The innocent passage rules apply to straits connecting the high seas or an EEZ with an historic bay.[550]

**Case (4).** Where a strait connects a part of the high seas or an EEZ and another part of the high seas where an island of a coastal State and the coastal State's mainland forms the strait, the LOS Convention provides that territorial sea passage, *i.e.* innocent passage, applies, if a route to the high seas or EEZ seaward of the island is of equal convenience with regard to navigational and hydrographic characteristics.[551] As in Case 2 dead-end straits, passage through these straits cannot be suspended.[552] The 1958 Conventions give no clear response to this kind of claim; presumably the Territorial Sea Convention's nonsuspendable innocent passage regime applies.[553] There are no such straits in the Gulf.[554]

**Case (5).** The LOS Convention exempts longstanding treaty regimes governing straits passage from treaty regimes; here the analysis is nearly the same under the Territorial Sea Convention. It subjects its rules to all prior treaties; the LOS Convention permits derogation only if a treaty is longstanding.[555] Another kind of treaty that might govern straits passage would be a more recent treaty that is compatible with the LOS Convention.[556] No straits treaties[557] apply to the Gulf.

**Case (6).** The LOS Convention gives special rules for straits through archipelagic waters, which are substantially the same as innocent passage through international straits, except that archipelagic innocent passage is suspendable, while straits innocent passage is nonsuspendable.[558] This situation might occur if a

strait under prior law becomes encapsulated in an LOS Convention-permitted archipelago. There is no clear answer under the 1958 Conventions, but the Territorial Sea Convention general rule of nonsuspendable innocent passage in the absence of treaties, of which there are none, may apply.[559] There are no claimed archipelagos in the Gulf, and no island groups eligible for claims.[560]

**Conclusions as to Cases (1)-(2), (4)-(6).** The first and most important conclusion from the foregoing is that the Territorial Sea Convention, despite its omissions and ambiguities, when combined with the other 1958 Conventions' principles, and the LOS Convention, state a general policy of relative freedom of access through most straits, a high seas and EEZ regime in Case (1), straits through which there is high seas passage; Cases (2) and (4), nonsuspendable innocent passage for dead-end straits and straits between an island and the mainland where there is an alternate high seas route around the island; Case (6), transit passage through archipelagic straits. For Case (5), straits governed by treaty regimes, the result is virtually the same under the 1958 Conventions and the LOS Convention; the treaty applies. The second is that the LOS Convention clarifies the law of straits while recognizing LOS developments, *e.g.*, the EEZ.[561]

Only Case (1), concerning the Bahrain-Qatar Passage and waters around Abu Musa; Case (2), concerning the Bahrain-Saudi Arabia Passage; and Case (3), the Strait of Hormuz; apply to the Gulf. There is no record of claims regarding restricting passage, *etc.*, around Abu Musa or through the Passages. The Tanker War involved navigation and other passage through the Strait of Hormuz, and therefore the question of transit passage under the law of the sea as stated in the LOS Convention.

*b. Passage Through the Strait of Hormuz.* As a technical point of law, it is possible to argue that two regimes governed passage through the Strait of Hormuz during the 1980-88 Tanker War.

**(i) High Seas Passage Through Hormuz?** The Strait is about 22 miles wide at its narrowest points. If a view is taken that the maximum territorial sea claim admissible under the LOS was three miles, the position of the United States until 1983,[562] when the conflict had been raging for about three years, navigation, overflight, warship activity, *etc.*, within the Strait was subject to LOS high seas principles[563] in the middle 16 miles of the Strait and territorial sea principles[564] within the territorial seas of Iran, Oman and the UAE. Under this analysis, the Strait presented a Case (1) scenario.[565] There is no record of claims to this effect. Analysis now examines passage under Case (3), passage from a high seas area or EEZ through a strait to another high seas area or EEZ on the other end of a strait.

**(ii) Case (3): Strait of Hormuz Transit Passage and the Tanker War.** If the Territorial Sea Convention nonsuspendable innocent passage rule for straits used in international navigation[566] is combined with limitations on territorial sea innocent passage in the Convention, it is clear that a coastal State may not temporarily suspend passage in a strait for security reasons as it might for territorial sea innocent passage.[567] Passage in either case does not mean entry into internal waters.[568] It does mean stopping and anchoring incident to ordinary navigation or if rendered necessary by *force majeure* or distress.[569]

The general definition of innocent passage in the Territorial Sea Convention, "Passage is innocent so long as it is not prejudicial to the good order or security of the coastal State,"[570] leaves open a question of whether innocent passage is totally equated to straits passage under the Convention,[571] and therefore whether transiting fishermen engaged in fishing that is not contrary to coastal State regulations are in innocent passage.[572] The Convention also leaves open issues of whether flight (particularly by military aircraft) through the strait, forbidden without prior permission under the general territorial sea innocent passage regime,[573] or whether transiting submarines must navigate on the surface and show their ensign unless prior permission has been granted.[574] There were also questions of whether weapons practice (no matter how innocuous, such as topside loading machine drills); launching, landing or taking aboard aircraft (including, *e.g.,* aircraft involved in mail delivery or medical evacuation cases); launching, landing or taking aboard any military device; or electronic interference with coastal State facilities (*e.g.,* while tuning radars) could be conducted.[575] There can be issues related to jurisdiction over merchantmen, rules applying to State-owned commercial shipping, and whether a coastal State can ask a transiting warship to leave the strait of the coastal State for failure to comply with its otherwise legitimate territorial sea regulations.[576] Because the Territorial Sea Convention is subject to the law of armed conflict in situations where the LOAC applies,[577] and to the right of self-defense,[578] an anomolous result is that naval forces may transit a strait under those circumstances without regard to Convention rules. A further possible result is that strict insistence on the Convention by a coastal State or third States could result in more assertions of unnecessary claims under these principles, with attendant counterclaims of violations of the Charter[579] or the law of naval warfare.[580] These are hardly the kinds of results the Convention drafters contemplated.[581]

For Case 3 straits, those used for international navigation and connecting a part of the high seas or an EEZ with another part of the high seas or an EEZ and which include most strategically important straits including Hormuz,[582] the LOS Convention provides that all ships and aircraft enjoy a right of unimpeded transit passage.[583] Transit passage means exercise of the freedoms of navigation and overflight solely for continuous and expeditious transit of the strait between one part of the high seas or EEZ and another part of the high seas or EEZ. Continuous and

expeditious transit includes strait passage to enter, leave or return from a country bordering the strait, subject to that country's conditions for entry.[584] Transit passage exists throughout the strait, including its approaches, and not just a territorial sea overlapped area.[585] These approach areas are high seas or EEZ areas, for which high seas freedoms apply,[586] and are therefore not subject to a territorial sea innocent passage or straits transit passage regime. Activity not an exercise of transit passage is subject to other LOS Convention provisions,[587] including the law of armed conflict through the Convention's other rules clauses.[588] The LOS Convention transit passage rules are also subject to the Charter.[589] During early LOS Convention negotiations Saudi Arabia advocated the rules eventually adopted; Iran supported regulated passage and a special regime for the Gulf.[590]

While in transit passage, ships (including warships) and aircraft (including military aircraft) must: proceed without delay through or over the strait; refrain from activities other than those incident to their normal modes of continuous and expeditious transit unless they experience *force majeure* or distress; refrain from a threat or use of force against the sovereignty, territorial integrity or political independence of straits-bordering States in violation of the Charter; and otherwise comply with LOS Convention transit passage rules.[591] Ships in transit passage must also comply with generally accepted SOLAS standards and international regulations, procedures and practices for preventing, reducing and controlling pollution from ships.[592] Aircraft in transit passage must observe ICAO-established Rules of the Air as applicable to civil aircraft; State aircraft, *e.g.*, military aircraft, "will normally comply" with these and will always operate with due regard for aviation safety. They must monitor air control and distress frequencies assigned by the competent internationally designated air traffic control authority.[593] There is, of course, unquestionably a right of warship transit through and military aircraft overflight of these straits, unlike the rule against territorial sea overflight where warships, like all vessels have innocent passage rights.[594] Oceanographic research or surveys cannot be conducted without bordering States' prior authorization.[595] In terms of normal mode of transit under the LOS Convention,[596] this means submarines and other undersea vehicles may transit submerged; for today's submersibles, that is their normal operational mode.[597] Surface vessels may steam in formation, zig-zag, or deploy aircraft incident to normal modes of operation; they may use, *e.g.*, radar for navigation but not for attack.[598] They must not threaten bordering States' sovereignty, territorial integrity or political independence.[599] There is no requirement of prior notification of intent to exercise straits transit passage by aircraft or warships.[600]

Bordering States may designate sea lanes and prescribe traffic separation schemes for straits if necessary to promote safe navigation and must publicize these after approval by a competent international organization, *i.e.*, IMO. Vessels in transit passage must respect these lanes and schemes.[601] Hormuz was among

major straits subject to a traffic separation scheme during the Tanker War.[602] States bordering straits may prescribe rules relating to transit passage for safety of navigation and regulating traffic; preventing, reducing and controlling pollution; prevention of fishing and stowing fishing gear; loading or unloading goods, currency or persons in violation of a coastal State's customs, fiscal, immigration or health laws, and must publicize them.[603] If a strait is bordered by two or more countries, those countries may cooperate through agreements to establish navigational and pollution prevention, reduction or control devices.[604] However, these rules may not discriminate in form or fact among foreign ships or in application have the practical effect of denying, hampering or impairing the right of transit passage. This differs from territorial sea innnocent passage, which can be suspended temporarily; rules for straits cannot stop transit passage, even temporarily.[605] This principle applies to dangers to navigation that a coastal State must publicize.[606] Vessels in transit passage must comply with these rules, and the country of a State aircraft registered under its flag, or of a vessel registered under its flag, bears international responsibility for loss or damage to coastal States from violating these rules.[607]

*c. Conclusions.* During and before the Tanker War there were threats from Iran to close the Strait. The United States and other countries rightly resisted these claims, insisting on the right of freedom of transit through the Strait for all ships or aircraft entering or leaving the Gulf.[608] If the Strait had a strip of high seas through it (Case 1), under no circumstances could a coastal State lawfully close it.[609] If the Strait is considered under the LOS Convention straits transit passage regime (Case 3), no coastal State could close it either.[610]

Iran delivered a diplomatic note concerning transit of the Strait in 1987. The United States asserted that the right of transit passage was a customary norm,[611] a correct interpretation.[612] There were no other coastal State claims to limit warship or military aircraft transit; under the LOS Convention regime, States bordering straits may not limit passage of these platforms, which were entitled to transit the Strait in their normal mode, subject to LOS Convention rules on transit passage, which might include submarines transiting submerged and formation steaming by surface combatants. Although the record is sparse as to exactly where warships began escorting or convoying tankers, since this was also a normal mode of operation and a proper defensive measure, convoying, escorting or accompanying through the Strait would have been permissible.[613] Iran's traffic management scheme for the upper Gulf required merchant ship notification before coming close to its ports.[614] The LOS did not require prior notification of straits passage by any merchantman, and certainly not by any warship or State aircraft;[615] there is no indication in the record that this was required, however. Strait of Hormuz

traffic separation schemes did not figure in the war, except insofar as they may have channeled shipping, making it easier to attack ships.

The belligerents attacked neutral-flag vessels in or near the Strait, including its traffic separation schemes.[616] It was permissible for warships to defend themselves, and to come to the aid of stricken merchantmen, under these circumstances.[617] Thus it was lawful for the *Vincennes* and other US warships to defend themselves from Iranian speedboat and air attacks.[618] It would also have been proper for neutral navies, including those of Oman and the UAE, to remove mines and conduct other mine countermeasures in the Strait, so long as they did not impede straits transit passage and, in the case of navies of States bordering the Strait, giving adequate notice of their operations to remove these menaces to neutral navigation.[619]

## Part C. Nationality of Ships, Cargo and Other Interests

Ownership, financing and use of merchant ships has been a complex business for centuries. Ownership of cargo aboard vessels in bulk (*e.g.*, oil, cement, grain),[620] break-bulk (*e.g.*, bagged goods, crates), perhaps stowed on deck (*e.g.* earth-moving equipment, railway locomotives),[621] or containerized,[622] and subject to freight charges or other liens, has become a complex business. This Part begins by examining transnational[623] aspects of ship and cargo ownership and issues arising during the Tanker War before proceeding to development of trends in claims on the public international law plane.

Warships have always been under State registry, but even here lines can be less than clear. Privateering, where States commission private vessels to attack enemy shipping, was a practice that ended only in the mid-nineteenth century.[624] Increasingly today, governments own or charter vessels that are merchant vessels in appearance and use. Some, although seeming to be merchant ships in function, serve warships as naval auxiliaries, *e.g.*, tankers, cargo carriers, and refrigerator ships.[625] Still others serve military purposes, such as troopships, but may be controlled by a country's institutions other than its navy. Other government vessels with a law enforcement mission may be operated by government departments other than its navy, *e.g.*, the US Coast Guard, or local governments may operate craft like police or fire boats. In some cases these functions may be combined with naval forces. Dividing lines can be far from bright, especially for States with minimal coasts or maritime forces. This Part ends by examining these principles, with analysis of the Tanker War "reflagging" debate.

### *1. Defining "Ships"*

There is no general definition of "ship" in the law of the sea, even in the 1958 conventions and the LOS Convention. The 1962 amendments to the 1954 Oil Pollution Convention say that a ship is "any sea-going vessel of any type whatsoever,

including floating craft, whether self-propelled or towed by another vessel, making a sea voyage," and the MARPOL 73/78 definition is similar: "a vessel of any type whatsoever operating in the marine environment. . . includ[ing] hydrofoil boats, air-cushion vehicles[ACVs], submersibles, floating craft and fixed or floating platforms."[626] The 1986 Ship Registration Convention defines a ship as "any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both . . .."[627] Here the definition might be said to exclude warships, since they do not carry passengers or goods as a general rule.[628] General as they are, the 1962 and the MARPOL 73/78 definitions are more inclusive and have been accepted by most seafaring States,[629] although MARPOL's reference to fixed platforms might raise some seafarers' eyebrows. National legislation occasionally supplies varying definitions, most of which are in accordance with the Convention statement.[630]

Definition of a merchant ship under the law of the sea has fared similarly;[631] there is no agreed definition except by way of exclusion: merchant ships are any privately or publicly owned vessels that are not warships or are otherwise in government public service, *e.g.*, police or fire boats and therefore entitled to sovereign immunity, engaged in commercial activity.[632] The law of naval warfare has much to say about merchant ships and cargoes, but those principles apply in appropriate situations through the LOS conventions' other rules clauses[633] and will be analyzed for the Tanker War in Chapter V.[634]

*2. Ownership in Merchant Ships and Cargoes; Crews; Insurance*

Individuals have owned ships since the earliest times; even today ownership of pleasure boats, some of which may be as large as small commercial vessels, is likely to be in an individual. Since one person might not be able to advance enough capital to buy and outfit a ship, a practice of joint venture, *i.e.*, ownership of shares in ships, perhaps for the voyage or longer, developed.[635] Some of British North America's colonial charters reflect this kind of business relationship.[636] Beginning in the nineteenth century, concurrent with evolving business forms on land, the corporation came to be the dominant modality for vessel ownership.[637] Even command economies have used the corporate form, *i.e.*, State-owned trading companies.[638] By the opposite token, free enterprise-based nations have owned and operated ships, usually through corporations. Countries with government-owed shipping fleets included many Gulf States during the Tanker War: Iran, Iraq, Kuwait, Qatar, Saudi Arabia and the UAE among them.[639] Vessels may travel independently as tramp steamers, picking up cargo at one port, discharging it at destination, and picking up another cargo for a third port, *etc.*, or along regular routes as liners. Today most US shipping operates as liners, but many tramp steamers still transit the oceans.[640] Shipping corporations may cluster in one of over 350 liner conferences to set carriage rates for certain routes and manage

sailings efficiently. This can result in noncompetitive pricing and competition between conference and non-conference shipping companies, however. Associations of shipowners also may influence decisions, particularly those in the political arena.[641] Corporations may own many ships; they may establish each vessel in a subsidiary corporation for tax and liability minimization.[642]

A vessel owner may "rent" a ship to others through a "charter party" or charter.[643] An owner can charter only part of a ship,[644] but usually an owner lets the whole vessel by one of three methods: demise or bareboat charter, time charter, or voyage charter. In a demise or bareboat charter, "the charterer takes over the ship, lock, stock and barrel, and mans her with his own people."[645] In a time charter, the owner's people continue to work the ship, and the owner retains possession; the charterer buys the vessel's carrying capacity for a fixed time to go anywhere.[646] The other non-demise arrangement, the voyage charter, is a contract for hire of the ship for one or more voyages. It is probably the most common form.[647] Subchartering to another party, for part or all of the ship or the time, may occur unless prohibited by a charter party.[648] Brokers in major maritime centers, *e.g.,* London or New York, carry on "fixture" of a ship under a charter far from the ship, its owner or the charterer. Today an owner may telex or radio a vessel to give directions on its use after a charter has been fixed.[649]

Today charters are standardized documents. Usually a nondemise charter includes a "safe ports" clause, allowing a master (an employee of the owner) the option of discharging the charterer's cargo at a port that is safe to enter.[650] For example, if a charterer directs a master to proceed to a port with a bar across the inlet, the master can refuse and go to another port; the owner can claim damages.[651] "Safe port" also means political dangers to the vessel's safety;[652] development of an armed conflict situation can affect these private contracts. A safe port clause does not apply after a vessel's arrival. However, if a port becomes unsafe after a charterer nominates it, the charterer must nominate another if that port is reasonable under the circumstances.[653] Reasonable deviation is permitted in proceeding to a nominated port,[654] and doctrines of frustration of performance or commercial impractability, perhaps caused by armed conflict or requisition clauses in the charter, may end a charter.[655] Governments may charter ships instead of requisitioning them during wartime.[656] If government cargo is stowed on a vessel that carries privately held goods as well, there is the possibility of multiple ownership interests, the vessel owner, the charterer, the subcharterers, and consignors and consignees of the goods.

The holder of a mortgage or other financing device[657] on a ship is another important ownership interest. Although nearly all maritime States have national legislation governing ship mortgages,[658] many (but not the United States) are parties to multilateral conventions establishing rules for ownership of mortgages by persons that are nationals of States other than that of the registry of the ship.[659] Other

provisions of national law may condition transfer of mortgage interests from a national of a registry State on mortgage registry State approval[660] or accord lower lien priorities for a foreign-owned ship mortgage, which may be given parity or near parity with mortgages held by nationals of the ship of registry.[661] A ship, registered in State A may be subject to a mortgage in State B whose trustee is a State C national, with ownership in a State D corporation, whose shareholders may be nationals of States E, F, G, *etc.* When the possibility of fleet mortgages[662]—a security interest in several vessels of different flags with a common owner—is contemplated, the issue becomes even more complex. When States guarantee or insure ship financing, as the United States may under federal legislation,[663] yet another participant—this time a sovereign nation—may have potential interests. Under these kinds of financing arrangements, a vessel owner may appear to be in some respects a lessee (charterer in maritime terminology) and the financing institution may appear to be the owner of the vessel.[664] Whatever the issues as to who are proper owners, charterers or others who can limit liability under treaties or national law,[665] the variety of financing arrangements add to the complexity of determining ownership interests under the Intervention Conventions[666] and perhaps issues of nationality of the ship for law of the sea issues.[667]

Transnational arrangements for carriage of goods at sea are equally complex.[668] While ordinarily a military commander or the commander's lawyer will not be concerned with the nuances of these transactions, except incident to visit and search, the following illustrates the complexity of trade by sea and the possible multitude of private parties, and therefore the countries potentially involved.

Seller and buyer of goods sign a contract of sale.[669] If the transaction is F.O.B. (Free on Board), it may be either a shipment contract or a destination contract. If the former, perhaps stated F.A.S. (Free Along Side a named vessel), a seller places the cargo with a carrier at a designated point or ship; the buyer bears the risk during transit. (Doubtless a buyer will buy insurance.) If it is an F.O.B. destination contract, the seller bears the risk of transit and tenders delivery at port of arrival. The alternative, C.I.F. (Cost, Insurance, Freight), obligates a seller to buy insurance and pay freight to the carrier; these are added to costs for the buyer's price at destination.

The buyer may obtain a letter of credit from a bank, by which the bank promises to honor the seller's draft if the buyer submits shipping documents for the goods, *i.e.,* the shipment's negotiable bill of lading, invoice and insurance contract. The letter is forwarded through the seller's bank for payment on submission of the documents.[670] A buyer may have credit arrangements to finance the letter of credit or to finance sale of the goods. Although these transactions are technically independent of the sales contract or the contract of carriage, they are linked to the sales contract, and participants in letter of credit transactions—usually banks—also have interests in safe, timely and orderly carriage of cargo on the seas. Today

multimodal transportation using containers is very common, the result being that many land-based companies under different ownerships (and therefore different national interests) may be involved if goods do not arrive or arrive damaged,[671] perhaps because of military action at sea.

Whether cargo is sent F.O.B. (perhaps F.A.S. for ocean transit), F.O.B. destination, or C.I.F., risk of loss during shipment must fall on a shipper or a carrier. As noted earlier in the context of direction of shipping,[672] carriage of goods by sea involves many ownership interests regulated by the customary, treaty and national law of admiralty. Most such arrangements are covered by the COGSA Convention as supplemented by more recent treaties.[673] These standards may be incorporated in a private contract, *e.g.*, a charter party.[674]

Clauses in contracts of carriage or affreightment may affect ownership interests in freight charges for transportation and hence ownership interests in transporting the goods. For situations related to armed conflict, these include fire, perils of the sea, acts of war, acts of public enemies, arrest or restraint of princes (*i.e.*, restraints by governments), seizure under legal process, riots or civil commotions, saving life or property at sea, and deviation.[675] Although armed conflict may trigger invocation of the war exception, the peripheral impact of armed conflict may cause ships to deviate from planned courses, or they may be tied up in port due to departure restrictions or domestic unrest resulting from armed conflict, *etc.* Thus, armed conflict can result in private parties' raising claims against other private parties, all of which may hail from different countries, and governments in these countries may hear from affected parties,[676] who may urge measures affecting the conflict, ranging from entry into the conflict to less coercive measures. The result is that cargo interests or others, faced with a carrier claim of exemption under COGSA, may look elsewhere, perhaps to their insurers, perhaps to the country that allegedly caused them harm,[677] but possibly to their governments for espousal,[678] if the ultimate cause of their loss is cognizable and compensable under international law. This was the basis of claims for the *Stark* and *Vincennes* attacks, although injury and death claims were primarily involved.[679]

Besides these claims related to cargo carriage, a ship owner is also concerned with claims related to illness, injury or death of mariners aboard the ship. At the least, an owner must pay maintenance, cure and wages; all States recognize the principle that injured or sick merchant seamen are entitled to food and lodging, medical services and unearned salary for the remainder of the voyage, plus burial expense, if death, injury or illness occurs while enrolled as a seaman on a ship.[680] States may accord other relief for injured seamen or mariners who die at sea.[681] In the United States and many industrialized countries, maritime workers (mariners, shipyard employees, and stevedores who work the docks) are heavily unionized; the unions themselves can be potent forces for claims involving members, as some countries discovered during the Tanker War.[682]

Passengers and others involved in maritime-related business, *e.g.*, oil platform workers, may claim for injuries or death under maritime law, perhaps augmented by national legislation.[683] The same can happen when there is loss or damage to civil aircraft. While these claimants might be content with claims against other private parties who allegedly harm them, there is a possibility of claims against an allegedly offending State or perhaps requests for espousal by their governments.[684]

Overarching these primary claims is a potential for insurance coverage and subrogation[685] to an insured's claims, *i.e.*, where an insurance company steps in an insured party's shoes, a common procedure for property damage claims under US law. Participants in the marine insurance field may be of entirely different nationalities than the insured ship owner, charterer or cargo interests. UK underwriters, usually operating from Lloyd's syndicates,[686] have dominated the field,[687] but other nationals or their companies may be involved.[688] Reinsurance, where a reinsurer agrees to indemnify another insurance company against risks assumed by it on insurance in favor of a third party,[689] (*e.g.*, vessel owner, charterer or cargo interests), may introduce more potential claimants (a reinsurer as ultimate subrogee) for a maritime law claim. Today three kinds of marine insurance are written. Hull insurance covers a vessel or a fleet, ships' machinery and certain collision liabilities plus general average and salvage charges.[690] Cargo insurance protects a shipper.[691] Protection and indemnity (P & I) insurance covers nearly everything not under a hull policy, including personal injury, illness and death of those aboard ship; other collision liability; pollution liability; omnibus coverage for new risks not within the express provisions in use. P & I is underwritten through "clubs" of insurers, most of which are in the United Kingdom. UK P & I clubs have insured about 65 percent of the world's shipping.[692] Although ownership interests can insure nearly everything, and can buy an "all risks" policy,[693] war risk insurance is written separately because of the "free of capture and seizure" (F C & S) clause in typical policies. Thus insureds must buy a separate policy and pay an additional premium for war risk.[694]

Obtaining insurance or writing it are voluntary acts. Owner interests can elect to operate ships uninsured because of high premium costs, but they are foolish to do so because of the high risk of personal liability beyond the value of the vessel, assuming that the ship or cargo survives the mishap for imposition of maritime liens, because of the possibility of failure of limitation of liability. Insurers can elect to charge relatively high premiums when the risks are high, *e.g.*, projected transit of a dangerous zone of the ocean,[695] or choose not to write policies at all for certain risks, *e.g.*, war. Today all oceangoing vessels carry basic war risk insurance. The result has been that States have war risk insurance legislation for coverage "whenever it appears... that such insurance adequate for the needs of the water-borne commerce of the United States cannot be obtained on reasonable terms and

conditions from companies . . .," as the US legislation has had it.[696] Recognizing growing use of flags of convenience,[697] legislation may permit coverage for these vessels besides nationally registered ships; cargoes on both national-flag and flag of convenience ships; and personal injury, death or detention of crews.[698] Other maritime risks may be covered as well.[699] The government may provide reinsurance coverage[700] to spread commercial carrier risk. Private coverage, if available, may continue.[701] The result is that governments may become subrogated to claims caused by war situations besides their building and operating, chartering or requisitioning vessels during crisis.[702]

*3. Nationality of Merchant Vessels*

The foregoing sub-Part has analyzed the plethora of government and private interests that may claim in transactions involving merchant ships. This sub-Part analyzes trends in claims to ships' nationality in international law. Jurisdiction over such ships in, *e.g.*, territorial waters, has been mentioned separately.[703]

Bilateral agreements, often in the form of FCN treaties, of the late eighteenth century, and continuing through the nineteenth into this century, provided for mutual recognition of each State's ships as national vessels if the master produced a passport, sea letter or other sufficient document issued by competent national authority.[704] Although early treaties stated this requirement as a wartime measure, perhaps requiring periodic renewal of papers, later agreements were more general and not so limited.[705] When bilateral treaties began to include MFN clauses to grant each party the highest favor any other treaty partner of either held, the practice and necessity of including sea letter clauses declined.[706] Occasional treaties recited requirements for these documents.[707] In 1906 Moore said these papers should be included: passport, sea letters, charts, bill of health, bill of sale or ownership certificate, manifest, charter party, bills of lading, and invoices.[708] A few agreements also based vessels' nationality on the crew's composition and the master's nationality, perhaps with a statement that national recognition was sufficient.[709] US Prohibition Era bilateral antismuggling treaties also infer a need for ship's papers.[710] To the extent these treaties had common or similar terms, it can be argued that they point to establishing a customary norm for determining the nationality of a vessel.[711] Treaty succession principles applied their terms to other countries in some cases.[712]

Early admiralty cases upheld the presumptive validity of bills of sale or similar documentation for vessels[713] and therefore the nationality of the ship.[714] By the mid-nineteenth century these papers were required to be aboard neutral ships.[715] The flag, Moore wrote in 1906, was only "*prima facie* evidence, on the high seas, that the nationality of the ship corresponds to that of the flag."[716]

In 1873 a Spanish man-of-war overtook *S.S. Virginius* on the high seas; *Virginius* was accused of carrying arms and insurgents to Cuba, then a Spanish possession.[717]

*Virginius* had been registered fraudulently as a US vessel, as later investigation showed; her real owners were Cubans resident in New York.[718] The United States protested *Virginius'* seizure;[719] Spain admitted an international law violation for having taken the ship on the high seas while flying a US ensign and carrying US registry papers.[720]

In 1896 the International Law Institute adopted a recommendation that nationalities of captain and crew should not be criteria of a ship's nationality.[721] The 1905 *Montijo* arbitration rejected the argument that a ship could not be considered a US vessel because only a third of her crew was American, a violation of US law. That was a domestic matter for the United States, the arbitrator ruled.[722] The Permanent Court of Arbitration in the 1905 *Muscat Dhows Case* held a State was free to decide which ships could fly its flag and to prescribe rules for the privilege.[723] "What that case reveals is that there is no unique connection between the national identity of a ship for jurisdiction purposes and the flying of a flag." Even though the dhows flew a French flag, they were Muscati manned and could be claimed as Muscat vessels.[724]

Although bilateral treaties continued to provide for mutual recognition of ships' papers to establish nationality,[725] advent of flags of convenience—vessels nominally registered under certain States' municipal legislation but beneficially owned by other States' nationals—in the early twentieth century challenged the basic principle of exclusively national decisionmaking as to which vessels could fly a State's flag.[726] Adopting another State's flag was nothing new,[727] but a general practice came into vogue with attempts to evade Prohibition and in sale of US and other flag vessels incident to World War I demobilization.[728]

The 1927 *Lotus Case* reiterated the principle that a vessel has a nationality conferred on it by a State and is subject to the authority of the flag it flies.[729]

Multilateral agreements following World War I began to vindicate establishing nationality by ship's papers with the flag as a symbol. The 1928 Convention on Private International Law (Bustamante Code),[730] 1929 SOLAS,[731] 1930 Load Line Convention[732] and 1948 SOLAS[733] echoed these principles. Given widespread acceptance in multilateral agreements, these principles began to reflect custom.[734]

In 1953 the US Supreme Court repeated the traditional national determination principle:

> Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each State under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering State.[735]

Two years later the *Nottebohm Case* articulated the "genuine link" test for determining nationality for espousal purposes in a dual-national situation.[736]

The 1958 High Seas Convention repeats traditional principles that every State may fix conditions for granting nationality to ships, registering them and granting the right to fly its flag. Nodding to *Nottebohm,* the Convention requires that a "genuine link" must exist between a ship and the State of registry; a State must exercise jurisdiction and control in administrative, technical and social matters over its flagged vessels. A State must issue documentation to vessels under its flag. Except for *bona fide* transfers of ownership or registry changes, a ship may not shift flags in port or on the high seas. Ships sailing under two or more States' flags may not assert them to any other State and may be assimilated to a Stateless vessel.[737]

The ICJ, however, in rendering its advisory opinion on the Constitution of the Maritime Safety Committee of IMCO, stated that the phrase "largest ship-owning nations" in the IMCO Convention meant registered tonnage, and not beneficially owned tonnage,[738] thereby supporting a view that registry, and not metaphysical linkage, controls for purposes of nationality of ships.

Other multilateral agreements restate the familiar nationality rule, *e.g.,* 1960 SOLAS,[739] 1974 SOLAS,[740] and marine pollution conventions;[741] they key State responsibility to ships entitled to fly the flag, or in some cases ships operating under a party's authority, fundamentally the High Seas Convention rule. Commentators also recognized the principle of national decisionmaking to determine a ship's nationality.[742] Boczek also claimed, "[T]he practice of registering ships has become universal and it is an established rule of international law that all maritime States make registration a formal condition of their nationality, the only exception being small craft. . . not intended for long-distance navigation." Issuing a document to evidence registration "is also universal."[743] The Convention on Facilitation of International Maritime Traffic confirms this view.[744]

The 1982 LOS Convention follows the High Seas Convention's theme with additional requirements for flag States. The genuine link concept is preserved, together with requirements for jurisdiction over administrative, technical and social matters in vessels.[745] The LOS Convention also requires registry of all vessels, except small craft, flying a State's flag,[746] and mandates flag State responsibility for safety at sea through adequate manning, construction and safety equipment, and signalling to communicate and prevent collisions.[747] If another State has clear grounds to believe a flag State is not exercising proper jurisdiction and control over a ship, the other State may report the facts to the flag State, which must investigate the matter and take appropriate action.[748]

The 1986 Ship Registration Convention[749] elaborates on the LOS Convention. Few States are party to it, but they include two Gulf States (Iraq, Oman), which ratified after the Tanker War.[750] After declaring that ships have the State's nationality whose flag they are entitled to fly,[751] the Convention requires that parties must

have a competent, adequate national maritime administration to manage and control vessels flying their flags.[752] Registration requirements are stated with particularity.[753] Although the Registration Convention does not mention genuine link, it lays down specific rules for nationality. First, a State's national laws may provide for ownership rules, which must "include appropriate provisions for participation by the State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation." These laws must "be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag."[754] Alternatively, States may "observe the principle that a satisfactory part of the complement" of a ship be flag State nationals, domiciliaries or lawful permanent residents. This goal must be considered in the light of available seafarers meeting the criterion, "sound and economically viable operation of [the flag State's] ships," and other international agreements. This alternative must be applied on a ship, company or fleet basis.[755] Other nationals may serve on a State's ships, but its own nationals, domiciliaries or permanent residents should be given opportunity for education and training in maritime work.[756]

Under either alternative, a registry State must ensure that a shipowning company, or a subsidiary, is established "and/or has its principal place of business within its territory in accordance with its laws and regulations." If a company is not a flag State-established enterprise or does not have its principal place of business there, a flag State national—either a natural or juridical person, *e.g.*, a corporation—in a management or representative capacity must be available for legal process. Moreover, a flag State must ensure that those accountable for or managing a ship are financially responsible as to potential tort liability and crew wages.[757]

Registration and documentation requirements are detailed; there are provisions for bareboat charterers.[758] The Convention encourages joint ventures to enlarge developing States' national shipping industries[759] and protecting labor-supplying nations' interests.[760] IMO and other international organizations may assist in implementation.[761]

Because of low acceptance since 1986 and its emergence during the Tanker War, the Registry Convention does not represent customary law. Its confirming LOS Convention rules, which build on the High Seas Convention's,[762] *i.e.*, means that although the LOS requires a genuine link between a registry State and a ship, registry details must be left to that country.

Few claims with respect to separate chartering interests[763] have been asserted. In 1921 the United States allowed US charter interests to fly the national ensign at the masthead and a Chinese ensign at the stern, despite US Navy concerns about identification. Chinese municipal law permitted the practice.[764] This practice would have tended to run afoul of High Seas Convention and LOS Convention rules for single flags from ships.[765] The Ship Registration Convention permits a State to register a vessel bareboat chartered-in, for the time of the charter, and to

allow the vessel to fly its flag.[766] This would not have violated the rule against two flags, for the chartered ship will be registered in only the chartering-in State.[767] States may espouse charterer claims like other claims.[768] The intervention conventions[769] require charter interests to be consulted if possible; certain limitation of liability treaties may equate some charterers with owners for private civil liability purposes,[770] even as a charterer may be equated with an owner when cargo interests claim for damage during transit.[771]

*4. Warships; Other Public Vessels*

The definition of a warship under the law of the sea and the law of naval warfare are nearly identical today. Thus whether a warship operates under the LOS or the LOAC, to which the LOS is subject under the other rules clauses of the LOS conventions or customary law,[772] the analysis results are the same. The first definitions of warships were published in the law of naval warfare.

Hague VII, announcing rules for conversion of merchantmen into warships, was the first general treaty to state rules that would apply to converted vessels:

> . . . A merchant ship converted into a war-ship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control and responsibility of the Power whose flag it flies. . . . Merchant ships [so] converted. . . must bear the external marks which distinguish the war-ships of their nationality. . . . [Its] commander must be in the service of the State and duly commissioned by the competent authorities. His name must [be] on the list of the officers of the fighting fleet. . . . The crew must be subject to military discipline.

Vessels so converted must observe the law and customs of war; belligerents must announce conversion as soon as possible.[773] The Convention, although all States have not ratified it,[774] restates customary law except perhaps as to where conversion must take place, [775] today a moot issue because of merchantmen's size and complexity, which demands conversion in a shipyard and not on the high seas as occurred with the *C.S.S. Alabama* during the Civil War.[776]

The 1913 Oxford Manual of Naval War defined "War-ships [as] Constituting part of the armed force of a belligerent State and, therefore, subject as such to the laws of naval warfare. . . which, under the direction of a military commander and manned by a military crew, carry legally the ensign and the pendant of the national navy," plus ships converted as warships,[777] the customary rule of that time.[778]

In 1916 the US Secretary of State published this definition of a warship:

> A belligerent warship is any vessel which, under commission or orders of its government imposing penalties or entitling it to prize money, is armed for the purpose of seeking and capturing or destroying enemy property or hostile neutral property on the seas. The size of the vessel, strength of armament, and its defensive or offensive force are immaterial.[779]

The 1930 London Naval Treaty did little to help definition. Although carefully categorizing ships usually considered men of war, *e.g.*, capital ships or battleships, aircraft carriers, cruisers, destroyers, minelayers, *etc.*, including "special vessels," *e.g.*, yachts, tenders, transports, depot ships, *etc.*, as "naval combatant vessels"[780] did not clarify whether these were warships or not. The 1936 London Naval Treaty categories for vessels usually considered warships was a second effort at particularity by again describing existing combatant vessels;[781] naval auxiliaries were excluded from classification as men of war.[782] The 1936 Montreux Convention, regulating Turkish Straits passage, followed this formula.[783]

Forty years and two World Wars involving major maritime conflict later, the 1958 High Seas Convention defined "warship" as

> a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew. . . under regular naval discipline."[784]

This represents the customary rule.[785] It is repeated, nearly verbatim, in the 1962 Convention on Liability of Operators of Nuclear Ships,[786] the 1972 INCSEA Agreement[787] and the 1977 Panama Canal neutrality treaty.[788] Except for referring to vessels "belonging to the armed forces of a State," thereby recognizing present realities of unified armed services, *e.g.*, the Canadian Forces, or that military services other than navies may operate warships (*e.g.*, the US Coast Guard).[789] The LOS Convention followed virtually the same language in 1982, but for all ocean areas.[790] Nuclear and conventionally powered warships have identical status;[791] there is no requirement that a warship be armed.[792] Title to sunken or wrecked warships and military aircraft remains in the State whose flag they flew.[793] Under the law of the sea, warships, wrecked, sunken or in service, enjoy sovereign immunity from authorities of States other than the flag State.[794] In wartime situations, to the extent the LOS continues to apply, *e.g.*, between a belligerent and a neutral, LOS immunity rules continue to apply, including title to sunken vessels or aircraft. On the other hand, operation of the other rules clauses[795] as between belligerents during war means that attacking and capturing an opponent's warship or military aircraft vests title immediately in the captor. This includes wrecked or sunken warships or aircraft if successfully recovered or otherwise brought into an opponent's possession.[796]

Protocol I, Article 43(1), one of that treaty's few provisions applying to naval warfare,[797] is more general, applying to all armed forces but echoing the LOS definition:

> The armed forces of a Party to a conflict consist of organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its

> subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia,* shall enforce compliance with the rules of international law applicable in armed conflict.[798]

Undoubtedly the LOS Convention rule is a customary norm for the law of the sea today.[799] However, as Swarzenberger and others have pointed out,[800] the LOS definition is subject to the LOS treaties' other rules clauses,[801] the result being that in the future the definition of a warship for law of naval warfare purposes may chart a different course than the LOS definition. For example, States could invoke and build gloss on Protocol I, art. 43, or apply Article 43 as a base for a customary norm if they are not party to the Protocol, the present case for the United States. For now, however, the definitions have merged for the LOS and the LOAC.[802] The definite trend of the law is that if a ship meets the LOS warship definition, regardless of its size, means of propulsion and armament or lack of it, it is a warship.

Although the LOS conventions have mentioned other ships owned or perhaps operated under charter by or for States for public purposes,[803] no definitional claims have been asserted, beyond statements that they may be totally immune from other States' jurisdiction on the high seas.[804] These issues should be differentiated from the law of naval auxiliaries, which applies during wartime.[805] On the other hand, there were issues related to State-owned commercial vessels, *e.g.,* tankers owned by governments such as Kuwait. In general the law of the sea applies the same rules for these ships as for privately owned merchantmen.[806]

The LOS Convention also provides that the genuine link and single-flag requirements do not prejudice the issue of vessels "employed on the official service of the United Nations, its specialized agencies or the International Atomic Energy Agency, flying the flag of the organization." The High Seas Convention includes similar provisions.[807] Protocol I forbids flying the UN flag unless "authorized by that Organization."[808] The UN flag has been flown on several occasions; when employed in peacekeeping operations, in practice it has been flown alone after agreements with the Host Country, *i.e.,* the State supplying the platform(s) or unit(s).[809] Protocol I also prohibits improper use of the red cross, red crescent, and red lion and sun,[810] the inference being that it can be used with ICRC permission and by agreement of State(s) concerned.

### 5. *Ocean Transit in Company; Warship Formation Steaming; Convoys*

Although as a general rule, merchantmen of any size travel independently, albeit in the case of liners on predetermined paths through the seas, or on prescribed routes, perhaps on the high seas as a matter of private initiative, or through straits or the territorial sea at coastal State direction,[811] small ships, *e.g.* fishing vessels, may proceed in convoy for mutual assistance in case of casualties or heavy weather. They may operate together for commercial purposes, *e.g.,* fishing.[812] Warships

may also steam independently, which is the usual situation in the case of submarines. However, for safety and mutual protection, warships may proceed in company, often in formation as ordered by the force commander. The law of the sea does not restrict these freedoms of the seas, even in the case of warships steaming in formation in straits,[813] except that all oceans users must have due regard for others' LOS rights.[814] By extension of this analysis, the law of the sea, as distinguished from the law of armed conflict, applicable in certain situations through the LOS other rules clauses,[815] does not forbid or qualify the right of "mixed company" usage of the oceans, *i.e.*, when merchant ships and warships travel together in convoys for reasons of safety[816] and perhaps protection by the warship(s).[817] Royal Navy warships accompanied and attempted to protect UK flag trawlers fishing beyond the three-mile territorial sea limit off Iceland during the First Cod War,[818] for example. Convoy principles in armed conflict situations are different, however.[819]

*6. The Tanker War: Analysis*

Even today the record is less than clear and full as to the identity of transnational claimants involved in the Tanker War. Civil litigation and government-espoused claims[820] may proceed for years in the future.[821] It is certain, however, that there were significant claims during the war. Merchant shipping losses, and the deaths and injuries of merchant mariners, were the highest since World War II,[822] there were claims arising from attacks by and on naval vessels, some of them defensive in nature,[823] and the environment suffered.[824] There were also questions involving the nationality of ships.

The clear inference from the LOS conventions and customary law is that as long as a new registry State has a genuine link to a vessel through compliance with the new State's registry requirements for ship safety, *etc.*, and there is ownership of the vessel, perhaps beneficial ownership through corporate shares, in nationals of the new registry State, LOS requirements are satisfied. The LOS leaves registration details to the new registry State. It may be presumed that reflagging Kuwaiti-registered tankers to US registry satisfied the LOS basic requirements. Proper US registration procedures were followed, and US nationals served as masters.[825] It was also appropriate for US and other navies to convoy, escort or accompany merchantmen, exercising a right of proportional self-defense if the merchant ships were attacked or threatened with attack.[826]

Neutrals also observed the rule of rescuing persons in danger of being lost at sea when they picked up survivors of attacks on merchantmen or naval vessels (*e.g.*, *Iran Ajr*), whether flying the same or another flag, people on offshore platforms, or at least one aviator who went down at sea. (In many cases the record is silent on individual rescue efforts, but available sources indicate neutrals, including warships

and merchant vessels, attempted to perform rescues commensurate with their ships' safety, as the rule allows.)[827]

Late in the war Iran used speedboats to attack tankers and other ships exercising freedom of navigation in the Strait of Hormuz and the Persian Gulf. These boats apparently exercised in naval maneuvers. Crew surviving neutrals' self-defense responses were repatriated to Iran as the 1949 Geneva Conventions provide. Presumably other speedboaters Iraq may have captured were treated as prisoners of war and repatriated at the war's end.[828] It is not clear, from the available record, whether these vessels met the customary definition of warships.[829] Although their personnel were perhaps imbued with a spirit of suicide not unlike World War II *kamikaze* and other pilots and midget submarine crew, the boats themselves appear to have been warships.

On at least one occasion when the reflagged tankers were ready to leave Kuwait, commercial tug crews refused to man tugs to accompany them. US Navy volunteers manned the tugs, which were equipped with minesweep gear.[830] The record is not clear whether the tugs met two standards of the definition of a warship, *i.e.*, under the command of an officer duly commissioned by the United States, or whether the tugs bore external marks distinguishing ships of the United States. Probably the crews were under US military discipline.[831] Nor can it be determined whether the tugs were government ships used for non-commercial purposes;[832] they may have been privately owned but manned by military personnel, or they may have been State-owned by Kuwait but operated for commercial towage. If privately owned but crewed by military personnel of a nationality other than the owner(s), this would make the tugs subject to the LOS genuine link principle.[833] If owned by Kuwait, the issue is whether they were operated for commercial purposes or whether they were used for noncommercial purposes. The available record does not give an answer. The nature of the minesweep gear aboard the tugs is not clear either; this is a law of naval warfare issue.[834] Based on the scanty record, it may be presumed that it was admissible under international law to man the tugs under the circumstances. If the tugs were commercial in nature, having a foreign crew made no difference; merchantmen the world over sail with crews of mixed nationalities. If the tugs were non-commercial, owned by Kuwait, it was the business of Kuwait to determine who would man them. The tugs did not become warships because they were operated by US Navy personnel, however.

Early in the war it was proposed evacuating merchant ships trapped in the Shatt al-Arab under the UN or ICRC flag. Iraq rejected this.[835] The UN flag proposal followed UN practice in seeking affected parties' agreement.[836] When this was not forthcoming, the proposal died. The ICRC flag proposal also required affected parties' agreement,[837] and when this was not forthcoming, this proposal also died.

Merchant shipping losses,[838] and claims arising from dislocations during the war,[839] were many. In many instances owners' losses were covered by insurance.[840]

There is always a possibility of government espousal,[841] where the genuine link issue[842] will arise. Thus far there appear to be no such claims.

Although there were charter interests afloat in the Gulf during the Tanker War, *e.g.*, USSR tanker charters to Kuwait,[843] there appear to have been no published claims in connection with losses to charter interests. In many instances these may have been subrogated to insurance carriers,[844] although there is the possibility of espousal for these claims as well.[845]

Aside from possible subrogation claims in connection with pollution intervention or private claims, no separate identification of insurance claims with, or apart from, the vessel have been noted. Insurance rates for war risk and other coverage rose spectacularly during the war, predicated on shipping losses, which were the heaviest since World War II.[846] Insurance and cargo claims usually follow the law of the flag,[847] although States may espouse nationals' claims here as in other situations.[848] National cargo preference legislation may direct that certain cargoes, *e.g.*, military supplies, be carried only in vessels flagged under that State.[849] In that circumstance the flag of cargo and ship will coincide. The cabotage trade of most States is restricted to carriage in national bottoms; this is often confirmed by treaties.[850] Although it would not necessarily be true, in many cases nationality of the ship and its cargo will coincide. This would be particularly true with respect to petroleum products, *e.g.*, crude oil from Valdez, Alaska, bound for US refineries. This might be contrasted with Persian Gulf oil lift, which was almost never in cabotage. Tanker convoys may have proceeded along the Saudi or Iranian coasts, but these were not engaged in coastal trade, at least as far as the record shows. The oil was for world trade.[851] Local oil shipments, *e.g.*, from northern to southern Iran, went by pipeline.[852]

There seems to be no record of government-espoused[853] claims for cargo or insurance interests. Nor does the record reveal the extent of claims by banks and other holders of ship mortgages; since vessels are almost invariably mortgaged, usually to the hilt, undoubtedly these claims figured in economic losses of the war to the extent not covered by insurance.[854] As the record of claims after any crisis, economic dislocation or war shows,[855] there was and is potential for espousal of these claims.[856]

There was heavy loss of life and injury to merchant seamen during the war from belligerents' attacks on neutral shipping.[857] Others may have been injured or may have died because of Iranian attacks on neutrals' offshore oil pumping facilities.[858] There were 290 deaths in the *Vincennes*-Airbus tragedy, and the United States compensated victims' families.[859] There may have been deaths or injuries resulting from other mistaken defensive actions, *e.g.*, the United States' firing on fishing vessels or dhows.[860] There were deaths and personal injuries among the *U.S.S. Stark* and *U.S.S. Samuel B. Roberts* crews.[861] Other military personnel from neutral countries may have been hurt or may have died because of belligerents'

war-related actions. There probably were deaths or injuries connected with US defensive attacks on oil platforms,[862] and there were deaths or injuries connected with US defensive attacks on *Iran Ajr* and other Iranian vessels or aircraft, notably the speedboats.[863] In the *Vincennes*-Airbus and *Stark* cases, governments paid compensation, the United States in the *Vincennes* incident and Iraq for *Stark* deaths and injuries.[864] Transnational litigation may resolve other death and personal injury claims, particularly for the merchant mariners, or parties may be compensated through espousal.[865] In many cases insurance may protect owners, charterers, *etc.*, from personal liability for these claims.[866] Governments may compensate their military personnel or their survivors under national law for active service injury or death, and these sums might be added to espoused claims.

The record is sparse as to proceedings involving these claims, and their amount and number, other than those involving *Stark, Vincennes* and the Rostum platforms.

## Part D. General Conclusions and Appraisal for the Law of the Sea

The Tanker War was a long conflict, eight years from the first shots and four years of more intensive war at sea. It produced nearly every conceivable issue related to the law of the sea, the law of armed conflict, and law under the UN Charter. Chapter III analyzed Charter law in the Tanker War, and Chapter V will discuss LOAC issues.

The Tanker War began while LOS Convention negotiations were underway. When the war ended in 1988, the ratification process was underway, but not enough countries had ratified the treaty for it to be effective as an international agreement. Some Tanker War participants had ratified the LOS Convention by 1988, however. For these States, there was an obligation not to defeat the treaty's object and purpose besides their duties under customary law (which might include customary rules restated in the LOS Convention) and perhaps the 1958 LOS conventions, if they were party to them. Other countries, *e.g.*, the United Kingdom and the United States, were not signatories or parties to the LOS Convention during the war but were parties to the 1958 LOS conventions. These countries were also bound by the customary law of the sea, including custom restated in the LOS Convention. Some States, including many Persian Gulf nations, were party to none of the LOS conventions. Nevertheless, these countries were bound by the customary law of the sea restated in the conventions, as well as other customary norms. The Tanker War era, 1980-88, was a time of transition for the law of the sea, requiring analysis of every issue under custom and five LOS conventions, in addition to other special LOS-related agreements.

*1. High Seas Freedoms: Navigation and Overflight*

Neutral countries' warships and military aircraft, whether launched from aircraft carriers or the land, had freedom of navigation or overflight in the Gulf, subject to the LOS norms limiting those freedoms, *e.g.*, due regard for others' exercise of these high seas freedoms, and the LOAC when it applied. Similarly, belligerents in their relations with neutrals had high seas freedoms of overflight and navigation, again subject to LOS norms limiting those freedoms, *e.g.*, due regard for neutrals' exercise of high seas freedoms, and the LOAC when it applied. In all cases, as between treaty-based norms and the U.N. Charter, the Charter prevailed. One example of this was the Airbus tragedy. Iranian aircraft had Gulf overflight rights, but the United States had a right to respond (in this case, in error) in self-defense when its warship appeared threatened by what was mistakenly perceived to be an incoming Iranian military aircraft.

In terms of customary LOS norms, the same principles were at stake, unless one takes the view that a separate customary Charter-based norm at variance from principles under the Charter was at issue, or that the customary Charter-based norm had been elevated to *jus cogens* status and therefore prevailed over custom or treaty-based rules. There is no evidence of claims involving these issues.

During the Tanker War belligerents interfered with neutrals' freedom of navigation through indiscriminate mining. Moreover, although it was an LOAC issue because they chose to fire indiscriminately on neutral merchantmen or neutral military aircraft in many instances, belligerents also violated neutrals' high seas rights of freedom of navigation and overflight. It was proper under the law of self-defense for neutral military forces (air, surface warships) to respond proportionally to attacks on warships, merchantmen flying the warship's flag, or (if requested, under a theory of informal self-defense) merchant ships flying other neutrals' flags, if the merchant vessels had not acquired enemy character through, *e.g.*, carrying war-fighting or war-sustaining goods for the opposing belligerent pursuant to that belligerent's direction or control as discussed in Chapter V.

Belligerents could announce and conduct naval maneuvers in Gulf high seas areas so long as they observed due regard for neutrals' high seas freedoms. Similarly, neutrals could announce and conduct these maneuvers, so long as they observed due regard for others' high seas freedoms, whether the other States were neutrals or belligerents.

*2. EEZs, Fishing and the Continental Shelf in the Persian Gulf*

There appear to have been no claims of LOS violations regarding Gulf EEZs, fishing or continental shelf zones. (As a technical matter, the Gulf does not have a continental shelf as defined in the law of the sea; there is no continental slope to the deep abyss.) All States, neutral or belligerent, continued to have high seas freedoms of navigation and overflight through these areas claimed by neutrals, subject

to limitations imposed by the LOS regime, *e.g.,* due regard or the equivalent for rights of coastal States in their EEZ, fishing or continental shelf operations. There were one or two attacks by neutrals on neutral fishing vessels operating legitimately in these areas when these craft were mistaken for attacking belligerent forces. As in the Airbus case, the response was in self-defense to a mistakenly perceived threat. The LOAC governed belligerents' attacks on an opponent's offshore facilities, as analyzed in Chapter V. Belligerents' attacks on neutrals' offshore facilities were governed by Charter-based law, *i.e.,* Article 2(4). Similarly, the US destruction of Iranian offshore platforms was a self-defense response to attacks launched or directed from those and other platforms on innocent neutral merchantmen.

### *3. The Territorial Sea and Contiguous Zone in the Persian Gulf; Entry into Neutral Ports*

During the Eighties more and more States shifted from traditional three-mile territorial sea claims to more expansive sovereignty claims, up to and beyond the 12-mile limit the LOS Convention would allow. There were also claims to offshore contiguous zones. These claims in some cases exceeded LOS limits, in terms of breadth (particularly under the 1958 Territorial Sea and similar customary regimes) and because of baselines declarations that did not always square with LOS definitions. None of these claims figured in the sea war, however.

Territorial sea usage did, however. Iran could use its territorial sea as well as the high seas for naval maneuvers. Iran could suspend territorial sea innocent passage temporarily for security reasons in connection with these maneuvers. It could use its territorial sea for coastal convoys of tankers under the LOS regime. (As Chapter V will point out, the LOAC allowed attacks on its warships during these maneuvers and attacks on the convoys if they carried war-fighting or war-sustaining goods.) However, Iran could not permanently bar territorial sea innocent passage, even as it could not permanently bar transit passage through the Strait of Hormuz.

Saudi Arabia could legitimately proclaim territorial sea safety corridors to facilitate neutral tanker traffic. It was unlawful for Iran to use neutrals' territorial seas for naval maneuvers; this was a violation of neutrals' territorial integrity under the Charter, Article 2(4). It was also unlawful for belligerents to attack neutral ports or attempt to frustrate entry into or egress from neutral ports, and the UN Security Council was fully justified in denouncing this behavior. The LOS principle, which is congruent with Article 2(4) and LOAC principles regarding neutrals, was thereby strengthened and reinforced.

### *4. Passage Through the Strait of Hormuz*

As noted, the Tanker War began while LOS Convention negotiations were on-going. When the war ended in 1988, the ratification process was underway.

During the Eighties more and more States shifted from traditional three-mile territorial sea claims to more expansive sovereignty claims, up to and beyond the 12-mile limit the LOS Convention would allow. This had important ramifications for the law of straits passage. If three miles was all a coastal State could claim, the Strait of Hormuz had a narrow band of high seas through which ocean traffic could exercise freedoms of navigation and overflight under the 1958 LOS conventions' high seas regime. On the other hand, if the LOS Convention territorial sea definition was the law and 12 miles could be claimed, the territorial seas of Iran and the UAE could (and did) totally overlap, so that the LOS Convention straits transit passage regime applied. Claims of Iraq and neutrals, *e.g.*, the United States, that Iran could not deny straits passage under either regime were well-founded in international law. This was one of the major victories of the Tanker War in terms of the law of the sea.

The war also pointed out one of the major weaknesses of the 1958 conventions, confusion over straits passage, particularly if territorial seas of opposite States overlap, which is now the situation for the Strait if, as most (including the United States) believe, countries may legitimately claim a 12-mile territorial sea. Does the territorial sea innocent passage regime, with its potential for temporary straits closure when a State bordering a strait like Hormuz asserts its security is threatened, apply through the Territorial Sea Convention, or does the customary rule of unfettered straits passage apply? Given worldwide dependence on Persian Gulf oil, and similar navigational needs for other straits (*e.g.*, Bab el-Mandeb in the Red Sea, through which tanker and other traffic may pass to transit the Suez Canal and serve Mediterranean Europe and Africa and the rest of the Earth through the Straits of Gibraltar), this remains a critical issue. Successful assertion of a straits passage regime, perhaps founded on the LOS Convention rules, was another critical victory of the Tanker War for the law of the sea.

*5. Merchantmen and Warships: Reflagging and Other Issues*

The Tanker War raised no countries' claims concerning the definition of a warship, although there was the possibility of it with respect to the Iranian speedboats and US crewing of tugs for at least one voyage of reflagged tankers from Kuwait. The High Seas Convention defines warships in traditional terms; other of the 1958 conventions have no definitions, and 1958 convention parties must depend on customary rules, which are relatively well-established, for high seas situations. The LOS Convention repairs this gap.

Reregistration, *i.e.*, reflagging of the Kuwaiti tankers complied with the LOS genuine link doctrine; for LOAC purposes, as Chapter V will point out, the flag of the tanker was all that counted. The rejected proposal for reflagging neutral merchant ships trapped in the Shatt al-Arab under the UN or Red Cross flag followed LOS Convention principles; Iraq's refusal to allow this was within Iraq's rights.

However, if the Security Council had decided to allow this under Charter Articles 25 and 48, the procedure would have been allowed.

Because of the complex business of today's international shipping, where ownership, cargo, insurance, financing and other interests may be spread among nationals and companies of many nations, there was, and remains, the potential for espousal of claims related to damage to or destruction of ships and cargoes during the war. None of these claims appear to have surfaced, however. No espoused claims for deaths of or injuries to merchant mariners or other maritime workers have appeared, but that potential for the future also exists. The United States settled death claims arising from the Airbus destruction by *ex gratia* payments, and presumably similar settlements were made for deaths or injuries related to self-defense responses connected with Gulf shipping, *e.g.,* the dhows and fishing boats. Iraq settled claims arising from its mistaken attack on the *U.S.S. Stark* on the high seas.

### 6. *Final Thoughts*

For most countries, the LOS Convention has become treaty law to serve, alongside customary rules often embedded in the Convention along with developing customary norms, as a relatively stable legal regime for the oceans. That this Convention is needed is most apparent in several areas. The Convention restates and thereby strengthens traditional rules, *e.g.,* freedoms of high seas navigation and overflight, vital to navies but also to merchant traffic and civil aviation. The Convention provides rules for new developments in the law of the sea since the 1958 treaties, *e.g.,* the EEZ, which is not covered at all in those earlier conventions. Rules for today's reality of a 12-mile territorial sea have crystallized. Knotty problems of straits passage are now closer to solution and will be solved through the transit passage regime for watery isthmuses like the Strait of Hormuz. The same warship definition will apply for all ocean areas.

Some countries, *e.g.,* the United States, have thus far chosen not to ratify the LOS Convention, even though a protocol, the Boat Agreement, revises what the United States and other nations have perceived as weaknesses in the LOS Convention's deep sea mining provisions. These countries must depend on customary norms, which can change through practice and acceptance as law, an example being the 12-mile territorial sea. Nonratifying countries' positions can be weakened, despite the vehicle of protests of nonacquiescence, as worldwide practice changes and more States accept the changes as law. If these countries, like the United States, are 1958 LOS conventions parties, their position is less strong than if they had not ratified these treaties, because opponents can argue that 1958 treaty norms, *e.g.,* the dangerously confusing straits passage principles, apply, and not the customary norm restated in the LOS Convention or in general customary law.

The final lesson from the Tanker War, as it applies to the law of the sea, is an argument for ratifying the 1982 LOS Convention. That Convention is not perfect and may not cover all situations; no contract, no will, no statute, no treaty, no legal document does or ever will. The straits passage and warship definition issues arising from the 1958 LOS conventions are two examples. It is hoped that nonratifying countries will study the Tanker War record as it applies to the LOS and give serious consideration to ratifying the 1982 LOS Convention and its protocol. Ratification of these treaties, and observance of them, may help prevent future crises or wars.

## NOTES

1. These are abbreviated citations; *see* Chapter I.B for further reference. As of January 1, 1998 63 States were High Seas Convention parties, 57 were Continental Shelf Convention parties, 51 were Territorial Sea Convention parties, and 36 were Fishery Convention parties. The United States is party to all four; many other Tanker War maritime powers, *e.g.*, Belgium, France, Italy, Netherlands, the United Kingdom and the former USSR, have been party to some or all of the treaties. Iran and Iraq have been party to none. TIF 374, 402-03. Because of the breakup of the USSR and Yugoslavia, numbers may be higher through treaty succession. *See generally* Symposium, *State Succession;* Walker, *Integration and Disintegration.*

2. SWARZTRAUBER 214-18; Robert D. Powers, Jr. & Leonard R. Hardy, *How Wide the Territorial Sea?*, 87 PROCEEDINGS 68 (Feb. 1961).

3. The LOS Convention came into force for those States party to it on Nov. 16, 1994. The United States had declined to sign the LOS Convention in 1982 because of objectionable provisions in Part XI dealing with deep seabed mining. However, the United States has recognized the navigational articles of the Convention, the principal interface for the law of naval warfare and the LOS, as representing customary international law for nearly two decades. President Ronald Reagan, *United States Ocean Policy,* Mar. 10, 1983, 19 WEEKLY COMP. PRES. Doc. 383 (Mar. 14, 1983). Commentators generally agree that these provisions reflect customary international law. *See, e.g.,* NWP 1-14M Annotated ¶1.1; NWP 9A Annotated ¶1.1; RESTATEMENT (THIRD), Part V, *Introductory Note,* 3-5; *cf.* John Norton Moore, *Introduction,* 1 Nordquist xxvii; Bernard H. Oxman, *International Law,* n. III. 963, 29; but see 1 O'CONNELL, LAW OF THE SEA 48-49. O'Connell researched *id.* through 1978 using LOS Convention drafts but died before a final version was available. Ivan A. Shearer made changes and additions, publishing before final negotiations produced the LOS Convention. Shearer, *Editor's Preface, id. vii.* Hence O'Connell's volumes may reflect views of the decade before RESTATEMENT (THIRD) was published. LOS Convention art. 308(1) provides that the Convention "shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession." On Nov. 16, 1993, Guyana became the 60th nation to do so, triggering the 12 month timetable. However, at that time, very few developed nations were among that number. Dissatisfaction with the deep seabed mining regime in Part XI (not relevant to this analysis) had precluded not only US acceptance of the Convention, but that of most other industrialized States as well. Recognizing amending Part XI to overcome US and other States' objections would be extremely difficult once the Convention entered into force, UN Secretary General Boutros Boutros Ghali spearheaded a multinational effort to modify that Part. That initiative was successful; on July 28, 1994 the UN General Assembly adopted, without dissent, the *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex* (known colloquially as the "Boat Agreement"). *See* UNGA Res. A/RES/48/263 of July 28, 1994, *in* 1 Nordquist 471-91. On Oct. 7, 1994, the Clinton Administration transmitted the LOS Convention, as amended by the "Boat Agreement," to the US Senate for advice and consent to ratification. *See* President of the United States, *Message Transmitting United Nations Convention of the Law of the Sea, with Annexes, Done at Montego Bay, Jamaica, December 10, 1982 (the "Convention"), and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982, with Annex, Adopted at New York, July 28, 1994 (the "Agreement"), and Signed by the United States, Subject to Ratification on July 28, 1994 S.* Treaty Doc. No. 103-39, 103d Cong., 2d Ses (1994) (S.Doc. 103-39), *reprinted in part in* 6 Dispatch Supp. No. 1, at 1-52. As of the date of this volume, the Senate had not yet acted on that transmittal. However, by April 1999, there were 129 parties to the LOS Convention, including many States with large navies or significant merchant marines, including nations with flag of convenience registries whose beneficial ownerships often list US interests, e.g., China, France, Germany, Greece, Japan, Republic of Korea, Norway, Panama, Russia, the United Kingdom. 1999 UN Treaties 754-56.

4. ICAO Convention, Part II, arts. 43-66, established the International Civil Aviation Organization (ICAO), a UN specialized agency.

5. Scholarly works and treaty or practice compilations include 1-2 BROWN; BROWNLIE, INTERNATIONAL LAW, chs. 9-11; COLOMBOS; FRANKLIN; MCDOUGAL & BURKE; 1-5 Nordquist; NWP 1-14M Annotated chs. 1-4; NWP 9A Annotated, chs. 1-4; 1-2 O'CONNELL, LAW OF THE SEA; 1-5 Nordquist; 1 OPPENHEIM, chs. 5-6; RESTATEMENT (THIRD), Parts V-VI; 4 WHITEMAN.

6. UN Charter, art. 103; *see also* nn. III.10-11, 916-18 and accompanying text.

7. *See* nn. III.10, 918 and accompanying text.

8. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03; *see also* nn. III.10, 917 and accompanying text.

9. UN Charter, arts. 25, 48, 51, 103; *see also* nn. III.10, 914 and accompanying text.

10. The ensuing analysis has been adapted from Walker, *Oceans Law* 190-92.

11. *See* nn. III.916-67 and accompanying text.

12. *Compare, e.g.,* LOS Convention, preamble, arts. 2(3) (territorial sea), 19(1), 21(1), 31 (innocent passage) 34(2) (straits transit passage), 58(1), 58(3) (EEZs), 78(2) (continental shelf; coastal State cannot infringe or interfere with "navigation and other rights and freedoms of other States as provided in this Convention"), 87(1) (high seas), 138 (the Area), 303(4) (archaeological, historical objects found at sea; "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature"), *with, e.g.,* High Seas Convention, art. 2; Territorial Sea Convention, arts. 1(2), 14(4), 17, 22(2). Although the Continental Shelf Convention and Fishery Convention do not have other rules clauses, they say they do not affect status of waters above that are part of the high seas, for the continental shelf; or other high seas rights, for high seas fisheries. Continental Shelf Convention, arts. 1, 3, 15; Fishery Convention, arts. 1-8, 13. The same is true for art. 24(1) (contiguous zone) of the Territorial Sea Convention. Thus the High Seas Convention regime, including its art. 2 other rules provision, is incorporated by reference into these Conventions, which modify some High Seas Convention principles but not the art. 2 other rules clause. LOS Convention, art. 33, governing the contiguous zone, refers to an ocean belt contiguous to the territorial sea, which is part of the high seas except for declared EEZ, fishing or continental shelf areas, which are otherwise subject to the high seas regime. *See also* nn. III.953-67 and accompanying text.

13. *See* n. III.955 and accompanying text.

14. *See* n. III.956 and accompanying text.

15. LOS Convention, art. 88; *see also id.,* arts. 141, 143(1), 147(2)(d), 155, 240(a), 242(1), 246(3) (Area scientific research for peaceful purposes); *see also* n. III.957 and accompanying text.

16. RESTATEMENT (THIRD) § 521, cmt. b, citing UN Charter, art. 2(4); *see also* n. III. 958 and accompanying text.

17. UN Charter, art. 103; *see also* n. III.10 and accompanying text.

18. UN Charter, arts. 51, 103; *see also* nn. III.10-11, 916-18 and accompanying text.

19. Fishery Convention, arts. 1-8, also deal with high seas living resources conservation. Specialized treaties protect certain species, *e.g.,* Convention for Regulation of Whaling, Sept. 13, 1931, 49 Stat. 3079, 155 LNTS 349 (1931 Whaling Regulation Convention), supplemented by Convention for Regulation of Whaling, Dec. 2, 1946, 62 *id.* 1716, 161 UNTS 72 (1946 Whaling Regulation Convention, amended by Protocol, Nov. 19, 1956, 10 UST 4228, 338 UNTS 366 (Whaling Regulation Protocol). There are many Protocol amendments. *See* TIF 466. Another major body of law regulating oceans conduct that would protect the environment if observed are the safety of life at sea (SOLAS) conventions and the rules of the road conventions (COLREGS). *See, e.g.,* Convention for Safety of Life at Sea, Jan. 20, 1914, 219 CTS 177 (applying only to passenger ships, superseded); Convention for Safety of Life at Sea, Mar. 31, 1929, 50 Stat. 1121, 136 LNTS 81 (1929 SOLAS), superseded by Convention for Safety of Life at Sea, June 10, 1948, 3 UST 3450, 164 UNTS 113 (1948 SOLAS), superseded by 1960 SOLAS, 1974 SOLAS; International Convention for Preventing Collisions at Sea, June 10, 1948, 4 UST 2956 (1948 COLREGS); International Regulations for Preventing Collisions at Sea, Feb. 17, 1960, 16 UST 795 (1960 COLREGS), largely replaced by Regulations for Preventing Collisions at Sea, July 15, 1972, 28 *id.* 3459, 1050 UNTS 16, *reprinted in part as a composite document in* 6 BENEDICT, Doc. 3-4 (1974 COLREGS). What began as a 1914 treaty to regulate passenger liner safety has expanded into two sets of international agreements, SOLAS and COLREGS, which contribute indirectly to a cleaner maritime environment. Of particular interest to navies in reducing collision risks are incidents at sea agreements (INCSEA), *e.g.,* INCSEA Agreement and INCSEA Protocol, supplemented by Agreement on Prevention of Dangerous Military Activities, June 19, 1989, *in* 28 ILM 877 (1989); *see also* 1 BROWN 285; Timothy J. Nagle, Note, *The Dangerous Military Activities Agreement: Minimum Order and Superpower Relations on the World's Oceans,* 31 VJIL 125 (1990).

20. *E.g.*, Civil Liability Convention, art. 3(1) (exclusion of liability due to "act of war, hostilities, civil war, [or] insurrection"). The Convention has been modified by a 1972 Protocol, and would be further modified by Protocol, May 25, 1984, art. 3, *in* 6A BENEDICT, Doc. 6-4A, at 6-77, 6-78, which extends coverage to parties' declared EEZs, or to a 200-mile belt for coastal States that do not have a declared EEZ. The 1992 Protocol, *in id.*, Doc. 6-4B, modifies the Convention in ways not relevant to this analysis. *See generally* 2 O'CONNELL, LAW OF THE SEA 1008-10. The United States is not party to the 1984 or 1992 Protocols. ICAO Convention, art. 89 declares it does not affect parties' freedom of action during war and for a state of emergency if the country declaring the emergency notifies the International Civil Aviation Council, ICAO's governing body.

21. *E.g.*, 1954 Oil Pollution Convention, art. 19, whose amendments do not affect this provision; Treaty of Rome, n. III.819, arts. 223-26, 298 UNTS 88-89; *see also* nn. III.819, 949 and accompanying text.

22. NAFTA, n. III 949, art. 2204, *in* 32 ILM 702 (1993). NAFTA includes a specific national security exception, stating *inter alia* that nothing in NAFTA shall be construed to prevent a party from taking actions it considers necessary to protect its "essential security interests," taken during war or other emergency in international relations, or to prevent a party from acting pursuant to its obligations under the UN Charter for maintaining international peace and security. NAFTA, arts. 2102(1)(b)-2102(c). NAFTA is subject to GATT, n. III.949. GATT, art. 21, 61(5) Stat. A63, 32 UNTS at 266, is similar to NAFTA, art. 2102, 32 ILM 699-700 (1993). *See also* n. III.949 and accompanying text.

23. *E.g.*, Kuwait Regional Convention & Kuwait Protocol, n. II.63.

24. High Seas Convention, preamble; *see also* n. III.962 and accompanying text. LOS Convention's navigational articles also reflect custom. *See* n. III.963 and accompanying text.

25. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

26. Vienna Convention, art. 61; *see also* n. III.928 and accompanying text.

27. Vienna Convention, art. 62; *see also* n. III.929 and accompanying text.

28. *See* n. III.930 and accompanying text.

29. *See* nn. III.938-51 and accompanying text.

30. *See* n. III.948 and accompanying text.

31. UN Charter, art. 2(2); Vienna Convention, art. 26; *see also* n. III.934 and accompanying text.

32. Vienna Convention, art. 18; *see also* ILC Rep. n. III.192, 202; MCNAIR 199, 204; 1 OPPENHEIM § 612, 1239; RESTATEMENT (THIRD) § 312(3) & cmt. i, r.n. 6; SINCLAIR 19, 42-44 (Vienna Convention provisions may have gone beyond customary rules as of 1984); Kearney & Dalton, n. III.58, 509.

33. *See generally* Symposium, *State Succession;* Walker, *Integration and Disintegration.*

34. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

35. High Seas Convention, preamble; *see also* nn. III.962, IV.24 and accompanying text.

36. *Cf.* President Ronald Reagan, Statement on Oceans Policy, Mar. 20, 1983, 19 Wkly. Comp. Pres. Doc. 383 (Mar. 14, 1983); *see also* NWP 1-14M Annotated ¶ 1.1; NWP 9A Annotated ¶ 1.1; n. III.963 and accompanying text.

37. *See* n. II.214 and accompanying text.

38. *See* nn. III.938-51, IV.29 and accompanying text.

39. *See generally* Chapter VI.

40. Vienna Convention, art. 61; *see also* nn. III.928, IV.26 and accompanying text.

41. Vienna Convention, art. 62; *see also* nn. III.929, IV.27 and accompanying text.

42. *See* nn. III.916-67, IV.6-36 and accompanying text.

43. *See* nn. 1-3 and accompanying text.

44. LOS Convention, art. 311(1); *see also* 5 Nordquist ¶¶ 311.1-311.5, 311.11; Vienna Convention, art. 59; ILC Report, n. III 192, 252-53; MCNAIR ch. 31; RESTATEMENT (THIRD) § 323; SINCLAIR 184. It has been argued that because the 1958 conventions have no denunciation clauses, they cannot be denounced. *See* Lowe, *The Commander's,* n. III.318, 120-21; Vienna Convention, art. 57; RESTATEMENT (THIRD) § 333; SINCLAIR 183-84. States' ratifying the LOS Convention moots the issue.

45. LOS Convention, art. 311(2); *see also* 5 Nordquist ¶¶ 311.1-311.8, 311.11; Vienna Convention, art. 30; RESTATEMENT (THIRD) § 323.

46. LOS Convention, arts. 311(3)-311(4); *see also* 5 Nordquist ¶¶ 311.1-311.8, 311.11; Vienna Convention, art. 41; RESTATEMENT (THIRD) § 334(3) & cmts. b,c, r.n. 2,3.

47. LOS Convention, arts. 37-45; *see also* Part B.6.

48. LOS Convention, art. 237; *see also* nn. VI. 47-50 and accompanying text.

49. 4 Nordquist ¶ 237.7(a); *see also* Jonathan I. Charney, *The Marine Environment and the 1982 United Nations Convention on the Law of the Sea,* 28 INT'L LAW. 879, 884 (1994).

50. LOS Convention, art. 311(5); *see also* 5 Nordquist ¶ 311.11; Vienna Convention, art. 30(2); 1 OPPENHEIM § 590, at 1213; SINCLAIR 97-98. *See* nn. VI.90-184, 207-09 and accompanying text for analysis of the LOS Convention's environmental protection standards.

51. LOS Convention, art. 45; *see also* Part B.6.

52. LOS Convention, arts. 17-32; *see also* Part B.4.

53. Vienna Convention, preamble, arts. 38, 43; *see also* n. III.10 and accompanying text.

54. ICJ Statute, arts. 38(1), 59; RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

55. Nicaragua Case, 1986 ICJ 31-38, 91-135; Corfu Channel, 1949 ICJ 22.

56. Michael Akehurst, *Custom as a Source of International Law,* 47 BYBIL 49-52 (1974). LOS Convention, art. 22(1) seems to anticipate this possibility with respect to proportionate anticipatory action to ward off pollution threats. *Id.,* art. 310 provides:

> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or Statements, however phrased or named, with a view, *inter alia,* to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or Statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to the State.

*Id.,* art. 309 forbids reservations or exceptions to the Convention and is the reason for the Boat Agreement, n. 3, to amend the Convention's Part XI. Such Statements, taken collectively, arguably could articulate custom apart from the Convention. However, occasional presence of clear, contradictory authorizations for custom, *e.g., id.,* art. 22(1), plus the "obscurity and uncertainty" of art. 310's meaning, *cf.* 5 Nordquist ¶ 310.5, indicate custom and other sources may be considered alongside Convention norms.

57. UN Members must comply with Security Council decisions. UN Charter, arts. 25, 48. These supersede treaty obligations. *Id.,* art. 103; Reisman, *The Constitutional,* n. III.651, 87. The Council may recommend action or call upon States for action pursuant to UN Charter, arts. 39-41; the General Assembly may recommend action under *id.,* arts. 10, 14; these resolutions do not have decisions' binding force, but they may restate customary or treaty norms and strengthen them. BAILEY & DAWS, n. III.657, chs. 3, 6; BROWNLIE, INTERNATIONAL LAW 699-700; CASTENADA, n. III.22, ch. 3.j; GOODRICH *et al.* 111-14, 141-45, 207-11, 334-37, 614-17; RESTATEMENT (THIRD) §§ 102, cmt. g; 103(2)(3), cmt. c & r.n. 2; SCHACHTER, INTERNATIONAL, n. III.358, ch. 6; SIMMA 236-42, 270-87, 614-16, 618, 626-28, 631-35, 651, 1118-25; *see also* nn. III.10-11, IV.6-9 and accompanying text.

58. Vienna Convention, arts. 53, 64; *see* also n. III.10 and accompanying text.

59. Table ST1-1: *Ratifications of the 1982 UN Convention on the Law of the Sea,* NWP 9A Annotated, at 1-3.

60. Vienna Convention, art. 18; *see also* UN G.A. Res. 59a, 38 UN GAOR, Supp. No. 47, at 48 (1983) (calling on all States to refrain from actions undermining the 1982 LOS Convention); n. 32 and accompanying text.

61. By war's end Belgium, Byelorussia (Belarus), Denmark, Italy, Japan, Ukraine, USSR, the United Kingdom and the United States were Territorial Sea Convention parties. Belgium, Byelorussia (Belarus), Denmark, FRG, Italy, Japan, Netherlands, Ukraine, USSR, the United Kingdom and the United States were High Seas Convention parties. Byelorussia (Belarus), Denmark, France, Netherlands, Norway, Ukraine, USSR, the United Kingdom and the United States were Continental Shelf Convention parties. Belgium, Denmark, France, Netherlands, the United Kingdom and the United States were Fishery Convention parties. 1989 TIF 309, 336-37; NWP 9A Annotated, Table ST1-2: *Ratifications of 1958 LOS Conventions.* Treaty succession principles may bind former USSR republics. Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.*

62. *See, e.g.,* High Seas Convention, preamble; nn. III.962-63 (LOS Convention navigational articles also restate custom); *see also* BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3) & cmt. f.

63. To a certain extent the Tanker War was an exception. Iranian Silkworm missiles hit Kuwaiti vessels and ships reflagged under the US ensign while in Kuwaiti territorial waters; there were armed conflict situations in Saudi and

other Gulf States' territorial waters. *See* nn. II.357 (mines in Kuwait, Omani territorial seas), 365 (Iran naval maneuvers in Saudi territorial sea), 379 (Iran's projected naval maneuvers in Strait of Hormuz, an international strait less than 24 miles wide and including Iranian territorial waters), 394-402 (Iranian Silkworm missile attack on Kuwaiti vessels, ships reflagged under US ensign in Kuwaiti territorial waters; attacks on Kuwaiti deepwater terminal); and accompanying text.

64. Most commentators take an opposite tack. *See, e.g.,* 1 BROWN; BROWNLIE, INTERNATIONAL LAW, Part IV; COLOMBOS; MCDOUGAL & BURKE; NWP 9A Annotated, ch. 1; NWP 1-14M Annotated, ch. 1; 1-2 O'CONNELL, LAW OF THE SEA; 1 OPPENHEIM, chs. 5-6; RESTATEMENT (THIRD), Part V; 4 WHITEMAN.

65. *See generally* MCDOUGAL & BURKE 730-33; 2 O'CONNELL, LAW OF THE SEA 793-94.

66. *Compare* High Seas Convention, art. 1, *with* LOS Convention, art. 86. RESTATEMENT (SECOND) ¶¶ 21, cmt. b; 45, cmt. a, accept this definition; *see also* 3 Nordquist ¶¶ 86.1-86.11(d).

67. UN Charter, arts. 51, 103; *see also* nn. III.958-61, IV.15-18 and accompanying text.

68. *Compare* High Seas Convention, art. 4, *with* LOS Convention, art. 90; *see also* 3 Nordquist ¶¶ 90.1-90.8(d). World War I's peace treaties settled the issue of whether landlocked States could register ships. Today it is a customary rule. COLOMBOS § 312.

69. *Compare* High Seas Convention, art. 2, listing the first four, *with* LOS Convention, art. 87(1), adding freedoms to build artificial islands and other similar installations, and to conduct scientific research; *see also* BROWNLIE, INTERNATIONAL LAW 233-37; MCDOUGAL & BURKE 758; 3 Nordquist ¶¶ 87.1-87.9(m); NWP 1-14M Annotated ¶ 2.4.3; NWP 9A Annotated ¶ 2.4.3; 1 OPPENHEIM §§ 284-85; RESTATEMENT (SECOND) § 21 cmt. b.

70. This is consistent with ICAO Convention, arts. 1-3, limiting aircraft overflights to areas not in States' territories, defining territory as a State's land mass and territorial waters. The two treaties are thus compatible with Continental Shelf Convention, art. 3, and LOS Conventions, art. 78, stating that continental shelf rights do not derogate from airspace rights. Thus aircraft may overfly international waters up to the outer limits of States' territorial seas, however defined. For the latter, *see* Part B.3.

71. LOS Conventions, art. 87(a)(c) makes this subject to limitations in *id.*, arts. 76-85 (continental shelf). Continental Shelf Convention, art. 4, takes a similar approach. *See also* LOS Conventions, arts. 51(2) (archipelagic States), 112-15 (general terms); High Seas Convention, arts. 26-30 (same); Convention for Protection of Submarine Cables, Mar. 14, 1884; Declaration Respecting Interpretation of Articles II and IV, Dec. 1, 1886; Final Protocol, July 7, 1887, 24 Stat. 989, 25 *id.* 1424, considered customary law. *See* 1 BROWN 238, 256, 261-62, 315-17; MCDOUGAL & BURKE 704-06, 733-34, 778-82, 844-48; 3 Nordquist ¶¶ 87.9(e), 112.1-15.7(d); 2 O'CONNELL, INTERNATIONAL LAW 820-21; 1 OPPENHEIM §§ 310-11; RESTATEMENT (THIRD) § 521, cmt. f & r.n. 4; Hague IV, Regulations, art. 54, forbids seizing or cutting submarine cables connecting occupied territory with neutral territory "except in . . . absolute necessity." Restoration and compensation are required after hostilities end. *Compare* OXFORD NAVAL MANUAL art. 54; *see also* Pietro Verri, *Commentary, in* LAW OF NAVAL WARFARE 329, 335.

72. LOS Convention, art. 87(1)(e) limits this right, referring to *id.* arts. 116-20, dealing primarily with living resources conservation, but also under *id.*, art. 116(a), any "treaty obligations." The High Seas Convention has no comparable qualifications, but Fishery Convention, arts. 1-4 limits high seas fishing. *See also* 3 Nordquist ¶¶ 87.9(g), 116.1-120.5(d); 1 OPPENHEIM §§ 327-47; RESTATEMENT (THIRD) § 521, cmt. e & r.n. 3.

73. LOS Convention, art. 87(1)(d) conditions this on observing continental shelf norms in *id.*, arts. 76-85. *Id.*, art. 80, incorporates standards for artificial islands and other structures in *id.*, art. 60 for the continental shelf; these follow generally Continental Shelf Convention, art. 5 principles. *See also* 3 Nordquist ¶ 87.9(f).

74. LOS Convention, art. 87(1)(f) conditions this on continental shelf norms in *id.*, arts. 76-85, and marine scientific research provisions, *id.*, arts. 238-65. *Id.*, arts. 259-60 provide for artificial scientific research installations; *id.*, art. 261 declares these installations "shall not constitute an obstacle to established international shipping routes." *Id.*, art. 262 provides for identification markings and "internationally agreed warning signals" to ensure safe sea and air navigation. *See also* 3 Nordquist ¶ 87.9(h).

75. *Compare*, LOS Convention, art. 87(2), *with* High Seas Convention, art. 2; *see also* 3 Nordquist ¶ 87.9(k); NWP 1-14M Annotated ¶ 2.4.3; NWP 9A Annotated ¶ 2.4.3; 2 O'CONNELL, LAW OF THE SEA 796-99; 1 OPPENHEIM § 285, 789; RESTATEMENT (THIRD) § 521(3); Robertson, New LOS 273-74, 286; Oxman, *The Regime,* n. III.956, 837-88.

76. LOS Convention, art. 87(2) must be read alongside the definition of the Area, "the sea-bed and ocean floor and subsoil . . . beyond the limits of national jurisdiction[.]" *Id.*, art. 1(1). The territorial sea, defined *in id.*, art. 3 as up to 12 miles off shore baselines; the contiguous zone, defined *in id.* art. 33 as up to 24 miles off shore; the continental shelf, defined *in id.*, art. 76 as up to 200 miles off shore or "the natural prolongation of [a State's] land territory to the outer

edge of the continental margin, whichever is greater;" the EEZ, defined *in id.*, as up to 200 miles off shore, all have potential for claims of national jurisdiction, or sovereignty in the case of the territorial sea.

77. *Compare* LOS Convention, arts. 90, 95-96, 110(1) *with* High Seas Convention, arts. 4, 8-9. *See also* LOS Convention, arts. 124-32, which expand on the High Seas Convention, art. 3 statement of rights for land-locked States. *See also* 3 Nordquist ¶¶ 95.1-96.10(d), 110.1-110.11(a) (longstanding rules for immunities); NWP 1-14M Annotated ¶¶ 2.1.2-2.1.3 (same); NWP 9A Annotated ¶¶ 2.1.2-2.1.3 (same); 1 OPPENHEIM §§ 289, 292 (same); RESTATEMENT (THIRD) § 522(1) (same); n. 68; Part B.2.

78. HUGO GROTIUS, THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE (*MARE LIBERUM*) (Ralph van Deman Magoffin trans. 1916), discussed *in* SWARZTRAUBER 18-20.

79. JOHN SELDEN, *MARE CLAUSUM: SEU, DE DOMINIO MARIS* [Of the Dominion or, Ownership of the Sea] (Marchamont Nedham trans. 1652, 1972 rep. ed.), discussed *in* SWARZTRAUBER 20-22.

80. *See* nn. II.68, 210, and accompanying text.

81. *See* nn. 84-118 and accompanying text.

82. STEFAN RIESENFELD, PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW 3 (1942).

83. S. Doc. 103-39, n. 3, 6 Dispatch, Supp. No. 1, at 27.

84. The treaty also stipulated landing rights for drying fish. Definitive Treaty of Peace, Sept. 3, 1783, Gr. Brit.-US, art. 3, 8 Stat. 80, 82. *See also* 1 MOORE 767-70.

85. 1 MOORE 773.

86. *Id.* 774-76, quoting John Quincy Adams, *Right of the People of the United States to the Fishing Liberties—Effect of War Upon Treaties and Treaty Stipulations—Peculiar Character of the Treaty of 1783, in id.*, The Duplicate Letters, The Fisheries and the Mississippi 182, 189-90, 194-96, 197 (1822).

87. Convention, Oct. 20, 1818, Gr. Brit.-US, art. 1, 8 Stat. 246. *See also* 1 MOORE 780-82; 1 O'CONNELL, LAW OF THE SEA 513-14.

88. Reciprocity Treaty, June 5, 1854, Gr. Brit.-US, art. 1, 10 Stat. 1089. *See also* 1 MOORE 792.

89. Treaty of Washington, May 8, 1871, Gr. Brit.-US, arts. 18-20, 33, 17 Stat. 863, 869-70, 874, modified by Protocol, June 7, 1873, 18 *id.* 372; Exchange of Memorandums & Notes, Mar. 12-June 22, 1885, 1885 FRUS, T.S. No. 138-1. *See also* 1 MOORE 799-810. The unperfected Treaty of Washington, Feb. 15, 1888, 3 WIKTOR 119, tried to resolve issues over US fishing vessels seizures in Canadian harbors and to grant Canada and Newfoundland reciprocal fishing rights off the eastern United States. A parallel interim Fisheries Protocol, Feb. 18, 1888, 12 BEVANS 209, expired in 1890. *See also* 1 MOORE 810-73.

90. Exchange of Notes, Oct. 6 & 8, 1906, Gr. Brit.-US, 12 BEVANS 279-82.

91. Exchange of Notes, Sept. 4 & 6, 1907, Gr. Brit.-US, *id.* 290-92; Exchange of Notes, July 15 & 23, 1908, Gr. Brit.-US, *id.* 317-18, T.S. No. 504; Exchange of Notes, July 22 & Sept. 8, 1909, Gr. Brit.-US, *id.* 339-40, T.S. No. 533. The North Atlantic Coast Fisheries Treaty, July 10, 1912, Gr. Brit.-US, 37 Stat. 1634, following the Permanent Court of Arbitration award, regularized fishing procedures under British, Canadian or Newfoundland local laws.

92. Treaty on Fisheries in US & Canadian Waters, Apr. 11, 1908, Gr. Brit.-US, arts. 1-2, 4, 35 Stat. 2000-01, as implemented by Commission recommendations. 1 HACKWORTH 798-800.

93. Agreement on Arbitration of North Atlantic Coast Fisheries, Jan. 27, 1909, Gr. Brit.-US, 36 Stat. 2141, T.S. No. 521; *see also* Exchange of Notes, Jan. 27-Mar. 4, 1909, Gr. Brit.-US, 12 BEVANS 335-38.

94. *See* n. 87 and accompanying text.

95. North Atlantic Fisheries (Gr. Brit. v. US), 11 UNRIAA 167, 188-89, 193, 194, 195, 202 (Perm. Ct. Arb. 1910). *Id.* 195-200 defined measurement of "three marine miles of any of the coasts, bays, creeks, or harbours" in the 1818 Convention, n. 87; fishermen could not exercise treaty fishing rights and commercial privilege concurrently. *Id.* 202.

96. *Compare id.* 190-92 *with* Agreement on North Atlantic Coast Fisheries, July 20, 1912, Gr. Brit.-US, 37 Stat. 1634. *See also* Minutes of Conferences, Jan. 12, 1911, Gr. Brit.-US, Jan. 14, 1911, 12 BEVANS 350, 351.

97. Convention for Preservation of the Halibut Fishery of the Northern Pacific Ocean, Mar. 2, 1923, Gr. Brit.-US, arts. 1, 3, 43 Stat. 1841-42; Convention on Halibut Fishery of the Northern Pacific Ocean & Bering Sea, May 9, 1930, Can.-US, arts. 1, 3, 47 *id.* 1872-73, implemented for the United States by Northern Pacific Halibut Act of May 2, 1932, 47 *id.* 142; Convention on Halibut Fishery of the Northern Pacific Ocean & Bering Sea, Jan. 29, 1937, arts. 1, 3, 50 *id.* 1351-52, implemented by Act of June 28, 1938, 50 *id.* 325, 328. *See also* 1 HACKWORTH 801.

98. Convention Concerning Sockeye Salmon Fisheries, May 26, 1930, Can.-US, arts. 1-2, 50 Stat. 1355, amended by Protocol, Dec. 28, 1956, 8 UST 1057; the United States had claimed rights to regulate this fishing by legislation since 1924.

99. 1 MOORE 890-92.

100. Convention, Apr. 17, 1824, Russ.-US, art. 1, 8 Stat. 302.

101. *Id.*, arts. 4, 5, 8 Stat. 304.

102. *Compare id.*, arts. 1, 4, 5, 8 Stat. 302, 304, *with* Convention Concerning Limits of Respective Possessions on Northwest Coast of America & Navigation of the Pacific Ocean, Feb. 16/28, 1825, arts. 1, 7, 9, 75 CTS 95, 97, 99-100.

103. Treaty Concerning Cession of Russian Possessions in North America, Mar. 30, 1867, Russ.-US, art. 1, 15 Stat. 539.

104. Act to Provide for Protection of Salmon Fisheries of Alaska, § 3, 25 Stat. 1009.

105. Bering Sea Arbitration (US v. Gr. Brit.), 1 MOORE 910, 912-13 (1893), constituted pursuant to Convention Submitting to Arbitration Questions Which Have Arisen Concerning Jurisdictional Rights of the United States in Waters of the Bering Sea, Feb. 29, 1892, Gr. Brit.-US, 27 Stat. 947 (Bering Sea Arbitration Convention); *see also* 1 MOORE 893-945.

106. Bering Sea Arbitration, n. 105, 914-16, implementing Bering Sea Arbitration Convention, n. 105, art. 7, 27 Stat. 950.

107. Act of Apr. 6, 1894 to Give Effect to Award Rendered by Tribunal of Arbitration Under Treaty between the United States & Great Britain Concluded Feb. 29, 1892, for Submitting to Arbitration Certain Questions Concerning Preservation of Fur Seals, 28 Stat. 52; *see also* 1 O'CONNELL, LAW OF THE SEA 522-23.

108. The same is true for Modus Vivendi on Fur Seal Fisheries in Bering Sea, June 15, 1891, Gr. Brit.-US, 27 Stat. 980; Agreement for Articles for Insertion in Arbitration Agreement, Dec. 18, 1891, Gr. Brit.-US, 12 BEVANS 217; Convention for Extending Modus Vivendi on Fur Seal Fisheries in the Bering Sea, Apr. 18, 1892, Gr. Brit.-US, 27 Stat. 952. For history of the controversy leading to the award, *see* 1 MOORE 895-910. Convention for Settlement of Claims in Virtue of the Convention of Feb. 29, 1892, Feb. 8, 1896, Gr. Brit.-US, 29 Stat. 844, also advanced no claims to regulate high seas navigation in the disputed fishery area.

109. *See generally* 1 MOORE 922-23.

110. Modus Vivendi for Regulation of Fur Seal Fisheries in the Bering Sea & North Pacific Ocean, May 4, 1894, Russ.-US, 28 Stat. 1202.

111. Protocol for Ship Claims, Sept. 8, 1900, Russ.-US, 11 BEVANS 1232.

112. Ship Claims Arbitration (US v. Russ.), 9 UNRIAA 51, 63-66, 1 MOORE 927, 928 (1902). Although rendered in the Permanent Court of Arbitration building, the award was not a Court decision because Protocol for Ship Claims, n. 111, had been ratified before Hague Convention (I) for Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, went into force. Ship Claims Arbitration 55 n.1.

113. Ship Claims Arbitration, n. 112, 66-78; *see also* 1 MOORE 928-29.

114. Convention for Preservation & Protection of Fur Seals, July 7, 1911, art. 1, 37 Stat. 1542, superseding Treaty for Preservation & Protection of Fur Seals, Feb. 7, 1911, Gr. Brit.-US, art. 1, *id.* 1538, which had covered the same subject without navigational limitations. Act of Aug. 24, 1912, 37 Stat. 499, 500, implemented the 1911 treaty. *See also* 1 HACKWORTH 792-98.

115. Treaty Relating to Spitsbergen, Feb. 9, 1920, arts. 1-2, 43 Stat. 1892, 1894-95, 2 LNTS 7, 10.

116. *Id.*, art. 3, 43 Stat. 1895, 2 LNTS 11.

117. *See, e.g.*, 1 HACKWORTH 803.

118. 1931 Whaling Regulation Convention, n. 19. Supplementary 1946 Whaling Regulation Convention and Whaling Regulation Protocol, n. 19, extending protected areas and forbidden whaling methods, also express no limits on navigation.

119. *See generally* 4 WHITEMAN 1096-97. The First Act of the Inter-American Specialized Conference on Conservation of Natural Resources, Mar. 28, 1956, noted disagreement on territorial sea breadth and coastal State "special interest" in adjacent high seas but expressed no opinion on matters for which no agreement was reached, urging negotiations on these points. The United States disclaimed a State's right to unilaterally claim broad territorial seas for exclusive jurisdiction over high seas fishing rights. *Id.* 1111-13.

120. *See, e.g.,* Secretary of the Interior Harold L. Ickes letter to President Franklin D. Roosevelt, June 5, 1943, 4 WHITEMAN 946-47; Roosevelt memorandum to Secretary of State Cordell Hull, June 9, 1943, *id.* 947; Assistant Secretary of State Breckenridge Long memorandum to State Department Legal Adviser Green H. Hackworth, Mar. 8, 1944, *id.* 949, the latter urging decoupling the concepts.

121. Sturgeon, memorandum of conference between US Departments of State and Interior representatives, July 15, 1944, *id.* 948-50; Sturgeon, internal memorandum for Department of State, July 19, 1944, *id.* 950. Foreign governments were also consulted; they approved the approach. William W. Bishop, *Summary Report on Department Fisheries Committee and Informal Discussions with Canada and Newfoundland,* July 8, 1944, *id.* 951-52; Bishop & James C. Dunn, *Continental Shelf and Coastal Fisheries Policies,* July 3, 1945, *id.* 953-54.

122. Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, Proclamation No. 2668, 10 Fed. Reg. 12304, 3 C.F.R. 68 (1943-48); *see also* 2 Nordquist ¶ V.5.

123. *See* 4 WHITEMAN 794, 797, 800 for texts of the decrees. Ecuador claimed a 12-mile territorial sea and asserted broad continental shelf rights.

124. Other provisions asserted 200-mile belts for islands and jurisdiction over the seabed and its subsoil. Treaties to this effect were projected. Declaration of Santiago, Aug. 18, 1952, 4 WHITEMAN 1089-90, MACCHESNEY 265-67.

125. Supplementary Agreement to Declaration of Sovereignty Over Maritime Zone of 200 Miles, Dec. 4, 1954, MACCHESNEY 275-76. Other treaties dealt with programs to control fishing and hunting in the zone, permits and neighboring States' accidental violations. *See id.* 276-82; *see also* 2 Nordquist ¶ V.5.

126. *See* 4 WHITEMAN 796, 798, 800 for texts of the protests; *see also* 2 Nordquist ¶ V.5.

127. *Conference on U.S.-Ecuadoran Fishery Relations,* Apr. 14, 1953, art. 2(1), 4 WHITEMAN 1092, 1093, 28 Bulletin 759 (1953).

128. *See, e.g.,* Herman Phleger, *Recent Developments Affecting the Regime of the High Seas,* 32 Bulletin 934, 936-37 (1955), citing *inter alia* UN Secretariat, Memorandum on the Regime of the High Seas 47, UN Doc. A/CN. 4/32 (1950); Int'l Law Comm'n, Report Covering the Work of Its Fifth Session, 1 June-14 August 1953, at 17, UN Doc. No. A/2456 (1953); US Delegation to Inter-American Specialized Conference on Conservation of Natural Resources, Memorandum on Certain Aspects of United States Policy Regarding Conservation of Resources of the Continental Shelf and Marine Waters (1956), 4 WHITEMAN 959, 960; US Secretary of State Christian A. Herter instruction to US Philippines Embassy, Jan. 31, 1958, *id.* 961-62.

129. *See generally* 4 WHITEMAN 1101-1110, 1198-1207.

130. Ecuador Foreign Minister Neftali Ponce Miranda press Statement, Sept. 28, 1963, 4 *id.* 1207-08; MCRM 2-147; ROACH & SMITH ¶ 5.5.

131. *See* nn. 99-101 and accompanying text.

132. Gene Glenn, *The Swedish-Soviet Territorial Sea Controversy in the Baltic,* 50 AJIL 942, 944 (1956).

133. *See id.*

134. Barents Sea Pact, May 25, 1956, USSR-UK, 266 UNTS 210. The USSR terminated this in 1962. 4 WHITEMAN 982.

135. USSR decree, Mar. 21, 1956, *id.* 1021 (transl.).

136. Treaty Concerning Fisheries on the High Seas in the North Pacific Ocean, May 14, 1956, Japan-USSR, 263 UNTS 99.

137. Fishery Convention, art. 1(1).

138. *Id.,* arts. 3-13. For background on *id., see* 4 WHITEMAN 963-77.

139. High Seas Convention, arts. 2(1)-2(2).

140. Territorial Sea Convention, art. 16(5); *see also* nn. 301-07 and accompanying text.

141. Territorial Sea Convention, art. 24(1), *see also* nn. 295-300 and accompanying text.

142. Fisheries Jurisdiction (FRG v. Ice., UK v. Ice.), 1974 ICJ 1; 1 O'CONNELL, INTERNATIONAL LAW 530-42. In 1966 the United States claimed a 12-mile offshore fishing zone. Contiguous Fishery Zone Act, Pub. L. No. 89-658, 80 Stat. 908. Pub. L. No. 88-308, 78 *id.* 194, replaced by Pub. L. No. 90-427, 82 *id.* 445, had prohibited foreign flag territorial sea fishing.

143. Fishing & Conservation Management Act of 1976, Pub. L. No. 94-265, § 101, 90 Stat. 331, 336, subsequently amended (FCMA).

144. The Act also empowered the US Secretary of the Treasury to amend regulations under the Act to conform to a general LOS convention, *e.g.*, the 1982 LOS Convention. FCMA, n. 143, §§ 201-05, 401, 90 Stat. 337-46, 359-60, later amended. *E.g.*, Pub. L. No. 99-659, § 101, 100 *id.* 3715, repealed FCMA § 401.

145. MACDONALD 140-41, 146.

146. *Id.* 141, 146-47.

147. LOS Convention, arts. 55-58(1). The Convention also provides for high seas fishing rights, subjecting them to existing treaties, cooperation in achieving agreements on high seas fishing, and Convention rules for certain fish stocks and conserving high seas living resources. *Id.*, art. 116, incorporating *id.*, arts. 63(2), 64-67, 118-20; *compare* Fishery Convention, arts. 1-8, 13; *see also* RESTATEMENT (THIRD) § 521, cmt. e; S. Doc. 103-39, n.3, 6 Dispatch Supp. No. 1, at 27-28, listing treaties regulating or prohibiting high seas fishing. *See also* 2 Nordquist ¶¶ V.6-V.33, 55.1-58.10(d), *id.* 116.1-116.9(g); Charney, *Marine Environment*, n. 49, 896-901.

148. LOS Convention, art. 58(2), incorporating *id.*, arts. 88-115; *see also* 2 Nordquist ¶ 58.10(d); for analysis of other rules clauses, *see* nn. III.952-67, IV.10-25 and accompanying text.

149. *Compare* Fishery Convention, art. 1(a)(b) *with* LOS Convention, arts. 56(2), 58(3); *see also* 2 Nordquist ¶ 56.11(f), 58.10(e)-58.10(f); n. 75 and accompanying text.

150. Fisheries Jurisdiction, 1974 ICJ 22, 29.

151. 2 Nordquist ¶ 58.10(b) (Brazil, Cape Verde); Lowe, *The Commander's*, n. III.318, 112-14 (same).

152. If high seas military exercises can be held pursuant to the LOS Convention, arts. 87-88, citing arts. 87-88 in *id.*, art. 58, means exercises can be held in the EEZ subject to the due regard principle governing high seas navigation, overflight, *etc.*, and EEZ navigation, overflight, *etc.* Due regard's content, *i.e.*, more care must be taken in the EEZ because of nearby installations, *etc.*, may be different and more exacting, but the shared use principle remains the same. 2 Nordquist ¶ 58.10(c); NWP 1-14M Annotated ¶ 1.5.2, at 1-20; NWP 9A Annotated ¶ 1.5.2, at 1-21. *See also* n. 75 and accompanying text. Protests on claims to regulate the EEZ beyond LOS parameters have been lodged, *e.g.*, Brazil's objection to EEZ use for military exercises or maneuvers. NWP 1-14M Annotated ¶ 1.5.2 n.51; NWP 9A Annotated ¶ 1.5.2 n.49; ROACH & SMITH ¶ 7.4.

153. Some countries have a different view. Lowe, *The Commander's*, n. III.318, 114-15.

154. LOS Convention, arts. 60(8), 121; *see also* 2 Nordquist ¶¶ 60.1-60.15(c), 60.15(k), 121.1-121.12(c); NWP 1-14M Annotated ¶ 1.5.2 n.52; NWP 9A Annotated ¶ 1.5.2 n.50.

155. UN Charter, arts. 51, 103; LOS, arts. 58, 87; High Seas Convention, art. 2; 1 BROWN 219; Robertson, New LOS 285; *see also* n. III.10-11, 47-630, 916-18, 932-67, IV.6-36 and accompanying text.

156. UN Charter, arts. 51, 103; LOS Convention, art. 87; High Seas Convention, art. 2; *see also* nn. III.10-11, 47-630, 916-18, 932-67, IV.6-36 and accompanying text.

157. Delimitation of Maritime Boundary of Gulf of Maine (Can. v. US), 1984 ICJ 246, 294; 1 BROWN 245; 2 Nordquist ¶ V.33; NWP 1-14M Annotated ¶ 1.5.2 n.48; NWP 9A Annotated ¶ 1.5.2 n.46; 1 OPPENHEIM § 329; RESTATEMENT (THIRD) § 514, cmt. a & r.n.1-3; ROACH & SMITH ¶ 7.2; *but see* NWP 1-14M Annotated ¶ 1.5.2 n.48 (Japan's 1987 Statement, coastal State EEZ rights, jurisdiction "are yet to be established as principles of general international law."); 1 O'CONNELL, LAW OF THE SEA 570-79 (uncertainty, in 1982, whether draft LOS Convention EEZ terms restated custom.) In 1983 the United States proclaimed a 200-mile EEZ, the largest EEZ on Earth. Presidential Proclamation No. 5030, Mar. 10 1983, 48 Fed. Reg. 10601 (1983); *United States Ocean Policy*, n. 3; NWP 1-14M Annotated ¶ 1.5.2, 1-20-121.

158. *See* nn. 80-136 and accompanying text (fishery claims).

159. *See* nn. 123-30 and accompanying text.

160. LOS Convention, art. 88; *see also* nn. III.932-67, IV.10-25 and accompanying text (art. 88 analysis in context of "other rules" clauses, Charter law).

161. LOS Convention, art. 87(2), High Seas Convention, art. 2; *see also* n. 75 and accompanying text.

162. NWP 9A Annotated, Table ST1-5; *see also* MACDONALD 199-200.

163. ROACH & SMITH ¶¶ 2.6, 14.2.1 at 413-14.

164. LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* n. 75 and accompanying text.

165. *See* nn. II.178-80, 210-14, 272, 306, 309, 367, 401-02, 410-11, 434, 457 and accompanying text.

166. *See* nn. II.178-80, 210-14, 272, 306, 309, 401-02, 434, 457 and accompanying text.

167. *See* nn. III.952-67 and accompanying text.

168. *See* Parts V.A, V.G.1, V.J.1, V.J.7, Chapter VI.

169. *See* nn. II.281, 393-99 and accompanying text.

170. UN Charter, arts. 51, 103; *see also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

171. *See* Parts V.A, V.J.1.

172. *See* nn. II. 393-99 and Chapter VI.

173. *See* nn. III. 952-67, IV.6-25 and accompanying text.

174. LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* n. 75 and accompanying text.

175. LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* n. 75 and accompanying text.

176. LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

177. UN Charter, arts. 51, 103; *see also* nn. III.9-10, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

178. LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* n. 75 and accompanying text.

179. LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

180. LOS Convention, art. 88; *see also* nn. III.955-58, IV.15-18 and accompanying text.

181. UN Charter, arts. 51, 103; *see also* nn. II.250, 264, 354, 357, 359, 368, 420, 430, III.10-11, 46-630, 916-18, 932-67, IV.6-25 and accompanying text.

182. *See* nn. II.148, 216, 278, 303, 357, 379-81, 463 and accompanying text; Part B.6.

183. LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* n. 75 and accompanying text.

184. LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* n. 75 and accompanying text.

185. UN Charter, arts. 51, 103; *see also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

186. LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

187. *See* nn. II.338-39, 459-69 and accompanying text.

188. *See generally* COLOMBOS § 83; SWARZTRAUBER 97-99.

189. *See generally* SWARZTRAUBER 95-97.

190. Humphrey Waldock, *The Legal Basis of Claims to the Continental Shelf*, 36 GROTIUS SOC'Y TRANS. 115, 116-18 (1951). For other summarized views, *see* COLOMBOS §§ 81-84; 1 O'CONNELL, LAW OF THE SEA 467-70; 1 OPPENHEIM § 314, 766-67; SWARZTRAUBER 165-69; 4 WHITEMAN 740-41; Josef L. Kunz, *Continental Shelf and International Law: Confusion and Abuse*, 50 AJIL 828-30, 832 (1956). MCDOUGAL & BURKE 412, 662 reject a connection between exploiting fisheries and mineral exploitation on the shelf.

191. Skiriotes v. Florida, 313 US 69 (1941) based jurisdiction on defendant's Florida citizenship, leaving open the issue of whether Florida could regulate offshore sponge fishing beyond the three-mile sea limit the United States recognized. COLOMBOS §§ 81, 164, 428; SWARZTRAUBER 96-97.

192. Treaty Relating to Submarine Areas of Gulf of Paria, Feb. 26, 1942, UK-Venez., arts. 2, 6, 205 LNTS 121, 122, 124 *implemented by* UK Submarine Areas of the Gulf of Paria (annexation) Order in Council, Aug. 6, 1942, § 4, 4 WHITEMAN 791, 792; *see also* COLOMBOS § 82; 1 O'CONNELL, LAW OF THE SEA 470, 484; SWARZTRAUBER 160; 4 WHITEMAN 789, 791. The Order supported lack of a claim based on custom. BROWNLIE, INTERNATIONAL LAW 5; *see also* COLOMBOS § 82; 1 O'CONNELL 470, 473-75, 484.

193. Proclamation No. 2668, n. 122; *see also* SWARZTRAUBER 161-63.

194. Policy of the United States with Respect to the Natural Resources of the Subsoil & Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12303 (1945), 3 C.F.R. 67 (1943-48); *see also* 2 Nordquist ¶¶ V.5, VI.6; SWARZTRAUBER 160-61.

195. *See, e.g.,* Eugene H. Dooman memorandum to William Phillips, June 15, 1945; William W. Bishop & Dooman memorandum to US Secretary of State James F. Byrnes, July 3, 1945, 4 WHITEMAN 754-55; US Secretary of the Interior Harold L. Ickes letter to President Franklin D. Roosevelt, June 9, 1943; Roosevelt letter to US Secretary of State Cordell Hull, June 9, 1943, *id.* 946.

196. Proclamation No. 2667, n. 194.

197. Pub. L. No. 83-212, 67 Stat. 462-71, now enacted as 43 USC §§ 1331-43, which has caused knotty private law issues. *See* SCHOENBAUM § 1-9; *see also* RESTATEMENT (SECOND) § 23 r.n.1. Outer Continental Shelf Resources Management Act of 1978, 43 USC § 1801 (1994), amended and supplemented OCSLA.

198. Submerged Lands Act, 43 USC §§ 1301-15 (1994), relinquishing US title to the continental shelf to the states inside of the three-mile limit; *see also* SCHOENBAUM § 1-9 n.3.

199. OCSLA, § 3(b), 67 Stat. 462, since amended. This buttressed the customary norm. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 26.

200. MACDONALD 115-16.

201. Edwin J. Cosford, Jr., *The Continental Shelf and the Abu Dhabi Award,* 1 MCGILL L.J. 109, 124 (1953); Sorenson, *Law of the Sea,* INT'L CONCILIATION 195, 226-27 (No. 520, 1958).

202. Argentina, Declaration Proclaiming Sovereignty Over the Epicontinental Sea & Continental Shelf, Decree No. 14,708, Oct. 9, 1946, 41 AJIL Supp. 11 (1947); *see also* COLOMBOS § 87B, 74; SWARZTRAUBER 162-63.

203. Chile Presidential Decree, June 23, 1947, 4 WHITEMAN 794-96; *see also* COLOMBOS § 87B, 74; SWARZTRAUBER 164.

204. Ecuador Congressional Decree, Feb. 21, 1951, WHITEMAN 799-800.

205. Peru Presidential Decree No. 781, Aug. 1, 1947, *id.* 797-98; *see also* COLOMBOS § 87B, 74.

206. Declaration of Santiago on Maritime Zone, n. 124; *see also* Supplementary Convention to Declaration of Santiago on Maritime Zone, MACCHESNEY 275; 1 OPPENHEIM § 315; SWARZTRAUBER 165; nn. 123-30 and accompanying text.

207. El Salvador Const., art. 7, 4 WHITEMAN 801-02; *see also* SWARZTRAUBER 164-65.

208. Honduras Decree No. 25 (Jan. 17, 1951), discussed *in* 1 OPPENHEIM § 715 n.4.

209. Presidential Declaration with Respect to Continental Shelf, Oct. 29, 1945, discussed *in* SWARZTRAUBER 162-63; Mexican Presidential Decree, Feb. 25, 1949, 4 WHITEMAN 803.

210. SWARZTRAUBER 163; Cosford, n. 201, 124. US protests included US Ambassador James Bruce note to Argentina Foreign Office, July 2, 1948, 4 WHITEMAN 794-94; US Ambassador Claude G. Bowers protest note to Chile Foreign Relations Minister German Vergara Donoso, July 2, 1948, *id.* 796-97; US Ambassador Paul C. Daniels note to Ecuador Ministry for Foreign Affairs, June 7, 1951, *id.* 800-01; US Charge d'Affaires *ad interim* de Lambert note to Peru Foreign Affairs Minister Armando Revoredo I, July 2, 1948, *id.* 798-99; US Ambassador George P. Shaw note to Salvador Minister for Foreign Affairs Canessa, Dec. 12, 1950, *id.* 802.

211. ROACH & SMITH ¶ 8.5, 205-08.

212. Saudi Arabia, Territorial Waters of Saudi Arabia, Decree No. 6/4/5/3711, May 28, 1949, *in* 43 AJIL SUPP. 154 (1949); COLOMBOS § 88; MACDONALD 115-16, 118-22 144-46, 199 (noting similarity of Saudi claim to US proclamation); 1 O'CONNELL, LAW OF THE SEA 473; Richard Young, *Saudi Arabian Offshore Legislation,* 43 AJIL 530 (1949).

213. COLOMBOS § 88A; MACDONALD 116, 119, 145.

214. COLOMBOS § 88A; MACDONALD 199.

215. Earlier disputes over land boundaries and islands clouded delimitation of offshore lines. MACDONALD 116-17, 126-37, 147-51, 199-201; *see also* nn. II.50-51, 69.

216. MACDONALD 199-200; *see also* MCRM 2-37, 2-235 - 2-240, 2-283, 2-352 - 2-356, 2-387 - 2-388, 2-437 - 2-526, 2-526 - 2-528.

217. 4 WHITEMAN 814-42 is an anthology of continental shelf definitions issues through 1965.

218. Continental Shelf Convention, art. 1; *see also* 2 O'CONNELL, LAW OF THE SEA 714-23.

219. Continental Shelf Convention, arts. 6(1), 6(2); *see also* 2 O'CONNELL, LAW OF THE SEA 684-727; 1 OPPENHEIM §§ 322-23. Convention shelf definitions do not necessarily coincide with geological definitions. NWP 1-14M Annotated ¶ 1.6 n. 56; NWP 9A Annotated ¶ 1.6 n.54; 1 OPPENHEIM § 316. *See* 1 O'CONNELL ch. 12 for geological analysis. National laws may vary from both; *see, e.g., id.* 492-98. To the extent national definitions vary from custom or treaty obligations, they are inadmissible under international law. Vienna Convention, art. 46; Nottebohm (Liech. v. Guat.), 1955 ICJ 4, 20-21; BROWNLIE, INTERNATIONAL LAW 35-36; 1 OPPENHEIM § 21; RESTATEMENT (THIRD) § 311(3).

220. RESTATEMENT (SECOND) § 23.

221. North Sea Continental Shelf (FRG v. Den., FRG v. Neth.), 1969 I.C.J. 4, 38, 53; *see also* 1 O'CONNELL, LAW OF THE SEA 480-82; 2 *id.* 690, 699-703, 705-08; 1 OPPENHEIM § 324; Wolfgang Friedmann, *The North Sea Continental Shelf Cases—A Critique,* 64 AJIL 229 (70).

222. Continental Shelf Convention, art. 2; *see also* 1 BROWN 255-56; 1 OPPENHEIM § 317; RESTATEMENT (THIRD) § 515(1).

223. Continental Shelf Convention, art. 3; *see also* 1 BROWN 256; NWP 1-14 Annotated ¶ 1.6, at 1-23; NWP 9A Annotated ¶ 1.6, at 1-24; 1 OPPENHEIM § 319; RESTATEMENT (THIRD) § 515(2).

224. Continental Shelf Convention, art. 5(a). *Id.*, art. 5(8) requires coastal State consent for shelf research, which should "not normally [be withheld] . . . . if . . . submitted by a qualified institution" engaged in "purely scientific research into the physical or biological characteristics of the . . . shelf," if the coastal State can participate or be represented in the research; *see also* 1 BROWN 256-57.

225. Continental Shelf Convention, arts. 4, 5(2)-5(7), 7.

226. High Seas Convention, art. 2.

227. *See* n. 75 and accompanying text.

228. Continental Shelf Convention, art. 4.

229. *Id.*, arts. 5(1), 5(6).

230. The coastal State must undertake all appropriate measures in the zones to protect the sea's living resources from harmful agents. The Convention does not prejudice that State's right to tunnel to exploit the subsoil at any depth. *Id.*, arts. 5(2)-5(5), 5(7), 7. *See also* COLOMBOS §§ 89-91; NWP 1-14 M Annotated ¶ 1.6; NWP 9A, Annotated ¶ 1.6; 1 OPPENHEIM § 321; SWARZTRAUBER 214.

231. *Compare* LOS Convention, art. 78, *with* Continental Shelf Convention, art. 3; *see also* 1 BROWN 258-59; 2 Nordquist ¶¶ VI.4, 78.1-78.8(d); NWP 1-14M Annotated ¶ 1.6, at 1-23; NWP 9A Annotated ¶ 1.6, at 1-24; 1 OPPENHEIM § 319; RESTATEMENT (THIRD) § 515.

232. *Compare* LOS Convention, art. 57, *with id.*, art. 76(1); *see also* 2 Nordquist ¶¶ 57.8(a)-57.8(b), 76.1-76.18(b).

233. *Compare* LOS Convention, arts. 76(1), 76(2), 76(4)-76(6) *with* Continental Shelf Convention, art. 1; *see also* 1 OPPENHEIM §§ 322-23. Although NWP 1-14M Annotated ¶ 1.6 and NWP 9A Annotated ¶ 1.6 declare this is a customary norm for distance, Lowe, *Commander's Handbook,* n. III.318, 114, says it may not be the case. 2 Nordquist ¶¶ 76.18(a)-76.18(b) is neutral on the point. LOS Convention, arts. 76(7)-76(9), provide for publishing and approving shelf claims by Commission on Limits of the Continental Shelf, established *in id.*, Annex II. *See also* 2 Nordquist ¶¶ 76.18(c), 76.18(e)-76.18(*l*).

234. *Compare* LOS Convention, art. 76(2), *with* Continental Shelf Convention, art. 1(a).

235. *Compare* LOS Convention, art. 83(1)-83(2), 83(4), referring to *id.*, arts. 279-99, *with* Continental Shelf Convention, arts. 6(1), 6(2); *see also* Maritime Delimitation in Area between Greenland & Jan Mayen (Den. v. Nor.), 1993 ICJ 38, 59-60; Continental Shelf (Libya v. Malta), 1985 ICJ 18, 43; Continental Shelf (Tunisia v. Libya), 1982 ICJ 18, 43; North Sea Continental Shelf, n. 221; United Kingdom - France Continental Shelf (UK v. Fr.), 54 ILR 6 (Ct. Arb. 1977); Delimitation of Maritime Boundary (Guinea v. Guinea-Bissau), 25 ILM 251, 272 (Ad Hoc Arb. 1985); 2 Nordquist ¶¶ 83.1-83.19(c), 83.19(e); 1 O'CONNELL, LAW OF THE SEA 480-82; 2 *id.* 685-714; 1 OPPENHEIM §§ 325-26. Optional Protocol of Signature Concerning Compulsory Settlement of Disputes, Apr. 26, 1958, 450 UNTS 169, refers disputes to the International Court of Justice but is not in force for the United States. RESTATEMENT (THIRD), Part V, *Introductory Note,* at 4 n.3. *United States Ocean Policy*, n. 3, besides proclaiming a 200-mile EEZ, said the claim would "provide jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf." This claim is consistent with customary law.

236. *Compare* LOS Convention, arts. 77(1)-77(3) *with* Continental Shelf Convention, art. 2; *see also* 2 Nordquist ¶¶ 77.1-77.7(b).

237. *Compare* LOS Convention, arts. 261-62 *with* Continental Shelf Convention, art. 5(1); *see also* 4 Nordquist ¶¶ 261.1-62.5.

238. *Compare* LOS Convention, art. 240(c) *with* Continental Shelf Convention, art. 5(1); *see also* 4 Nordquist ¶¶ 240.1-40.8, 240.9(c).

239. LOS Convention, arts. 192-265; Continental Shelf Convention, art. 24, calls upon States to draft regulations to prevent sea pollution resulting from seabed and subsoil exploration and exploitation. *See* nn. VI.64, 110, 116-20 and accompanying text.

240. *Compare* LOS Convention, arts. 60, 79-81, 85 *with* Continental Shelf Convention, arts. 4, 5(2)-5(7), 7; *see also* 2 Nordquist ¶¶ 60.1-60.15(m), 79.1-81.7(d), 85.1-85.6; 1 OPPENHEIM § 320-21; n. 215 and accompanying text. The Area is the deep seabed beyond the continental shelf; its resources are declared the common heritage of mankind. LOS Convention, arts. 136-37; *see also* BROWN 10, 20, 445-47; 1 OPPENHEIM §§ 350-52; nn. VI.64, 116-17, 147-50 and accompanying text. Because of the Persian Gulf's shallow depth, there is no Area beneath its waters. *See* nn. II.66-69 and accompanying text.

241. North Sea Continental Shelf, n. 221 and accompanying text.

242. Delimitation of Maritime Boundary of Gulf of Maine (US v. Can.), 1984 ICJ 246, 294; *see also* Continental Shelf (Libya v. Malta), 1985 ICJ 13, 55; 1 O'CONNELL, LAW OF THE SEA 688-714; ROACH & SMITH ¶ 8.5; RESTATEMENT (THIRD), *Introductory Note* to Part V, 5; *id.* § 515, cmt. b, say some LOS Convention provisions may be *de lege ferenda*, *e.g.*, LOS Convention, arts. 68, 77.

243. ROACH & SMITH ¶ 8.5.

244. *See* nn.123-30, 200-16 and accompanying text.

245. UN Charter, arts. 51, 103; *see also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

246. LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

247. *See* nn. V.653, 659 and accompanying text; *see also* Parts V.G.2-V.G.3, V.J.6-V.J.7.

248. Seabed Arms Control Treaty, arts. 1-2, incorporating by reference Territorial Sea Convention, art. 24 (12-mile limit for contiguous zone). As of January 1, 1998, 99 States were party, albeit some with reservations, *etc.* TIF 445-46. State succession principles may increase the number. Symposium, *State Succession*; Walker, *Integration and Disintegration*. Given the number of parties, the treaty may be on the way toward recognition as a customary norm. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3) & cmt. 4; *see also* n. III.10 and accompanying text.

249. *Accord*, NWP 1-14M Annotated ¶ 10.2.2.1; NWP 9A Annotated ¶ 10.2.2.1; *see also* 1 BROWN 243-44; 1 O'CONNELL, LAW OF THE SEA 488 (divergence of views whether coastal State has exclusive use of its proclaimed continental shelf for these purposes).

250. UN Charter, arts. 51, 103; LOS Convention, arts. 78, 87(1); Continental Shelf Convention, art. 3; High Seas Convention, art. 2. *See* nn. III.10-11, 916-18, 952-67, IV.6-9, 10-25 and accompanying text.

251. Seabed Arms Control Treaty, art. 4.

252. LOS Convention, arts. 78-79(1), 87(1); Continental Shelf Convention, arts. 3-5(1); High Seas Convention, art. 2; *see also* nn. 75, 149-50, 152, 155-56 and accompanying text.

253. *See* nn. II.66-69 and accompanying text.

254. MACDONALD 119.

255. *Id.* 200; *see also* n. II.51 and accompanying text.

256. *See* n. 239 and accompanying text.

257. *See* nn. II.367, 410-11 and accompanying text.

258. *See* nn. II.178-80, 210-14, 272, 306, 309, 401-02, 434, 457 and accompanying text.

259. *See* n. III.952-67, IV.10-25 and accompanying text.

260. *See* Parts V.A, V.G.1, V.J.1, V.J.7, Chapter VI.

261. *See* nn. II.281, 393-99 and accompanying text.

262. *Cf.* UN Charter, arts. 51, 103; *see also* nn. III.10-11, 916-18, IV.6-9 and accompanying text.

263. *See* nn. V.21-28 and accompanying text.

264. *See generally* Chapter VI.

265. *See* nn. III.10-11, 48-630, 916-18, 952-67, IV.6-25 and accompanying text.

266. *See* nn. 75, 149-50, 152, 155-56, 239 and accompanying text.

267. *See* COLOMBOS §§ 95-106; PHILIP C. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 3-66 (1927); 1 O'CONNELL, LAW OF THE SEA chs. 3-4; SWARZTRAUBER *passim* for similar analysis through their publication dates.

268. SWARZTRAUBER 130; *accord,* JESSUP, THE LAW, n.267, 66.

269. Customs Consolidation Act, 39 & 40 Vict., ch. 36, § 134. The Act also asserted other claims related to policing smuggling.

270. SWARZTRAUBER 70; *see also* JESSUP, THE LAW, n. 267, 10-11, also citing Act of Aug. 20, 1853, 16 & 17 Vict., ch. 107. Convention for Regulating Police of North Sea Fisheries, May 6, 1882, arts. 2, 3, 160 CTS 219, 222, established a three-mile zone for exclusive fishing by coastal State nationals. Convention Respecting Free Navigation of the Suez Canal, Oct. 29, 1888, art. 4, 171 CTS 241, 244 and the Hay-Pauncefote Treaty, Treaty to Facilitate Construction of a Ship Canal, Nov. 18, 1901, Gr. Brit.-US, art. 3(5), 32 Stat. 1903, 1904, forbade hostilities within three miles of ports at the ends of the Suez and Panama canals. Alleganean Claim (Gr. Brit. v. US), 4 MOORE, ARBITRATIONS 4332, stated three miles was the territorial limit recognized by international law. *See also* COLOMBOS § 106; JESSUP, THE LAW, n. 267, 61-62; 1 O'CONNELL, LAW OF THE SEA 157.

271. Territorial Waters Jurisdiction Act, Oct. 16, 1878, 41 & 42 Vict., ch. 73, §§ 2, 7, superseding The Queen v. Keyn, 2 Ex.D. 63 (1876). COLOMBOS §105 notes the connection between the Acts.

272. US Secretary of State Thomas Jefferson letters to British Minister to the United States George Hammond, French Minister to the United States Charles Genet, Nov. 8, 1793, *in* 6 THE WRITINGS OF THOMAS JEFFERSON 440-42 (Paul Leicester Ford ed. 1895).

273. Act of June 5, 1794, § 6, 1 Stat. 381, 384; *see also* NWP 1-14M Annotated ¶ 1.4.1 n.32; NWP 9A Annotated, ¶ 1.4.1 n.30; SWARZTRAUBER 60.

274. *See generally* JESSUP, THE LAW, n. 267, 9-66; SWARZTRAUBER 64-107.

275. Declaration of Herbert H. D. Price, U.S. Agent, *in* C. H. White Case (US v. Russ.), 9 UNRIAA 63, upon the US Secretary of State's specific authority. Until 1988 the United States remained committed to three miles. US Department of State Public Notice 358, 37 Fed. Reg. 11906 (June 15, 1972). *See also* The Delaware, 161 US 459 (1896); Manchester v. Massachusetts, 139 US 240, 257-58 (1891) for contemporary judicial views; COLOMBOS § 107; 1902 FRUS, App. C 440-61; SWARZTRAUBER 77-78, 92-95.

276. US Naval War Code, art. 2.

277. *See* SWARZTRAUBER 112-15.

278. *Id.* 117-23, citing Convention for Preservation & Protection of Fur Seals, n. 114, art. 5, 37 Stat. 1543; North Atlantic Fisheries (Gr. Brit. v. US), n. 95, implemented by North Atlantic Coast Fisheries Treaty, n. 91, art. 2, 37 Stat. 1635.

279. *Compare* Hague VIII, art. 2, *with* Hague XIII, referring to "neutral waters;" *see also Report to the Third Commission of the Second Hague Peace Conference,* Sept. 17, 1907, art. 2, *in* JAMES BROWN SCOTT, THE REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907, at 664 (1917). SWARZTRAUBER 116 says "This draft was essentially the British version . . ." The US Navy may have been more interested in a different rule than *id.* indicates; Naval War College, International Law Topics and Discussions 1913, at 11 (1914), a draft for a Hague conference that never was because of World War I, advocated a six-mile marginal sea. *See* JESSUP, THE LAW, n. 267, 56; *see also* Robertson, New LOS 274-77; nn. V.60, 70-72 and accompanying text.

280. *See generally* COLOMBOS § 157; 1 O'CONNELL, LAW OF THE SEA 157; SWARZTRAUBER 123-25.

281. *Report of the Neutrality Committee, in* International Law Association, Report of the Thirty-Third Conference 260 (1924), recommending *Amended Draft Convention: Laws of Maritime Jurisdiction in Time of Peace, id.* 286. *See also* COLOMBOS § 114, 103; SWARZTRAUBER 126.

282. Institute of International Law, *Projet de reglement relatif a la mer territoriale en temps de paix,* 34 ANNUAIRE 755 (1928); *see also* COLOMBOS § 114, 102-03; SWARZTRAUBER 127.

283. Harvard Research Draft, arts. 2, 3.

284. Conference for Codification of International Law, Final Act, B. Territorial Sea, Resolution, arts. 1-2, 4-5 (1930), 24 AJIL SUPP. 169, 183-85 (1930). COLOMBOS §§ 114-17; O'CONNELL, LAW OF THE SEA 158-59; SWARZTRAUBER 131-38 describe events leading up to the Conference, illustrating divided opinion on the limit.

285. MACDONALD 86.

286. Sixteen conventions were ratified: Belgium, Dec. 9, 1925, 45 Stat. 2456, 72 LNTS 171; Chile, May 27, 1930, 46 *id.* 2852, 133 LNTS 141; Cuba (with exchange of notes & memorandum of understanding), Mar. 4, 1926, 44 *id.* 2395, 61 LNTS 383; Denmark, May 29, 1924, 43 *id.* 1809, 27 LNTS 361; France, June 30, 1924, 45 *id.* 2403, 61 LNTS 415; Germany, May 19, 1924, 43 *id.* 1815; Great Britain, Jan. 23, 1924, *id.* 1761, 27 LNTS 181; Greece, Apr. 25, 1928, 45 *id.* 2736, 91 LNTS 231; Italy, June 23, 1924, 43 *id.* 1844; Japan (with memorandum of understanding), May 31, 1928, 46 *id.* 2446, 101 LNTS 63; Netherlands, Aug. 21, 1924, 44 *id.* 2013, 33 LNTS 433; Norway, May 24, 1924, 43 *id.* 1772, 26 LNTS 43; Panama, June 6, 1924, *id.* 1875, 138 LNTS 397; Poland, June 30, 1930, 46 *id.* 2773, 108 LNTS 323; Spain, Feb. 10, 1926, 2, 44 *id.* 2465, 67 LNTS 131; Sweden, May 20, 1924, 43 *id.* 1830, 29 LNTS 421. All are in force except those with Germany and Italy. TIF 22, 52, 66, 72, 97, 111, 155, 203, 213, 222, 236, 263, 270, 304. JESSUP, THE LAW, n. 267, 56-57, in zeal for the three-mile limit, does not note the distinction, although several treaties leaving the issue open were concluded by 1927.

287. *See* nn. 123-30, 200-16 and accompanying text; *see also* COLOMBOS §§ 87, 88A; SWARZTRAUBER 162-65.

288. *See* SWARZTRAUBER 171-72.

289. Fisheries Jurisdiction (UK v. Nor.), 1951 ICJ 116, 119-21, 143; *see also* BROWN 24-26 (Fisheries Jurisdiction formula followed in Territorial Sea Convention, art. 4); COLOMBOS §§ 124-28A, 131, 134 (same); 1 O'CONNELL, LAW OF THE SEA 199-206.

290. MACDONALD 86-87.

291. Philippines Ministry of Foreign Affairs note to UN Secretary General, Dec. 12, 1955, 4 WHITEMAN 282-83; Republic of Indonesia, Announcement on Territorial Waters, Dec. 14, 1957, *id.* 284. The United States noted non-acquiescence to the Philippines claim and protested the Indonesia Announcement. *Id.* 283-85.

292. MACDONALD 87-88.

293. Territorial Sea Convention, arts. 1-2, reaffirmed by LOS Convention, art. 2; *see also* 2 Nordquist ¶¶ II.1, II.3, 2.8(f); 1 OPPENHEIM § 187; RESTATEMENT (THIRD) § 512 & cmts. a, b, r.n.1, 2.

294. The 12-mile claim was an amendment of its 1934 assertion of a contiguous zone. MACDONALD 88, 107; *see also* nn. 300, 354 and accompanying text.

295. Territorial Sea Convention, art. 24, which is also the limit for emplacing nuclear weapons or weapons of mass destruction, as stated in the Seabed Arms Control Treaty, arts. 1-2. *See* nn. 248-52 and accompanying text. To the extent that States assert a right to punish offenses committed within the zone, as Lowe, *The Commander's*, n. III.318, 112 says, this exceeds the scope of the Convention's grant. However, States may arrest, try and punish persons who commit offenses in the zone pursuant to jurisdictional bases other than the territorial principle, *e.g.*, the protective principle cited by *id.* n. 14 in United States v. Gonzalez, 776 F.2d 931, 938-39 (11th Cir. 1985). *See* RESTATEMENT (THIRD) §§ 402-04, 421-23.

296. Territorial Sea Convention, art. 24(1) ("In a zone of the high seas contiguous to the territorial sea . . .").

297. The US contiguous zone was reasserted in US State Department Public Notice 358, n. 275. Most countries' pre-Convention contiguous zone claims were part of widespread practice for protecting revenue and health interests. *See* BROWN 128-30; 1 OPPENHEIM § 205. In 1999 the United States proclaimed a 24-mile contiguous zone. Proclamation No. 7219, 64 Fed. Reg. 48701 (1999). *See also* n. 536 and accompanying text.

298. High Seas Convention, art. 23; *see also* BROWN 135-36; COLOMBOS §§ 171-79; NWP 1-14M Annotated ¶ 3.11.2.2.2; NWP 9A Annotated ¶ 3.9; 2 O'CONNELL, LAW OF THE SEA 1075-93; RESTATEMENT (THIRD) § 513 cmt. g; Craig H. Allen, *Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Technologies and Practices*, 20 ODIL 309 (1989) (analyzing LOS Convention rules); Susan Maidment, *Historic Aspects of the Doctrine of Hot Pursuit*, 46 BYBIL 365 (1972).

299. MACDONALD 100, 107.

300. Manley O. Hudson and Richard Young of the Harvard Law School, acting in private capacity, drafted the 1949 claim, noting regional practice for a 6-mile territorial sea. *Id.* 87-88, 100-07.

301. Territorial Sea Convention, arts. 3-13; *see also* BROWN 24-26 (Territorial Sea Convention, art. 4 follows Fisheries Jurisdiction, n. 289); COLOMBOS §§ 118-10, 134 (same); 1 O'CONNELL, LAW OF THE SEA 170-235;

SWARZTRAUBER 204-11; 4 WHITEMAN *passim.* For discussion of Iranian and Saudi baseline claims through 1959, *see* MACDONALD 92-98.

302. Territorial Sea Convention, art. 14; its other rules clause refers to the LOAC. *See* nn. III.953-67, IV.10-25 and accompanying text. What is "prejudice" under the Convention, art. 14(4) was left to coastal State interpretation and failed to limit prejudicial activities to those in which a foreign ship engaged while transiting the territorial sea. *See also* 1 O'CONNELL, LAW OF THE SEA 294-97; RESTATEMENT (SECOND) § 45, cmts. f-g; 48; *id.* (THIRD) §§ 512, cmt. c & r.n.3-6; 513(1)-513(2) & cmts. a-c, e, f, r.n.1-2; Roma Sadurska, *Foreign Submarines in Swedish Waters: The Erosion of an International Norm,* 10 YALE INT'L L.J. 34 (1984). LOS Convention art. 19 tries to eliminate some subjective interpretative difficulties that have arisen concerning the 1958 Convention innocent passage rules. NWP 9A Annotated ¶ 2.3.2.1 n.25. O'CONNELL does not rule out using force against a submerged transiting submarine but says "every measure should be taken short of force to require the submarine to leave, as provided in Article 23 of the [Territorial Sea Convention]." 1 O'CONNELL 297. A coastal State retains a right of self-defense, including anticipatory self-defense, under UN Charter, arts. 51, 103. *See* nn. III.10-11, 48-630, 916-18, 952-67, IV.6-25 and accompanying text. *See also* 2 Nordquist ¶¶ 19.1-19.11.

303. NWP 1-14M Annotated ¶ 2.3.2.4 n.33; NWP 9A Annotated ¶ 2.3.2.4 n.32.

304. 1 O'CONNELL, LAW OF THE SEA 294 (right to exclude rooted in treaty law, *e.g.,* ICAO Convention, arts. 1, 3(c)); NWP 1-14M Annotated ¶ 2.3.2.1; NWP 9A Annotated ¶ 2.3.2.1; RESTATEMENT (SECOND) § 45, cmt. j; *id.* (THIRD) § 513, cmt. i & r.n.6.

305. Special agreements can give military and other State aircraft overflight or landing rights. RESTATEMENT (THIRD) § 513, r.n.6, citing Chicago International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, 84 UNTS 389, which does not cover military or State aircraft.

306. Territorial Sea Convention, art. 15.

307. Eight countries appended reservations to protect their claims that surface warship passage was subject to prior notification or authorization. Nevertheless, the weight of authority is that the Convention permits innocent passage of warships without prior notice or authorization. BROWN 64-66; NWP 1-14M Annotated ¶ 2.3.2.4; NWP 9A Annotated ¶ 2.3.2.4; 1 O'CONNELL, LAW OF THE SEA 274-91 (customary trends, which apply to warship innocent passage under the Convention; no evidence of State practice before very recent times of other than free, uncontested warship passage); RESTATEMENT (SECOND) § 49 (implication of coastal State waiver); *id* (THIRD) § 513, cmt. h & r.n.2; *but see* 1 OPPENHEIM § 201 (right doubtful). Saudi Arabia opposed warship innocent passage; Iran claimed warship passage required prior authorization. MACDONALD 170-71, 178.

308. Territorial Sea Convention, art. 16; *see also* 1 O'CONNELL, LAW OF THE SEA 297-98; RESTATEMENT (THIRD) § 513(2) & cmts. b-c. For analysis of straits passage, *see* Part.B.6.

309. MCDOUGAL & BURKE 592-93; NWP 1-14M Annotated ¶ 2.3.2.3 n.31; NWP 9A, Annotated ¶ 2.3.2.3 n.30.

310. Territorial Sea Convention, art. 17; *see also* RESTATEMENT (THIRD) § 513(2) & cmts. b, c. Art. 17's other rules clause refers to the LOAC; *see* nn. III.953-67, IV.10-25 and accompanying text.

311. Territorial Sea Convention, arts. 18-20; *see also* RESTATEMENT (SECOND) §§ 46-47; *id.* (Third) §§ 512, r.n. 5; 513(2) & cmt. e.

312. Territorial Sea Convention, arts. 21-22. The other rules clause refers to the LOAC. *See* nn. III.953-67, IV.10-25 and accompanying text.

313. Territorial Sea Convention, art. 23.

314. BROWN 44-45; COLOMBOS §§ 119-20A; MACDONALD 171; 1 O'CONNELL, LAW OF THE SEA 161-64; SWARZTRAUBER 214-18; 4 WHITEMAN 122-35; Powers & Hardy, n. 2, 70-71.

315. RESTATEMENT (SECOND) § 15(2); *accord,* COLOMBOS § 121, citing *inter alia* MCDOUGAL & BURKE 562, asserting two years later that the three-mile limit was the only common denominator.

316. *See generally* RESTATEMENT (SECOND) §§ 11-15, citing Territorial Sea Convention, arts. 3-4, 6-12.

317. MACDONALD 90-91; *see also* nn. 299-300 and accompanying text.

318. LOS Convention, arts. 2-3; *see also* 2 Nordquist ¶¶ 2.1-3.8(e).

319. *Compare* LOS Convention, arts. 4-16, *with* Territorial Sea Convention, arts. 3-13; *see also* BROWN 22-36; 2 Nordquist ¶¶ 4.1-16.8(e); NWP 1-14M Annotated ¶ 1.3; NWP 9A Annotated ¶ 1.3; 1 O'CONNELL, LAW OF THE SEA 175-235; 1 OPPENHEIM §§ 188-95; ROACH & SMITH ¶¶ 4.1-4.5. 2 O'CONNELL 842-47 notes the LOS Convention's ambiguity on whether deepwater ports are artificial islands. The US Deepwater Port Act of 1974, 33 USC §§ 1501, 1502(10), provide for them; *see also* NWP 1-14M Annotated ¶ 1.4.2.2; NWP 9A Annotated ¶ 1.4.2.2.

320. RESTATEMENT (THIRD ) §§ 511(a) & cmt. b; 512.

321. *Id.* § 511, r.n.4.

322. In 1958 19 States claimed 4 to 11 miles; in 1965 24 claimed 4 to 11 miles; in 1974 14 claimed 4 to 11 miles; in 1979 7 claimed 4 to 11 miles. Table A1-6: The Expansion of Territorial Sea Claims, *in* NWP 1-14M Annotated, at 1-84; Table 3: Territorial Sea Claims, *in* ROACH & SMITH 149; *see also* BROWN 45-50. Newly independent States claimed 12-mile limits, while many that had claimed 4 to 11 miles moved to 12 miles as the number of countries adhering to a 3-mile limit declined.

323. LOS Convention, art. 3; *see also* 1 OPPENHEIM § 196.

324. *Compare* LOS Convention, art. 33, *with* Territorial Sea Convention, art. 24. RESTATEMENT (SECOND) § 21 approves Territorial Sea Convention principles.

325. This analysis is derived from the LOS Convention. *Compare id.*, art. 33(1) ("In a zone contiguous to its territorial sea...") with *id.*, art. 24(2) ("The... zone may not extend beyond 24... miles from the baselines from which ... the territorial sea is measured."). *See also* BROWN 129-35; 2 Nordquist §§ 33.1-33.8(i); 1 OPPENHEIM § 205; RESTATEMENT (THIRD) §§ 511(b) & cmt. k; 513 cmt. f.

326. *Compare* LOS Convention, art. 111, *with* High Seas Convention, art. 23; *see also* BROWN 135-36; 2 Nordquist ¶ 33.8(g); 3 *id.* ¶¶ 111.1-11.9(i); NWP 1-14M Annotated ¶ 3.11.2.2.2; NWP 9A Annotated ¶ 3.9; RESTATEMENT (SECOND) § 22; *id.* (THIRD) § 513 cmt. g; Allen, n. 298; Maidment, n. 298; n. 298 and accompanying text.

327. LOS Convention, art. 303(2); *see also* BROWN 135; RESTATEMENT (THIRD) § 521 r.n.6; nn. VI.141-50 and accompanying text. Article 303 also says its terms are also "without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature," an example of derogation permitted by art. 311(2) and the Convention's other rules clauses, which allow applying the LOAC in appropriate situations. *See* nn. III.953-67, IV.10-25 and accompanying text.

328. President Ronald Reagan, *United States Oceans Policy,* Mar. 10, 1983, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 14, 1983); *see also* BROWN 50-51; NWP 1-14M Annotated ¶ 1.2; NWP 9A Annotated ¶ 1.2; RESTATEMENT (THIRD) § 511 r.n.4; Mark B. Feldman & David Colson, *The Maritime Boundaries of the United States,* 75 AJIL 729, 730 (1981).

329. RESTATEMENT (THIRD), Part V, *Introductory Note* 5; *see also* n. 328 and accompanying text. Five years later the United States proclaimed a 12-mile territorial sea. Proclamation No. 5928, Territorial Sea of the United States, Dec. 27, 1988, 54 Fed. Reg. 777 (1989); *see also* n. 332 and accompanying text.

330. Only 5 claimed 4 to 11 miles. Table 3: Territorial Sea Claims, *in* ROACH & SMITH 149.

331. RESTATEMENT (THIRD ) § 511(a) & r.n.4.

332. Presidential Proclamation No. 5928, Dec. 27, 1988, 54 Fed. Reg. 777 (Jan. 9, 1989).

333. By 1997 Bahrain, Qatar and the UAE had joined 119 other States in proclaiming 12-mile territorial seas. NWP 1-14M Annotated, Table A1-5; NWP 9A Annotated, Table ST1-5; *see also* BROWN 45-50.

334. *Cf.* BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3) & cmt. f.

335. NWP 1-14M Annotated, Table A1-5 at 1-84; NWP 9A Annotated, Table ST1-5; *see also* Table 6.1: Territorial Sea Claims as at 1 June 1993, *in* BROWN 46-49.

336. ROACH & SMITH ¶¶ 5.4-5.5.

337. Territorial Sea Convention, art. 14(5) omitted reference to foreign flag fishing ships, as did the straits innocent passage rule in *id.*, art. 16(4). The 1982 LOS Convention, art. 20 also requires "other underwater vehicles" to navigate on the surface and to show their flag. *Compare* LOS Convention, arts. 17-18, 20, 25-28, 30, 32 *with* Territorial Sea Convention, arts. 14-15, 18-20, 22(2), 23; *see also* BROWN 51-53, 62-64; 2 Nordquist ¶¶ 17.1-18.6(f), 20.1-20.7(c), 25.1-28.4(e), 30.1-30.6, 32.1-32.7(b); NWP 1-14M Annotated ¶ 2.3.2.1, 2.3.2.4; NWP 9A Annotated ¶¶ 2.3.2.1, 2.3.2.4; 1 O'CONNELL, LAW OF THE SEA 294-97; Part B.5. Although LOS Convention, art. 30, like Territorial Sea Convention, art. 23, limits a coastal State to requiring a submerged submarine to leave, and this might be the only step a coastal State takes, that State also has self-defense and any LOAC rights, the latter applying to the territorial sea through other rules clauses in LOS Convention, arts. 2(3), 19(1), 21(1), 31; Territorial Sea Convention, arts. 1(2), 14(4), 17, 22(2). UN Charter, arts. 51, 103; *see also* nn. III.10-11, 47-630, 914-18, 952-67, IV.6-25 and accompanying text.

338. *Compare* LOS Convention, art. 19(1) *with* Territorial Sea Convention, art. 14(4); *see also* 2 Nordquist ¶ 19.10(a); 1 OPPENHEIM § 615; RESTATEMENT (THIRD) § 513(1) & cmt. b, r.n.1.

339. *See* nn. III.952-67, IV.10-25 and accompanying text.

340. *Compare* LOS Convention, art. 19(2) *with* Territorial Sea Convention, art. 14(5).

341. *Compare* Joint Statement with Uniform Attached Interpretation of Rules of International Law Governing Innocent Passage, Sept. 23, 1989, USSR-US, ¶ 3, *in* 28 ILM 1444, 1446 (1989) (Joint Interpretation) (list exhaustive); 2 Nordquist ¶¶ 19.2-19.9, 19.10(b)-19.11 (although negotiations may indicate list open-ended, Joint Interpretation likely to be influential for view that list is exhaustive); NWP 1-14M Annotated ¶ 2.3.2.1 n.27 (art. 19[2] list exclusive); NWP 9A Annotated ¶ 2.3.2.1 n.26 (same); F. David Froman, *Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO L. REV. 625, 659 (1984) (same); Robert J. Grammig, Comment, *The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea*, 22 HARV. INT'L L. J. 331, 340 (1981) (same); John R. Stevenson & Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session*, 69 AJIL 763, 771-72 (1975) (same) *with* BROWN 56-58 (taking no position); 2 Nordquist ¶ 19.10(*l*) (diplomatic conference criticism of list as being open-ended); 1 O'CONNELL, LAW OF THE SEA 270 (list does not say these activities are the "only" ones; art. 19(2)(*l*) so general as to comprehend anything); 1 OPPENHEIM § 199, 616 ("possibly comprehensive list"); Lowe, *The Commander's*, n. III.318, 116 (list illustrative; erroneous citation of NWP 9A Annotated ¶ 2.3.2.1 as agreeing with this point). RESTATEMENT (THIRD) § 513 cmt. b takes no position.

342. *Compare* LOS Convention, art. 20 *with* Territorial Sea Convention, art. 14(6); *see also* 1 OPPENHEIM § 201, 620; Sadurska, n. 302, 57; nn. 302, 337 and accompanying text.

343. 1 O'CONNELL, LAW OF THE SEA 294 (citing *inter alia* ICAO Convention, arts. 1, 3(c)); NWP 1-14M Annotated ¶ 2.3.2.1, at 2-9; NWP 9A Annotated ¶ 2.3.2.1, at 2-11; RESTATEMENT (THIRD) § 513 cmt. i.

344. *See* nn. III.952-67, IV.10-25 and accompanying text.

345. LOS Convention, art. 21; *see also* Joint Interpretation, n. 341, arts. 5-7, 28 ILM 1446-47; 2 Nordquist ¶¶ 21.1-21.12; NWP 1-14M Annotated ¶ 2.3.2.2; NWP 9A Annotated ¶ 2.3.2.2.

346. NWP 1-14M Annotated ¶ 2.3.2.2 n.30; NWP 9A Annotated ¶ 2.3.2.2 n.29; *see also* BROWN 58-59 (no view); 1 OPPENHEIM § 198 (same); RESTATEMENT (THIRD) § 513 cmt. c (same).

347. In designating sea lanes and traffic separation schemes, a coastal State must consider competent international organization recommendations, channels customarily used for international navigation, particular ships' and channels' special characteristics, and traffic density. LOS Convention, art. 22. *See also* BROWN 59-61; 2 Nordquist ¶¶ 22.1-22.9; 2 O'CONNELL, LAW OF THE SEA 833-36, noting their use in straits and on the high seas; 1 OPPENHEIM § 200; RESTATEMENT (THIRD) § 513 cmt. d.

348. LOS Convention, art. 23; *see also* BROWN 60; 2 NORDQUIST ¶¶ 23.1-23.9; 1 OPPENHEIM § 200; RESTATEMENT (THIRD) § 513 cmt. d.

349. *Compare* LOS Convention, arts. 24-25 *with* Territorial Sea Convention, arts. 14-16; *see also* BROWN 61; 2 Nordquist ¶¶ 24.1-25.9; NWP 1-14M Annotated ¶ 2.3.2.3; NWP 9A Annotated ¶ 2.3.2.3; 1 OPPENHEIM §§ 198, 200; RESTATEMENT (THIRD) § 513 cmt. c; 4 WHITEMAN 379-86; n. 337 and accompanying text. The President of the United States has authority to suspend innocent passage in US territorial waters. 50 USC § 191.

350. LOS Convention, art. 31; *see also* 2 Nordquist ¶¶ 31.1-31.7(b).

351. Territorial Sea Convention, art. 14(1); LOS Convention, art. 17, confirmed by Joint Interpretation, n. 341, ¶ 2, 28 ILM 1446; *see also* BROWN 64-66; 2 Nordquist ¶ 17.9(b); NWP 1-14M Annotated ¶ 2.3.2.4; NWP 9A Annotated ¶ 2.3.2.4; 1 O'CONNELL, LAW OF THE SEA 274-91; RESTATEMENT (THIRD) § 513, cmt. h & r.n.2; Froman, n. 341, 625; Bruce Harlow, *Legal Aspects of Claims to Jurisdiction in Coastal Waters*, JAG J. 86 (Dec. 1969-Jan. 1970); Bernard H. Oxman, *The Regime*, n. III.956, 854; *but see* 1 OPPENHEIM § 201 (expressing doubt as to the rule). *See also* nn. 337-50 and accompanying text.

352. Table ST2-2: *Nations Claiming a Right to Control Entry of Warships into Own Territorial Sea, in* NWP 9A Annotated, at 2-17; *see also* Froman, n. 341, 651-55; Lowe, *The Commander's*, n. III.318, 119. 1 O'CONNELL, LAW OF THE SEA 292-93 says the shift has been from a Cold War orientation to States wishing to demonstrate positions detached from global seapower politics.

353. Table ST2-1: *Nations Specifically Recognizing the Right of Innocent Passage, in* NWP 9A Annotated, at 2-12. The US view is that surface warships possess the same innocent passage right as any vessel in the territorial sea, and that right cannot be conditioned on prior notice or authorization of passage. NWP 1-14M Annotated ¶ 2.3.2.4 n.32; NWP 9A Annotated ¶ 2.3.2.4 n.31; *accord*, BROWN 66-72; 1 O'CONNELL, LAW OF THE SEA 292-93; Froman, n. 341, 625; Harlow, n. 351, 86; Oxman, *The Regime*, n. III.956, 854; *see also* nn. 337-50 and accompanying text.

354. All listed countries except Saudi Arabia, which claimed an 18-mile zone and a 12- mile territorial sea, proclaimed a 24-mile zone. Table 7: *States Claiming a Contiguous Zone Beyond the Territorial Sea, in* ROACH & SMITH 164 n.7.

355. *Id.* 164 n.7.

356. Presidential Proclamation No. 7219, n. 297, referring to Presidential Proclamation No. 5030, n. 157; *see also* nn. 157, 297, 329 and accompanying text.

357. The most egregious is North Korea's 50-mile military maritime boundary. ROACH & SMITH ¶ 6.2; *see also* RESTATEMENT (THIRD) § 511 cmt. k (international law does not recognize coastal State assertions of special zones to protect security or environment).

358. COLOMBOS § 170A, referring to *Defensive Sea Areas, in* 46 NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS 1948-49, at 157-68 (1950); *Defensive Sea Areas, in* MACCHESNEY 603-04.

359. *See* nn. 301, 319 and accompanying text.

360. *See generally* ROACH & SMITH ¶ 4.6; Dennis Mansager, *The U.S. Freedom of Navigation Program: Policy, Procedure and Future,* LIBER AMICORUM ch.6.

361. LOS Convention, art. 5, 7; Territorial Sea Convention, arts. 3-4; *see also* BROWN 23; 2 Nordquist ¶¶ 5.1-5.4(d), 7.1-7.9(h); NWP 1-14M Annotated ¶ 1.3.2; NWP 9A Annotated ¶ 1.3.2; 1 O'CONNELL, LAW OF THE SEA 170-218; 1 OPPENHEIM § 188; RESTATEMENT (THIRD) § 511 cmt.h; nn. 289, 301, 319, 359 and accompanying text.

362. *See, e.g.,* Table 2: *Claims Made to Straight Baselines,* ROACH & SMITH ¶ 4.6, at 77-81, with notation, "Absence of protest or assertion should not be inferred as acceptance or rejection by the United States of the straight baseline claims." *See also id.* n.63, listing scholars' criticism of 17 States' claims.

363. Table 2, n. 362, *in* ROACH & SMITH ¶ 4.6, 79-81.

364. *See* nn. II.66-69, IV.212-16 and accompanying text.

365. *See* nn. 296-300, 324-27 and accompanying text.

366. *See* nn. 80-157, 188-243 and accompanying text.

367. *See* n. 357 and accompanying text.

368. *See* nn. 300, 357 and accompanying text.

369. *See* nn. 333, 353 and accompanying text.

370. LOS Convention, art. 22; *see also* nn. II.103, 262, IV.347 and accompanying text. *See* Parts V.B, V.C.3, V.C.5, V.J.1, V.J.3, for analysis of Iranian coastal convoying in the LOAC context.

371. *See* n. II.365 and accompanying text.

372. *See, e.g.,* LOS Convention, arts. 19(2)(a) (threat, use of force against coastal State sovereignty, territorial integrity or political independence, or in any other manner violating principles of international law in the UN Charter), 19(2)(b) (exercise, practice with weapons of any kind), 19(2)(*l*) (any other activity not having direct bearing on passage); 1 O'CONNELL, LAW OF THE SEA 293-94; *see also* nn. 338-43 and accompanying text.

373. Territorial Sea Convention, art. 16(4); *see also* nn. 338-43 and accompanying text.

374. *See generally* Hague XIII; SAN REMO MANUAL, ¶¶ 15-16 & Commentaries; nn. V.485-92 and accompanying text; Parts V.F.2, V.F.5, V.J.6.

375. LOS Convention, arts. 2(3), 19(1), 21(1), 31; Territorial Sea Convention, arts. 1(2), 14(4), 17, 22(2); *see also* nn. III. 953-67, IV.10-25 and accompanying text.

376. *See* n. 363 and accompanying text.

377. LOS Convention, art. 2; Territorial Sea Convention, art. 1; *see also* nn. 293, 318-21 and accompanying text.

378. LOS Convention, art. 25(3), adding weapons exercises; Territorial Sea Convention, art.16(3); *see also* 1 O'CONNELL, LAW OF THE SEA 297-98; n. 349 and accompanying text.

379. *See* nn.II. 379-81 and accompanying text.

380. *See* Parts IV.B.6, IV.D.4, V.F.1, V.F.2, V.F.5, V.J.6.

381. 381. JESSUP 144-45; *see also* COLOMBOS §§ 180-81; 1 OPPENHEIM §§ 193, 203; Memorandum of Frank Boas, Attorney Adviser, US Department of State Office of the Legal Adviser (Sept. 1957), *reprinted in* 4 WHITEMAN 259-61.

382. 1 LASSA OPPENHEIM, INTERNATIONAL LAW § 449, 853 (Hersch Lauterpacht ed., 8th ed. 1955); *accord,* COLOMBOS § 181; *but see* A.V. Lowe, *The Right of Entry into Maritime Ports in International Law,* 14 SAN DIEGO L. REV. 597-98 (1977).

383. 1 OPPENHEIM, n. 382, § 190c; *see also* COLOMBOS § 181, 177.

384. *Cf.* WHITEHURST, U.S. MERCHANT MARINE, n. II.59, ch. 16 (US ports).

385. LOS Convention, arts. 2(1), 8; Territorial Sea Convention, arts. 2(1), 5(1).

386. *See* SWARZTRAUBER 4-6.

387. Inland Navigational Rules Act of 1980, 33 USC §§ 2001-38. In most countries COLREGS, *i.e.,* treaties governing high seas ship maneuvering and collision minimization principles, also apply to those countries' inland waters. SCHOENBAUM § 12-2, 716.

388. SCHOENBAUM § 12-2; SWARZTRAUBER 95, 239.

389. The Mowe, 1915 P. 1, 15 (Adm.); *see also* COLOMBOS § 180.

390. Territorial Sea Convention, art. 5(1); for baselines definitions, *see id.*, arts. 3-4, 8, 11. RESTATEMENT (SECOND) §§ 11-14 accepted the Convention definitions.

391. LOS Convention, arts. 2(1), 5-8(1), 13-14, 16; *see also* BROWN ch. 5; 2 Nordquist ¶¶ 2.1-2.8(f), 5.1-8.6, 13.1-14.6, 16.1-16.8(e); NWP 1-14M Annotated ¶ 1.4.1; NWP 9A Annotated ¶ 1.4.1; 1 OPPENHEIM § 171; RESTATEMENT (THIRD) § 511, cmt. e.

392. LOS Convention, art. 11; Territorial Sea Convention, art. 8; *see also* 2 Nordquist ¶¶ 11.1-11.5(d); 1 OPPENHEIM § 193.

393. LOS Convention, art. 5; Territorial Sea Convention, art. 3; *see also* 2 Nordquist ¶¶ 5.1-5.4(d); 1 OPPENHEIM § 188; RESTATEMENT (SECOND) §14, accepting Territorial Sea Convention definitions; *id.* (THIRD) § 511 & cmt e, r.n.2.

394. LOS Convention, arts. 12, 16; Territorial Sea Convention, art. 9; MCDOUGAL & BURKE 423-27; 2 Nordquist ¶¶ 12.1-12.4(e), 16.1-16.8(e); NWP 1-14M Annotated ¶ 1.4.1; NWP 9A Annotated ¶ 1.4.1; 1 O'CONNELL, LAW OF THE SEA 218-21; 1 OPPENHEIM § 193; RESTATEMENT (SECOND) § 15, cmt. c & r.n.3; *id.* (THIRD) § 511, cmt. e & r.n.2.

395. *Cf.* Fed. R. Civ. P. 4(k)(1)(B) for an example of a jurisdictional "bulge" in a private law context.

396. *See* nn. 390-91 and accompanying text.

397. LOS Convention, art. 11; *see also* 2 Nordquist ¶¶ 11.1-11.5(d); 1 OPPENHEIM § 193.

398. LOS Convention, art. 9; Territorial Sea Convention, art. 13; *see also* 2 Nordquist ¶¶ 9.1-9.5(e); 1 O'CONNELL, LAW OF THE SEA 221-25; 1 OPPENHEIM § 189.

399. NWP 1-14M Annotated ¶ 1.4.1; NWP 9A Annotated ¶ 1.4.1; 1 OPPENHEIM §§ 176-77; 3 WHITEMAN 872-1075.

400. *See* nn. II.66-69 and accompanying text.

401. US Secretary of State James Monroe note to Spanish Minister Chevalier de Onis, Jan. 19, 1815, 2 MOORE 269.

402. MCDOUGAL & BURKE 99-100.

403. Schooner Exchange v. McFaddon, 11 US (7 Cranch) 116, 141 (1812).

404. 2 MOORE 270, citing *id.* 855-58, referring to the US' sealing Charleston harbor during the Civil War by sinking blockships; China's sinking them during the 1884 China-France war, and Japan's near closure of Foochow harbor during the China-Japan war.

405. 7 MOORE 855, 858.

406. LOS Convention, art. 25(3); *compare* Territorial Sea Convention, art. 16(3); *see also* n. 349 and accompanying text.

407. *See* Parts V.F.1, V.F.2, V.F.5, V.J.6 for LOAC analysis. The LOAC, which includes the LONW, applies through the LOS conventions' other rules clauses, *e.g.,* LOS Convention, arts. 2(3), 19(1), 21(1), 31; Territorial Sea Convention, arts. 1(2), 14(4), 17, 22(2); *see also* nn. III.953-67, IV.10-25 and accompanying text.

408. UN Charter, arts. 51, 103; *see also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

409. *Compare* LOS Convention, art. 124(1)(a), *with* Transit Trade Convention, art. 1(a), which has 37 States parties. TIF 458. *See also* MCDOUGAL & BURKE 113; 3 Nordquist ¶¶ X.5, 124.1-24.8(f); 1 O'CONNELL, LAW OF THE SEA 580-81; 1 OPPENHEIM § 240. The number may be higher because of treaty succession for the USSR and Yugoslavia. Symposium, *State Succession*; Walker, *Integration and Disintegration.*

410. Convention & Statute Concerning Freedom of Transit & Statute on Freedom of Transit, Apr. 20, 1921, 7 LNTS 11 (Freedom of Transit Convention), which has 50 parties and perhaps more if treaty succession principles apply. For some States, however, the Transit Trade Convention or the LOS conventions may have superseded it in part. *See generally* 1999 UN Treaties 955; Symposium, *Treaty Succession*; Walker, *Integration and Disintegration.*

411. 3 Nordquist ¶ X.5.

412. *Compare* LOS Convention, arts. 124(1)(b), 125 *with* Transit Trade Convention, arts. 1(c), 2, 11-12; High Seas Convention, art. 3; Freedom of Transit Convention, Statute, n. 410, arts 1-4, 7 LNTS 27. LOS Convention, art. 17; Territorial Sea Convention, art.14(1) affirm a right of all ships, flagged under coastal or landlocked States, to territorial sea innocent passage, thereby giving them ports access. A 1957 UN General Assembly resolution was an impetus for the High Seas Convention provision. COLOMBOS § 200.

413. *Compare* LOS Convention, art. 124(2) *with* Transit Trade Convention, art. 1(c).

414. *Compare* LOS Convention, art. 131 *with* Transit Trade Convention, Principles II-III, art. 2(1), *and* High Seas Convention, art. 3(1); *see also* 3 Nordquist ¶¶ 131.1-31.7(e); RESTATEMENT (THIRD) § 512 r.n.3.

415. *Compare* LOS Convention, art. 125(3) *with* Transit Trade Convention, arts. 11-12; Freedom of Transit Convention, Statute, n. 410, art. 7, 7 LNTS 29.

416. Transit Trade Convention, arts. 13-14; *see also* Freedom of Transit Convention, Statute, n. 410, arts. 8-9, 7 LNTS 29 (same; subject to League of Nations Covenant); UN Charter, arts. 2(4), 51, 103; nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

417. *E.g.*, LOS Convention, arts. 2(3), 19(1), 21(1), 31; Territorial Sea Convention, arts. 1(2), 14(4), 17, 22(2); *See also* nn. III.952-67, IV.10-25 and accompanying text.

418. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3) & cmt. f. The High Seas Convention, preamble, says it restates customary law, and most accept this; the LOS Convention navigational articles are also widely thought to restate custom. *See* nn. III.962-63 and accompanying text.

419. LOS Convention, art. 311(1); *see also* n. 44 and accompanying text.

420. LOS Convention, art. 311(2); *see also* nn. 45-46 and accompanying text.

421. LOS Convention, art. 311(5); *see also* n. 50 and accompanying text.

422. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

423. Territorial Sea Convention, art. 25.

424. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03; *see also* nn. III.10 and accompanying text.

425. Schooner Exchange, 11 US (2 Cranch) 145.

426. Act of Mar. 3, 1805, § 6, 2 Stat. 339, 342.

427. US Secretary of State Thomas F. Bayard letter to US Treasury Secretary Manning, May 28, 1886, 2 MOORE 718, 720, referring to Proclamation of Nov. 19, 1807, 3 Am. St. Pap. 23 (1832).

428. Act of May 15, 1820, 3 Stat. 597, designated Boston, Mass; Charleston, S.C.; Mobile, Al.; New London, Ct.; New York City; Norfolk, Va.; Philadelphia; Portland, Me.; Smithville, N.C. *See* nn. 480, 492, 494-506 for analysis of entry in distress.

429. President Abraham Lincoln, Proclamation of Apr. 11, 1865, 1865(1) FRUS 310.

430. Rev. Stat. §§ 2791, 5288 (1878).

431. *See generally* 2 MOORE 564-70 (Austria, Germany, Netherlands, South Australia, Venezuela, others).

432. Permission to enter Guam; Kiska Islands, Alaska; Pearl Harbor, Hawaii; Subic Bay, Philippines; Tortugas, Fla.; and "actual limits of any navy yards" was necessary and could be obtained from the Secretary of the Navy through diplomatic channels. US Secretary of the Navy Frank Knox Nov. 19, 1909 letter to Mr. Ekengren, Swedish Charge d'Affaires, 2 HACKWORTH 416.

433. Treaty of Amity & Commerce, Feb. 6, 1778, Fr.-US, arts. 3-4, 8 Stat. 12, 14, abrogated by Act of July 7, 1798, 1 *id.* 578.

434. *See, e.g.*, US treaties with Algiers, Sept. 5, 1795, arts. 2, 10, 8 Stat.133-34, superseded, June 30-July 5, 1815, arts. 9, 12, *id.* 224, 225; renewed and modified, Dec. 22-23, 1816, arts. 9, 12, *id.* 244, 245; Argentina, July 20, 1853, arts. 2-4, 10 Stat. 1001, 1002; July 27, 1853, art. 2, *id.* 1005, 1006; Austria, Aug. 27, 1829, arts. 1, 7-8, 8 *id.* 398, 399-400; June 19, 1928, art. 7, 47 *id.* 1876, 1881; Belgium, Nov. 10, 1845, arts. 1, 6, 8 *id.* 606, 608, superseded, July 17, 1858, arts. 1, 5, 12 *id.* 1043, 1045-46; superseded Mar. 8, 1875, arts. 1, 4, 19 *id.* 628, 630; partially terminated Feb. 21, 1961, 14 UST 1284, 480 UNTS 149; Bolivia, May 13, 1858, art. 3, 12 Stat. 1003, 1004; Brazil, Dec. 12, 1828, arts. 3-4, 8 *id.* 390-91; Brunei, June 23, 1850, arts. 2, 7, 10 *id.* 909-10; Bulgaria, Apr. 15, 1974, art. 48, 26 UST 687, 717; Central American Federation, Dec. 5, 1825, arts. 3-4, 6, 8 Stat. 322-24; Chile, May 16, 1832, arts. 3-4, *id.* 434-35; Colombia, Oct. 3, 1824, arts. 3-4, *id.* 306-08,

superseded Dec. 12, 1846, arts. 3-7, 9 *id.* 881, 882-84; Congo, Jan. 24, 1891, arts. 1, 6, 27 *id.* 926, 927, 930; Costa Rica, July 10, 1851, art. 2, 10 *id.* 916, 917; Danzig, Mar. 9, 1934, 48 *id.* 1680; Denmark, Apr. 25, 1826, art. 2, 8 *id.* 340; Oct. 1, 1951, art. 2, 12 UST 908, 910, 421 UNTS 105, 108; Dominican Republic, Feb. 8, 1867, arts. 3, 7, 15 Stat. 473, 475, 477; Ecuador, June 13, 1839, arts. 3, 7, 8 *id.* 534, 536; Egypt, Nov. 16, 1884, art. 1, 24 *id.* 1004, 1005; El Salvador, Jan. 2, 1850, arts. 3, 7, 10 *id.* 891-92; superseded Dec. 6, 1870, arts. 3, 7, 18 *id.* 725, 726, 728; Estonia, Dec. 23, 1925, arts. 1, 7, 44 *id.* 2379, 2381; Ethiopia, art. 14, 4 UST 2134, 2145, 206 UNTS 41, 76; Fiji, June 10, 1840, art. 2, 7 BEVANS 684; Finland, Feb. 13, 1934, art. 6, 49 Stat. 2659, 2663, 152 LNTS 45, 50, modified by protocols of Dec. 4, 1952, 4 UST 2047, 205 UNTS 149 & July 1, 1991, TIAS ——; France, Feb. 6, 1778, arts. 3-4, 8 Stat. 14; renewed, Sept. 30, 1800, art. 6, *id.* 178, 180; superseded June 24, 1822, *id.* 278; modified, July 17, 1919, 41 *id.* 1723; modified, Nov. 25, 1959, 11 UST 2398, 401 UNTS 75; Germany, Dec. 8, 1923, art. 7, 44 Stat. 2132, 2137; terminated June 3, 1935, art. 1, 49 *id.* 3258; reinstated June 3, 1953, art. 1, 5 UST 1939, 1941, 253 UNTS 89, 90; partially terminated Oct. 29, 1954, art. 20 & Protocol ¶ 20, 7 *id.* 1839, 1860, 1908, 273 UNTS 3, 26, 44; Great Britain, Nov. 19, 1794, arts. 3, 12-14, 8 Stat. 116, 117, 122-24, modified May 4, 1796, *id.* 130, July 3, 1815, arts. 1, 3, *id.* 228-29, continued Aug. 6, 1827, art. 1, *id.* 361; Greece, Dec. 22, 1837, arts. 1-5, 8 *id.* 498-500; replaced Aug. 3, 1951, art. 21, 5 UST 1829, 1889, 224 UNTS 279, 324; Guatemala, Mar. 3, 1849, arts. 3, 6, 10 Stat. 873, 874, 876; Haiti, Nov. 3, 1864, arts. 6, 12, 13 *id.* 711, 713, 716; Hanover, May 20, 1840, arts. 1-2, 8 *id.* 552; July 10, 1846, art. 1, 9 *id.* 857; Hanseatic Republics, Dec. 20, 1827, arts. 1, 6, 8 *id.* 366, 368; Hawaii, Dec. 23, 1826, art. 2, 8 BEVANS 861 (entry of US ships into Hawaii); Dec. 20, 1849, arts. 2, 5-7, 9 *id.* 977-78; Honduras, July 4, 1864, art. 2, 13 *id.* 699, 700; superseded Dec. 7, 1927, arts. 1, 7, 11, 45 *id.* 2618-19, 2622, 2625; Iraq, Dec. 3, 1938, art. 3, 54 *id.* 1790, 1792; Ireland, Jan. 21, 1950, art. 18, 1 UST 785, 798, 206 UNTS 269, 290; Israel, Aug. 23, 1951, art. 19, 5 *id.* 550, 570, 219 UNTS 237, 276; Italy, Feb. 26, 1871, arts. 1, 7, 17 Stat. 845, 848; replaced Feb. 2, 1948, arts. 19, 22, 63 *id.* 2255, 2284, 2286, 79 UNTS 171, 200, 204; Japan, Mar. 31, 1854, art. 2, 11 Stat. 597 (designated ports in Japan, no reciprocity); modified June 17, 1857, art. 1, *id.* 723 (Nagasaki opened); July 29, 1858, art. 3, 12 *id.* 1051, 1052 (more ports opened); Nov. 22, 1894, art. 2, 29 *id.* 848-49 (full, reciprocal commerce, navigation rights); Feb. 21, 1911, art. 4, 37 *id.* 1504-05 (same); replaced Apr. 2, 1953, art. 19, 4 UST 2063, 2077, 206 UNTS 143, 214; Korea, May 22, 1882, art. 5, 23 Stat. 720, 722, replaced Nov. 28, 1956, 8 UST 2217, 302 UNTS 281; Lagos, July 31, 1854, 9 BEVANS 513-14; Latvia, Apr. 20, 1928, arts. 7, 12, 45 Stat. 2641, 2643, 2645; Liberia, Oct. 21, 1862, art. 2, 12 *id.* 1245; replaced Aug. 8, 1938, arts. 7, 21, 54 *id.* 1739, 1742, 1747, 201 LNTS 163, 168, 176; Loochoo [Ryukyu], July 11, 1854, 10 *id.* 1101; Luxembourg, Feb. 23, 1962, art. 13, 14 UST 251, 260, 474 UNTS 3, 22; Madagascar, Feb. 14, 1867, arts. 2-3, 15 Stat. 491-92, replaced May 13, 1881, art. 4(1), 22 *id.* 952, 955; Mecklenburg-Schwerin, Dec. 9, 1847, arts. 1-2, 9 Stat. 910, 912; Mexico, Apr. 5-Dec. 17, 1831, art. 3, 8 *id.* 410, replaced Feb. 2, 1848, art. 17, 9 *id.* 922, 935; Morocco, June 23-July 15, 1786, arts. 7, 14, 8 *id.* 100-02, replaced Sept. 10 & Oct. 1, 1836, arts. 7, 14, *id.* 484-85; Muscat, Sept. 21, 1833, arts. 2, 6, *id.* 458; Netherlands, Oct. 8, 1782, arts. 2-3, *id.* 32; superseded Jan. 19, 1839, art. 1, *id.* 524; Aug. 26, 1852, arts. 1-2, 4, 10 *id.* 982-84; Mar. 27, 1956, art. 19 & Protocol ¶ 17, 8 UST 2043, 2073, 2089, 285 UNTS 231, 259, 273; Nicaragua, June 21, 1867, art. 2, 15 Stat. 549-50; Jan. 31, 1956, art. 19, 9 UST 449, 463, 367 UNTS 3, 26; Norway, June 5, 1928, arts. 7, 15, 47 Stat. 2135, 2140, 2146, 134 LNTS 81, 86, 92; Oman, Dec. 20, 1958, art. 10, 11 UST 1835, 1840, 380 UNTS 181, 206; Ottoman Empire, May 7, 1830, arts. 1, 5, 8 Stat. 408-09; Paraguay, Feb. 4, 1859, art. 2, 12 *id.* 1091-92; Persia/Iran, Dec. 13, 1856, art. 3, 11 Stat. 709; superseded Aug. 15, 1955, art. 10, 8 UST 899, 907, 284 UNTS 93, 122; Peru, July 26, 1851, arts. 2, 12, 10 Stat. 926, 931; replaced July 4, 1854, 11 *id.* 725; Sept. 6, 1870, arts. 2, 8, 18 *id.* 698-99, 701; Aug. 31, 1887, arts. 2, 7, 25 *id.* 1444-45, 1447; Peru-Bolivia Confederation, Nov. 30, 1836, arts. 2-3, 8 *id.* 487, 488; Poland, June 15, 1931, art. 6, 48 *id.* 1507, 1512; Portugal, Aug. 26, 1840, arts. 1, 7, 8 *id.* 560, 564; Prussia, July 9, 1785, arts. 2-3, *id.* 84; superseded July 11, 1799, arts. 2-3, *id.* 162; May 1, 1828, arts. 1, 7, *id.* 378, 380; Russia, Apr. 5/17, 1824, arts. 1-2, *id.* 302; replaced Dec. 6/18, 1832, art. 1, *id.* 444; Samoa, Jan. 17, 1878, art. 2, 20 *id.* 704; Sardinia, Nov. 26, 1838, arts. 1, 7, 8 *id.* 512, 514; Saudi Arabia, Nov. 7, 1933, art. 3, 48 *id.* 1826; Serbia, Oct. 14, 1881, arts. 1, 13, 22 Stat. 963, 966; Spain, Oct. 27, 1795, arts. 15-16, 8 *id.* 138, 146 (by implication), replaced July 3, 1902, arts. 2, 9, 33 *id.* 2105, 2106, 2110; Sweden, Apr. 3, 1783, arts. 7-8, 8 *id.* 60, 64; superseded Sept. 4, 1816 (Sweden & Norway), arts. 1, 12, *id.* 232, 240 & July 4, 1827, arts. 1, 6, 17, *id.* 346, 348, 354; Thailand (formerly Siam), Mar. 20, 1833, art. 2, *id.* 454 (entry into Thai ports only); replaced May 29, 1856, art. 4, 11 *id.* 683, 684 (same); replaced Dec. 16, 1920, arts. 3, 9, 42 *id.* 1928, 1929-30 (reciprocity), Nov. 13, 1937, art. 1, 53 *id.* 1731 (same); May 29, 1966, art. 10, 19 UST 5843, 5855, 652 UNTS 253, 282; Togo, Feb. 8, 1966, art. 11, 18 *id.* 1, 8, 680 UNTS 159, 174; Tonga, Oct. 2, 1886, arts. 4, 6-8, 25 Stat. 1440-41; Tripoli, Nov. 4, 1796 & Jan. 3, 1797, art. 9, 8 *id.* 154-55; replaced June 4, 1805, art. 11, *id.* 214-15 (same); Tunis, Aug. 28, 1797, art. 12, *id.* 157, 159 (rights for US ships only); replaced Feb. 24, 1824, art. 12, *id.* 298-99; Turkey, Oct. 1, 1929, art. 3, 46 Stat. 2743, 2744; Two Sicilies, Dec. 1, 1845, art. 1, 9 *id.* 833; replaced Oct. 1, 1855, art. 8, 11 *id.* 639, 645; Venezuela, Jan. 20, 1836, arts. 2-3, 8 *id.* 466; replaced Aug. 27, 1860, arts. 6-7, 12 *id.* 1143, 1147-48; Yemen, May 4, 1946, art. 3, 60 *id.* 1782, 1783. *See also* nn. 488-90 for recent treaties with Bulgaria, Poland, PRC, and the former USSR.

435. While MFN clauses usually appear in bilateral treaties, they can be in multilateral agreements, *e.g.*, the GATT, n. III. 949. These contrast with national treatment, reciprocity or preferences clauses. MCNAIR ch. 15; 1 OPPENHEIM § 669; RESTATEMENT (THIRD) § 801 & cmts. a-d, r.n.1,2.

436. For a sampling, *see* 6E BENEDICT, Docs. 18B-1 - 18B-4 (selected bilateral treaties, including FCN, consular treaties).

437. Treaty, July 3, 1844, China-US, arts. 3-5, 8 Stat. 592-93, supplemented by Treaty of Peace, Amity & Commerce, June 18, 1858, China-US, art. 14, 12 *id.* 1023, 1026; supplemented, Treaty for Extension of Commercial Relations, Oct. 8, 1903, China-US, art. 3, 33 *id.* 2208, 2209; superseded, Treaty of Friendship, Commerce & Navigation, Nov. 4, 1946, arts. 2, 21, 24, 63 *id.* 1299, 1301, 1316, 1318, 25 UNTS 69, 92, 128, 132. The later agreements opened doors to other Chinese ports, first on an MFN basis and later to all Chinese ports and all US ports. The first agreement with Hawaii, Article of Arrangement, Dec. 23, 1826, Hawaii-US, art. 3, 8 BEVANS 861, applied only to US vessels; the second, Friendship, Commerce & Navigation Treaty, Dec. 20, 1849, Hawaii-US, arts. 2, 6-7, 9 Stat. 977, 978, extended reciprocal rights but confirmed the Hawaii practice of limiting access to designated ports as in the case of China. Agreements with Japan followed a similar pattern. Treaty of Peace & Amity, Mar. 31, 1854, Japan-US, art. 2, 11 *id.* 597 (designated ports in Japan); Convention, June 17, 1857, Japan-US, art. 1, *id.* 723 (Nagasaki opened); Amity & Commerce Treaty, July 29, 1858, Japan-US, art. 3, 12 *id.* 1051, 1052 (additional ports); Commerce & Navigation Treaty, Nov. 29, 1894, Japan-US, art. 2, 29 *id.* 848, 849 (full reciprocal commerce, navigation rights); Commerce & Navigation Treaty, Feb. 21, 1911, Japan-US, art. 4, 37 *id.* 1504, 1505 (same). Thailand, formerly Siam, had the same arrangement until 1920. Amity & Commerce Treaty, Mar. 20, 1833, Siam-US, art. 2, 8 *id.* 454, (entry into Siamese ports); Amity & Commerce Treaty, May 29, 1856, Siam-US, art. 4, 11 *id.* 683, 684 (same); Amity & Commerce Treaty, Dec. 16, 1920, Siam-US, art. 3, 42 *id.* 1928, 1929 (reciprocity); Friendship, Commerce & Navigation Treaty, Nov. 12, 1937, Siam-US, art. 10, 53 *id.* 1731, 1736 (same); Treaty of Amity & Economic Relations, May 29, 1966, Thailand, art. 10, 19 UST 5843, 5855, 652 UNTS 253, 282 (same).

438. Lowe, *Right of Entry,* n. 382, 619.

439. BROWNLIE, INTERNATIONAL LAW 13-14; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3) & cmt. f. JESSUP, THE LAW, n. 267, xxxii, 60, 192-93 asserts these treaties were not norm-creating, being mere attempts to obtain mutual benefits by a bargaining process. Lowe, *Right of Entry,* n. 382, 619, argues that these bilaterals "lack the 'fundamentally norm-creating character' necessary for the transition[;] the mere repetition of rights of entry . . . could not constitute a rule of customary international law."

440. *Compare* custom's impact through the bilaterals, n. 434, *with* Lowe, *Right of Entry,* n. 382, 607.

441. LOS Convention, art. 126; *see also* Transit Trade Convention, arts. 10, 15, (same; Convention applied on reciprocity basis); *see also* 3 Nordquist ¶¶ X.5, 126.1-126.8(d); nn. 409-18.

442. Institute de Droit Internationale, 17 ANNUAIRE 274 (1898), *in* RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 144 (James Brown Scott ed. 1916).

443. *Id.*, 35 ANNUAIRE 736 (1928), *in* James Brown Scott, *The Institute of International Law,* 22 AJIL 844, 847 (1928).

444. Lowe, *Right of Entry,* n. 382, 602.

445. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03; *see also* n. 10 and accompanying text.

446. Convention & Statute on International Regime of Maritime Ports, Dec. 9, 1923, Statute, arts. 2-3, 5-7, 10-13, 58 LNTS 285 (Ports Convention). MFN status is not permitted. *Id.,* Statute, art. 15, 58 LNTS 305.

447. *Id.*, Statute, arts. 13-14, 58 LNTS 305.

448. *Id.,* Statute, arts. 9, 14, 58 LNTS 303-05.

449. *Id.*, Statute, art. 17, 58 LNTS 305.

450. *Id.*, Statute, art. 8; 58 LNTS 303; *see also id.*, arts. 21-22, 58 LNTS 307-09. The ICJ has succeeded the PCIJ.

451. *Id,* Statute, art. 12, 58 LNTS 305, cited *in* Saudi-Arabia v. Arabian Amer. Oil Co., 27 ILR 117, 212 (1955), criticized by Lowe, *Right of Entry,* n. 382, 598-600, 606.

452. Ports Convention, n. 446, Statute, art. 18, 58 LNTS 307; for further analysis, *see* COLOMBOS §§ 182, 418; 1 OPPENHEIM § 204.

453. *E.g.,* LOS Convention, arts. 2(3), 19(1), 21(1), 25(3); Territorial Sea Convention, arts. 2(2), 14(4), 16(3), 22(2); *see also* nn. III.952-67, VI.10-25 and accompanying text.

454. LOS Convention, art. 311(2); *see also* n. 45 and accompanying text.

455. Vienna Convention, arts. 30, 59; BROWNLIE, INTERNATIONAL LAW 624-25; MCNAIR 215-33; 1 OPPENHEIM § 591; RESTATEMENT (THIRD) § 323; RESTATEMENT (SECOND) § 156; SINCLAIR 184-85.

456. Ports Convention, n. 446, art. 2, 58 LNTS 295, declares it is subject to the Treaty of Versailles, which included the League of Nations Covenant, succeeded by the UN Charter in 1945; the Convention, Statute, art. 24, 58 LNTS 309, declares the Convention may not be construed to affect parties' rights and duties under the Covenant. Since self-defense was recognized as an inherent right under the Covenant, there would have been no inconsistency between

the Convention and the Covenant on that score. UN Charter, arts. 51, 103; nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

457. 1999 UN Treaties 961-62; *see also* Symposium, *Treaty Succession*; Walker, *Integration and Disintegration.*

458. *Compare* Convention & Statute Concerning Freedom of Transit, Apr. 20, 1921, art. 1 & Statute, arts 1-15, 7 LNTS 11, 19, 27-33, *with* Ports Convention, n. 446, discussed nn. 446-57 and accompanying text.

459. 1999 UN Treaties 957-58, 961-62; *see also* n. 446 and accompanying text. An Additional Protocol, Apr. 20, 1921, 7 LNTS 65, extends certain obligations to navigable waterways normally not of international concern. There are 23 parties, none of them Gulf States. 1999 UN Treaties 959. Treaty succession principles may bind more States. *See* Symposium, *Treaty Succession*; Walker, *Integration and Disintegration.*

460. UN Charter, arts. 2(4), 51, 103; *see also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

461. Inter-American Convention on Facilitation of International Waterborne Transportation (Convention of Mar del Plata), June 7, 1963, TIAS 12064, *in* 6E BENEDICT, Doc. 19-12, arts. 1-3, *id.* 19-104 - 19-105.

462. *Id.*, arts. 4-5, 6E BENEDICT 19-105.

463. *Id.*, art. 6(a), 6E BENEDICT 19-106.

464. *E.g.*, LOS Convention, arts. 2(3), 19(1), 21(1), 25(3), 311(2); Territorial Sea Convention, arts. 2(2), 14(4), 16(3), 22(2); *see also* Vienna Convention, arts. 30, 59; nn. III.952-67, IV.10-25, 455 and accompanying text.

465. UN Charter, arts. 51, 103; *see also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

466. TIF 404.

467. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3) & cmt. f.

468. *Compare* Convention on Facilitation of International Maritime Traffic, Apr. 9, 1965, arts. 1-3, 18 UST 410, 412, 591 UNTS 265, 266-68, *with* Convention of Mar del Plata, n. 461, arts. 1-3, 6E BENEDICT 19-104.

469. Convention on Facilitation of International Maritime Traffic, n. 468, art. 2(3), 18 UST 412, 591 UNTS 266-68.

470. *Id.*, art. 5, 18 UST 414, 591 UNTS 268. The International Maritime Organisation (IMO) plays a similar role for achieving standards through proposals or conferences as the OAS Inter-American Port and Harbor Conference does for the Convention of Mar del Plata, n. 461. *Compare* Convention on Facilitation of International Maritime Traffic, n. 468, arts 4, 6-8, 18 UST 414-16, 591 UNTS 268-72, *with* Convention of Mar del Plata, arts. 4-6, 6E BENEDICT 19-105 - 19-106. For amendments and annexes to the Convention on Facilitation of International Maritime Traffic, *see generally* 6E BENEDICT, Doc. 19-11; *see also* 1 OPPENHEIM § 204.

471. *E.g.*, LOS Convention, arts. 2(3), 19(1), 21(1), 25(3), 311(2); Territorial Sea Convention, arts. 2(2), 14(4), 16(3), 22(2); *see also* Vienna Convention, arts. 30, 59; nn. III.952-67, IV.10-25, 455 and accompanying text.

472. UN Charter, arts. 51, 103; *see also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

473. TIF 404; 6E BENEDICT 19-93, which does not list Iran. Treaty succession principles may add to the total for the former USSR and Yugoslavia. Symposium, *Treaty Succession*; Walker, *Integration and Disintegration.*

474. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3) & cmt. f.

475. Saudi-Arabia v. Arabian Amer. Oil Co., 27 ILR 117, 212 (1955), citing *inter alia* Ports Convention, Statute, n. 446, art. 12, 58 LNTS 305; *criticized,* Lowe, *Right of Entry,* n. 382, 598-600, 606.

476. *See* n. 434.

477. The Kronprins Gustaf Adolf (Swed. v. US), 2 UNRIAA 1239, 1256 (1932).

478. 1 HYDE § 187.

479. Institute of International Law, *Resolutions Adopted at Its Session of Amsterdam: Distinction Between the Regime of the Territorial Sea and the Regime of Internal Waters,* preamble, Sept. 18-27, 1957, 1957[2] ANNUAIRE, *reprinted in* 52 AJIL 103 (1958).

480. COLOMBOS § 181; *see also id.* §§ 273-75; for analysis of port access for ships in distress or forced in by *force majeure*, *see* nn. 492, 494-506 and accompanying text.

481. 4 WHITEMAN 258-60, quoting Boas Memorandum, n. 381; *see also* 1 HYDE § 187.

482. RESTATEMENT (SECOND) § 50, cmt. a.

483. *Id.* § 49, cmt. a. Perhaps significantly, RESTATEMENT (THIRD) § 512 does not cite these references in analyzing the law of ports.

484. 2 O'CONNELL, LAW OF THE SEA 848; *see also* Lowe, *Right of Entry,* n. 382, 598-600, 606.

485. RESTATEMENT (THIRD) § 512, cmt. c, citing *id.* r.n.3.

486. *Id.* r.n. 3, citing *inter alia* Convention on Liability of Nuclear-Powered Ships, May 25. 1962, *in* 57 AJIL 268 (1963); *see also* 2 O'CONNELL, LAW OF THE SEA 848.

487. RESTATEMENT (THIRD) § 513, cmt. h & r.n.2; *see also* nn. 337-50 and accompanying text.

488. Agreement Regarding Certain Maritime Matters, June 1, 1990, USSR-US, TIAS 11541, *reprinted in* 6E BENEDICT, Doc. 18B-10, art. 3, 6E BENEDICT 18-300 - 18-301 (2 days' notice) (USSR Agreement); Agreement on Maritime Transport, Dec. 15, 1988, China-US (China Agreement), Supplemental Agreement on Entry of Vessels of Either Party into Ports of the Other Party, ¶ 3, TIAS 12026 (Supplemental Agreement), *reprinted in* 6E BENEDICT, Doc. 18B-11, at 18-314; Agreement on Maritime Matters: Port Access Procedures, Sept. 27, 1973, Pol.-US, 24 UST 2271 (Poland Agreement), no longer in force. USSR Agreement superseded Agreement Regarding Certain Maritime Matters, Oct. 14, 1972, USSR-US, art. 4, 23 *id.* 3573, 3578, imposing a four-day notice period. China Agreement superseded Agreement on Maritime Transport, Memorandum of Conditions Applicable to Entry of Vessels of Each Party into Ports of the Other Party, Sept. 17, 1980, China-US, ¶¶ 1-2, 33 *id.* 3595, 3597, extended, Sept. 1 & 10, 1983, 35 *id.* 2314, which imposed four to seven days' notice requirements. Other US treaties with other former Soviet bloc nations do not have these requirements and are more like typical bilateral arrangements, *e.g.,* Agreement on Maritime Transport, Bulg.-US, Feb. 19, 1981, 33 *id.* 1116, 1281 UNTS 9 (Bulgaria Agreement), extended Feb. 7 & 13, 1984, 35 *id.* 4400; Agreement on Maritime Transport, June 4, 1976, Rom.-US, 27 *id.* 1416 (Romania Agreement), no longer in force. The USSR agreements may be in force through treaty succession principles. Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.*

489. USSR Agreement, n. 488, art. 1, 6E BENEDICT 18-300; China Agreement, n. 488, art. 1, *id.* 18-309; *cf.* Bulgaria Agreement, n. 488, art. 1, 33 UST 1117; Romania Agreement, n. 488, art. 1, 27 *id.* 1417; Poland Agreement, n. 488, 24 *id.* 2271 (by implication).

490. USSR Agreement, n. 488, art. 2 & Annexes I-II, 6E BENEDICT 18-300, 18-303 - 18-305; China Agreement, Supplemental Agreement, n. 488, ¶¶ 1, 3 & Annexes A-B, *id.* 18-314 - 18-316 (listing China ports open, US ports forbidden).

491. *See* nn. 488-90 and accompanying text.

492. *See* nn. 494-506 and accompanying text.

493. LOS Convention, arts. 17-32; Territorial Sea Convention, arts. 14-23; *see also* nn. 437-50 and accompanying text. Some countries would dispute this. *See* n. 352 and accompanying text.

494. COLOMBOS § 181; *see also* Lowe, *Right of Entry,* n. 382, 607-19.

495. JESSUP, THE LAW, n. 267, 194; 1 OPPENHEIM § 204; RESTATEMENT (THIRD) § 512, r.n.5.

496. The Fortuna, 164 Eng. Rep. 685-86 (Adm. 1803); *see also* The Eleanor, *id.* 1058, 1067 (Adm. 1809); COLOMBOS § 181 n.2; JESSUP, THE LAW, n. 267, 200-01; 2 O'CONNELL, LAW OF THE SEA 853-54.

497. Hallet & Bowne v. Jenks, 7 US (3 Cranch) 210, 219 (1805); *see also* JESSUP, THE LAW, n. 267, 194-97; 2 MOORE 399-42; 2 O'CONNELL, LAW OF THE SEA 853-54.

498. 2 O'CONNELL, LAW OF THE SEA 854.

499. Act of May 15, 1820, 3 Stat. 597.

500. *See* nn. 433-37 and accompanying text.

501. Many early treaties have two provisions, one promising assistance if a vessel enters in distress and another renouncing claims to wrecked goods and a pledge of restoration to owners. Others included only one provision, but these have been included to show the universal obligation to assist and protect ships forced to enter because of distress or *force majeure, e.g.,* Algiers, Sept. 5, 1795, art. 6, 8 Stat. 133, 134, superseded June 30 & July 5, 1815, arts. 9-10, *id.* 224, 225, renewed and modified, Dec. 22-23, 1816, arts. 9-10, *id.* 244, 245; Belgium, Nov. 10, 1845, art. 16, *id.* 606, 610, superseded July 17, 1858, art. 14, 12 *id.* 1043, 1047; Mar. 8, 1875, art. 13, 19 *id.* 628, 632, superseded, Feb. 21, 1961, art. 14, 14 UST 1284, 1303, 480 UNTS 149, 169; Bolivia, May 13, 1858, arts. 9-10, 12 Stat. 1003, 1009; Brazil, Dec. 12, 1828, arts. 8, 10, 8 *id.* 390, 392; Brunei, June 23, 1850, arts. 8, 10, 10 *id.* 909, 910; Bulgaria, Feb. 19, 1982, art. 7, 33 UST 1116, 1120, 1281 UNTS 9; Central American Federation, Dec. 5, 1825, arts. 8, 10, 8 Stat. 322, 326; Chile, May 15, 1832, arts. 6, 8, *id.* 434, 435; China, July 3, 1844, art. 27, *id.* 592, 598 (refuge anywhere on China coast despite prohibition on trading

except in five designated ports), supplemented June 18, 1858, art. 13, 12 *id.* 1023, 1026, superseded Nov. 4, 1946, art. 22(5), 63 *id.* 1299, 1317, 25 UNTS 69, 130; China Agreement, n. 488, art. 6, 6E BENEDICT 18-311; New Granada (Colombia), Oct. 3, 1824, art. 8, 8 Stat. 308, 309, superseded Dec. 12, 1846, arts. 9, 11, 9 *id.* 881, 885-86; Dominican Republic, Feb. 8, 1867, art. 11, 15 Stat. 473, 479; Ecuador, June 13, 1839, arts. 9, 11, 8 *id.* 534, 538; San Salvador, Jan. 2, 1850, arts. 9, 11, 10 *id.* 891, 893, superseded Dec. 6, 1870, arts. 9, 11, 18 *id.* 675, 677; Germany, art. 28, 44 *id.* 2132, 2156, superseded for FRG, Oct. 29, 1954, art. 21, 7 UST 1839, 1861, 273 UNTS 3, 28; Fiji, June 10, 1840, art. 3, 7 BEVANS 684; France, July 18, 1966, art. 32, 18 UST 2939, 2950, 700 UNTS 257, 282; Great Britain, Nov. 16, 1794, art. 23, 8 Stat. 116, 127 (protection for US vessels only); Greece, Dec. 22, 1837, art. 14, *id.* 498, 506, superseded Aug. 3, 1951, art. 22, 5 UST 1829, 1893, 224 UNTS 279, 326; Guatemala, Mar. 3, 1849, arts. 8, 10, 10 Stat. 873, 876-77; Haiti, Nov. 3, 1864, arts. 15-16, 13 *id.* 711, 716 (applied in John I. Snow claim, 2 MOORE 349); Hanover, May 20, 1840, art. 8, 8 Stat. 552, 558, superseded June 20, 1846, art. 4, 9 *id.* 857, 859; Hawaii, Dec. 23, 1826, art. 4, 8 BEVANS 862 (US ships' entry into Hawaii), superseded Dec. 20, 1849, arts. 12-13, 9 Stat. 977, 981 (reciprocal rights); Hungary, July 7, 1972, art. 52, 24 UST 1141, 1179; Italy, Feb. 26, 1871, art. 9, 17 Stat. 845, 849; Japan, Mar. 31, 1854, arts. 3-5, 10, 11 *id.* 597-98 (applicable only to US ships in distress), superseded Nov. 22, 1894, art. 11, 29 *id.* 848, 851 (full reciprocity), superseded Mar. 23, 1963, art. 23, 15 UST 768, 804, 518 UNTS 179, 288 (*see also* Convention for Reimbursement of Shipwreck Expenses, May 17, 1880, 22 Stat. 815); Korea, May 22, 1882, art. 3, 23 *id.* 720, 721, superseded Jan. 8, 1963, art. 7, 14 UST 1637, 1643, 493 UNTS 105, 130; Latvia, Apr. 20, 1928, art. 28, 45 Stat. 2641, 2651; Liberia, Oct. 21, 1862, art. 5, 12 *id.* 1245, 1246; Loochoo (Ryukyu), July 11, 1854, 10 *id.* 1101; Madagascar, Feb. 14, 1867, art. 7, 15 *id.* 491, 493 (applies to US vessels only), superseded May 13, 1881, art. 8, 22 *id.* 952, 960; Mecklenburg-Schwerin, Dec. 9, 1847, art. 4, 9 *id.* 910, 912; Mexico, Apr. 5-Dec. 17, 1831, arts. 10, 12, 8 *id.* 410, 414, superseded Feb. 2, 1848, art. 17, 9 *id.* 922, 935; Morocco, June 23-July 15, 1786, arts. 8-9, 8 *id.* 100, 101, superseded Sept. 16 & Oct. 1, 1836, arts. 8-9, *id.* 484, 485; Muscat, Sept. 21, 1833, art. 5, *id.* 458; Netherlands, Oct. 8, 1782, arts. 16-17, *id.* 32, 42, superseded Jan 19, 1839, art. 5, *id.* 524, 526, superseded Mar. 27, 1956, art. 19 & Protocol ¶¶ 16-17, 8 UST 2043, 2073, 2089, 285 UNTS 231, 259, 273; Nicaragua, June 21, 1867, art. 13, 15 Stat. 549, 557; Norway, June 5, 1928, art. 27, 47 *id.* 2135, 2156; Ottoman Empire, May 17, 1830, art. 9, 8 *id.* 408, 409; Peru, July 26, 1851, arts. 16-17, 10 *id.* 926, 933, superseded Sept. 6, 1870, 13-14, 10 BEVANS 1038, 1042, superseded Aug. 31, 1887, arts. 12-13, 25 Stat. 1444, 1449-50; Peru-Bolivia Confederation, Nov. 30, 1836, arts. 5, 7, 8 *id.* 487, 488-90; Poland, May 31, 1972, art. 34, 24 UST 1231, 1268; Portugal, Aug. 26, 1840, art. 9, 8 Stat. 560, 564; Prussia, July 9, 1785, arts. 9, 18, *id.* 84, 88, 92, superseded July 11, 1799, arts. 9, 18, *id.* 162, 166, 172, & May 1, 1828, art. 12, *id.* 378, 384; Romania, July 5, 1972, art. 13, 24 UST 1317, 1327; Sardinia, Nov. 26, 1838, arts. 11-12, 8 Stat. 512, 516; Siam (now Thailand), Mar. 20, 1833, art. 5, *id.* 454, 455 (protection for US ships in Siamese waters), superseded Dec. 16, 1920, art. 10, 42 *id.* 1928, 1931 (full reciprocity), superseded Nov. 12, 1937, art. 12, 53 *id.* 1731, 1737 (same); Spain, Apr. 3, 1795, arts. 8, 10, 8 *id.* 138, 142, superseded July 3, 1902, art. 10, 33 *id.* 2105, 2110; Sweden, Apr. 3, 1783, arts. 20-21, 8 *id.* 60, 72, superseded Sept. 4, 1816, arts. 10, 12, *id.* 232, 238-40, superseded July 4, 1827 (Sweden & Norway), arts. 15, 17, *id.* 346, 354; Tripoli, Nov. 4, 1796 & Jan. 3, 1797, arts. 6-7, *id.* 154 (apparently only applicable to US ships), superseded June 4, 1805, arts. 8-9, *id.* 214, 215; Tunis, Aug. 28, 1797, arts. 8-9, *id.* 157, 158; Two Sicilies, Dec. 1, 1845, arts. 9-10, 9 *id.* 833, 839, superseded Oct. 1, 1855, arts. 16-17, 11 *id.* 639, 648-49; USSR, June 1, 1964, art. 14, 19 UST 5018, 5029, 165 UNTS 121, 144; Venezuela, Jan. 20, 1836, arts. 9-10, 8 Stat. 466, 470, superseded Aug. 21, 1860, art. 11, 12 *id.* 1143, 1149. *See also* Docs. 18B-1 - 18B-4, 6E BENEDICT, referring to US, UK, USSR and other bilaterals.

502. *See* nn. 433-40 and accompanying text.

503. Schooner Exchange, 11 U.S. (7 Cranch) 141-42.

504. *E.g.*, 1 Op. Att'y Gen. 509 (1821); US Secretary of State John Forsyth June 23, 1835 letter to William Hunter, Jr., Charge d'Affaires to Brazil, 2 MOORE 342; US Secretary of State Daniel Webster Jan. 29, June 28, 1842 letters to Edward Everett, US Minister to England, *id.* 353-54; Webster Aug. 1, 1842 letter to British Minister Plenipotentiary Lord Ashburton, *id.* 353; US Secretary of State William Henry Seward June 4 & 13, 1864 letters to Russian Minister to the US M. Stoeckl, *id.* 343 (identical Russian practice); US Secretary of State Bayard Nov. 6, 1886 letter to Mr. Phelps, *id.* 343-45, 1886 FRUS 362, 364-65; US Secretary of State Report, Feb. 26, 1887, S. Exec. Doc. 109, 49th Cong., 2d Sess., *in* 2 MOORE 345-46; Acting US Secretary of State James G. Blaine Feb. 13, 1892 letter to US Minister of Argentina John R.G. Pitkin and Pitkin May 27 & July 7, 1891 letters to Blaine, *id.* 349, 1891 FRUS 4, 10-12.

505. *See* 2 MOORE 350-52, 355-62; 2 MOORE, ARBITRATIONS 1016-18, 4 *id.* 4349-72; 5 *id.* 4609, 4623; 2 O'CONNELL, LAW OF THE SEA 854-56.

506. *See generally* BROWN 39; NWP 1-14M Annotated ¶¶ 2.3.1, at 2-7, 3.2, 7.3.2; NWP 9A Annotated ¶¶ 2.3.1, 3.2, 7.3.2, at 7-12; RESTATEMENT (THIRD) § 512 r.n.5; 2 O'CONNELL, LAW OF THE SEA 853-58.

507. NWP 1-14M Annotated ¶ 2.3.2.5; NWP 9A Annotated ¶ 2.3.2.5.

508. The US Department of State believes a customary right of aircraft entry into territorial seas under these circumstances is not as well developed as that for ships. NWP 1-14M Annotated ¶ 2.3.2.5 n.35, citing *inter alia* US

Department of State *et al.*, Statement of Policy (June 27-Aug. 8, 1986), *id.* 2-48; NWP 9A Annotated ¶ 2.3.2.5 n.34, citing *inter alia* US Department of State *et al.*, at AS2-1-1.

509. LOS Convention, art. 25(3); Territorial Sea Convention, art. 16(3); nn. 349, 378 and accompanying text.

510. LOS Convention, art. 125(a)(3); *see also* nn. 409-18 and accompanying text.

511. LOS Convention, arts. 2(3), 19(1), 21(1), 31; Territorial Sea Convention, arts. 1(2), 14(4), 17, 22(2); *see also* nn. III.953-67, IV.10-25 and accompanying text.

512. Vienna Convention, arts. 61-62; nn. III.928-29, 938-49, IV.26-27, 29 and accompanying text.

513. UN Charter, arts. 2(4), 51, 103; *see also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

514. The see-saw nature of the conflict meant that from time to time Iraq had access to its coast and the Shatt before the end of the war in 1988.

515. *See generally* LOS Convention, arts. 124-32, nn. 409-18 and accompanying text.

516. LOS Convention, art. 124(1)(a); *see also* nn. 409-18 and accompanying text.

517. *See* nn. II.111-14 and accompanying text.

518. LOS Convention, arts. 2(3), 19(1), 21(1), 31; Territorial Sea Convention, arts. 1(2), 14(4), 17, 22(2); *see also* nn. III.953-67, IV.10-25 and accompanying text. For analysis of this issue under the LOAC, *see* Parts V.A.-V.E, V.J.1-V.J.5.

519. Vienna Convention, arts. 61-62; nn. III.928-29, 938-49, IV.26-27, 29 and accompanying text.

520. *See* nn. II.250-59 and accompanying text.

521. UN Charter, art. 2(4); S.C. Res. 552 (1984), *in* WELLENS 473; *see also* nn. II.250-59, III.47-157 and accompanying text. To the extent the Iranian action involved hostilities in neutral territorial waters, there was also a violation of traditional neutrality law principles. *See* Parts V.F.1, V.F.2, V.F.5, V.J.6.

522. Not every strait geographers recognize is a strait in international law. 1 O'CONNELL, LAW OF THE SEA 299.

523. *See* Lewis M. Alexander, *International Straits, in* Robertson 91, 104-05; nn. II.69-73 and accompanying text.

524. Territorial Sea Convention, art. 16(4); 2 Nordquist ¶¶ III.1-III.8.

525. Territorial Sea Convention, arts. 14-23. Because *id.*, art. 25 declares the Convention does not affect treaties already in force, those straits governed by international agreements are not regulated by the Convention. *See also* nn. 555-57 and accompanying text.

526. RESTATEMENT (SECOND) § 45(3)(b) & r.n.1, 2, citing Territorial Sea Convention, arts. 14-15, Corfu Channel, 1949 ICJ 28.

527. 3 Nordquist ¶ III.7; *see also* nn. 268-94, 314-22, 328-34 and accompanying text.

528. BROWN 80; 3 Nordquist ¶ III.7; *see also* nn. 285, 301-13, 337-53, 367, 369 and accompanying text.

529. *See* nn. 83-157 and accompanying text.

530. *See* nn. II.51, 67, 81, 119, 163, 379-81, IV.333, 363 and accompanying text.

531. 1 O'CONNELL, LAW OF THE SEA 299; *but see* BROWNLIE, INTERNATIONAL LAW 284; for a trend study, *see* O'CONNELL 301-31. For analysis of LOS Convention negotiations, *see* BROWN 81-86; 2 Nordquist ¶¶ III.9-III.15; 1 O'CONNELL 328-31. Commentators say the LOS Convention navigational articles, which include straits passage principles, reflect customary norms. *See* nn. III. 963 and accompanying text. BROWN 96 agrees that the LOS Convention reflects customary straits passage principles, except for warship transit passage.

532. *See* Fig. A2-4: Strait of Hormuz, *in* NWP 1-14M Annotated, at 2-74; Fig. SF2-5: Strait of Hormuz, *in* NWP 9A Annotated.

533. LOS Convention, arts. 86-87; High Seas Convention, arts. 1-2; NWP 1-14M Annotated ¶ 2.3.3.2; NWP 9A Annotated ¶ 2.3.3.2; 1 OPPENHEIM § 210; Alexander, n. 523, 99-100; *see* nn. 68-79 and accompanying text for analysis of the high seas regime. It is, of course, possible that the strait State(s) may claim EEZ, fishing zone, continental shelf or contiguous zone rights for the ocean area beyond the territorial sea(s) in the strait. In that case those regimes' LOS rules would also apply to the belt of waters within the strait beyond the territorial sea.

534. *See* nn. 268-94, 314-22, 328-34 and accompanying text.

535. NWP 9A Annotated ¶ 2.3.3.2 n.43 & Annex AS2-4: International Straits: Least Width, seemingly erroneously listing Strait of Hormuz as having a least width of more than 24 miles; Annex AS2-6: Straits, Less Than

24 Miles in Least Width, in Which There Exists a Route Through the High Seas or an Exclusive Economic Zone of Similar Convenience with Respect to Navigational or Hydrographical Characteristics, *in id.* AS2-4-1 - AS2-6-1; *compare id.*, Fig. SF2-4: Strait of Hormuz, *in id.*

536. NWP 1-14M Annotated ¶ 2.3.3.2 n.46 & Table A2-5: International Straits: Least Width, seemingly erroneously listing Strait of Hormuz as having a least width of more than 24 miles; Table A2-6: Straits, Less Than 24 Miles in Least Width, in Which There Exists a Route Through the High Seas or an Exclusive Economic Zone of Similar Convenience with Respect to Navigational or Hydrographic Characteristics, *in id.* 2-86 - 2-88; *compare id.*, Fig. A2-4: Strait of Hormuz, at 2-74.

537. NWP 9A Annotated, ¶ 2.3.3.2 n.43 & Annex AS2-6. By 1997 Bahrain, Qatar and the UAE had claimed greater territorial seas, n. 533; only the area around Abu Musa Island might be considered as falling within this category. NWP 1-14M Annotated ¶ 2.3.3.2 n.46.

538. *See* nn. II.51, 67, 81, 119, 163, 379-81, 410 and accompanying text.

539. *See* Fig. A2-4: Strait of Hormuz, *in* NWP 1-14M Annotated, at 2-74.

540. Table A2-5: International Straits: Least Width, NWP 1-14M Annotated, at 2-87; Table AS2-4: International Straits: Least Width, NWP 9A Annotated, at AS2-4-2; *see also* nn. II.51, 67, 81, 119, 163, 379-81, 410 and accompanying text.

541. Territorial Sea Convention, art. 16(4), 25; *see also* nn. 524-25, 555-57, 566-81 and accompanying text.

542. *See* nn. 566-81 and accompanying text.

543. LOS Convention, art. 36; *see also* BROWN 88; NWP 1-14M Annotated ¶ 2.3.3.2; NWP 9A Annotated ¶ 2.3.3.2; 1 O'CONNELL, LAW OF THE SEA 330; RESTATEMENT (THIRD) § 513 r.n.3; ROACH & SMITH ¶ 11.4.

544. ROACH & SMITH ¶ 11.2, 283; *see* nn. 582-607 and accompanying text for transit passage analysis.

545. *See* Fig. A2-4: Strait of Hormuz, in NWP 1-14M Annotated, at 2-74.

546. *See* nn. 337-50 and accompanying text.

547. LOS Convention, art. 45; *see also* 2 Nordquist ¶¶ 45.1-45.8(c); NWP 1-14M Annotated ¶ 2.3.3.1, at 2-16; NWP 9A Annotated ¶ 2.3.3.1, at 2-23; RESTATEMENT (SECOND) § 45(3)(b); RESTATEMENT (THIRD) § 513 r.n.3; ROACH & SMITH, ¶ 11.3; Alexander, n. 523, 103; John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AJIL 77, 112 (1980).

548. NWP 1-14M Annotated ¶ 2.3.3.1 n.45; NWP 9A Annotated ¶ 2.3.3.1 n.42.

549. *Compare* LOS Convention, arts. 17-20, 45, *with* Territorial Sea Convention, arts. 14, 16(4); *see also* nn. 301-13, 337-50 and accompanying text. Article 16(4) was drafted with Case 2 straits in mind. BROWN 80; 1 O'CONNELL, LAW OF THE SEA 331; *see also* RESTATEMENT (SECOND) § 43(3)(b); Alexander, n. 523, 99.

550. Alexander, n. 523, 99.

551. LOS Convention, art. 38(1).

552. *Id.*, arts. 44-45(1)(a); *see also* BROWN 92; 2 Nordquist ¶¶ 38.1, 38.8(b), 44.1-44.8(c), 45.1-45.8(b); NWP 1-14M Annotated ¶ 2.3.3.1 n.36; NWP 9A Annotated ¶ 2.3.3.1 n.36; RESTATEMENT (THIRD) § 513 r.n. 3 (Art. 45 responds to Corfu Channel, 1949 ICJ 28-29); ROACH & SMITH ¶ 11.3; Alexander, n. 523, 100-01; *see* nn. 337-50 and accompanying text for territorial sea innocent passage analysis.

553. *Compare* LOS Convention, arts. 38(1), 45, *with* Territorial Sea Convention, art. 16(4). No 1958 Convention addresses EEZ claims.

554. The Strait of Messina between the Italian mainland and Sicily is a familiar example. *See* Table A2-2: Straits Formed by an Island of a Nation and the Mainland Where There Exists Seaward of the Island a Route Through the High Seas or an Exclusive Economic Zone of Similar Convenience, NWP 1-14M Annotated, at 2-84; *id.*, ¶ 2.3.3.1 n.36. Abu Musa and the Greater and Lesser Tunbs are more than 24 miles from the mainland. *See* nn. II.51, 67, 81, 119, 163, 379-81, 410 and accompanying text.

555. *Compare* LOS Convention, art. 35(c) *with* Territorial Sea Convention, arts. 16(4), 25; *see also* BROWN 86; NWP 1-14M Annotated ¶ 2.3.3.1 n.36; NWP 9A Annotated ¶ 2.3.3.1 n.36; 1 O'CONNELL, LAW OF THE SEA 322-24; ROACH & SMITH §§ 11.8.4, 11.8.8; Alexander, n. 523, 101-02; Moore, *Regime of Straits*, n. 547, 111; Daniel Vignes, *Commentary, in* LAW OF NAVAL WARFARE, 468, 479-81.

556. LOS Convention, art. 311(2); *see also* BROWN 86-88, citing Treaty of Peace, Mar. 26, 1979, Egypt-Israel, art. 5(2), 18 ILM 362, 365, 392 (1979); NWP 1-14M Annotated ¶ 2.3.3.1 n.42; NWP 9A Annotated ¶ 2.3.3.1 n.42; ROACH & SMITH ¶ 11.8.15; n. 45 and accompanying text.

557. The Bosphorus and Dardanelles are generally considered LOS Convention art. 35(c) exceptions; *see* Convention Regarding Regime of the Straits, July 20, 1936, 173 LNTS 213 (Montreux Convention); as is the Beagle Channel, Boundary Treaty, July 23, 1881, Arg.-Chile, art. 5, 159 CTS 45; Treaty of Peace & Friendship, Nov. 29, 1984, Arg.-Chile, 24 ILM 11, 13 (1985). Other treaties or statememts affecting straits include Treaty Concerning Sovereignty & Maritime Boundaries in the Area Between the Two Countries, Dec. 18, 1978, Austl.-Papua N.G., 18 ILM 291 (1979) (Torres Strait); Treaty of Peace, Mar. 28, 1979, Egypt-Isr., 1136 UNTS 100, 1138 *id.* 59; Agreement Relating to Delimitation of Territorial Sea in the Straits of Dover (With Joint Declaration & Map), Nov. 2, 1988, Fr.-UK, 1547 *id.* 47, 54 ("unimpeded transit passage . . . of merchant ships, government ships and especially warships in their normal mode of navigation, and also the right of overflight by aircraft" recognized; passage must be "continuous and expeditious."); Statements by Malaysia *et al.* Relating to Article 233 of the Draft Convention on the Law of the Sea in Its Application to the Strait of Malacca & Singapore, UN Doc. A/CONF.62/L.145, Annex & Adds. 1-8 (1982), *in* 4 Nordquist ¶ 233.8 (US a party to statement); Delimitation Treaty, Mar. 31, 1978, Neth.-Venez., 1140 UNTS 311 (strait between Netherlands Antilles, Venezuela); Agreement on Delimitation of Marine & Submarine Areas, April 18, 1990, Trin. & Tobago-Venez., 19 L. of the Sea Bull. 22 (Oct. 1991), cited *in* 2 Nordquist ¶ III.20 n. 49 (strait between Trinidad & Tobago, Venezuela). These treaties may apply to third States through the *erga omnes* principle. 1 OPPENHEIM §§ 234, 275; *see also* 2 Nordquist ¶ III.20; 1 O'CONNELL, LAW OF THE SEA 322-24; 1 OPPENHEIM § 213; RESTATEMENT (THIRD) § 336 r.n.2; Vignes, *Commentary*, n. 555.

558. *See* LOS Convention, arts. 17-26, 52, 53(4), 54; *see also* 2 Nordquist ¶¶ 51.1-54.7(b); NWP 1-14M Annotated, ¶¶ 2.3.3.1 n.36, 2.3.4.1; NWP 9A Annotated, ¶¶ 2.3.3.1 n.36, 2.3.4.1; Alexander, n. 523, 95-96; Thomas A. Clingan, *Freedom of Navigation in a Post-LOS Convention III Environment, in* Symposium, *The Law of the Sea: Where Now*, 46 L. & CONTEMP. PROBS. 107, 117 (1983); Bruce Harlow, *Comment, in* Symposium 125, 126; Oxman, *The Regime*, n. III.956, 851-61; William J. Schachte, *International Straits and Navigational Freedoms*, 24 ODIL 179, 181-84 (1993); *see* nn. 337-50 (territorial sea innocent passage), 546-54 (nonsuspendable straits innocent passage).

559. Territorial Sea Convention, arts. 16(4), 25.

560. *See* Table A1-7: Archipelagos; Table A1-8, & Table A1-9: States with Acceptable Water/Land Ratios for Claiming Archipelagic Status, *in* NWP 1-14M Annotated, at 1-85 - 1-87; Table ST1-7: Archipelagos; Table ST1-8, & Table ST1-9: States with Acceptable Water/Land Ratios for Claiming Archipelagic Status, *in* NWP 9A Annotated, at 1-17 - 1-18.

561. *See* nn. 524-30 and accompanying text.

562. *See* nn. 268-94 and accompanying text.

563. *See* nn. 68-79 and accompanying text.

564. *See* nn. 268-94 and accompanying text.

565. *See* nn. 533-45 and accompanying text.

566. Territorial Sea Convention, art. 16(4); *accord,* RESTATEMENT (SECOND) § 45(1) & cmts. a,b.

567. Territorial Sea Convention, arts. 16(3)-16(4); *accord,* RESTATEMENT (SECOND) § 45(3)(b); *compare* LOS Convention, art. 25(3); *see also* nn. 301-13 and accompanying text.

568. Territorial Sea Convention, art. 16(1); *accord,* RESTATEMENT (SECOND) § 45(2)(a) & cmt.b; *see also* nn. 381-521 and accompanying text.

569. Territorial Sea Convention, art. 14(3); *accord,* RESTATEMENT (SECOND) § 45(2)(b) & cmt.b; *see also* nn. 302, 492, 494-95, 500-01, 507 and accompanying text.

570. Territorial Sea Convention, art. 14(4); *accord,* RESTATEMENT (SECOND) § 45(1); *see also* nn. 301-13 and accompanying text.

571. 1 O'CONNELL, LAW OF THE SEA 331. Corfu Channel, 1949 ICJ 29-33, which spoke in terms of "innocent passage," influenced the Convention drafters. BROWN 78-79; 2 Nordquist ¶ III.5; O'CONNELL 314-16; Alexander, n. 523, 96-99. Promoting territorial sea innocent passage in the straits context as a rule of international law continues. *See* BROWNLIE, INTERNATIONAL LAW 281, 284 (Territorial Sea Convention, art. 16[4] the straits passage rule; the LOS Convention "a substantial departure from . . . customary law"); 1 OPPENHEIM § 210; *but see id.* § 211, recognizing the LOS Convention transit passage regime. In later LOS discussions, maritime States made it clear that maintaining an unrestricted ships straits passage regime was essential for a future LOS treaty. 2 Nordquist ¶ III.6.

572. *See* Territorial Sea Convention, art. 14(5); RESTATEMENT (SECOND) § 45, cmt. f; by contrast, LOS Convention, art. 19(2)(i) declares that "any" fishing is considered under *id.*, art. 19 as prejudicial to a coastal State's peace, good order or security; *see also* nn. 301-02, 337, 340-41 and accompanying text.

573. *Cf.* Territorial Sea Convention, arts. 1-2; *see also* nn. 304-05 and accompanying text. In later LOS discussions maritime States made it clear that maintaining an unrestricted straits aircraft overflight passage regime was essential for a future LOS treaty. 2 Nordquist ¶ III.6.

574. Territorial Sea Convention, art. 14(6); *see also* RESTATEMENT (SECOND) § 45 cmt. g; *but see id.* § 48; nn. 302-03 and accompanying text. In later LOS discussions maritime States made it clear that maintaining an unrestricted submarine straits passage regime was essential to a future LOS treaty. 2 Nordquist ¶ III.6.

575. LOS Convention, art. 19(2) declares these activities and others in an all-inclusive list are considered under *id.*, art. 19 to be prejudicial to a coastal State's peace, good order or security; *see also* nn. 338-41 and accompanying text.

576. *Cf.* Territorial Sea Convention, arts. 18-23; *see also* n. 313 and accompanying text.

577. Territorial Sea Convention, arts.1(2), 14(4), 17, 22(2) (application of "other rules of international law"); *see also* nn. III.952-67, IV.10-25 and accompanying text.

578. UN Charter, arts. 51, 103; *see also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

579. *E.g.*, UN Charter, arts. 2(4), 103. LOS Convention, art. 19(2)(a) declares "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter" is considered under *id.*, art. 19 as conduct prejudicial to a coastal State's peace, good order or security. *See also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

580. Territorial Sea Convention, arts. 1(2), 14(4). For example, RESTATEMENT (SECOND) § 45 cmt. i, following the Convention, declares a "coastal state may take the necessary steps in its territorial sea to prevent passage that is not innocent, regardless of the type of vessel involved," adding that the vessel's immunity is not affected. While the latter covers warship immunity, reading the "necessary steps" language broadly without considering warship immunity could lead to an erroneous conclusion that warships can be treated like merchantmen for straits passage.

581. *See* MACDONALD 170 for Saudi Arabia's position on innocent passage through straits under the 1958 Convention.

582. Others include the Straits of Gibraltar, between the Mediterranean Sea and the Atlantic Ocean; Bab el Mandeb, between the Red Sea and the Indian Ocean; Malacca, between the Indian Ocean's Andaman Sea and the Pacific Ocean's South China Sea. *See* Fig. A2-2: Strait of Gibraltar; Fig. A2-3: Strait of Bab el Mandeb; Fig. A2-5, in NWP 1-14M Annotated, at 2-72, 2-73, 2-75; *see also* 1 O'CONNELL, LAW OF THE SEA 318-22; Alexander, n. 523, 104-05.

583. LOS Convention, arts. 36-38(1), 44; *see also* 2 Nordquist ¶¶ 36.1-36.7(e), 37.1-37.7(c), 38.1-38.8(c), 44.1-44.8(c); NWP 1-14M Annotated ¶ 2.3.3.1, at 2-15; NWP 9A Annotated ¶ 2.3.3.1, at 2-23; Alexander, n. 523, 91, 94.

584. LOS Convention, art. 38(2); *see also* BROWN 89 (transit passage is "a right akin to freedom of the high seas but for one purpose only—. . . continuous and expeditious transit"); 2 Nordquist ¶¶ 38.1-38.8(b), 38.8(d)-38.8(e); NWP 1-14M Annotated ¶ 2.3.3.1, at 2-15; NWP 9A Annotated ¶ 2.3.3.1, at 2-23; RESTATEMENT (THIRD) § 513(3) & cmt. j, r.n.3 (right of unimpeded transit passage a customary norm); Alexander, n. 523, 91-93; for analysis of conditions of entry, *see* nn. 381-513 and accompanying text.

585. NWP 1-14M Annotated ¶ 2.3.3.1 n.37, citing US Navy Judge Advocate General message 061630Z June 1988 ¶ 4, at 2-59; NWP 9A Annotated ¶ 2.3.3.1 n.37; ROACH & SMITH ¶ 11.2, 286, quoting Dec. 21, 1984 telegram to US Embassy, Santiago, Chile.

586. LOS Convention, arts. 58, 87-115; High Seas Convention, arts. 1-2; *see also* nn. 68-79, 147-57 and accompanying text.

587. LOS Convention, art. 38(1).

588. Since waters in and around these straits are necessarily part of coastal State territorial seas, an EEZ or the high seas, the other rules clauses of *id.*, arts. 2(3), 19(1), 21(1), 31, 58(3), 87(1) apply; *see also* High Seas Convention, art. 2; Territorial Sea Convention, arts. 1(2), 14(4), 17, 22(2). LOS Convention, art. 34(2) declares straits-bordering States' sovereignty or jurisdiction is exercised subject to *id.*, arts. 34-45, and "other rules of international law." Other rules clauses refer to the LOAC. *See* 2 Nordquist ¶¶ 34.1-34.8(g); Akira Mayama, *The Influence of the Straits Transit Passage Regime on the Law of Neutrality at Sea*, 20 ODIL 1 (1995); nn. III.953-56, IV.10-25 and accompanying text.

589. *E.g.*, UN Charter, arts. 2(4), 51, 103; LOS Convention, arts. 39(1)(b), 301; *see also* nn. III.10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

590. MacDonald 183-84; *see also* 2 Nordquist ¶¶ III.9-III.14.

591. LOS Convention, art. 39(1); *see also* 2 Nordquist ¶¶ 39.1-39.10(h); NWP 1-14M Annotated ¶ 2.3.3.1, at 2-15; NWP 9A Annotated ¶ 2.3.3.1, at 2-22; 1 O'Connell, Law of the Sea 331-336; Moore, *Regime of Straits*, n. 547, 95-102.

592. LOS Convention, art. 39(2); *see also* 2 Nordquist ¶ 39.10(j); nn. VI.136-40 and accompanying text.

593. LOS Convention, art. 39(3); *see also* 2 Nordquist ¶¶ 39.10(k)-39.10(*l*).

594. 2 Nordquist ¶ 39.10(k); NWP 1-14M Annotated ¶ 2.3.3.1, at 2-15; NWP 9A Annotated ¶ 2.3.3.1, at 2-22; Alexander, n. 523, 93; Lowe, *The Commander's*, n. III.318, 119.

595. LOS Convention, art. 40; *see also id.*, art. 19(2)(j) (territorial sea research, survey activities considered prejudicial to coastal State's peace, good order or security if conducted by ships otherwise in *id.*, art. 19(1) innocent passage); 2 Nordquist ¶¶ 40.1-40.9(e); Alexander, n. 523, 92-93. However, research may be conducted in a strait-bordering State's territorial waters within the strait if that State consents. 2 Nordquist ¶ 40.9(d). Research does not include transiting platforms' normal mode of operations while going through a strait, *e.g.*, sonic depth sounding by fathometer or position plotting by radar, *etc.* These activities are not prohibited if legitimately incidental to continuous, expeditious transit in the normal mode. *Id.* ¶¶ 39.10(f), 40.9(c).

596. LOS Convention, art. 39(1)(c); *see also* nn. 591, 595 and accompanying text.

597. 2 Nordquist ¶ 39.10(e); NWP 1-14M Annotated ¶ 2.3.3.1, at 1-15; NWP 9A Annotated ¶ 2.3.3.1, at 2-22; Alexander, n. 523, 91; William T. Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 Wash. L. Rev. 193, 212-14 (1977); Ronald Clove, *Submarine Navigation in International Straits: A Legal Perspective*, 39 Nav. L. Rev. 103 (1990); Lowe, *The Commander's*, n. III.318, 120, 122; Horace B. Robertson, Jr., *Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 VJIL 801, 843-44 (1980); Schachte, *International Straits*, n. 558, 184-86; *but see* Lowe, *The Commander's*, 122; W. Michael Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AJIL 48, 71-75 (1980). By contrast, under territorial sea innocent passage rules submarines must transit surfaced, flying the ensign. LOS Convention, art. 20; Territorial Sea Convention, art. 14(6); *see also* nn. 302, 338, 342, 493, 574 and accompanying text.

598. For special maritime vehicles, *e.g.*, hovercraft or hydrofoils, normal mode transit passage means the mode normal to them under the circumstances. For aircraft normal mode is altitude and speed appropriate under the circumstances. 2 Nordquist ¶¶ 39.10(e), 40.9(c); US Navy Judge Advocate General message, n. 586, ¶¶ 5, 9, *in* NWP 1-14M Annotated, at 2-60 - 2-61; 1 O'Connell, Law of the Sea 333; Alexander, n. 523, 92; *but see* Lowe, *The Commander's*, n. III.317, 122. As the Navy Message ¶ 5 makes clear, this is for navigation safety and ships' protection, *i.e.*, self-defense. UN Charter, arts. 51, 103; *see also* nn. 10-11, 47-630, 916-18, 952-67, IV.6-25 and accompanying text.

599. LOS Convention, art. 39(1)(b); *see also* 1 Nordquist 207, 450; 2 *id.* ¶ 39.10(c); 5 *id.*, ¶ 301.5; discussing LOS Convention, art. 301.

600. Brown 78. If prior notification or permission is unnecessary for warship territorial sea innocent passage, as argued nn. 337-52 and accompanying text concerning LOS Convention, arts. 17-32 and Territorial Sea Convention, arts. 14-23, surely there is no prior notification or permission requirement for straits transit passage where a strait includes territorial seas.

601. Sea lanes and traffic separation schemes must conform to generally accepted international regulations. If two or more States border a strait, they must cooperate in formulating proposals to IMO. LOS Convention, art. 41; *see also id.*, art. 22(1) (coastal State may prescribe sea lanes, traffic separation schemes for its territorial sea); 2 Nordquist ¶¶ 41.1-41.9(h); NWP 1-14M Annotated ¶ 2.3.3.1, at 2-26; NWP 9A Annotated ¶ 2.3.3.1, at 2-23; Alexander, n. 523, 94-95.

602. NWP 1-14M Annotated ¶ 2.3.3.1 n.43, referring to Fig. A2-4, at *id.* 2-74; NWP 9A Annotated ¶ 2.3.3.1 n.41, referring to Fig. SF2-4.

603. LOS Convention, arts. 42(1), 42(3); *see also* 2 Nordquist ¶¶ 42.1-42.10(e), 42.10(h); Alexander, n. 523, 94-95; nn. VI.122, 136-40, 175 and accompanying text.

604. LOS Convention, art. 43; *see also* 2 Nordquist ¶¶ 43.1-43.8(e).

605. *Compare* LOS Convention, art. 42(2) *with id.*, art. 25(3) (no discrimination in form or fact when territorial sea innocent passage temporarily suspended); *see also* nn. 301-13, 337-50 and accompanying text.

606. LOS Convention, art. 44; *see also* 2 Nordquist ¶ 44.8(b); Alexander, n. 523, 94-95.

607. LOS Convention, arts. 42(4)-42(5); *compare id.*, arts. 21, 31 (similar rules for territorial sea innocent passage); *see also* 2 Nordquist ¶¶ 42.10(i)-42.10(*l*); Alexander, n. 523, 94-95; n. 350 and accompanying text.

608. *See* nn. II.104-06, 220, 277, 290, 325, 357, 375, 379-81, 463 and accompanying text.

609. LOS Convention, arts. 36, 87(1); High Seas Convention, art. 2; *see also* nn. 533-45, 561-65 and accompanying text.

610. LOS Convention, arts. 38(1), 44; *see also* nn. 566-607 and accompanying text.

611. *See* nn. II.325 and accompanying text.

612. Lowe, *The Commander's*, n. III.318, 120.

613. UN Charter, arts. 51, 103; *see also* nn. III.10-11, 48-626, 916-18, 952-67, IV.6-25 and accompanying text.

614. *See* n. II.102 and accompanying text.

615. *See* n. 600 and accompanying text.

616. *See, e.g.,* nn. II.357 (mines), 457 (Iran's Larak oil terminal by air attack), 463-64 (speedboat attacks) and accompanying text.

617. UN Charter, arts. 51, 103; *see also* nn. III.10-11, 48-630, 916-18, 952-67, IV.6-25 and accompanying text.

618. *See* nn. II.459-69 and accompanying text.

619. *Cf.* LOS Convention, arts. 41-44; *see also* n. II.357 and accompanying text.

620. *See* WHITEHURST, U.S. MERCHANT MARINE, n. II.59, ch. 7.

621. *See* GILMORE & BLACK 188; SCHOENBAUM § 8-33; WHITEHURST, U.S. MERCHANT MARINE, n. II.59, 201-02.

622. *See* GILMORE & BLACK 14, 144; SCHOENBAUM § 8-33; WHITEHURST, U.S. MERCHANT MARINE, n. II.59, 202.

623. PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956) coined the phrase, now in general use, to define private parties' and governments' relationships in the international context. Transnational law is a mix of public international law, *e.g.,* the LOS or the LOAC with which this study is primarily concerned, and conflict of laws, also known as private international law.

624. US Const., art. I, § 8 gives Congress power to "grant Letters of Marque and Reprisal," *i.e.,* authorizing Congress to approve privateering. The general view is that privateering is outlawed, despite US equivocations half a century or more ago. COLOMBOS §§ 536-38; 2 O'CONNELL, LAW OF THE SEA 1102-03, 1106; TUCKER 40-41; Harvard Draft Convention on Naval & Aerial War, art. 50 & cmt.; Hisakazu Fujita, *Commentary, in* LAW OF NAVAL WARFARE 66, 68. *See* Paris Declaration, ¶ 1. Whatever its weight as a customary norm, the Declaration's 53 original and acceding parties, except the United States, which has not ratified the Declaration, represent nearly all nations if treaty succession principles are taken into account. SCHINDLER & TOMAN 789-90; Symposium, *State Succession;* Walker, *Integration and Disintegration.*

625. *See* NWP 1-14M Annotated ¶ 2.1.3; NWP 9A Annotated ¶ 2.1.2.3; WHITEHURST, U.S. MERCHANT MARINE, n. II.59, ch. 11 (US National Defense Reserve Fleet, Military Sealift Command, naval fleet auxiliaries, RDJTF, Ready Reserve Fleet); except as a "fleet in being," RDJTF played no active role in the Tanker War. *See* nn. II.40, 77, 80, 175, 219 and accompanying text. Insofar as the record indicates, no State employed naval auxiliaries during the war. Properly speaking, under the LOS, naval auxiliaries are State-owned vessels operated for noncommercial purposes that are not warships and, in territorial waters, are governed by LOS Convention, arts. 31-32; Territorial Sea Convention, art. 22. On the high seas they enjoy immunity as well. LOS Convention, art. 96; High Seas Convention, art. 9. *See generally* 2 Nordquist ¶¶ 31.1-32.7(b), 3 *id.* 96.1-96.96.10(d); NWP 1-14M Annotated ¶ 2.1.3; NWP 9A Annotated ¶ 2.1.3; 1 OPPENHEIM § 565. Where the law of armed conflict applies through the other rules clauses of the LOS conventions, they would be considered under LAW OF NAVAL WARFARE principles applicable to naval auxiliaries. Applicable international agreements include 1936 London Naval Treaty, art. 1(B)(6); Montreux Convention, n. 557, Annex II, art. B(6), 173 LNTS 237; Convention on Maritime Neutrality, arts. 12-13. However, because there were apparently no naval auxiliary issues, as distinguished from issues of government-owned or operated vessels for commercial purposes, during the Tanker War, Chapter V will not analyze this difficult issue.

626. 1962 Oil Pollution Convention Amendments, art. 2(2)(b); *compare* MARPOL 73/78, art. 2(4); 1960 COLREGS, Rule 1(c)(i). Some ILO conventions offer partial definitions. 2 O'CONNELL, LAW OF THE SEA 749.

627. Ship Registration Convention, n. II.61, art. 2(4), 26 ILM 1237, (1987) excluding vessels under 500 gross registered tons (GRT). *See also* RESTATEMENT (THIRD) § 501 r.n.1.

628. *See* Part C.4 for analysis of the definition of a warship.

629. By 1995 MARPOL 73/78 had been accepted by countries, including the United States, representing 92 percent of world merchant fleets, measured in GRT. BOWMAN & HARRIS 292-93 (1995 Supp.); TIF 400-01.

630. *See, e.g.*, 16 USC § 916(e); 33 USC §§ 1471(5), 1502(19); 46 USC § 23 (includes seaplanes on the water); *see also* 2 O'CONNELL, LAW OF THE SEA 747-50.

631. SAN REMO MANUAL, cmt. 13.23.

632. NWP 1-14M Annotated ¶2.1.3 n.13; NWP 9A Annotated ¶2.1.2.3 n.13; SAN REMO MANUAL ¶13(i) & Commentary.

633. *E.g.*, LOS Convention, art. 87(1); *see also* nn. III.953-67, IV.10-25 and accompanying text.

634. *See* Parts V.C.-V.E, V.J.3-V.J.5.

635. GILMORE & BLACK 12.

636. *See, e.g.*, First Charter of Virginia, Apr. 10/20, 1606, arts. 1-2.

637. GILMORE & BLACK 12.

638. ALFORD, n.III.833, 84-88. The USSR, a command economy State, has since collapsed and is moving to a free enterprise economy. However, other command economies and those transitioning to a capitalist system may still use these. Many free enterprise-based economies also have the form, *e.g.*, Israel and its State-owned ZIM shipping line.

639. Table 2.2: *Non-Communist Countries with Government Owned Shipping Fleets, in* LAWRENCE JUDA, THE UNCTAD LINER CODE: UNITED STATES MARITIME POLICY AT THE CROSSROADS 46 (1983).

640. GILMORE & BLACK 13-14, 197; SCHOENBAUM § 8-5, 491; WHITEHURST, U.S. MERCHANT MARINE, nn. II.59, chs. 8-9.

641. GILMORE & BLACK 12, 990-95; JUDA, n. 639, ch. 1; LAWRENCE, n. II.60, 14-16, 30, 198-202, 289-91, 293-95; DANIEL MARX, JR., INTERNATIONAL SHIPPING CARTELS: A STUDY OF INDUSTRIAL SELF-REGULATION BY SHIPPING CONFERENCES (1953); WHITEHURST, U.S. MERCHANT MARINE, n. II.59, 35.

642. *See, e.g.*, arrangements in In re Barracuda Tanker Corp., 281 F.Supp. 228 (S.D.N.Y. 1968), *rev'd*, 409 F.2d 1013 (2d Cir. 1969), (1967 *Torrey Canyon* oil spill disaster); In re Amoco Transp. Co. (*Amoco Cadiz*), 1979 AMC 1017 (N.D. Ill. 1979), *aff'd*, 954 F.2d 1279, 1302-04 (7th Cir. 1992); *see also* Frankel, n. II.60, 66; GILMORE & BLACK 841-43; SCHOENBAUM § 13-2 n.4; WHITEHURST, U.S. MERCHANT MARINE, n. II.59, 225; Andreas Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction*, 163 RCADI 311, 322-26 (1979); nn. 664, V.12-15 and accompanying text.

643. "Charter party" derives from the Latin *charta partita* (divided document), the ancient custom of splitting a ship rental document drafted in duplicate, so that only the whole could give rise to rights and remedies. Each party kept a part; comparing the halves proved the document's authenticity. SCHOENBAUM § 9-1 n.1.

644. *See, e.g.*, Pacific Vegetable Oil Corp. v. M/S Norse Commander Corp., 264 F.Supp. 625 (S.D. Tex. 1966); *see also* SCHOENBAUM § 8-6, 492.

645. GILMORE & BLACK 194. If an owner provides master and crew, tendering them as the charterer's agents, the charter is a demise, although not technically a bareboat charter. SCHOENBAUM § 9-3 n.1-2.

646. GILMORE & BLACK 194; SCHOENBAUM § 9-1, 631.

647. GILMORE & BLACK 193; SCHOENBAUM § 9-1, 631-32.

648. GILMORE & BLACK 195.

649. *Id.* 197-98; SCHOENBAUM § 9-2. Satellite-based communications through INMARSAT (International Maritime Satellite Communications), established by Convention on International Maritime Satellite Organization, Sept. 3, 1976, 31 UST 1; Operating Agreement on International Maritime Satellite Organization, Sept. 3, 1976, *id.* 135, accomplishes this for many ships. WHITEHURST, U.S. MERCHANT MARINE, n. II.59, 152. *See, e.g.*, Dominant Navig. Ltd. v. Alpine Shipping Co., 1982 AMC 1241 (R. Glenn Bauer, Manfred W. Arnold, Jack Berg, arbs.).

650. GILMORE & BLACK 202-07; SCHOENBAUM § 9-10.

651. The Gazelle, 186 US 474 (1902); *see also* SCHOENBAUM § 9-10, 654.

652. SCHOENBAUM § 9-10, 653-54.

653. *Id.* § 9-10, 654.

654. GILMORE & BLACK 209-10; SCHOENBAUM § 9-14.

655. GILMORE & BLACK 223-28; SCHOENBAUM §§ 9-14, 9-16; George K. Walker, *The Interface of Criminal Jurisdiction and Actions Under the United Nations Charter*, 20 TULANE MARITIME L.J. 217, 241 (1996).

656. *E.g.*, Calmar S.S. Corp. v. Scott, 345 US 427, 439-40 (1953); Glidden Co. v. Hellenic Lines, 272 F.2d 253 (2d Cir. 1960) (voyage charter); Navious Corp. v. The Ulysses II, 161 F.Supp. 932 (D. Md.), *aff'd*, 260 F.2d 959 (4th Cir. 1958); The Claveresk, 264 F. 276, 281-82 (2d Cir. 1920) (time charter); Denali Seafoods, Inc. v. Western Pioneer, 492 F.Supp. 580 (W.D. Wash. 1980) (voyage charter); *see also* GILMORE & BLACK 240.

657. Bottomry bonds, loans on the security of a ship and its cargo, and respondentia bonds on cargo are now obsolete. Although they created liens on vessel or cargo, the liens (*i.e.*, the security) were discharged if a ship did not complete a voyage, *i.e.*, if it sank. GILMORE & BLACK 632, 690; SCHOENBAUM § 7-5 n.2.

658. *E.g.*, Ship Mortgage Act, 46 USC §§ 31322, 31325.

659. Convention for Unification of Certain Rules Relating to Maritime Liens & Mortgages, Apr. 10, 1926, 120 LNTS 187; Convention for Unification of Certain Rules Relating to Maritime Liens & Mortgages, May 27, 1967, *in* 6E BENEDICT, Doc. 15-5; Convention on Maritime Liens & Mortgages, May 6, 1993, 33 ILM 353 (1994). Each supersedes the previous one; the 1993 IMO-sponsored convention is not in force for many States, the situation for earlier treaties. *See* Jan M. Sandstrom, *The Changing International Concept of the Maritime Lien as a Security Right*, 47 TULANE L. REV. 681 (1973). The United States is not party to any maritime lien treaty. *See* John M. Kriz, *Ship Mortgages, Maritime Liens and Their Enforcement: The Brussels Conventions of 1926 and 1967*, 1963 DUKE L.J. 670, 674-75.

660. *E.g.*, Ship Mortgage Act, 46 USC 31328, requires US Department of Transportation approval of trustees holding a US ship mortgage in trust for the benefit of a foreignor who cannot hold a US ship mortgage; *see also* SCHOENBAUM § 7-5.

661. US law, *e.g.*, subordinates foreign preferred ship mortgages in US courts to repair facilities' lien claims. 46 USC § 31326(b); *see also* GILMORE & BLACK 709-12; SCHOENBAUM § 7-6.

662. *See generally* GILMORE & BLACK 702-06; SCHOENBAUM § 7-5, 444.

663. *See generally* GILMORE & BLACK 702-06.

664. *See, e.g.*, In re Barracuda Tanker Corp., n. 642; *see also* n. 642 and accompanying text.

665. *See generally* Convention for Unification of Certain Rules Relating to Limitation of Liability of Owners of Sea-Going Vessels, Aug. 24, 1924, 120 LNTS 123 (1924 Limitation Convention); Convention Relating to Limitation of Liability of Owners of Seagoing Ships, Oct. 10, 1957, 6 BENEDICT, Doc. No. 5-2 (1957 Limitation Convention); Protocol, Dec. 21, 1979, *id.*, Doc. No. 5-3; Convention on Limitation of Liability of Maritime Claims, Nov. 19, 1976, 16 ILM 606 (1977) (1976 Limitation Convention); SCHOENBAUM ch. 13; In re Barracuda Tanker Corp., n. 642; n. 642 and accompanying text. The United States is not party to these treaties; Limitation of Shipowners' Liability Act, 46 USC §§ 181-89, governs in US courts.

666. *See* nn. VI.14-15, 160-65, 195-97 and accompanying text. Maritime liens, inchoate (*i.e.*, hidden) *in rem* interests in a ship because of collisions with other merchantmen, personal injury and death aboard ship, contracts for vessel repair, charter claims, towage, pilotage, wharfage, cargo damage claims, *etc.*, add still another dimension (and therefore more possible claimants) relating to the vessel. *See generally* GILMORE & BLACK 586-688; SCHOENBAUM ch. 7.

667. *See* LOS Convention, art. 91; High Seas Convention, art. 5; *see also* Part B.3. The vessel's flag governs its nationality for LOAC situations. SAN REMO MANUAL ¶¶ 60 & cmt. 60.4; 112-14 & cmts.; *see also* Parts V.B-V.E, V.J.2-V.J.5.

668. Much of what follows has been distilled from SCHOENBAUM § 8-1, who publishes a helpful diagram of typical maritime sale, financing and transportation contracts.

669. Convention on Contracts for International Sale of Goods, Apr. 11, 1980,—UST—, 19 ILM 668 (1980), increasingly governs maritime transactions' sales aspects. At least 52 countries, including the United States and more if treaty succession principles apply, are parties. TIF 459; Symposium, *State Succession;* Walker, *Integration and Disintegration. See also* JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1982); *Symposium on the International Sale of Goods Convention*, 18 INT'L LAW. 3 (1984).

670. This was the transaction in Banco Nacional de Cuba v. Sabbatino, 376 US 398 (1964).

671. *See generally* SCHOENBAUM § 8-4; WHITEHURST, U.S. MERCHANT MARINE, n. II.59, ch. 17.

672. *See* nn. 635-67 and accompanying text.

673. Convention for Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 LNTS 155 (COGSA Convention), modified by Protocol to Amend 1924 Convention for Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, *in* 6 BENEDICT, Doc. 1-2, and UN Convention on Carriage of Goods by Sea, Mar. 31, 1978, 17 ILM 608 (1978); neither of the latter are in force for the United States. US trading partners are parties to the modifications, albeit with reservations or domestic law gloss. *Comparative Table of Ratifications of the*

*Hague Rules and the Hamburg Rules (1996)*, Doc. 1-3A, 6 BENEDICT; *see also* SCHOENBAUM § 8-14. The US COGSA Convention reservation, 51 Stat. 252, declares US law, *i.e.*, the Carriage of Goods by Sea Act, 46 USC §§ 1300-15, is paramount to the Convention for cases in US courts, thereby perhaps creating different results in US courts from cases in other countries' courts. Parties can modify the contract of carriage to a certain extent, perhaps incorporating US COGSA rules, such that even more parties, such as shoreside freight handling companies, also may be involved. SCHOENBAUM §§ 8-15 - 8-41.

674. SCHOENBAUM § 9-6. Parties' choice of law, stated in a contract clause, can also be applied in salvage, towage, marine insurance and carriage of goods contracts. *See also id.* §§ 8-20, 10-11; Walker, *Interface*, n. 655, 245-46.

675. *Cf.* COGSA Convention, arts. 4(2)(b)-4(2)(c), 4(2)(e)-4(2)(g), 4(2)(k)-4(2)(*l*), 4(4), 51 Stat. 251-52, 120 LNTS 167; *see also, e.g.*, 42 USC app. § 182, 42 USC §§ 1304(2)(b)-1304(2)(c), 1304(2)(e)-1304(2)(g), 1304(2)(k)-1304(2)(*l*), 1304(4) for application in US law, and GILMORE & BLACK §§ 3-31 - 3-34; SCHOENBAUM §§ 8-27 - 8-29; Walker, *Interface*, n. 655, 239-41. The COGSA Convention and US COGSA parallel public law obligations to save life at sea by granting a civil case liability exception. LOS Convention, art. 98; High Seas Convention, art. 12; Second Convention, arts. 12-13; *see also* Parts V.H.2, V.J.8, nn. VI.12-15 and accompanying text.

676. Besides these treaty-based exceptions, the maritime law of average, in which a party sustaining loss from a peril during a voyage (*e.g.*, of the sea) may collect *pro rata* from other parties in the maritime venture if loss of that party's property (*e.g.*, by pushing it overboard) saves the ship, can involve more claimants, *i.e.*, those forced to contribute to the party losing property. *See generally* GILMORE & BLACK 252-54; SCHOENBAUM ch. 15.

677. *Cf.* Argentine Republic v. Amerada Hess Shipping Co., 488 US 428 (1989), where jurisdiction over a shipping company's claim for loss of its vessel when a dud bomb lodged in the ship during the Falklands/Malvinas War and could not be dislodged safely resulting in the scuttling of the ship was denied because of the Foreign Sovereign Immunities Act, 28 USC §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11. The Public Vessels Act, 46 USC §§ 746-90, and the Suits in Admiralty Act, *id.* §§ 741-52 govern liability of the United States for acts of its public ships, *e.g.*, warships, and ships the government operates commercially. *See also* SCHOENBAUM §§ 17-1, 17-3. This parallels LOS immunities. LOS Convention, arts. 32, 58, 95-96, 110(1), 236; High Seas Convention, arts. 8-9; Territorial Sea Convention, art. 22; *see also* nn. 77, 312, 337, 809 and accompanying text. Just because warships have immunity in civil litigation and from boarding, *etc.*, on the ocean does not necessarily mean that a ship's government escapes liability. *E.g.*, LOS Convention, art. 31 (State's liability to a coastal State for damages its warship causes in territorial sea.) A ship's commanding officer can be liable for hazarding a vessel and other charges under military law. *Cf.* Uniform Code of Military Justice, art. 110, 10 USC § 910.

678. As a general rule only the State of an individual's nationality, or the State of a company's incorporation, can claim against another government; treaties may modify these principles. Nottebohm (Liech. v. Guat.), 1955 ICJ 4; Mavromattis Palestine Concessions (Jurisdiction) (Greece v. Gr. Brit.), 1924 PCIJ, Ser. A, No. 2, at 11-12; Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 ICJ 3; United States ex rel. Merge v. Italian Republic, 14 UNRIAA 236 (Ital.-US Concil. Comm'n, 1955); BROWNLIE, INTERNATIONAL LAW 407-23; 1 OPPENHEIM §§ 378-80; RESTATEMENT (SECOND) §§ 26-27, 201-13; *id.* (THIRD) § 902. LOS Convention, arts. 31-32 is an example of a treaty's confirming the principle of government liability.

679. *See* nn. II.338-40, 459-69 and accompanying text.

680. *Cf.* Convention Respecting Shipowners' Liability in Case of Sickness, Injury or Death of Seamen, Oct. 24, 1936, arts. 2-7, 54 Stat. 1693, 1695-99, 40 UNTS 169, 172-76. National maritime standards may be more favorable; the Convention states a minimum. Warren v. United States, 340 US 523 (1951).

681. *E.g.*, recovery under an employers liability act, unseaworthiness or product liability under US maritime law, 46 USC § 688; Mahnich v. Southern S.S. Co., 321 US 96, 103-04 (1944); East River S.S. Co. v. Transamerica Delaval, Inc., 476 US 858 (1986). *See also* SCHOENBAUM §§ 3-6 - 3-7, chs. 4, 6.

682. LAWRENCE, n. II.60, 287-88, 292-93; WHITEHURST, U.S. MERCHANT MARINE, n. II.59, 35-36, 225; n. II.359 and accompanying text (UK seafarer unions opposed arming merchantmen).

683. Convention Relating to Carriage of Passengers & Their Luggage by Sea, Dec. 13, 1974, arts. 3, 6-9, *in* 6 BENEDICT, Doc. 2-2, at 2-9, 2-11 - 2-13; Convention for Unification of Certain Rules Relating to Carriage of Passengers by Sea, Apr. 29, 1961, arts. 4, 6, 10, *in id.*, Doc. 2-1, at 2-1, 2-3 - 2-5, state presumptions of fault if injury or death occurs because of shipwreck, collision, stranding, explosion or fire (which might be caused by external forces), or defect in the ship, subject to a comparative fault defense and recovery caps. Few States are parties. *See also* 2 O'CONNELL, LAW OF THE SEA 780-81. The United States is not a but achieves similar results through legislation and a comparative negligence theory. *See* Death on the High Seas Act, 46 USC §§ 761-68; SCHOENBAUM §§ 3-5, 6-1 - 6-3, 6-5 - 6-6.

684. *See* nn. 677-79 and accompanying text.

685. *See generally* GILMORE & BLACK 91-92; E.R. HARDY IVAMY, MARINE INSURANCE 481-86 (3d ed. 1979); R.J. LAMBETH, TEMPLEMAN ON MARINE INSURANCE 392-408 (5th ed. 1981).

686. Edinburgh Assoc. Co. v. R.L. Burns Corp., 479 F.Supp 138, 144-45 (C.D. Cal. 1979), *aff'd*, 669 F.2d 1259 (9th Cir. 1982) describes the Lloyd's system; *see also* n. II.65 and accompanying text.

687. GILMORE & BLACK 55, 60. The American Hull Insurance Institute includes many foreign insurance companies. LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 1 (2d ed. 1981).

688. BUGLASS, n. 687, 291.

689. Hartford Fire Ins. Co. v. California, 509 US 764 (1993) considered UK reinsurance agreements in the US antitrust law context. *See also* Part VI.B.4.

690. *See generally* Alex L. Parks, *The New London Hull Clauses*, 15 J. MAR. L. & COM.1 (1984).

691. *See generally* Samir Mankabady, *The New Lloyd's Policy and Cargo Clauses*, 13 *id.* 527 (1982).

692. *See generally* Mark Tilley, *The Origin and Development of the Mutual Shipowners' Protection and Indemnity Association*, 17 *id.* 261 (1986).

693. GILMORE & BLACK 75; WILLIAM D. WINTER, MARINE INSURANCE 193 (3d ed. 1952); Milford L. Landis, *All Risks Insurance*, 1951 INS. L.J. 709; *see also* Morrison Grain Co. v. Utica Mut. Ins. Co., 632 F.2d 424 (5th Cir. 1980).

694. 2 ARNOULD'S LAW OF MARINE INSURANCE AND GENERAL AVERAGE ¶¶ 880-906 (Michael J. Mustill *et al.* eds., 16th ed. 1981); GILMORE & BLACK 71-72; WINTER, n. 693, 325; Haehl, *The Hull Policy: Coverages and Exclusions Frequently Employed*, 41 TULANE L. REV. 277 (1967).

695. This was the Tanker War practice. *See generally* MICHAEL D. MILLER, MARINE WAR RISKS 18-22, 270-72 (1992); Chaser Shipping Corp. v. United States, 649 F.Supp. 736, 737 (S.D.N.Y. 1986); n. 215 and accompanying text.

696. 46 USC app. § 1282(a).

697. *See generally* BOCZEK, FLAGS, n. II.60; CARLISLE, n. II.60; FRANKEL, n. II.60, 74-77; LAWRENCE, n. II.60, 101-04, 182-89; WHITEHURST, U.S. MERCHANT MARINE, n. II.59, ch.18; Wiswall, *Flags*, n. II.60.

698. *E.g.*, 46 USC app. § 1283.

699. *See, e.g., id.* § 1284.

700. *E.g.*, 42 USC app. § 1287.

701. *E.g.*, 42 USC app. § 1293. The legislation has been renewed periodically. *Cf. id.* § 1294; GILMORE & BLACK 981 n.130.

702. GILMORE & BLACK 980-81.

703. *See* nn. 302-13, 337-50 and accompanying text.

704. The terms passport, sea brief, sea letter or pass have been used interchangeably. *See* 2 MOORE, DIGEST 1046 and *id.* 1066-68, reprinting Morton P. Henry Apr. 1887 opinion letter to US Department of State Solicitor and Examiner of Claims Francis Wharton. For a representative form, *see id.* 1058. US and other countries' legislation might distinguish between ships built in the State and those owned by nationals, also eligible for registration, and ships built abroad by nationals and eligible for a certificate but not registration. *See, e.g., Paper Prepared for Use of the U.S. Delegation to the 1958 Geneva Conference on the Law of the Sea*, 9 WHITEMAN 1, 3-4. *See also* 46 USC §§ 12102-05, 12112-14.

705. *See, e.g.*, these representative treaties between the United States and other countries: Algiers, Sept. 5, 1795, art. 4, 8 Stat. 133; June 30-July 3, 1815, art. 7, *id.* 224, 225; Dec. 22-23, 1816, art. 7, *id.* 244, 245; Argentina, July 27, 1853, art. 7, 10 *id.* 1005, 1008; Belgium, Nov. 10, 1845, art. 12, 8 *id.* 606, 610; July 17, 1858, art. 10, 12 *id.* 1043, 1046; Mar. 8, 1875, art. 9, 19 *id.* 628, 631; Bolivia, May 13, 1858, art. 22, 12 *id.* 1003, 1015; Brazil, Dec. 12, 1828, arts. 4, 21, 8 *id.* 390, 391, 395; Central American Federation, Dec. 5, 1825, art. 21, *id.* 322, 332; Chile, May 16, 1821, art. 19, *id.* 434, 438; China, Nov. 4, 1946, art. 21(2), 63 *id.* 1299, 1316; Colombia, Oct. 3, 1824, art. 19, 8 *id.* 306, 314; Dec. 12, 1846, art. 22, 9 *id.* 881, 892; continued, Sept. 13, 1935, art. 11, 49 *id.* 3875, 3887; Dominican Republic, Feb. 8, 1867, art. 16, 15 *id.* 473, 482; Ecuador, June 13, 1839, art. 22, 8 *id.* 534, 544; El Salvador, Jan. 2, 1850, art. 22, 10 *id.* 891, 896; Dec. 6, 1870, art. 25, 18 *id.* 698, 710; Feb. 22, 1926, art. 10, 46 *id.* 2817, 2825; Finland, Feb. 12, 1934, art. 15, 49 *id.* 2659, 2669, 152 LNTS 45, 56; France, Feb. 6, 1778, art. 27, 8 Stat. 12, 28, abrogated by Act of July 7, 1798, 1 *id.* 578; Sept. 30, 1800, art. 17, 8 *id.* 178, 186; Germany, Dec. 8, 1923, art. 10, 44 *id.* 2132, 2140; replaced Oct. 29, 1954, art. 1, 7 UST 1839, 1841, 253 UNTS 89, 90; Guatemala, Mar. 3, 1849, art. 21, 10 Stat. 873, 883; Haiti, Nov. 3, 1864, art. 23, 13 *id.* 711, 720; Honduras, Dec. 7, 1927, art. 10, 45 *id.* 2618, 2626; Italy, Feb. 26, 1871, art. 17, 17 *id.* 845, 853; Feb. 2, 1948, art. 19(2), 63 *id.* 2255, 2284; Japan, Feb. 21, 1911, art. 10, 37 *id.* 1504, 1507; Liberia, Aug. 8, 1938, art. 15, 54 *id.* 1739, 1745; Morocco, Sept. 16 & Oct. 1, 1, 1836, art. 4, 8 *id.*

484; Netherlands, Oct. 8, 1782, art. 10, *id.* 32, 38; Jan. 19, 1839, art. 4, *id.* 524, 526; Mar. 27, 1956, art. 19, 8 UST 2043, 2073, 285 UNTS 231, 259; Norway, June 5, 1928, art. 10, 47 Stat. 2135, 2143; Ottoman Empire, Feb. 25, 1862, art. 10, 18 *id.* 585, 588; Paraguay, Feb. 4, 1859, art. 7, 12 *id.* 1091, 1094; Peru, July 26, 1851, art. 28, 10 *id.* 926, 940; Sept. 6, 1870, art. 25, 18 *id.* 698, 710; Aug. 31, 1887, art. 23, 25 *id.* 1444, 1456; Peru-Bolivia Confederation, Nov. 30, 1836, art. 18, 8 *id.* 487, 492; Prussia, July 9 & Sept. 10, 1785, art. 4, *id.* 84, 86; July 17, 1799, art. 14, *id.* 162, 168; Spain, Oct. 27, 1795, art. 17, *id.* 138, 148, confirmed Feb. 22, 1819, art. 12, *id.* 252, 262; Sweden, Apr. 3, 1783, arts. 11-12, *id.* 60, 66; Sweden & Norway, Sept. 4, 1816, art. 12, *id.* 232, 240; July 4, 1827, art. 17, *id.* 346, 354; Tripoli, Nov. 1796 - Jan. 3, 1797, art. 4, *id.* 154; June 4, 1804, art. 6, *id.* 214, 215; Tunis, Aug. 28, 1797, art. 4, *id.* 157; Two Sicilies, Oct. 1, 1855, art. 9, 11 *id.* 639, 646; Venezuela, Jan. 20, 1836, art. 22, 8 *id.* 466, 476; Aug. 27, 1860, arts. 15-16, 12 *id.* 1143, 1151-52. US Department of State Solicitor & Examiner of Claims Francis Wharton, *Opinion* (Nov. 30, 1885), 2 MOORE 1063-66 omits some prior agreements, as does BOCZEK, n. II.60, 94-98, who divides the era into two periods: bilateral recognition of a stronger power's ships' nationality based on its internal laws with a weaker power's rights stated in the treaty; beginning in 1830, equal reciprocity.

706. *See* nn. 434-36 and accompanying text.

707. *E.g.*, Peru-Bolivia Confederation, Nov. 30, 1836, art. 18, 8 Stat. 487, 492 (name, property, ship's burthen; name, residence of master or commander; certificates describing cargo, port of origin); Prussia, July 11, 1799, art. 14, *id.* 162, 168 (sea-letter; passport with name, property and ship's burthen, plus master's name and dwelling; charter party or bills of lading; list of ship's company). These documents might serve other purposes, *e.g.*, identifying deserters by comparing the crew manifest, *e.g.*, Protocol to Friendship, Commerce & Navigation Treaty, July 11, 1862, Denmark-US, art. 2, 13 *id.* 605, 606.

708. MOORE 1048. 1 OPPENHEIM n. 382, § 262 had practically the same list. A US circular (1815) listed certificate of registry for US built or owned vessels, a sea-letter or passport and a Mediterranean passport. 2 MOORE 1059.

709. *E.g.*, Treaty, China-US, n. 437, art. 10, 8 Stat. 594; Treaty of Peace, Amity & Commerce, China-US, n. 437, art. 19, 12 *id.* 1023, 1027.

710. Sixteen conventions were ratified: Belgium, Dec. 9, 1925, art. 2(1), 45 Stat. 2456, 2457, 72 LNTS 171, 173; Chile, May 27, 1930, art. 2(1), 46 *id.* 2852, 2853, 133 LNTS 141, 143; Cuba (with exchange of notes & memorandum of understanding), Mar. 4, 1926, art. 2, 44 *id.* 2395, 2396, 61 LNTS 383, 385; Denmark, May 29, 1924, art. 2(1), 43 *id.* 1809, 1810, 27 LNTS 361, 363; France, June 30, 1924, art. 2(1), 45 *id.* 2403, 2404, 61 LNTS 415, 417; Germany, May 19, 1924, art. 2(1), 43 *id.* 1815, 1816; Great Britain, Jan. 23, 1924, art. 2(1), *id.* 1761, 27 LNTS 181, 183; Greece, Apr. 25, 1928, art. 2, 45 *id.* 2736, 2737, 91 LNTS 231, 233; Italy, June 23, 1924, art. 2(1), 43 *id.* 1844, 1845; Japan (with memorandum of understanding), May 31, 1928, art. 2(1), 46 *id.* 2446, 101 LNTS 63, 64; Netherlands, Aug. 21, 1924, art. 2(1), 44 *id.* 2013, 2014, 33 LNTS 433, 435; Norway, May 24, 1924, art. 2(1), 43 *id.* 1772, 1773, 26 LNTS 43, 45; Panama, June 6, 1924, art. 2(1), *id.* 1875, 1876, 138 LNTS 397, 399; Poland, June 30, 1930, art. 2(1), 46 *id.* 2773, 2774, 108 LNTS 323, 325; Spain, Feb. 10, 1926, art. 2, 44 *id.* 2465, 2466, 67 LNTS 131, 133; Sweden, May 20, 1924, art. 2(1), 43 *id.* 1830, 1831, 29 LNTS 421, 423. All are in force except those with Germany and Italy. TIF 22, 52, 66, 72, 97, 111, 155, 203, 213, 222, 236, 263, 270, 304.

711. BROWNLIE, INTERNATIONAL LAW 5, 13-14; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3) & cmt. f.

712. Symposium, *Treaty Succession*; Walker, *Integration and Disintegration*.

713. Ohl v. Eagle Ins. Co., 18 F. Cas. 630, 631(C.C.D. Mass. 1827) (Story, J., on Circuit, citing English precedent); Weston v. Penniman, 29 *id.* 815, 819 (C.C.D. Mass. 1817) (same).

714. 2 MOORE, DIGEST 1046. *See also* US Treasury Secretary Bantwell May 23, 1871 letter to US Minister to France Elihu B. Washburne, *id.* 1062.

715. *Id.* 1046.

716. *Id.* 1002.

717. *Id.* 895-96.

718. 14 Op. Att'y Gen. 340, 343 (1874).

719. US Secretary of State Hamilton Fish Nov. 14, 1873 telegram to US Minister to Spain Daniel E. Sickles, *reprinted in* 2 MOORE, DIGEST 896.

720. Protocol of Conference, Spain-US, Nov. 29, 1873, *id.* 896-97; Fish Dec. 31, 1873 telegram to US Charge d'Affaires to Spain Alvey A. Adee, *id.* 899; *see also* Claims Agreement, Feb. 27, 1875, Spain-US, 11 BEVANS 544.

721. BOCZEK, n. II.60, 108, citing Institut de Droit Internationale, 15 ANNUAIRE 202 (1896).

722. The Montijo (US v. Colom.), 2 MOORE, ARBITRATIONS 1421, 1433-34 (1905).

723. Muscat Dhows (Fr. v. Gr. Brit.), 1 Hague Ct. Rep. 93, 96, 99, 2 AJIL 923, 924, 928 (Perm. Ct. Arb. 1905); *see also* BOCZEK, n. II.60, 100-01.

724. 2 O'CONNELL, LAW OF THE SEA 753.

725. *See* nn. 704-12 and accompanying text.

726. *See generally* BOCZEK, n. II.60; CARLISLE, n. II.60.

727. BOCZEK, n. II.60, 8; CARLISLE, n. II.60, xiii.

728. *See generally* BOCZEK, n. II.60, 9-12; CARLISLE, n. II.60, 2-18. The anti-smuggling treaties, n. 710, which included an agreement with Panama, were a response.

729. S.S. Lotus (Fr. v. Turk.), 1927 PCIJ (Ser. A), No. 10, at 25.

730. Convention on Private International Law, Feb. 20, 1928, General Rules, art. 274, 86 LNTS 111, 326 (Bustamante Code).

731. 1929 SOLAS, n. 19, art. 2(3)(a), 50 Stat. 1130, 136 LNTS 90.

732. International Load Line Convention, July 5, 1930, art. 3(a), 47 *id.* 2228, 2240, 135 LNTS 301, 312 (1930 Load Line). Its successor, Convention on Load Lines, Apr. 5, 1966, art. 4(1)(a), 18 UST 1857, 1860, 640 UNTS 133, 136 (1966 Load Line), also applies the registration formula. Over 140 States are party to it. TIF 404-05.

733. 1948 SOLAS, n. 19, art. 2, 3 UST 3450, 164 UNTS 124.

734. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3) & cmt. f.

735. Lauritzen v. Larsen, 345 US 571, 584 (1953), citing *inter alia* the *Virginius* incident, nn. 717-20 and accompanying text. Hellenic Lines v. Rhoditis, 398 US 306, 308-10 (1970) amplified *Lauritzen*'s Jones Act, 46 USC § 688, seaman test but did not qualify Justice Jackson's statement, 345 US 584. *See also* SCHOENBAUM § 18-11.

736. Nottebohm (Liech. v. Guat.), 1955 ICJ 4; *see also* BROWNLIE, INTERNATIONAL LAW 407-20; 2 O'CONNELL, LAW OF THE SEA 757; 1 OPPENHEIM § 378; RESTATEMENT (SECOND) §26; *id.* (THIRD) § 211.

737. High Seas Convention, arts. 5-6; *see also* Agreement Regarding Financial Support of North Atlantic Ice Patrol, Jan. 4, 1956, art. 2, 7 UST 1969, 1970, 256 UNTS 171, 174. *See generally* 9 WHITEMAN 7-15, (summarizing genuine link debate before Convention negotiations); BOCZEK, n. II.60, 119-24; BROWNLIE, INTERNATIONAL LAW 424-26, 493-94; 2 O'CONNELL, LAW OF THE SEA 755-57; 1 OPPENHEIM §§ 287-88, 290; RESTATEMENT (SECOND) § 28; RESTATEMENT (THIRD) § 501; Wilfred A. Hearn, *The Law of the Sea: The 1958 Geneva Conference*, JAG J. 3, 6 (Mar.-Apr. 1960); Myres S. McDougal, *Foreword*, BOCZEK xii-xiv.

738. Constitution of Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 ICJ 150, 170-71, construing Convention for Establishment of Inter-Governmental Maritime Consultative Organization, Mar. 6, 1948, art. 28(a), 9 UST 621, 629, 289 UNTS 48, 60-62. *See also* BOCZEK, n. II.60, 125-55; BROWNLIE, INTERNATIONAL LAW 407, 426; 9 WHITEMAN 20-25.

739. 1960 SOLAS, art. 16.

740. 1974 SOLAS, art. 2.

741. *E.g.*, 1969 Civil Liability Convention, art. 1(4); 1971 Fund Convention, art. 1(2); 1972 Dumping Convention, art. 15(1)(a); 1973 Pollution Convention, art. 3(1). ILO-sponsored conventions state the same requirements. BOCZEK, n. II.60, 114-15.

742. BOCZEK, n. II.60, 288; COLOMBOS § 309; RESTATEMENT (SECOND) § 28.

743. BOCZEK, n. II.60, 111.

744. Convention on Facilitation of Maritime Traffic, n. 468, Annex, § 2, 18 UST 436-48, 591 UNTS 300-10; *see also* nn. 468-74 and accompanying text.

745. *Compare* LOS Convention, arts. 91-92, 94(1), *with* High Seas Convention, arts. 5-6.

746. LOS Convention, art. 94(2)(a).

747. *Id.*, arts. 94(3)-94(5).

748. Flag States also must conduct inquiries into high seas marine casualties or incidents of navigation involving their ships and cooperate with other States involved. *Id.*, arts. 94(6)-94(7); *compare* High Seas Convention, art. 10. *See also* BROWNLIE, INTERNATIONAL LAW 424-26; 493-94; 2 Nordquist ¶¶ 91.1-92.6(f), 94.1-94.8(*l*); O'CONNELL, LAW OF THE SEA 755-57; 1 OPPENHEIM §§ 287-88, 290; RESTATEMENT (THIRD) §§ 501-02. NWP 1-14M Annotated ¶ 2.1.3, n.13 and

NWP 9A Annotated ¶ 2.1.2.3 n.13 do not discuss characterization of merchantmen under the genuine link or other theories, saying that in international law a merchant ship is any vessel including a fishing vessel not entitled to sovereign immunity, *i.e.*, a privately or publicly owned or controlled ship that is not a warship and that is engaged in commercial activities. *See also* SAN REMO MANUAL ¶ 13(i) & cmt. 13.23.

749. Ship Registration Convention, n. II.61; *see also* 1 OPPENHEIM § 288.

750. *See* 6E BENEDICT 15-20.

751. *Compare* Ship Registration Convention, n. II.61, art. 4(2), 26 ILM 1238 (1987), *with* LOS Convention, art. 91(1); High Seas Convention, art. 5(1). Provisions for landlocked States' rights, ships flying two flags and changes of flag or registry are identical. *Compare* Ship Registration Convention, arts. 4(1), 4(3)-4(5), 26 ILM 1238 (1987), *with* LOS Convention, arts. 90, 92; High Seas Convention, arts. 4, 6.

752. Ship Registration Convention, n. II.61, art. 5, 26 ILM 1238 (1987).

753. *Compare id.*, art. 5, 26 ILM 1238-39 (1987), *with* LOS Convention, art. 91(2); High Seas Convention, art. 5(2).

754. *Compare* Ship Registration Convention, n. II.61, art. 8, 26 ILM 1239 (1987), *with* LOS Convention, arts. 91(1), 94; High Seas Convention, art. 5(1).

755. Ship Registration Convention, n. II.61, arts. 7, 9(1)-9(3), 26 ILM 1239-40 (1987); *see also id.*, art. 9(6)(b), 26 ILM 1240.

756. *Id.*, arts. 9(5)-9(6), 26 ILM 1240 (1987).

757. *Id.*, art. 10, 26 ILM 1240-41(1987).

758. *Id.*, arts. 11-12, 26 ILM 1241-42 (1987).

759. *Id.*, art. 13, 26 ILM 1242-43 (1987).

760. *Id.*, art. 14, incorporating Resolution 1, 26 ILM 1243, 1245-46 (1987).

761. *Id.*, art. 15, incorporating Resolution 2, 26 ILM 1243, 1246 (1987).

762. *See* nn. 745-48 and accompanying text. International Institute for Unification of Private Law, Draft Convention on Registration & Nationality of Air-Cushion Vehicles, 1976, arts. 1, 5-6, 8, *in* 6E BENEDICT, Doc. 15-2, at 15-22 - 15-23, repeat familiar rules of requiring registration, leaving details to flag States; it does not apply to military or State owned or operated ACVs.

763. *See* nn. 625, 643-56, 664-65, 674, 686, 702, 707-08 and accompanying text.

764. US Secretary of State Charles Evans Hughes May 31, 1921 telegram to US Consul, Canton, China; Hughes Oct. 7, 1921 letter to US Secretary of the Navy Denby; US Assistant Secretary of State Leland Harrison June 15, 1923 letter to US Minister in China Jacob G. Schurman; Harrison Oct. 7, 1924 letter to US Charge d' Affaires *ad interim* Bell, 2 HACKWORTH 732-34.

765. High Seas Convention, art. 6; LOS Convention, art. 92; *see also* RESTATEMENT (SECOND) § 28; RESTATEMENT (THIRD) § 501.

766. Ship Registration Convention, n. II.61, art. 12(1), 26 ILM 1242 (1987).

767. *Id.*, art. 12(5), 26 ILM 1242 (1987), requiring deleting the chartering-out State's registry. The practice began in 1951 with the FRG's economic rebirth. Wiswall, *Flags*, n. II.60, 109-111.

768. *See* n. 678 and accompanying text.

769. Intervention Convention, art. 3; Intervention Protocol, art. 1(3).

770. Civil Liability Protocol, art. 4(2) (no claim against charterer allowed); 1924 Limitation Convention, n. 665, art. 10, 120 LNTS 133 (charterer steps into owner's shoes); 1957 Limitation Convention, n. 665, art. 6(2), *in* 6 BENEDICT, Doc. 5-2, at 5-15 (same); 1976 UN Limitation Convention, n. 665, art. 1(2), *in id.*, Doc. 5-4, at 5-32.1 (same); *see also* Limitation of Liability Act, 46 USC App. § 186 (bareboat charterer equated to owner); n. 665 and accompanying text.

771. *See, e.g.*, COGSA Convention, n. 673, art. 1(a), 51 Stat. 251, 120 LNTS 163; *see also* 46 USC § 1301(a).

772. *E.g.*, LOS Convention, preamble, arts. 2(3), 19(1), 21(1), 31 (territorial sea), 33 (contiguous zone, an area contiguous to the territorial sea and subject to the high seas regime except as modified by the LOS Convention for the continental shelf, fishing zones or EEZ), 34(2) (straits), 58(1), 58(3) (EEZ), 78(2) (continental shelf), the 87(1) (high seas), 138 (Area), 303(4) (archeological property); High Seas Convention, preamble, art. 2; Territorial Sea Convention, arts. 1(2), 14(4), 17, 22(2); *see also* Continental Shelf Convention, arts. 1, 3, 15 (waters above shelf high

seas); Fishing Convention, arts. 1-8, 13 (waters are high seas); Territorial Sea Convention, art. 24(1) (contiguous zone considered part of high seas); nn. III.953-67, IV.10-25 and accompanying text.

773. Hague VII, arts. 1-6.

774. The United States never was a party; France and Great Britain denounced it. Thirty States are party, perhaps more through treaty succession principles. SCHINDLER & TOMAN 794-96; Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.*

775. 7 HACKWORTH 445-46; 2 O'CONNELL, LAW OF THE SEA 1106-07; 2 OPPENHEIM § 84; 2 SCHWARZENBERGER 375-76; Gabriella Venturini, *Commentary, in* LAW OF NAVAL WARFARE 120, 122-23; War Claims Arbiter Functioning Under Settlement of War Claims Act of 1928, Administrative Decision III (Mar. 29, 1929), 23 AJIL 673, 676 (1929); *cf.* NWP 1-14M Annotated ¶ 2.1.1 n.1; NWP 9A Annotated ¶ 2.1.1 n.1. In 1913 the Naval War College would have limited conversions to a belligerent's or an ally's territorial waters, or waters "occupied by one of these," and would have provided that such a conversion lasted until war's end. NAVAL WAR COLLEGE, INTERNATIONAL LAW TOPICS AND DISCUSSIONS 1913, 148, 154 (1914). Absence of a requirement for conversion in a belligerent's territorial waters, as Hague VII, preamble notes, was a reason the United States did not sign Hague VII. 7 HACKWORTH 446; Venturini 122. Convention on Maritime Neutrality, art. 13 allows naval auxiliaries' reconversion to merchant ships if, *inter alia*, conversion is in the flag State's or an ally's port or jurisdictional authority. The Convention is in force for the United States and seven Western Hemisphere countries. TIF 443. *See also* 2 O'CONNELL, LAW OF THE SEA 1107.

776. 1909 London Declaration, arts. 49-50, 62 mentions warships but offers no definitions. Conferees divided on whether conversion could take place on the high seas. 2 O'CONNELL, LAW OF THE SEA 1107.

777. OXFORD NAVAL MANUAL, art 2.

778. Verri, n. 71, 331.

779. US Secretary of State Memorandum, Apr. 27, 1916, 1916 FRUS 244, 247, 7 HACKWORTH 445.

780. 1930 London Naval Treaty, art. 14, incorporating by reference *id.*, art. 8, which incorporates by reference *id.*, Annex III. All of the Treaty except arts. 22-23 (submarine warfare) expired Dec. 31, 1936. The United States and 48 other countries, including Iran, Iraq and other Tanker War participants, *e.g.*, France, Italy, Netherlands, Panama, the United Kingdom and the USSR, are parties. TIF 443. Treaty succession principles applying to the USSR and Yugoslavia may increase the number. Symposium, *State Succession*; Walker, *Integration and Disintegration.*

781. 1936 London Naval Treaty, arts. 1(A)-1(C), no longer in force.

782. *Id.*,arts. 1(B)-1(G), 19.

783. Montreux Convention, n. 557, art. 8, Annex II, 173 LNTS 221, 235-37, citing 1936 London Naval Treaty, arts. 1(A)-1(C), to that extent preserving the 1936 definition. Nyon Supplemental Agreement ¶ 2 refers to "surface vessel[s]" but means surface warships in addition to submarines.

784. High Seas Convention, art. 8(2); *see also* NWP 1-14M Annotated ¶ 2.1.1; NWIP 10-2, art. 500(d); NWP 9A Annotated ¶ 2.1.1; 2 Nordquist ¶ 29.2; 2 O'CONNELL, LAW OF THE SEA 1106; 1 OPPENHEIM § 201, 620. Third Convention (1949), arts. 14-15, 28, 32 refer to warships without defining them.

785. High Seas Convention, preamble. 2 SCHWARZENBERGER 376; *id.* 377-78 notes the Convention, art. 8(2) adopts the definition for the purpose of that treaty only and that article 2(1) says freedom of the seas is also subject to other rules of international law, *e.g.*, the UN Charter and the LOAC. *See also, e.g.*, High Seas Convention, art. 2; Lighthouses Case, 12 UNRIAA 161, 205; nn. III.963-67, IV.10-25.

786. Convention on Liability of Operators of Nuclear Ships, n. 486, art. 1(11), 57 AJIL 269, not in force for the United States.

787. INCSEA Agreement, art. 1(1)(a).

788. Treaty Concerning Permanent Neutrality & Operation of the Panama Canal, with Annexes & Protocol, Sept. 7, 1977, Panama-US, Annex A, ¶ 2, 33 UST 1, 22, 1161 UNTS 177, 187. Although the Treaty binds only Panama and the United States to a neutralized Canal, the Protocol can bind third States. At least 36 countries and perhaps more through treaty succession rules for the former USSR are Protocol parties. TIF 219; Symposium, *Treaty Succession;* Walker, *Integration and Disintegration. Erga omnes* may apply Treaty terms to third States. BROWNLIE, INTERNATIONAL LAW 623-24; 1 OPPENHEIM §§ 583, at 1205; 626, at 1261.

789. The US Coast Guard is an armed force of the United States. 10 USC §101. Coast Guard vessels designated "USCGC" under the command of a commissioned officer are warships. NWP 1-14M Annotated ¶ 2.1.1. The Coast Guard becomes a part of the Navy when Congress declares war or the President so directs. 14 USC § 3.

790. High Seas Convention, art. 8(2) refers to "these articles," *i.e.,* the Convention, and there is no definition, strictly speaking, for the territorial sea. LOS Convention, art. 29, although in the territorial sea provisions, says the definition is "For the purposes of this convention," *i.e.,* for the entire treaty. *Compare* LOS Convention, art. 29 *with* High Seas Convention, art. 8(2); *see also* 2 Nordquist ¶¶ 29.1-29.8(b); NWP 1-14M Annotated ¶ 2.1.1; NWP 9A Annotated ¶ 2.1.1; 1 OPPENHEIM §§ 201 at 620, 561; Oxman, *The Regime,* n. III.956, 813. Another result of the 1958 Conventions is that States that have not ratified the High Seas Convention with its warship definition but which ratified other 1958 Conventions—there are a few in that category, *see* TIF 374, 402-03—are left with customary LOS definitions, without the persuasive authority of having ratified the High Seas Convention and its definition. The LOS Convention solves the problem with a single, unified agreement.

791. Joint Interpretation, n. 341, ¶ 2, 28 ILM 1446 (1989); NWP 1-14M Annotated ¶ 2.1.2.1; NWP 9A Annotated ¶ 2.1.2.1; *cf.* LOS Convention, arts. 21(1), 22(2)-23, which by special provisions under these circumstances support a view that nuclear-powered vessels have equal status with conventionally powered ships on the high seas and in other circumstances unless otherwise limited, *e.g.,* by other agreements not incompatible with the LOS Convention; *see also* 2 Nordquist ¶¶ 21.1-21.11(e), 21.12; 22.1-23.9; *but see* Lowe, *The Commander's,* n. III.318, 115.

792. NWP 1-14M Annotated ¶ 2.1.1 n.2; NWP 9A Annotated ¶ 2.1.1 n.2.

793. NWP 1-14M Annotated ¶ 2.1.2.2; NWP 9A Annotated ¶ 2.1.2.2; 1 OPPENHEIM § 560.

794. LOS Convention, arts. 32, 58(2), 95, 236; High Seas Convention, art. 8; COLOMBOS § 277; 2 Nordquist ¶¶ 32.1-32.7(b); 58.1-58.9, 58.10(d), 95.1-95.6(c) (reaffirms "longstanding principle"), 236.1-126.6(f) (ships, aircraft); NWP 1-14M Annotated ¶ 2.1.2; NWP 9A Annotated ¶ 2.1.2; 1 OPPENHEIM § 560.

795. *E.g.,* LOS Convention, art. 87(1); *see also* nn. III.953-67, IV.10-25 and accompanying text.

796. NWP 1-14M Annotated ¶ 8.2.1 n.36; NWP 9A Annotated ¶ 8.2.1 n.34; NWIP 10-2, art. 503(a)(2).

797. *See generally* BOTHE *et al.* 233-39; PILLOUD COMMENTARY 506-14; *cf. Introductory Note,* SAN REMO MANUAL 5.

798. Protocol I also requires a party to a conflict to notify parties to a conflict if it incorporates a paramilitary or armed law enforcement agency into its armed forces. *Compare* Protocol I, art. 43 *with* LOS Convention, art. 29; High Seas Convention, art. 8(2); *see also* BOTHE *et al.* 233-36, 240-41; PILLOUD, COMMENTARY 517-18.

799. *See* nn. 784, 790 and accompanying text.

800. 2 SCHWARZENBERGER 376-77; *see also* nn. III.953-67, IV.10-25 and accompanying text.

801. *E.g.,* LOS Convention, art. 87(1).

802. NWP 1-14M Annotated ¶ 2.1.1; NWP 9A Annotated ¶ 2.1.1; SAN REMO MANUAL, ¶ 13(g) & Commentary 13.21.

803. LOS Convention, arts. 31-32, 96; High Seas Convention, art. 9; Territorial Sea Convention, art. 22(1).

804. LOS Convention, arts. 31-32, 96; High Seas Convention, art. 9; Territorial Sea Convention, art. 22(1); *see also* n. 77 and accompanying text.

805. *See* n. 625 and accompanying text; *see also* Parts V.B., V.C.1, V.D.1, V.F.1, V.F.2, V.F.5., V.J.2,-V.J.4, V.J.6.

806. *Cf.* LOS Convention, arts 27-28; Territorial Sea Convention, arts. 19-21.

807. LOS Convention, art. 93, referring to *e.g., id.,* arts. 91-92; *compare* High Seas Convention, art. 7, referring to *id.,* arts. 1-6. The result was the same as the warship definition in *id.,* art. 8(2); the *id.* definition applies only to the high seas because of a decision to split the 1958 LOS draft into four treaties. 3 Nordquist ¶ 93.7(a); *see also* n. 805 and accompanying text. For general analysis of art. 93, *see* 3 Nordquist ¶¶ 93.1-93.7(g); 1 OPPENHEIM § 289, 734.

808. Protocol I, art. 38(2); *see also* BOTHE *et al.* 207-11; 3 Nordquist ¶ 93.7(g); NWP 1-14M Annotated ¶ 12.4 (US concurs with Protocol I, art. 38[2], extends its application to maritime operations as policy); NWP 9A Annotated ¶ 12.4; PILLOUD COMMENTARY 446-60.

809. 3 Nordquist ¶ 93.7(e).

810. Protocol I, art. 38(1); *see also, e.g.,* First Convention, arts. 36-39, 43-44; Second Convention, arts. 38-41, 43-45 (distinctive emblem for medical transports, hospital ships, etc.); BOTHE *et al.* 207-11; NWP 1-14M Annotated ¶ 11.9.1; NWP 9A Annotated ¶ 11.10.1; 1 PICTET 280-308, 322-39; 2 *id.* 212-32, 240-49; PILLOUD COMMENTARY 446-60.

811. *See* nn. 347 (territorial sea), 601 (straits transit), 640, 649 (independent steaming on high seas except as directed by ship owner or charterer) and accompanying text.

812. *Cf.* Broms, *The Definition,* n. III.62, 350-51, 365; Walker, *Maritime Neutrality,* n. III.828, 134, 136-37.

813. *See* nn. III.957-60, IV.15-18, 582-600 and accompanying text.

814. *E.g.,* LOS Convention, art. 87(2); High Seas Convention, art. 2. The due regard principle applies to other aspects of the law of the sea. *See* n. 75 and accompanying text

815. *E.g.,* LOS Convention, art. 87(1); *see also* nn. III.952-67, IV.10-25 and accompanying text.

816. Sea services, *e.g.,* the US Navy and Coast Guard, as well as other ships or aircraft, go to the assistance of, and may accompany, mariners in danger of being lost at sea. International and national law mandates this in peace and war; there are certain conditions to saving life at sea, *e.g.,* the rescuer must do so if it would not endanger the rescue ship. LOS Convention, art. 98; Convention on Salvage, Apr. 28, 1989, arts. 4, 10, TIAS ——, *in* 6 BENEDICT, Doc. No. 4-2A, at 4-13, 4-14, 4-17 (not applicable to warships unless State party applies treaty to them), to supersede Convention for Unification of Certain Rules Relating to Assistance & Salvage at Sea, Sept. 23, 1910, arts. 11, 14, 37 Stat. 1658, 1672 (not applicable to warships); 1974 SOLAS, Regulations 2, 10, ch. V; Convention for Unification of Certain Rules Relating to Assistance & Salvage of Aircraft or by Aircraft, at Sea, Sept. 28, 1938, art. 2, 6 BENEDICT, Doc. No. 4-5, at 4-21 (not in force but United States a signatory); High Seas Convention, art. 12; Second Convention, arts. 12, 18, 21; Hague X, art. 16; *see also* COLOMBOS § 369 (ancient duty of masters); 3 Nordquist ¶¶ 98.1-98.11(g) (general tradition and practice); NWP 1-14M Annotated ¶¶ 3.2.1-3.2.1.2 (same), 11.4; NWP 9A Annotated ¶¶ 3.2.1-3.2.1.2, 11.6; 1 OPPENHEIM § 298; 2 *id.* §§ 204-05; 2 PICTET 84-92, 129-36, 150-53; SCHOENBAUM § 14-8. The author recalls his destroyer escort's (*i.e.,* frigate's) going to the assistance of a merchant ship and accompanying it to safe haven during the 1962 Ash Wednesday Storm off the Virginia Capes and picking up Cuban refugees fleeing the Castro regime on another occasion in 1962. They were in open boats on the high seas, out of fuel, and would have drifted in the Gulf Stream until they died or were picked up. They were taken to Port Everglades, Fla.

817. *Cf.* UN Charter, arts. 51, 103; *see also* nn. III.10-11, 48-630, 916-18, 932-67, IV.6-25 and accompanying text.

818. 1 O'CONNELL, LAW OF THE SEA 533; *see also* nn. 80-157 and accompanying text for EEZ and fishing zone analyses.

819. *See* Parts V.B, V.C.3, V.J.2, V.J.3.

820. *See* n. 678 and accompanying text.

821. *See, e.g.,* Lekas & Drivas, Inc. v. Goulandris, 306 F.2d 426 (2d Cir. 1962), decided 22 years after a cargo loss caused by Greece's requisition of the ship during World War II. The trial court ruled on the claims in 1959, 173 F.Supp. 140 (S.D.N.Y. 1959).

822. *See* n. II.519 and accompanying text.

823. *See, e.g.,* nn. II.338-40 (*U.S.S. Stark*), 368-72 (*Iran Ajr*), 459-69 (*Vincennes* incident), 430-33 (*U.S.S. Samuel B. Roberts*), 281, 393-99 (oil platforms).

824. *See, e.g.,* nn. II.210-11 (Iraqi attack on Iranian Nowruz facility) and accompanying text; *see also* ch. VI for further analysis of the law of the environment.

825. Registry changes to other, *e.g.,* Norwegian or UK, ensigns likely met LOS standards. Weinberger, *Report,* n. II.52, 1448, 1450-52, 1458 1461-63; Caron, n. II.328, 161-66; Davidson, n. II.332, 387; Nordquist & Wachenfeld, n. II.332, 138; Peace, *Major Maritime Events,* n. II.90, 553-54; Phillipps, n. II.332, 275; Wolfrum, *Reflagging,* n. II.332, 387; Mertus, n. II.332, 207; Wachenfeld, n. II.332, 202; Murphy statement, n. II.332, 58-60; (1987). Armacost statement, n. II.332, 1431 said Kuwait had reflagged two tankers under the UK ensign. In fact there were many more. Second Report, ¶¶ 6.14-6.15, reporting that at one time 50 to 60 Norwegian ships may have switched to the UK flag. Some in the United States opposed the transfer. *See generally* Gamlen & Rogers, n. II.326, 133-35; *see also* nn. II.326-33, 394 (US national as master blinded in Iranian attack) and accompanying text.

826. *See* nn. II. 343-45, 348, 350-52, 358-59, 361-62, 382, 437, 446-47, 453, 472, IV.811-19 and accompanying text.

827. *See, e.g.,* nn. II.178-80, 210-14, 250-60, 272, 281, 306, 309, 334, 338-40 (*U.S.S. Stark*), 354, 357, 362, 367, 368-72 (*Iran Ajr*), 373, 393-99, 401-02, 410-12, 421, 430-33 (*U.S.S. Samuel B. Roberts*), 434, 446, 457, 459-69 (Airbus, Iranian speedboat survivors), 470, IV.816 and accompanying text.

828. *See* nn. II.364, 379, 411, 459-69.

829. LOS Convention, art. 29; High Seas Convention, art. 8(2); nn. 772-802 and accompanying text.

830. *See* n. II.355 and accompanying text.

831. LOS Convention, art. 29; High Seas Convention, art. 8(2); *see also* nn. 772-813 and accompanying text.

832. *Cf.* LOS Convention, arts. 31-32; High Seas Convention, art. 9; Territorial Sea Convention, art. 22(1); *see also* Part B.4.

833. LOS Convention, art. 91; High Seas Convention, art. 5(1); *see also* nn. 737, 745-48 and accompanying text.

834. *See* Parts V.B, V.C.3, V.C.5, V.D, V.J.2-V.J.4.

835. *See* nn. II.153-55.

836. *See* nn. 825-26 and accompanying text.

837. *See* n. 827 and accompanying text.

838. *See* n. II.250, 260, 334, 354, 361, 373, 393-94, 412, 421, 446, 469, 519 and accompanying text.

839. *See, e.g.*, National Petrochem. Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551 (2d Cir. 1988) (diversion of vessel from Iran destination).

840. *See* nn. II 215, 519, IV.685-702 and accompanying text.

841. *See* n. 678 and accompanying text.

842. LOS Convention, art. 91; High Seas Convention, art. 5(1); *see also* nn. 737, 745-48 and accompanying text.

843. *See* nn. II.326 and accompanying text.

844. *See* nn. II 215, 519, IV.685-702 and accompanying text.

845. *See* n. 678 and accompanying text.

846. *See* nn. II.215, 334, 250, 260, 334, 354, 361, 373, 393-94, 412, 421, 446, 469, 519 and accompanying text; *see also* nn. 685-702 and accompanying text.

847. *Cf.* The August, 1891 A.C. 328.

848. *See* n. 678 and accompanying text.

849. *See generally* SCHOENBAUM § 8-2, 472; 9 WHITEMAN 264-83. US legislation is 10 USC § 2631.

850. *E.g.*, 46 USC § 883; *see also* GILMORE & BLACK 963 (US policy since 1817); SCHOENBAUM § 8-2, 472.

851. *Cf.* nn. II.103 (Iranian convoys), 262 (Saudi corridor) and accompanying text.

852. There was also a Kuwait to Yanbu, Saudi Arabia pipeline to pump outbound oil, the sale of which may have financed the Iraqi war effort. *See* nn. II.182-83 and accompanying text.

853. *See* n. 678 and accompanying text.

854. *See* nn. II 215, 519, IV.685-702, and accompanying text.

855. *See, e.g.*, MOORE, ARBITRATIONS; the UNRIAA series.

856. *See* n. 678 and accompanying text.

857. *See* nn. II.250, 260, 334, 354, 361, 373, 393-94, 412, 421, 446, 469, 519 and accompanying text.

858. *See* nn. II.309 (UAE), 401-02 (Kuwait), 434 (UAE) and accompanying text.

859. *See* nn. II.459-69, IV.683-84 and accompanying text.

860. *See* nn. II.367, 410-11 and accompanying text.

861. *See* nn. II.338-40, 430-33 and accompanying text.

862. Iran has claimed against the United States in the International Court of Justice for the Rostum platform attack. *See* nn. II.281, 393-99 and accompanying text.

863. *See* nn. II.368-72, 391, 429 and accompanying text.

864. *See* nn. II.338-40, 459-69, IV.678-80 and accompanying text.

865. *See* n. 678 and accompanying text.

866. *See* nn. 685-702 and accompanying text.

# Chapter V

# THE TANKER WAR AND THE LAW OF ARMED CONFLICT (LOAC)

The 1980-88 Tanker War nearly ran the gamut of issues related to the law of armed conflict (LOAC), or the law of war (LOW) and its component, the law of naval warfare (LONW). The general law of maritime neutrality, general issues of necessity and proportionality, and issues of specific concern—visit and search including operations against convoyed, escorted or accompanied neutral merchant ships; commerce of belligerents including belligerents' convoys and contraband; acquisition of enemy character; blockade, maritime exclusion and other zones and other uses of the ocean for warfare; capture of neutral vessels; humanitarian law and belligerents' personnel interned by neutral governments; targeting of ships and aircraft including convoys; conventional weapons; mine warfare; treatment of noncombatants, *e.g.,* merchant seamen; deception (ruses of war) during armed conflict—all figured during the Tanker War. These are the subjects of this Chapter as they applied to belligerents and neutrals during the war.

Chapter III analyzed UN Charter law with particular reference to the law of self-defense and its relationship to the law of neutrality, the law of treaties, customary law, and *jus cogens*-based norms, and the general principles of neutrality as they apply to war at sea, and to conduct between neutrals and belligerents. This Chapter will not repeat that analysis, except as it interfaces with the LOAC in situations involving neutrals, *e.g.,* mine warfare, discussed in sub-Part G.2.

Chapter IV analyzed the law of the sea, and those principles will not be repeated in here, except as LOS concepts, *e.g.,* due regard for others' uses of the sea,[1] apply by analogy in the LOAC. The LOS conventions are subject to the LOAC during war because of operation of these treaties' "other rules of international law" clauses.[2] Because these clauses, at least for high seas areas and perhaps other parts of the ocean, restate customary law,[3] LOS customary rules are also subject to the LOAC for countries not party to the LOS conventions. This Chapter tries to give content to those other rules of international law, the LOAC, to which the law of the sea is subject. Law of treaties principles declaring suspension or termination of treaties' operation during war may also apply.[4] This Chapter also attempts to place LOS principles in the LOAC context, *e.g.,* by analyzing how the LOS rules for the territorial sea interact with LOAC principles governing war at sea.

While many international agreements governing land, sea and air warfare[5] remain primarily subject to customary norms, general principles of law, commentators' research including military manuals,[6] occasional judicial decisions,

resolutions of international organizations, *e.g.*, the UN General Assembly and Security Council,[7] and perhaps *jus cogens*-based norms.[8] Council "decision" compliance is mandatory for UN Members,[9] but other international organizations' resolutions can restate or help crystallize rules of international law,[10] and this was the Tanker War experience.

As in the case of LOS analysis, law of treaties principles may apply to agreements governing the LOAC, *e.g.*, impossibility,[11] fundamental change of circumstances,[12] desuetude,[13] or material breach.[14] Some LONW treaties have "escape clauses," *e.g.*, "do their utmost" and the like,[15] and these treaties' *force majeure* and distress clauses may or may not amount to a restated form of impossibility or fundamental change,[16] but the possibility remains for these kinds of claims.[17] Armed conflict does not vitiate treaties governing humanitarian law,[18] *e.g.*, the 1949 Geneva Conventions,[19] or agreements governing the law of warfare, including the law of neutrality. Law of treaties principles cannot operate to suspend or terminate custom, including custom derived from or restated in international agreements, *e.g.*, those governing armed conflict. Thus claims of impossibility, fundamental change of circumstances or desuetude cannot be applied to customary law derived from treaties. If a treaty has an exception clause, *e.g.*, for entry in distress,[20] and if that exception is also a customary rule, that exception must be applied to the basic rule in the treaty that has become custom. If treaty-based custom has lapsed into disuse, a new custom or treaty norm may have taken its place. There is always the possibility of application of other sources, *e.g.*, general principles of law including humanity and chivalry, and rules laid down by courts and commentators.

## Part A. Basic Principles: Necessity and Proportionality; ROE; the Spatial Dimension

The principles of necessity and proportionality apply when the inherent right of individual or collective self-defense is invoked.[21] However, the law of armed conflict also requires application of necessity and proportionality; it has its own standards for these principles,[22] now firmly embedded in custom. Necessity is, of course, not the same as military necessity or *kriegsraison*, a defense rejected by the Nuremberg trials.[23] *NWP 9A Annotated*, published at the end of the Tanker War, ably recites the customary rules of necessity, proportionality and the rule against perfidious conduct during armed conflict:

The law of armed conflict seeks to prevent unnecessary suffering and destruction by controlling and mitigating the harmful effects of hostilities through minimum standards of protection . . . accorded to "combatants" and "noncombatants." . . . [T]he law of armed conflict provides that:

1. Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the

enemy, with a minimum expenditure of time, life, and physical resources may be applied.
2. The employment of any kind or degree of force *not* required for... partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources, is prohibited.
3. Dishonorable (treacherous) means, ... expedients, and ... conduct during armed conflict are forbidden.[24]

However, the LOAC is not intended to impede waging war:

> Its purpose is to ensure that the violence of hostilities is directed toward the enemy's forces and is not used to cause purposeless, unnecessary human misery and physical destruction .... [T]he law of armed conflict complements and supports the principles of warfare... in the concepts of objective, mass, economy of force, surprise, and security.

The LOAC and principles of warfare underscore the importance of concentrating forces against critical military targets while avoiding expending personnel and resources against militarily unimportant persons, places and things.[25]

*NWP 9A Annotated* also explains policies behind the customary rules of necessity and proportionality:

> As long as war is not abolished, the law of armed conflict remains essential. During such conflicts the law of armed conflict provides common ground of rationality between enemies. This body of law corresponds to their mutual interests during conflict and constitutes a bridge for a new understanding after the end of the conflict. The law of armed conflict is intended to preclude purposeless, unnecessary destruction of life and property and to ensure that violence is used only to defeat the enemy's military forces. If followed by all participants, the law of armed conflict will inhibit warfare from needlessly affecting persons or things of little military value. By preventing needless cruelty, the bitterness and hatred arising from armed conflict is lessened, and thus it is easier to restore an enduring peace. The legal and military experts who attempted to codify the laws of war more than a hundred years ago reflected this when they declared that the final object of armed conflict is the "reestablishment of good relations and a more solid and lasting peace between the belligerent States."[26]

The return of Tanker War prisoners of war illustrates the point of a potential for "bitterness and hatred" long after the shooting stops. Humanitarian law requires that prisoners of war be repatriated promptly after hostilities end, if they have not been returned previously because of wounds or illness.[27] Nevertheless, a decade after the war ended, most prisoners of war had not been repatriated, and this was a central issue in protracted final settlement negotiations.[28] This might be contrasted with rapid US turnover of surviving *Iran Ajr* crew after that incident.[29]

Beyond the broad sweep of the customary rules of necessity, proportionality and prohibition against perfidy, problems in law and practice remain.

*1. Necessity and Proportionality in Self-Defense and in the Conflict Context*

The same terms, necessity and proportionality, are employed in the *jus ad bello* context of the inherent right of self-defense, and particularly anticipatory self-defense,[30] as in *jus in bello* situations. What passes muster as a necessary and proportionate response in self-defense may not necessarily pass muster as a necessary and proportionate response against the same object once armed conflict has begun, and *vice versa*. Comparing the definition of anticipatory self-defense and the LOAC principles demonstrates this. *NWP 1-14M Annotated*, differing slightly from its predecessor, says: "Anticipatory self-defense involves the use of force where attack is imminent and no reasonable choice of peaceful means is available." Under either this view or *Caroline Case* principles,[31] it is clear that necessity in combat need not await the enemy's attack or threat of attack. LOAC necessity principles apply in that context, to be sure, but also when a belligerent attacks or if it is necessary to defend against a belligerent's attack. The same can be said about proportionality during combat; the principle applies for attack or defense during war as well as in self-defense situations, but what is proportional for LOAC situations may or may not be proportional in a self-defense scenario. Moreover, the law of self-defense says little, if anything, about the third LOAC principle, prohibition against perfidy, although it should. Lawful ruses should be part of the law of self-defense as well as the LOAC, although their content and what is permitted as a lawful ruse will necessarily differ from LOAC situations.[32]

In a situation involving multiple States, *e.g.*, three countries, two of whom are at war, LOAC principles of necessity and proportionality apply as to the two belligerents. If a third State individually (and not pursuant to a defense treaty) attacks either belligerent, the attacked belligerent may respond in self-defense but must observe necessity and proportionality principles attached to that inherent right,[33] which may be different from those attaching to defenses under the law of armed conflict. Once in a war situation, the attacked belligerent (the target in the latter scenario) and the new belligerent (the attacker) must observe LOAC principles. It is, of course, entirely possible that necessity and proportionality standards may be the same in a given self-defense or LOAC scenario.

It is impossible to lay down black-letter rules for LONW necessity, proportionality and humanity principles to be observed during war. The *San Remo Manual*, relying on Protocol I land warfare provisions by analogy, does about as good a job as any in its *Precautions in Attack* principles:

> With respect to attacks, the following precautions shall be taken:

(a) those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack;
(b) in the light of the information available to them, those who plan, decide upon or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives;
(c) they shall furthermore take all feasible precautions in the choice of methods and means [of warfare] . . . to avoid or minimize collateral casualties or damage; *and*
(d) an attack shall not be launched if it may be expected to cause collateral casualties or damage . . . excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive . . . .[34]

"Attack" includes defensive as well as offensive measures and includes measures taken against shipping or aircraft that have acquired enemy character as well as the enemy.[35]

The question then arises as to whether, and how, these general principles relate to other LOAC principles, *e.g.,* prohibitions against attacking coastal traders or coastal fishermen when engaged in their usual occupations and not contributing to the enemy war effort.[36] The traditional, correct view is that necessity and proportionality must be considered when attacking or defending any target. If a target is a forbidden object, *e.g.* a coastal trader or fisherman, customary necessity and proportionality principles cannot be weighed against customary or treaty-based rules forbidding attacks on that object. The same might be said about using necessity and proportionality as qualifying use of a means of warfare otherwise forbidden. Thus attack on a coastal fishing vessel engaged in its trade and not contributing to the enemy war effort cannot be legitimized by factoring in necessity; to do so would be to invoke the military necessity (*kriegsraison*) doctrine condemned at Nuremberg.[37] Similarly, necessity does not enter into the equation of using gas warfare the Geneva Gas Protocol forbids; again, to do so would be to invoke the condemned *kriegsraison* doctrine.[38] A target, *e.g.,* a coastal fishing boat, can lose protected status if it aids the enemy, and under those conditions it may properly be an object of attack, subject to LOAC necessity and proportionality principles.[39] Similarly, if an opponent uses gas warfare, the Protocol no-first-use reservation is triggered, and the target State can respond. Other options are proportional reprisals involving use of force or other unlawful means not involving force to compel compliance with the law, or retorsions, *i.e.,* unfriendly but lawful acts to compel compliance with the law. Here again the law of *jus ad bellum* differs from the LOAC, the law of *jus in bello*; by the majority view only reprisals not involving use of force can be used before war begins, but afterward, during war, reprisals involving use of force or non-force reprisals can be used. Retorsions can

be used in either context. The US and perhaps other States' policy is that only the national command authority, *i.e.* at the presidential level, can order reprisals.[40]

The relationship between objects of attack, whether during the offensive or in defense, should be understood to mean that if an object is a lawful target, necessity and proportionality dictate that methods and means of attack should be chosen to minimize or avoid, if at all feasible, damage to or destruction of objects that enjoy protected status. Where there is no specific prohibition against attacking an object defensively or offensively, here too the principles require using methods or means that best achieve the objective without damage to other objects that are not necessary for achieving the objective. Therefore, the two concepts—the customary principles of necessity and proportionality, and in some cases, rules against attacking some objects or using some means of warfare—travel alongside each other as separate rules of law.

*2. The Temporal Factor: When Does Liability Accrue?*

I have urged application of a rule from the law of armed conflict, that a decisionmaker should be held to what he or she knew or should have known at the time the decision is made as to the necessity for or proportionality of a response when these issues arise incident to a claim of a right of self-defense.[41] That principle arises from the LOAC and is in four States' declarations of understanding to Protocol I[42] and in two Conventional Weapons Convention protocols,[43] international agreements governing the LOAC. Because of widespread acceptance of Protocol I and the Convention as treaty law,[44] and these provisions as customary norms by those States that have not ratified,[45] this principle is well on its way to acceptance as a rule of law among all States for the LOAC. This rule also follows Nuremberg principles for initiating armed conflict[46] and recognizes a common-sense observation that hindsight can be 20/20, but decisions at the time may be clouded with the fog of war[47] and should be judged accordingly.

*3. Rules of Engagement (ROE)*

The place of rules of engagement (ROE) in the context of the law of self-defense[48] has its analogue in the relationship of ROE to the law of armed conflict. As with the supremacy of Charter-based norms, including the right of individual and collective self-defense, over treaties and perhaps the customary LOAC,[49] a military commander has the option, indeed the duty under US ROE, to defend his or her unit, ship or force. ROE may impose limitations on options for actions the law of armed conflict would permit, or they may allow a commander a full range of options the law permits.[50] In the context of neutral merchant ship visit and search operations, for example, current law allows a belligerent to visit and search or divert a neutral-flag merchantman for later visit and search.[51] A belligerent's ROE might direct a commander to divert and not search immediately. However, that

commander always retains the right to defend his or her ship, unit or force. If during a merchant ship interception that vessel displays hostile intent, a commander of a belligerent warship, unit or force may initiate appropriate necessary and proportional self-defense measures.[52]

The same is true for the law of self-defense if, *e.g.*, a warship of a belligerent or neutral country exercises its analogous law of the sea right of approach and visit of a merchant vessel on the high seas upon suspicion of piracy, slave trading or pirate radio broadcasting, if the ship has no nationality, or the ship is of the warship's nationality.[53] In this case the law of armed conflict does not apply through the LOS other rules clauses,[54] and the sole basis for force, unit or ship protection is necessary and proportional self-defense, which preempts the law of the sea under the circumstances.[55] The right of visit and search, part of the LONW and therefore the LOAC, does not and cannot apply to merchant ship visits on suspicion of piracy, slave trading, *etc.*

*4. The Spatial Dimension*

Robertson has aptly analyzed the differences between oceans areas, and areas above the oceans, under the law of the sea and under the law of naval warfare. The LOS has developed a relatively detailed structure of law for the high seas, the EEZ, fishery zones, the continental shelf, the Area and the contiguous zone.[56] The LONW, still mostly stated in custom and older treaties, recognizes only two sea areas, territorial waters and their correlative, internal waters, and the high seas and airspace above these sea areas; belligerents may conduct warfare on the high seas, in their side's territorial and inland waters, in opposing States' territorial and inland waters and airspace above these areas, but not in neutrals' territory, territorial or inland waters and airspace above these areas, with certain exceptions.[57] The high seas are a legitimate arena for combat, subject to neutrals' rights to navigate or overfly the high seas, with neutrals' and belligerents' having due regard for the other's exercise of high seas freedoms,[58] and neutrals' right to exercise proportional self-defense.[59] Writing in the context of the impact of changes in jurisdictional zones upon the law of neutrality, Robertson notes modern military manuals' acceptance of the expanded territorial sea for LOAC purposes, adoption of LOS straits principles for the LONW, and advocates applying LONW principles to the EEZ, fishing zones in the high seas whether qualified by an EEZ claim or not, the continental shelf and the contiguous zone inasmuch as these areas are subject to high seas freedoms of navigation and overflight for LOS purposes.[60] *NWP 1-14M* and the *San Remo Manual* continue the view that these areas are subject to high seas freedoms, and that belligerents may exercise straits passage in accordance with LOS principles.[61]

Robertson and the *Manual* also make the important point that belligerents must have due regard for neutrals' rights under the law of the sea in the newer areas

(*e.g.*, EEZ, continental shelf) recognized by the LOS Convention and the 1958 LOS conventions, in addition to the high seas, where there is no explicit LOAC rule to cover the point.[62]

*5. Necessity, Proportionality, ROE and the Spatial Dimension in the Tanker War*

The historical record is slim with respect to belligerents' general observance of the principles of necessity, proportionality and prohibitions against perfidy during the Tanker War. Parts B-J of this Chapter comment on observance of them in specific circumstances of warfare, *e.g.*, mine warfare, attacks on shipping, *etc.* Similarly, the historical record does not disclose what Iranian or Iraqi decisionmakers knew or should have known when planning offensive or defensive measures. Nor is there any record of perfidy or ruses of war in the self-defense context.[63] That information, if it exists, is in government intelligence and military archives.

The US self-defense response and other States' potential responses to Iranian attacks, including those during the Airbus tragedy, were necessary and proportional.[64] This is an example of the three-State scenario discussed above.[65] At the time of this and similar attacks on neutrals and opposing belligerent platforms, assuming they were thought to have acquired enemy character, Iran and Iraq were required to use LOAC principles of necessity and proportionality in attacks and defensive measures. There is no published record of what any country knew, or should have known, during these situations, apart from information the US had on origins of the attacks, *i.e.*, from platforms, helicopters and ships involved.[66]

There is no published record of Iranian or Iraqi ROE, if any. US and other countries' ROE, to the extent that they have been published,[67] deal largely with self-defense issues,[68] although their other aspects, undoubtedly classified, might cover LOAC subjects such as neutral convoy protection of neutral merchantmen. These have not been published; therefore analysis of LOAC topics like convoy and accompanying merchant ships must look to the facts and the law, and not to any self-imposed restrictions imposed by ROE. ROE dealing with self-defense show awareness of necessity and proportionality principles for self-defense reasonable under the circumstances.[69]

Iran appeared not to observe the distinction between restricting its territorial waters, *i.e.*, its territorial sea, for military operations and its territorial waters that were within the Strait of Hormuz, the implication from Iran's announcements being that it could restrict Strait transit passage.[70] Under the LOS and the LONW, Iraq or Iran could not deny straits passage to neutral vessels.[71] Iran's using neutrals' territorial waters for naval maneuvers, besides being a clear LOS violation,[72] also violated the LOAC.[73] The same is true concerning Iran's attacks on merchantmen or facilities in or landward of neutral territorial waters.[74] Whether Iran or Iraq showed due regard for neutrals' high seas freedoms in air attacks on neutral merchantmen and warships[75] is also questionable.

## Part B. Visit and Search; Capture, Destruction or Diversion

Warships have had an LOS right to approach and visit vessels on the high seas as an exception to the rule that ships sailing the high seas are immune from the jurisdiction of any country other than the flag State. This includes merchant ships, fishermen, boats, *etc.*, if the vessel to be approached and visited is a suspected pirate ship or slaver, refuses to show its flag, or flies a flag of another State but is in reality registered under the warship's flag. The LOS Convention adds two categories: ships without nationality, or a ship engaged in unauthorized broadcasting and the warship's flag State has jurisdiction as the Convention provides. The approach and visit right does not extend to warships or government vessels on noncommercial service, *e.g.*, naval auxiliaries; they are immune from this procedure.[76]

States have also concluded treaties, sometimes bilateral, with other countries, to allow high seas approach and visit of the other country's merchant ships, *etc.*, to inspect ships suspected of carrying illicit cargoes destined for that State, *e.g.*, the Prohibition Era treaties,[77] or more recently, drug interdiction agreements. In the latter cases permission to board may be obtained by telecommunications as the agreement provides.[78] Agreements also exist for suppressing terrorist acts against maritime navigation and offshore oil platforms.[79]

In either case, traditional LOS approach and visit or interdiction operations, a warship retains its right of self-defense.[80] The LOAC applies through the LOS conventions' other rules clauses, or applying treaty suspension or wartime termination principles, in war situations.[81]

### *1. Visit and Search Pursuant to the Law of Naval Warfare*

The right of warship visit and search on the high seas and in a belligerent's territorial sea during armed conflict differs from the LOS right of high seas approach and visit.[82] First, visit and search rights obtain through the other rules clauses of the LOS conventions or applying treaty suspension or termination principles during wartime situations.[83] Second, the right applies only incident to the visit and search, and does not spill over into a right of approach and visit; the right of approach and visit is governed by LOS principles.[84] If a warship closes on a merchantman with visit and search and approach and visit in mind during an armed conflict situation, the rules for each procedure must apply. Third, neutral warships and neutral noncommercial vessels retain immunity they have under the law of the sea from visit and search.[85] Fourth, warships conducting visit and search retain a right of self-defense.[86]

Visit and search may be conducted in belligerents' territorial seas and internal waters and on the high seas, including areas subject to States' contiguous zone, EEZ, fishing zone or continental shelf claims, and in the Area. Visit and search may not be conducted in neutral States' territorial seas, in international straits

overlapped by territorial seas in that part of a strait whose waters comprise neutral States' territorial seas, and in a neutral's archipelagic sea lanes. Hague XIII, art. 2, forbids visit and search in neutral State "territorial waters," a customary rule,[87] but the previous formula takes into account Hague XIII's more general language in a context of modern LOS principles.[88] Although coastal States have rights in the contiguous zone, EEZ, fishing zone and the continental shelf, these zones' waters remain subject to high seas freedoms of navigation and overflight as do waters above the Area,[89] *i.e.*, the deep seabed the LOS Convention reserves as humankind's common heritage.[90] Visit and search operations in these areas, and on high seas not subject to any of these claims, are subject to a requirement that a belligerent observe due regard for neutral States' rights, whether that be high seas rights, neutrals' rights in these zones, or humankind's rights in the Area, besides specific LOAC rules applying to the situation.[91] A belligerent may conduct visit and search in its territorial sea and internal waters without applying the due regard principle; that is part of its sovereign territory.[92] Even here, however, belligerents must apply LOAC rules, including humanitarian and neutrality law principles. Similarly, a belligerent may conduct visit and search in an opposing belligerent's territorial sea and internal waters, but here visit and search must observe due regard for neutral State rights, *i.e.*, innocent passage by neutral shipping in an opposing belligerent's territorial sea,[93] in addition to positive rules of the law of armed conflict. However, this innocent passage in a belligerent's own territorial sea might be subject to the LOS rule that a coastal State may suspend innocent passage temporarily for security reasons,[94] and the LOAC rule that belligerents may order neutral shipping away from the immediate area of naval operations or may impose special restrictions on this shipping.[95] In an opposing belligerent's territorial sea, only the LOAC naval operations rule would apply, territorial sovereignty continuing to reside in the coastal State. In either case belligerents may not deny territorial sea access to a neutral nation unless there is a route of equal access.[96]

Hague XIII and customary law say nothing specific about visit and search in straits; however, the customary rule against visit and search in neutral waters should apply by extension for straits bordered by neutral State territorial seas. If one side of a strait is belligerent territorial seas and the other is neutral territorial seas, visit and search may be conducted in the belligerent's territorial sea but not in the neutral's territorial sea. Besides this restriction, a belligerent must observe due regard for high seas rights through straits with a high seas passage in the middle, neutral State transit passage, or innocent passage through a strait, or treaties governing a particular strait, depending on the kind of strait involved.[97] As a practical matter, this could well mean barring visit and search in a particular strait, depending on the strait's geographic, navigational and hydrographic configurations; the nature of the vessel to be searched; methodology of visit and search (*e.g.*, surface vessel, small boat or helicopter); and other factors.[98] If a littoral State cannot close

a strait under the law of the sea[99] for temporary security protection as it may for territorial sea innocent passage,[100] a belligerent cannot cite this reason for closing its side of a strait, even if incident to an otherwise valid visit and search. The same principle applies to invoking the rule that a belligerent may order neutral shipping out of the immediate area of naval operations or impose special restrictions on them; this LOAC rule cannot have the effect of impeding neutral shipping straits passage, unless another route of similar convenience is open to neutral traffic.[101]

Recent operational law manuals restate traditional visit and search rules:

1. Visit and search should be exercised with all tact and consideration.
2. Before summoning a vessel to lie to, the warship should hoist its national flag. The summons is made by firing a blank charge, by international flag signal . . . , or by other recognized means. The summoned vessel, if a neutral merchant ship, [must] . . . stop, lie to, display her colors, and not resist. (If the summoned vessel is an enemy ship, it is not so bound and may legally resist, even by force, but thereby assumes all risk of resulting damage or destruction).
3. If the summoned vessel takes flight, she may be pursued and brought to by forcible measures if necessary.
4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. The officer(s) and the boat crew may be armed at the discretion of the commanding officer.
5. If visit and search at sea is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning, or another, . . . warship or by a . . . military aircraft to the nearest place (outside neutral territory) where the visit and search may be conveniently and safely conducted. The neutral vessel is not obliged to lower her flag (she has not been captured) but must proceed according to the orders of the escorting warship or aircraft.
6. The boarding officer should first examine the ship's papers to ascertain her character, ports of departure and destination, nature of cargo, manner of employment, and other facts deemed pertinent. Papers to be examined will ordinarily include a certificate of national registry, crew list, passenger list, logbook, bill of health clearances, charter party (if chartered), invoices or manifests of cargo, bills of lading, and on occasion, a consular declaration or other certificate of noncontraband carriage certifying the innocence of the cargo [navicert].
7. Regularity of papers and evidence of innocence of cargo, employment, or destination furnished by them are not necessarily conclusive, and, should doubt exist, the ship's company may be questioned and the ship and cargo searched.
8. Unless military security prohibits, the boarding officer will record the facts concerning the visit and search in the logbook of the visited ship, including the date and position of the interception. The entry should be authenticated by the signature and rank of the boarding officer, but neither the name of the visiting warship nor the identity of her commanding officer should be disclosed.[102]

Although once a debatable issue, today the diversion option (¶ 5) instead of visit and search on the spot is accepted practice.[103] "Although there is a right of visit and search by military aircraft, there is no established international practice as to how that right should be accomplished."[104] The common practice today, given availability of seaborne helicopters on smaller surface warships or perhaps land-based aircraft, is to launch a helicopter. Under those circumstances, the same rules for approach and visit using boats, which are frequently impracticable, given the size of modern merchantmen and frequently sea conditions, should prevail.[105] Aircraft may also be used for scouting for merchantmen and escorting the merchant ship to a diversion point for search or to a belligerent port, instead of using warships for those purposes.[106]

As the visit and search principles suggest, a resisting merchant ship, or one that attempts to flee, risks capture, damage or destruction, like merchantmen who assist the enemy's intelligence system by signaling or are otherwise integrated into the enemy's war effort, unless exempted under the law of naval warfare.[107] If the vessel is found to carry contraband or warfighting/war-sustaining cargo, she may be declared a prize of war.[108] The right to visit and search continues during an armistice, unless the armistice's or other ceasefire's terms provide otherwise.[109]

A right of belligerent visit and search extends to other vessels beyond typical merchant ships, *e.g.*, ships carrying cultural property,[110] hospital ships,[111] perhaps mail ships,[112] and other vessels exempt from capture, etc., *e.g.*, coastal trading and fishing vessels,[113] although there are no specific treaty provisions permitting visiting and searching these other exempt vessels. They are subsumed under the general rubric of being merchant ships for this purpose.

Two exceptions to belligerents' right of visit and search, besides neutral warships or neutral-flag government ships operated for noncommercial purposes,[114] are neutral-flag vessels not engaged in an opposing belligerent's war effort or not carrying contraband and under convoy by a neutral warship, or neutral-flag vessels not engaged in a belligerent's war effort or not carrying contraband and escorted or accompanied by a neutral warship. Under the London Declaration, only neutral-flag convoys are subject to exemption; however, practice during other wars or crises (*e.g.* World War II, before the United States entered the war, during the Formosa Straits crisis) confirms that neutral warships flying a country's flag other than that of the vessel(s) convoyed may escort or convoy neutral merchantmen not in support of the belligerents' war effort and not carrying contraband if the merchantman's flag State so requests. Traditional practice has been for a belligerent warship to request information as to the character of cargo and vessels convoyed or escorted, and for the escort or convoy commander to certify the innocent nature of the convoy or escorted ship(s) by signal to the belligerent warship. Given modern practice of instant, reliable worldwide communications, the 1998 *Helsinki Principles on Maritime Neutrality* rightly advocate authorizing communications between

neutral and belligerent States' governments and their ships at sea for this purpose as a progressive development. Even if the belligerent warship believes the privilege of neutral convoy or escort has been abused, it is up to the neutral warship escort or convoy commander to withdraw protection.[115] If a neutral warship commander does not do so, a belligerent government may protest this. For a belligerent to attack a neutral warship, or its convoyed, escorted or accompanied merchantmen, invites self-defense responses.[116]

The traditional law of naval warfare states no principles for neutral military aircraft convoy, escort or accompaniment of merchantmen that do not carry contraband or material contributing to a belligerent's war effort. However, the same principles should apply. The main problem is communications with a belligerent warship or aircraft proposing to conduct visit and search. Aircraft must have capability to communicate with belligerent warships or aircraft wishing to conduct visit and search; this is usually the case with today's aircraft. Even if there has been prior communication between governments, prudence suggests a clear understanding between the platform proposing visit and search (perhaps another aircraft, perhaps a warship) and the convoying, escorting or accompanying aircraft. The same principles for risk of self-defense response also apply to this situation.[117]

In the case of "mixed" convoy, escort or accompaniment situations, *i.e.*, when neutral military aircraft and warships operate together, the same principles should apply. This should be true whether there is symmetry of flag between the aircraft and warships or situations where aircraft of one flag convoy, escort or accompany, along with warships of other nationalities. Here communications are critical, not only between neutrals and belligerents, but also among neutrals. The traditional law, including the law of self-defense, has nothing to say about this situation, yet another reason for clear communications, particularly with belligerents.[118]

Different principles apply if belligerent warships and/or aircraft convoy, escort or accompany merchantmen, however; these merchantmen are subject to attack and destruction by opposing belligerents.[119]

Under the customary law of naval warfare, the flag the merchantman flies, and not the LOS genuine link analysis, counts for *prima facie* attribution of vessel nationality,[120] yet another example of the operation of the LOS conventions' other rules clauses.[121] (Different rules apply if a belligerent transfers flags from its merchantmen to neutral flags,[122] not a Tanker War issue, insofar as the historical record shows.) If there is a transfer from one neutral flag to another, this may raise LOS issues,[123] but the LONW rule of *prima facie* attribution of neutrality covers the transfer to attribute *prima facie* neutral flag status to the reflagged vessel.[124] (The principle is different if a vessel flies the UN or ICRC flag; under the LOS and presumably the LONW jurisdiction remains vested in the registry State.)[125] Thus neutral-flag warships may convoy, escort or accompany neutral-flag merchantmen

that have been reflagged under the same circumstances as they could if no reflagging has taken place.

Transfers of goods follow the same kind of rules. If there has been a *bona fide* transfer of cargo from a belligerent to a neutral before a voyage from a neutral country to another neutral begins, that is considered neutral cargo. Rules concerning delivery of neutral cargo *to* a belligerent from a neutral, or transfer of title from a belligerent to a neutral, once the cargo has been lifted and is on its way, *i.e.*, the continuous voyage rule, do not apply. The continuous voyage rule might apply, for example, to contraband consigned to an enemy destination with intermediate overland transportation from a neutral port to a belligerent.[126]

*2. Visit and Search: Tanker War Issues*

There are no reported cases of attempts by belligerent or neutral warships to conduct approach and visit on suspect merchant ships under the law of the sea, nor were there any accounts of terrorist attacks on vessels or Persian Gulf oil platforms, during the Tanker War. If there had been, principles applying to these situations, and not LONW principles, would have governed.[127]

Iran conducted visit and search operations with ships and aircraft against neutral merchant ships inbound to Iraq through Kuwaiti or other ports, and vessels outbound with Kuwaiti or other cargo destined for neutral ports, throughout most of the war.[128] Despite neutral governments' protests on some occasions, Iran was within its LOAC rights to conduct these visits and searches, including visit and search after the cease-fire, if international law criteria for these operations were met. For example, it was not proper to shoot up a merchantman before conducting visit and search, unless that ship tried to evade visit. Iran complied with visit and search rules some of the time, but in other cases the evidence may point toward violations of the law. It is not clear, *e.g.*, whether vessels that were attacked tried to evade visit, or whether Iran shot first and asked questions later. In the latter cases Iran violated LOAC rules. Although Iran threatened to close the Strait of Hormuz from time to time,[129] the purpose of threatened closure appeared not to be incident to visit and search operations. If visit and search occurred near or in the Strait, there are no reports of these actions impeding neutrals' straits passage.

Belligerents kept merchant ships plying the Gulf pursuant to their high seas and straits passage rights under surveillance, Iraq primarily through aircraft and Iran through aircraft and surface vessels.[130] This surveillance, if interpreted as the first step in a projected visit and search, was legitimate under the LOS as high seas overflight, freedom of navigation or straits transit rights, as long as it did not interfere with the merchant ships' high seas or transit passage rights.[131] These States' warships and military aircraft also could conduct surveillance as a self-defense measure.[132] However, once the visit and search process began with notice to the merchantman, Iran and Iraq were bound by its LONW procedures. This did not

include initial indiscriminate attacks by aircraft or surface vessels, or mines, particularly if a vessel's identity, cargo and destination were not known.[133] Whatever the result under Charter law analysis,[134] these were also violations of the law of naval warfare proportionality and necessity principles as they related to visit and search.

The United States and other neutral nations were within their rights to form convoys of neutral-flag merchant ships, or to escort or accompany neutral-flag merchant ships, carrying cargoes to and from neutral States, *e.g.*, Kuwait, where cargoes did not directly contribute to a belligerent's war effort, *i.e.*, were not property of a belligerent or destined to a belligerent when lifted. The fact that the cargo may have been legitimately sold to a neutral or may have been legitimately exchanged before lift from a belligerent did not change the cargo's characterization when on the high seas. There is no evidence that the convoyed or escorted neutral flag merchant ships, reflagged or otherwise, carried belligerents' cargoes that contributed to war efforts.[135]

Early in the war, Iraq rejected overtures to allow neutral merchant ships trapped in the Shatt al-Arab to leave under a UN or ICRC flag.[136] Toward war's end, there was no consensus on substituting a UN naval flotilla, supported by Italy and the USSR, for warships operating in the Gulf pursuant to each country's orders.[137] (The UN ensign has been used on several prior occasions.)[138] If vessels released from the Shatt had traveled in convoy or had been escorted or accompanied by warships, an issue might have arisen on whether these ships were legitimately reflagged under the LOAC for purposes of the evacuation.[139] If they were reflagged legitimately, a further question would be whether the United Nations or the ICRC could legitimately request convoy protection for these ships. The United Nations, possessing legal personality,[140] could request protection, preferably through a Security Council decision,[141] but the ICRC as a nongovernmental organization would not have had status necessary in international law to request convoy, unless the ICRC were placed in UN service.[142] If the merchantmen had flown a UN or ICRC flag under these circumstances, presumably the same principles would have applied for convoying, *i.e.*, a warship with a different ensign[143] could have convoyed, escorted or accompanied the merchant ships, provided there had been a request for protection from the flag State and, as a precautionary measure, from the United Nations. If a Security Council decision had established terms, those would be mandatory, even if they were different from the usual LOAC rules for these operations.[144] The same issues could have arisen, except perhaps reflagging questions unless merchantmen as well as warships flew the UN flag, in connection with the UN flotilla proposal late in the war. They did not because the flotilla was never approved.

Indiscriminate shooting at, damage to, and destruction of, neutral merchant ships by surface ship or aircraft weapons subjected both belligerents to possibilities

of self-defense responses. If a merchantman was flagged under the same ensign as its convoying, escorting or accompanying warships, the right of self-defense stemmed from a right to protect the merchant ship as an act of individual self-defense. If the merchantman was flagged under an ensign different from the warship's, and convoy, escort or accompanying had been requested, there was a right to protect those merchant ships under an informal collective self-defense theory.[145] Merchant ships painted grey to simulate warships, feigning convoys, or which snuggled close to convoyed, escorted or accompanied ships without request for protection,[146] were not entitled to self-defense protection on those accounts, whatever might be said of these measures as ruses.[147]

To the extent that belligerents used mines to deter, threaten or attack convoyed, escorted or accompanied merchantmen,[148] this too was a violation of LONW principles. Besides neutral warships' rights to remove the mines, neutrals could also defend against these by removing the source of the mines, *e.g.*, *Iran Ajr*,[149] as incident to legitimate self-defense of their warships; as legitimate self-defense of vessels convoyed, escorted or accompanied; or as incident to legitimate self-defense of their and others' neutral flag shipping if assistance had been requested. Nothing in the law of naval warfare forbade removal of the mines.[150]

### *3. Projections for the Future*

The Tanker war thus strengthened traditional visit and search rules, albeit with some cases where neutral countries wrongly protested the actions. Valid protests against belligerents' indiscriminate attacks on innocent neutral merchant ships vindicated the strength of those principles. Traditional principles of convoy, escort or accompaniment of neutral merchantmen were reinforced, with added dimensions of developing rules for potential use of aircraft with surface ships as part of operations, and using warships of one neutral flag for convoy, *etc.*, of another neutral flag's merchantmen when requested by that neutral.

Given downsizing of naval forces worldwide, and ready availability of aircraft, particularly helicopters aboard ship but perhaps shore-based, a trend of conducting visit and search by aircraft, perhaps operating with warships and perhaps alone (*i.e.*, helicopters), is likely to continue. The same is true with respect to neutral convoys of merchantmen; it is likely that this kind of operation, *i.e.*, use of aircraft as part of a convoy, escort or accompaniment operation, will be seen in future wars. Similarly, convoying operations employing aircraft and warships of different flags are likely. Traditional principles should apply in these situations as well. Because of relative ease of communications between governments, and a risk of lack of communications on the high seas, the *Helsinki Principles* option of government-to-government communications during convoy operations should be adopted as a rule of law.

## Part C. Belligerents' Seaborne Commerce; Belligerents' Convoys

Part B discussed the law of naval warfare relating to neutral flag commerce during the Tanker War. This Part analyzes issues of the belligerents' seaborne commerce, principles of convoying applicable to belligerent-flag shipping, and principles of contraband.

### *1. The Law of Naval Warfare and Belligerents' Seaborne Commerce*

Enemy warships and military aircraft, including naval and military auxiliaries, are subject to capture, attack, or destruction anywhere beyond neutral territory,[151] *i.e.*, outside neutrals' inland waters or territorial seas, including the high seas and areas governed by contiguous zone, EEZ, fishing zone, continental shelf, or Area regimes. Captures, attacks and destruction of vessels in these areas are subject to the principle of due regard for neutrals' uses of these areas and a belligerent's right to exclude neutrals from the immediate area of naval operations.[152] Capture of a warship, naval auxiliary or military aircraft immediately vests title in a captor.[153] Crews of captured, attacked or destroyed aircraft or military vessels become prisoners of war when captured.[154] If the wounded, sick or shipwrecked are taken aboard a neutral warship or military aircraft, "it shall be ensured, where so required by international law, that they can take no further part in operations of war."[155]

Although enemy merchantmen sailing outside neutral territorial seas or inland waters may be subject to visit and search,[156] they may be captured without visit and search if positive determination of enemy status may be made by other means.[157] (Hague VI principles, regulating conduct toward belligerents' merchant ships in enemy ports at war's outbreak,[158] are considered not to reflect customary law.[159] Before 1907 some countries observed a usage that enemy merchant ships in a belligerent port could not be captured; there was no rule of law to that effect.[160] Today they too may be captured.) Enemy merchant ship officers and crews must be made prisoners of war.[161] If military circumstances preclude sending it in as prize, a captured ship may be destroyed after all possible measures are taken to provide for passenger and crew safety. Ship and cargo documents and papers and, if possible, passenger and crew personal effects should be preserved.[162]

Enemy merchant ships may be attacked and destroyed without prior warning or an attempt to capture them if they are a legitimate military objective[163] and: (1) persistently refuse to stop upon being summoned to do so, *e.g.*, incident to visit and search; (2) actively resist visit and search or capture; (3) are armed, *i.e.*, equipped with weapons or other equipment capable of inflicting serious battle damage on a warship or aircraft; (4) are incorporated in or assist in any way the enemy's intelligence systems; (5) engage in belligerent acts on behalf of the enemy; (6) act as a naval or military auxiliary; (7) sail under convoy of enemy warships or military

aircraft; or (8) are integrated into the enemy war-fighting or war-sustaining effort.[164] (Principles relating to belligerent convoy of neutral merchantmen are addressed in Part D.) This list follows *NWP 9A*, published at the end of the Tanker War, with an addition from the *San Remo Manual* and modifications suggested, for reasons stated below.[165]

The *NWP 9A* and *Manual* enumerations differ slightly from customary law, and they divide on minor points and one major issue. Categories (1), (2), (4), (6) and (7) are essentially the same in *NWP 9A* and the *Manual* and correspond with customary and treaty norms.[166]

The traditional rule for armed merchant ships, Category (3), has been that they may have defensive armament, *e.g.*, pistols or rifles for defense against pirates, but that armament of a kind to enable the ship to conduct warfare is forbidden.[167] *NWP 9A* and the *Manual* sensibly drop the distinction between defensive and offensive weapons. *NWP 9A* comments:

> In light of modern weapons, it is impossible to determine, if it ever was possible, whether the armament on merchant ships is to be used offensively or merely defensively. It is unrealistic to expect enemy forces to be able to make that determination.

The *Manual* is to the same effect.[168] While shoulder-fired missiles and rockets would likely be considered arming a vessel, equipping an enemy merchantman with chaff would not. Although a ship's bow can be an effective ramming weapon, having a sharp bow, perhaps reinforced against collisions, does not mean that a merchant ship is thereby armed.[169] *NWP 9A* recites that an enemy merchant ship is subject to attack and destruction "If armed."[170] The *Manual* says an enemy merchantman is a proper military objective if it "[is] armed to an extent that [it] could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, *e.g.*, against pirates, and purely deflective systems such as "chaff[.]" ...[171] Both definitions must be read with their explanatory comments to determine, for *NWP 9A*, the limitation on offensive armament; for the *Manual*, what is meant by "damage to a warship," *i.e.*, it does not include using a bow to ram. Being armed, under the *Manual* definition, may not mean the capability to damage another merchant vessel, however. The *Manual* does not say.[172] If *NWP 9A* might seem too broad on its face, the *Manual* statement might seem to lack precision in definition. Given advances in weapons technology, it is almost impossible to describe banned or lawful weapons within a definition or to anticipate the future.[173] It is better, as *NWP 9A* does, to avoid lists or definitions, whether by inclusion or exclusion.[174]

I suggest this as a more workable restatement of the law on this issue:

> Enemy merchant ships may be attacked and destroyed if they are armed, *i.e.*, equipped with weapons or other equipment capable of inflicting serious battle

> damage on a warship or aircraft. This does not include equipment aboard an enemy merchant ship for its protection from collision, pirates, or riots; for maintaining internal order aboard the vessel, *e.g.*, to quell a mutiny; or for deflecting incoming weapons, *e.g.* special paint to deceive homing missiles, chaff and like devices to deceive missiles, or extra shell plating to protect against projectiles or missiles as well as against collisions, ice or other maritime perils.

"Weapons or other equipment" covers armament, *e.g.*, missiles or naval guns but also equipment that could damage or destroy sensing systems, *e.g.*, offensive electronic warfare equipment, *etc.*[175] As a matter of theory, pistol bullets could inflict some battle damage against close aboard warships, *e.g.*, the Iranian speedboats during the Tanker War,[176] but side arms are not considered arms within the meaning of the definition. "Battle damage" is common parlance well understood in naval warfare. Use of the generic word "equipment" would cover not only weapons, but also devices, *e.g.*, tear gas or high pressure water hoses that might be used to deflect an attempt to rush a ship.[177] Similarly, having heavier than usual shell plating or a reinforced bow to protect against ice or collision should not qualify a vessel as an armed merchantman. With good reason, *NWP 9A*, its successor and the *Manual* depart from the traditional law; perhaps their definitions could be refined, however.

The *San Remo Manual* adds Category (5), permitting attack on and destruction of enemy merchant ships if they "engag[e] in belligerent acts on behalf of the enemy, *e.g.*, laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels[.]"[178] This has no direct counterpart in other sources, *e.g.*, *NWP 9A*, but it is a restatement of the law. There are problems with the statement, however, if there are no other considerations. Hague VII, reciting conditions for converting merchant ships into warships, lays down customary standards[179] but does not cover situations where merchantmen engage in belligerent acts. The 1856 Paris Declaration condemns privateering[180] but does not cover a situation when privateers commit belligerent acts from a merchant ship. Category (5), taken from the *Manual*, would cover these situations. There are problems with the law of the sea. The LOS, *e.g.*, condemns and sets standards for jurisdiction over the universal crime of piracy.[181] here the conventions' other rules clauses[182] have no impact, and pirates can be pursued, captured, tried and convicted by belligerents or neutrals during armed conflict as in other situations. If it is assumed that pirates and other LOS violators[183] cannot be assumed to commit belligerent acts when they engage in LOS-condemned activity, then the *Manual* definition is a correct statement of the law. The problem is with the clause, "*e.g.*, laying mines, . . . attacking other merchant vessels." Suppose, for example, a patriotic pirate attacks a merchant ship of the enemy. Is the pirate subject to the LOS rules or those of the

LONW? Perhaps it would have been better to omit the examples, as stated above in Category (5).[184]

Category (7), a residual clause,[185] copies its principles from *NWP 9A*:

> ... [E]nemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:
>
> . . . If integrated into the enemy's war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.[186]

The *San Remo Manual* is more defense-oriented: "The following activities may render enemy merchant vessels military objectives: ... otherwise making an effective contribution to military action, *e.g.*, carrying war materials."[187] This was because the *Manual* conferees agreed, after considerable discussion, that the NWP 9A descriptive phrase "integration into the enemy's war-fighting/war-sustaining effort" was too broad to use for a residual category.[188] Three years later, however, the *Helsinki Principles* defined contraband as "goods ... designed for the use of war fighting and other goods useful for the war effort of the enemy."[189] Although contraband only involves goods shipped to a belligerent port,[190] if the *Principles* drafters were willing to accept such a broad definition for goods shipped *to* a belligerent's port in a neutral-flag merchantmen, then logically they might well have accepted the *NWP* view of a residual category of integration into the enemy war-fighting or war-sustaining effort. Although the issue is close, given worldwide use of *NWP 9A* and its successor,[191] Category (7) follows the NWP model. To be sure, "war-sustaining" is not subject to precise definition, "effort" that indirectly but effectively supports and sustains a belligerent's warfighting capability is within the scope of the term. The varying language of the *NWP*s, the *Manual* and the *Principles* represents distinctions without differences for practice.[192] There is nothing unusual about this kind of phraseology. Naval targeting is governed by concepts like necessity and proportionality,[193] the LOS recites a due regard principle[194] to describe oceans usage sharing. "War-sustaining" is neither more nor less precise. State practice will determine what constitutes "war-sustaining," precisely as State practice has determined and will determine proportionality.

On its face, the London Protocol would require, except for Categories (1) and (2) (persistent refusal to stop on being duly summoned, or active resistance to visit and search) that a surface warship or submarine may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a safe place. The Protocol says the vessel's boats are not regarded as a safe place unless passenger and crew safety are assured under existing sea and weather conditions by proximity of land or presence of another ship that can take

them aboard.[195] The Protocol does not mention air attacks,[196] although by 1936, when the Protocol was negotiated, attacks from the air were part of the experience of armed conflict. The 1923 Hague Air Rules, however, had restated the general rule of the military objective, and although the Rules recited this in a context of land targets, this general principle could be said to apply to maritime targets.[197]

The issue is the vitality and scope of these London Protocol requirements, negotiated in 1936 with World War I experience in mind, in today's law of naval warfare. The law of the sea,[198] and since 1949 the Second Geneva Convention and Protocol I,[199] restate a customary rule[200] requiring rescue of those in peril on the sea, and status of these persons, helpless against the elements unless assisted by others, undoubtedly has played an emotional role even though these principles do not apply to the Protocol issue. Sinking merchantmen, particularly ships with passengers aboard, *e.g.,* liners, had been a highly charged issue during the Great War,[201] and it was an emotional and legal issue in World War II, particularly during the early years.[202] Even after the currents of war swept liners from the seas, except for use as troopships, for which they were (and are) liable to attack and destruction,[203] losses of merchant mariners after attacks was considerable.[204] The Allies and the Axis did not follow Protocol standards during World War II, initially on a theory of reprisal and later because merchant ships were armed, convoyed, used as intelligence collectors, or otherwise incorporated into the war effort. Besides attacks from surface ships and submarines, merchantmen were also attacked by enemy aircraft.[205]

The Nuremberg trials of German Admirals Karl Doenitz and Erich Raeder did not resolve the issue. The admirals, *inter alia* found guilty of failing to rescue the shipwrecked, received no sentence on these counts because of evidence of wartime UK and US practice.[206]

Post-World War II commentator opinion has also divided. Some say the London Protocol is of no effect today[207] or not relevant in modern warfare,[208] some say it has been cast in ambiguous light or is unrealistic,[209] others say it remains in effect,[210] and still others say it applies only to Categories (1) and (2), *i.e.,* where a merchant ship persistently refuses to stop upon due summons or actively resists visit and search, the Protocol's exact language,[211] or does not apply to attacks from the air.[212]

Military manuals show similar ambiguity. For example, the 1900 US Naval War Code said that prizes could be destroyed under certain conditions, *e.g.,* unseaworthiness,[213] reflecting the law and times when visit and search, as distinguished from diversion, was the typical way to deal with merchantmen. The US Navy's 1917 Instructions said a prize could be destroyed "in case of military necessity," but only after visit and search and "persons on board have been placed in safety and also, if practicable, their personal effects." Documents aboard the prize were to be preserved. A neutral ship engaged in unneutral service "must not be

destroyed . . . save in . . . the gravest military emergency which would not justify [the capturing warship] in releasing the vessel or sending it in for adjudication."[214] World War II US Navy manuals published the Protocol word for word but in a context of visit and search. They declared that since title to an enemy vessel vested in a captor through capture, "enemy ships made prizes may in case of military necessity be destroyed . . . when they cannot be sent or escorted in for adjudication." In the ordinary case, if a neutral flag prize could not be sent or escorted in for adjudication, they should be released. Neutral prizes could also be destroyed, but because "responsibility . . . for destroying a neutral prize is so serious that [a capturing warship] should never order such destruction without being entirely satisfied that the military reasons therefor justify it . . . ." In cases of enemy or neutral prizes Protocol provisions for protecting passengers, crew and papers had to be observed.[215]

*NWIP 10-2*, published and revised by the US Navy as a naval warfare publication between September 1955 and October 1974,[216] and declared not to be "a legislative enactment binding upon courts and tribunals applying the rules of war,"[217] was a major watershed in US naval thinking. The 1955 version, published as an Appendix to Tucker's *Law of War and Neutrality at Sea*, written in 1955 but printed in 1957,[218] represented the thinking of the US Navy when it was the largest naval power on Earth.[219] The *NWIP 10-2* text continues recitation of Protocol principles of safety of passengers, crew and papers as applicable to prize destruction.[220] In a note to this requirement, however, *NWIP 10-2* refers these terms to its list of merchantmen that could be attacked and destroyed before capture. The note declares in part:

> According to the customary and conventional law of naval warfare valid prior to World War II, a belligerent warship or military aircraft was forbidden to destroy an enemy merchant vessel or render her incapable of navigation without having first provided for the safety of passengers and crew; exception being made in the circumstances of persistent refusal to stop on being duly summoned or of active resistance to visit and search (or capture).

After reciting the Protocol rules, the note says: "These rules, deemed declaratory of customary international law, have been interpreted as applicable to belligerent military aircraft in their action toward enemy merchant vessels," but that they have not been considered applicable to nonmilitary enemy aircraft. The note then recites World War II experience and mentions the Doenitz acquittal without saying how these square with the prior analysis.[221] The final version of *NWIP 10-2* (1974) follows the 1955 edition.[222]

One reading of *NWIP 10-2* is that it means what it said, *i.e.*, the Protocol recites customary law and attacking aircraft are bound by them too. Under this analysis, the result is that the *NWIP 10-2* drafters at the Naval War College[223] came to a

different conclusion from Professor Tucker, a Stockton Professor of International Law at the College (and later a consultant there),[224] author of *The Law of War and Neutrality at Sea,* which precedes the 1955 version of *NWIP 10-2* in the same book.[225] A second is that the drafters omitted a final part of the note, which would have concluded the law had changed because of World War II experience, the Doenitz judgment and perhaps treaty interpretation principles of desuetude, impossibility of performance (perhaps the situation of an aircraft which attacks an enemy merchantman), or fundamental change of circumstances because of the universal use of merchantmen, often armed and in convoys, lifting goods for the war effort in a global conflict.[226] This is negated by earlier language in the note[227] and lack of amendments in six later manual supplements over nearly 20 years.[228] A third is that the War College drafters intended the World War II experience as a "soft law" coda to the "hard law" of the Protocol and a parallel customary norm.[229] The difficulty with this is that these concepts were not part of international law analysis in 1955 and were only beginning to appear in 1974, when the last *NWIP 10-2* supplement was published.[230] The reason for the difference is thus not clear.

The 1976 US Air Force manual quoted *NWIP 10-2,* noted trends in practice, and concluded: "The extent to which this traditional immunity of merchant vessels, still formally recognized, will be observed in practice in future conflicts will depend upon the nature of the conflict, its intensity, the parties to the conflict and various geographical, political and military factors."[231]

Ambiguities of the first round of post-World War II military manuals thus match the differences (and difficulties) among commentators. *NWP 9A* and *NWP 1-14M* represent improvement. Besides adopting *NWIP 10-2*'s category approach for vessels subject to attack and destruction without warning, they publish the Protocol text, review World War II practice, note debate over the Protocol's validity as a current rule of law, and close thus:

> . . . [E]nemy merchant vessels may be attacked and destroyed by surface warships, . . . with or without prior warning, in any of the following circumstances:
>
> . . . If integrated into the enemy's war-fighting/war-sustaining effort and compliance with . . . the . . . Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

The *NWPs* then say that rules for surrender and search for the missing and collection of the shipwrecked, wounded, sick and the dead also apply to enemy merchantmen and civil aircraft that may become subject to attack and destruction.[232] The *NWPs* then recite the same rules for submarines, including a statement that the Protocols apply to submarine attacks, but noting the "impracticality of imposing on submarines the same targeting constraints as burden surface warships

[being] reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping[,]" justified as reprisal or as "a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy's war-fighting/war-sustaining effort." Like surface ships, submarines must search for the missing and collect the shipwrecked, sick and wounded, to the extent military exigencies permit, after an engagement.[233] A third analysis for aircraft attacks follows the pattern of those for surface warships and submarines, except that *NWP 1-14M* adds armed merchantmen to the list, and places Category (2), active resistance to visit and search, in a footnote that would not be part of the commander's version of the manual. Moreover, the *NWP*s omit reference to the Protocol for aircraft attacks, a change from the *NWIP 10-2* view, although they require military aircraft to search for the missing and collect the shipwrecked, wounded and sick, to the extent military exigencies permit.[234]

The *San Remo Manual,* published in 1995 in between the *NWPs,* discusses the "failure" of the London Protocol[235] but adopts its principles as a standard for *captured* merchantmen:

> . . . [A] captured enemy merchant vessel may, as an exceptional measure, be destroyed when military circumstances preclude taking or sending such a vessel for adjudication as an enemy prize, only if the following criteria are met beforehand:
> (a) the safety of passengers and crew is provided for; for this purpose, the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the prevailing sea and weather conditions by the proximity of land or the presence of another vessel which is in a position to take them on board;
> (b) documents and papers relating to the prize are safeguarded; *and*
> (c) if feasible, personal effects of the passengers and crew are saved.

Destruction of enemy passenger vessels carrying only civilians at sea is prohibited. For passenger safety, these liners must be diverted to an "appropriate area" or port to complete capture. Thus except for a prohibition on destruction of passenger ships carrying only passengers, which must be diverted for completion of capture, the *Manual* adopts the Protocol's literal language, which says it applies to destruction of enemy merchantmen if they persistently refuse to stop upon being duly summoned or if they actively resist visit and search. The *Manual* does not state an alternative for disabling a vessel, mentioned in the Protocol. The *Manual* applies its terms to aircraft attacks under these circumstances.[236]

The *Manual* treats the Protocol rules, like the rules for visit, search and destruction as alternatives to attack.[237] In effect they are indicia of proportionality; the *Manual* says that "Indeed, it could be argued that according to the wording of the [London Protocol] . . . destruction of merchant ships can be considered legal as long as passengers, crew and ship's papers have been placed in safety."[238] One

should add that *any* right to destroy a merchantmen is subject to categories permitting destruction[239] and exemptions, *e.g.*, for hospital ships.[240] In effect, the *Manual* sees the Protocol principles as indicia of proportionality for particular situations in naval war.[241]

Given the divergence among individual commentators, the collective effort of the *Manual*, and among operational law manuals, what is the status of the Protocol today? While it would appear that its literal language is not binding law, many of its policies are reflected in rules of law. A perhaps oversimplified analysis might be:

1. If an enemy-flag merchantman falls within any of the categories listed above, clearly recognized in international law, it may be attacked and destroyed without warning.[242]
2. This principle is subject to an important qualification: Certain classes of merchantmen may never be attacked if they are operating within exceptions granted by law, *e.g.*, hospital ships operating as such.[243]
3. As an option to attack, a belligerent's warship may choose to visit and search, followed by destruction as an alternative to sending in as prize, with diversion as an option to completing visit and search on the high seas. As a further alternative to the foregoing, a warship may first order a merchant ship to divert to an appropriate place where visit and search may be conducted.[244]
4. Principles of necessity and proportionality apply to all attacks.[245]
5. Preserving crew's and passengers' lives and property, and ship's papers, are very important proportionality factors if necessity indicates an enemy merchantman's destruction is appropriate. The London Protocol states specific principles of necessity and proportionality. Even here, however, there are gradations, with passenger and crew effects having a lower priority than the lives of crew and passengers and ship's papers.[246] By the same token, a decisionmaker must take into account possible costs in his or her force members' lives, and property, if, *e.g.*, visit and search as opposed to attack without warning is considered.[247] While the LONW sets a high premium on humanity aboard the target ship through law flowing from the London Protocol and humanitarian law *after* destruction of a ship, where assistance is subject to circumstances after attack,[248] humankind aboard a belligerent platform *before* projected destruction of the target also has high value. Admiral Service has emphasized the value of human beings aboard a belligerent platform,[249] risk of loss of life aboard each platform, the attacking platform(s) and the merchant ship, and the military value of the merchantman, must be thrown into the necessity and proportionality balance. It might be argued that this point is new to the LOAC and humanitarian law in particular, *i.e.*, that lives aboard an attacking ship should not be taken into account in striking the proportionality balance. This argument does not square with emerging

basic principles of human rights law, which *inter alia* declare an "inherent right to life," which cannot be derogated during public emergency.[250] Nor does it square with the possibility that loss of "smart" attacking platforms engaged in rescue may result in more casualties when that belligerent must resort to less sophisticated weaponry that may entail greater loss of life for both sides. Last, the argument flies in the face of a basic policy of the law of warfare, that it be conducted by means calculated to engender the least bitterness and hatred, so that a more lasting and just peace can be more easily achieved at war's end.[251] And while the latter is usually considered a problem of the defeated State, one might ask whether the Versailles victors' decisions for the vanquished Central Powers were partly motivated by the enormous loss of life on the Western Front, and that these decisions contributed to what many have seen as onerous peace treaties that led to Adolf Hitler and World War II? Suppose the British invention of the tank had worked, the German lines had broken with relatively light loss of life, and there had been an armistice at that point?

6. The foregoing apply to all modalities of attack, *i.e.,* by surface warships, submarines, or aircraft.[252] Different principles of proportionality and necessity may dictate different options for different platforms, indeed different options for the same platform under different conditions, *e.g.,* size of the merchant ship, military value of its cargo, heavy or moderate seas, cold or temperate weather, relative nearness of enemy forces, *etc.* It does not seem logical, *e.g.,* to say that aircraft attacks should not be considered in the light of London Protocol requirements. To be sure, an attack jet cannot do much about placing crew and passengers in safety pursuant to strict Protocol standards, but a method of attack (*e.g.,* ship-disabling fire instead of ship-destroying weapons) might be appropriate, given the nature and military value of the cargo and ship, so that the crew could use lifeboats. By the opposite token, a large helicopter might be able to winch a surviving crewman of a small craft to safety aboard the helicopter under some circumstances, and that might be taken into account. Moreover, if attack will be coordinated among, *e.g.,* three or more platforms, *e.g.,* aircraft, surface warship and submarine, having different basic rules for each invites confusion. Operational plans or orders and ROE can spell out proportionate actions dictated by the situation.
7. Although this Part has discussed attacks on enemy merchant ships in the LOAC context, the same kinds of necessity and proportionality are at play in the conditioning factors of necessity and proportionality in the self-defense[253] context. The content of necessity and proportionality will be different; *e.g.,* while a deliberate confrontation with an enemy merchantman might dictate visit and search of *e.g.,* a suspected intelligence-transmitting merchantman (perhaps to have a look at its equipment before ordering destruction or other action) with Protocol provision for crew and passengers, while in a self-defense situation, particularly with

an immediate problem of anticipatory self-defense, destruction might be appropriate under self-defense necessity and proportionality principles.

8. In any case, after the merchant vessel has been sunk, the attacking platform(s) must search for the missing and collect the shipwrecked, sick, wounded and dead in accordance with humanitarian law, taking into account "all possible measures," *i.e.,* risk of hazard to the platform that has conducted an attack or destruction with the possibility of loss of additional life if the platform engages in this effort, the capabilities of the platform, *etc.* Thus a submarine, having legitimately attacked and sunk a ship, might not be able to conduct search and rescue because of danger to it from enemy attack while on the surface, with resultant loss of more life, because of hull configuration, or because of capacity on board to accommodate more people, the case of a small submarine. An attack jet might be able to do no more than report that there are survivors in the water, while some helicopters, depending on the operational situation and their size and capabilities, might be able to pick up some or all. A surface warship might be able to pick up all, unless there is the possibility of successful fatal attack on the warship with more resultant casualties or heavy seas; this occurred after sinking of the *Bismarck* during World War II. On the other hand, if destruction occurs after visit and search, and there is no possibility of attack on the visiting platform(s) with resultant loss of crew in perhaps a combined surface ship and helicopter operation, humanitarian law dictates picking up survivors if, *e.g.,* the merchantman's lifeboats do not operate properly or it appears London Protocol requirements cannot otherwise be met.[254]
9. Principles 1-8 are subject to UN Security Council decisions and actions taken pursuant to them.[255]

This seems an appropriate way to cut the Gordian Knot of responding to modern warfare's technological realities,[256] London Protocol requirements and Second Convention and Protocol I principles for an attack or destruction otherwise legitimate under the LOAC or self-defense principles.

The foregoing assumes a potentially legitimate target. The LOAC, and humanitarian law in particular, has declared that certain objects, enemy-flag vessels or enemy-flag civil aircraft, are not legitimate objects of capture or attack, if they are employed in their capacity exempting them from capture or attack, do not commit acts harmful to an opposing enemy, immediately submit to identification and inspection when required, do not hamper combatants' movements, and obey belligerents' orders to stop or move out of the way when required.[257] If, *e.g.,* they are not so employed or do not obey orders to stop for, *e.g.,* visit and search, they may be subject to other action, *e.g.,* attack and destruction under some circumstances. Exempt vessels include:

1. Hospital ships;[258]
2. Small craft used for coastal rescue operations and other medical transports;[259]
3. Cartel ships, *i.e.*, vessels belligerents grant safe conduct for transporting prisoners of war, diplomats or other noncombatants, *e.g.*, civilians from a war zone or repatriated civilians;[260]
4. Ships engaged in humanitarian missions, including those carrying supplies indispensable to civilian population survival, and ships engaged in relief or rescue operations, pursuant to the belligerents' agreement;[261]
5. Ships transporting cultural property under special protection;[262]
6. Passenger vessels when engaged only in carrying civilian passengers;[263]
7. Ships on religious, scientific or philanthropic missions;[264]
8. Small coastal fishing vessels or small boats in local coastal trade;[265]
9. Vessels designed or adapted exclusively for responding to pollution incidents involving the marine environment, perhaps not a customary norm but introduced by the *San Remo Manual;*[266]
10. Ships or vessels of any size (*e.g.*, boats) or aircraft that have surrendered;[267]
11. Life rafts and lifeboats;[268] or
12. Vessels a belligerent gives a unilateral safe-conduct or license, perhaps by proclamation.[269]

There is no customary exemption for ships driven ashore by *force majeure.*[270] Mail ships are not exempt; there seems to be no custom to exempt them, although the issue is not free of doubt.[271] However, if a mail ship, *e.g., R.M.S. (Royal Mail Ship) Titanic* (lost in 1912) is exempt for another reason, *e.g. Titanic,* as a passenger liner carrying only passengers and no military cargo, it normally would not be subject to capture or attack.[272] Enemy merchant vessels in an belligerent's port, unless they are otherwise exempt, *e.g.*, a hospital ship or a passenger vessel with only civilian passengers aboard, are not exempt from capture or attack.[273]

By the opposite token, if a ship otherwise exempt from attack is used for war effort,[274] or if it is otherwise used in activity that removes it from exempt status,[275] that ship may be subject to capture or attack, depending on circumstances.[276] Rules of engagement or operational plans or orders can direct options, *e.g.*, diversion instead of visit and search, limit capture or destruction of vessels not otherwise exempt, *etc.*[277]

Certain kinds of enemy civil aircraft are also exempt from attack:

1. Medical aircraft;[278]
2. Aircraft granted safe conduct by belligerents;[279] or
3. Civil airliners.[280]

As with exempt enemy merchant vessels and exempt ships, enemy aircraft otherwise exempt can lose this status under certain conditions,[281] they are subject to self-defense considerations[282] and UN Security Council decisions.[283] Rules of engagement or operation plans or orders can further limit capture or destruction of aircraft not otherwise exempt.[284]

*2. Acquiring Enemy Character*

Neutral merchantmen may acquire enemy character by acting in various capacities on behalf of belligerents. Part D discusses this.

*3. Convoying by Belligerents*

Principles applicable to neutral warships' convoying, escorting or accompanying neutral merchantmen that are not carrying goods for a belligerent's war effort have been discussed.[285] When a belligerent's warships or military aircraft convoy, escort or accompany merchantmen flying its flag, the result is quite different. These convoys are presumed to be military convoys and, being lawful military objectives,[286] are subject to attack, with or without warning, and may be defended by the convoying State, just as independently steaming merchantmen may be protected.[287] The exception is if the convoy, escorted ship or accompanied ship is entitled to protected status, *i.e.*, coastal fishing vessels engaged in their trade and not contributing to the enemy war effort.[288] An enemy warship or military aircraft, unless exempted, *e.g.*, as part of a cartel ship operation, is subject to attack even if the convoyed, escorted or accompanied vessels are not.

*4. Principles of Contraband*

The law of contraband in naval warfare only applies to goods inbound to a belligerent.[289] Goods with a neutral destination coming from a belligerent's port cannot be contraband.[290] This is not to say, however, that these goods may not be classified as aiding the enemy war effort, *i.e.*, warfighting or war-sustaining goods, and therefore subject to an opponent's options, discussed in Parts C.1 - C.2, which include visit and search, diversion, and in some circumstances, *e.g.*, when under enemy direction or control, attack and destruction of the vessel. Contraband was associated with neutral-flag merchantmen during the Tanker War, if at all, and the principal discussion is in Part D.

*5. The Tanker War*

Did Iran and Iraq comply with the principles of attack and destruction of *enemy-flag* merchantmen[291] during the Tanker War? Iran conducted visit and search operations on numerous merchant ships during the war,[292] but there is no firm evidence of attempts to destroy these ships incident to these operations. Iraq, lacking much of a navy or aircraft capable of visit and search, did not use these procedures.

The question then comes to the legitimacy of Iraqi air attacks on Irani-flag merchantmen, and of Iranian air and surface attacks on Iraqi-flag merchantmen. Unfortunately, the record is not clear as to whether these attacks, as distinguished from attacks on neutral-flag merchant ships,[293] occurred. Analysis proceeds on an assumption that these attacks occurred.

The record is fairly clear that these attacks did not involve destruction of exempted vessels or aircraft, *e.g.*, hospital ships or civil airliners.[294] There were no claims of self-defense attacks on them. There were no Security Council decisions affecting these aspects of the war. All belligerent attacks were conducted under the law of naval warfare.

Given Iraqi propensity to use long-distance weapons to attack merchantmen of whatever flag, without discrimination between those carrying war-fighting or war-sustaining goods or otherwise subject to attack without warning[295] and those with other cargoes, the attacks clearly lacked proportionality, unless in the case of cargoes subject to attack Iraq knew, or had reason to know at the time,[296] of the nature of the cargoes. Attacks on vessels not carrying these goods might be excused if it is assumed that these were cases of legitimate collateral damage,[297] *e.g.*, where an attack conducted against a proper target results in a missile's seeking and hitting another vessel, despite the attacking platform's best efforts. The same can be said of similar Iranian attacks. Since attack jets conducted these attacks, as a practical matter of this warfare mode (and as a matter of law, if it is accepted that the London Protocol does not apply to aircraft attacks[298]) there was little to no opportunity for humanitarian law survivor assistance. Perhaps the belligerents notified other vessels of the survivors;[299] the record is silent on the point. If Iran and Iraq had reason to know there were survivors (which cannot be assumed, given the fog of war and the distances from which some attacks were conducted), and did not do what was feasible under the circumstances, there were humanitarian law violations.

Iranian attacks by surface warships, whether destroyer types or speedboats, and its helicopter attacks stand on different footing. Here Iran had a much better opportunity for other options. In some situations, to be sure, there was a risk of Iraqi attack on belligerent forces at sea, and under these circumstances, attack in lieu of other operations was a permissible mode. However, in cases where there was no possibility of attack, the option of visit and search or diversion should have been given strong, perhaps imperative, consideration, if this option was feasible. If visit and search had been conducted, and destruction were ordered by a surface combatant, compliance with London Protocol and humanitarian law requirements was mandatory. Given that attack was a valid option, the issue is whether the attack was necessary and proportional under circumstances known or which should have been known at the time.[300] The record on this issue is less than clear, and will likely be forever enshrouded. The same can be said of Iran's duty to attend to survivors in the water. If it was possible, Iran should have searched for the missing,

shipwrecked, sick, wounded or dead after an engagement.[301] In many cases, particularly those involving surface ship attacks, Iran probably had a capability to do so and did not. If so, Iran was guilty of humanitarian law violations.

Iranian warships and perhaps other platforms (*e.g.*, military helicopters, fixed-wing aircraft) convoyed tankers carrying petroleum down its coast, using Iranian coastal waters as much as possible.[302] Iranian-flag merchantmen were subject to Iraqi attack while being convoyed; Iran could defend these ships under the LOAC, like any other Iraqi target.[303] As will be seen, neutral flag merchantmen participating in these convoys were also subject to attack.[304] These convoys should be distinguished from situations where neutral-flag warships convoyed, escorted or accompanied neutral-flag merchantmen carrying cargoes that were not part of the belligerents' war efforts; these convoys were not subject to belligerent attacks as legitimate targets.[305] In either case, however, the humanitarian law or LOS rules for survivors, *etc.*, applied.[306]

Neutral-flag warships could respond in self-defense to belligerents' air and surface ship attacks on merchant vessels flying the warship's flag, or the flag of another neutral if that neutral requested it, if the merchantmen were not lifting belligerent war-fighting or war-sustaining goods,[307] the merchantmen steamed independently, or were convoyed, escorted or accompanied.[308] Neutral warships and merchantmen they convoyed, escorted or accompanied had obligations to see to the missing, shipwrecked, sick, wounded or dead after each engagement.[309] Other merchantmen in the area of the engagement but not involved in the attack also had an LOS duty to assist with search and rescue.[310] Duties of ships involved in the engagement devolved from the LOAC as applied under the law of self-defense[311] through the LOS conventions' "other rules" clauses, the customary law of the sea, and Article 103 of the Charter,[312] other ships in the area but not involved in the engagement only had LOS obligations.[313]

Similarly, neutrals could respond to what were perceived to be air, mine or surface ship attacks on their military aircraft or warships[314] in self-defense,[315] but in these cases neutrals also had obligations to see to the missing, shipwrecked, sick, wounded or dead after each engagement.[316] In these situations as well, the LOS did not apply during the engagement; duties to rescue, *etc.*, devolved from the LOAC as applied under the law of self-defense[317] through the LOS conventions' other rules clauses, the customary law of the sea, and Article 103 of the Charter.[318] Merchantmen in the area but not involved in the engagement were obligated to attempt rescue pursuant to the LOS.[319]

Although the record is not clear, perhaps owing to the fog of war or incomplete reporting, there is no indication that neutral military aircraft, warships and merchantmen involved in air or surface attacks on them did not attempt to succor victims after these attacks by Iran or Iraq, or the occasional erroneous and tragic

attacks by neutral forces on neutral aircraft (*e.g.* the *U.S.S. Vincennes* incident) or neutral-flag shipping (*e.g.*, firings on dhows or fishing vessels).[320]

There appear to have been no incidents of battles between Iranian and Iraqi naval, air or other military forces over the high seas; their territorial seas, continental shelves, EEZs, or contiguous zones; or neutrals' EEZs or continental shelves. Consequently, the general rule (subject to important qualifications) allowing belligerent combat in these areas, as well as belligerents' inland waters and territories,[321] was not at stake during the Tanker War. Similarly, there was no application of the requirement to recover those lost at sea or the dead.[322] The story was far different on land and in belligerents' inland waters, but these aspects of the conflict are beyond this volume's scope.

## Part D. Neutral Flag Merchantmen: Enemy Character; Reflagging; Contraband

During the Tanker War, neutral flag merchantmen carried much of the trade between the belligerents and the outside world,[323] apart from petroleum Iraq pumped through pipelines to Turkey, Syria, Kuwait and Saudi Arabia,[324] Iran through pipelines to its southern Gulf ports,[325] and perhaps through pipelines to the USSR.[326] Iran conducted visit and search operations aboard neutral flag merchantmen, looking for cargoes destined to benefit the Iraqi war effort;[327] both belligerents attacked and damaged or destroyed some of these ships, sometimes by surface ship or aircraft attacks, but also by mining.[328] Iran published a contraband list late in the war.[329]

This Part examines claims related to these issues, specifically whether and when neutral flag merchantmen acquired enemy character so as to render them amenable to attack because they, *e.g.*, lifted warfighting/war-sustaining goods for a belligerent's war effort; the effect of reflagging; and the doctrine of contraband, including the continuous voyage rule. If a neutral merchant ship or aircraft has not acquired enemy character, it may be subject to approach and visit under the law of the sea,[330] or visit and search pursuant to the law of armed conflict,[331] but it is otherwise exempt from capture or attack and destruction, and doubly so if it is an exempt vessel or aircraft.[332] Neutral exempt vessels may also acquire enemy character.

### *1. Vessels and Aircraft that Have or Acquire Enemy Character*

A ship operating under an enemy flag or an aircraft with enemy markings possesses enemy character. Just because a merchant ship flies a neutral flag or an aircraft has neutral markings does not necessarily establish neutral character. Any merchantman or aircraft a belligerent owns or controls has enemy character, regardless of whether it is operating under a neutral flag or has neutral markings.[333]

An opposing belligerent may treat ships or aircraft acquiring enemy character as if they are enemy vessels or aircraft.[334]

Neutral ships and civil aircraft are *prima facie* neutral in character if flying a neutral flag or bearing neutral markings.[335] They acquire enemy character, and a belligerent may treat them as enemy warships or military aircraft if they take direct part in hostilities on the enemy's side or act in any capacity as a naval or military auxiliary in enemy armed forces. This unneutral service makes them subject to capture, attack and destruction as though they were enemy-flag warships.[336]

Neutral merchant ships and civil aircraft acquire enemy character, and a belligerent may treat them as enemy merchantmen or civil aircraft, if they are operating directly under enemy control, orders, charter, employment or direction, including operating in convoys escorted by belligerent aircraft and/or warships.[337] Under these circumstances they may be subject to visit and search, diversion, capture, attack or destruction, depending on the situation and perhaps whether they are in an exempt category of ship.[338] Neutral merchant ships or civil aircraft that retain neutral character also may be captured and perhaps destroyed, and may be attacked if they resist visit and search or diversion,[339] if they:

1. Avoid attempts to identify them;
2. Resist visit and search;
3. Carry contraband;
4. Break or attempt to break blockade;
5. Present irregular or fraudulent ship's papers, lack necessary ship's papers, or destroy, conceal or deface ship's papers;
6. Violate rules a belligerent establishes for the immediate area of naval operations;
7. Carry personnel in the enemy's military or public service; or
8. Communicate information in the enemy's interest, *e.g.*, by communicating belligerent warship movements on the high seas.[340]

A neutral platform may be liable to capture if it engages in more than one of these, *e.g.*, by resisting visit and search while carrying an opposing belligerent's military personnel. Neutral merchantmen are not liable to capture because they carry military or public service personnel or for communicating information in the enemy's interest, at the beginning of a war, if the ship is unaware of the opening of hostilities or, in the case of military, *etc.*, passengers has not been able to disembark them after learning of the opening of hostilities. A vessel is deemed to know about a war if it leaves an enemy port after war begins, or if it leaves a neutral port after notice of hostilities has been made in sufficient time to a neutral whose port the merchantman departs. Because of the ease of worldwide communications today, there is a presumption that the merchantman knows of the outbreak of hostilities.[341] Captured

vessels are sent in for adjudication as prize; they may be destroyed under certain circumstances.[342]

As in the case of enemy flag merchantmen, these specific principles are subject to the general principles of necessity and proportionality, either in the context of self-defense or the LONW, depending on the circumstances.[343] Under the LOAC the belligerent whom these vessels serve may defend them, like any legitimate military target. They are also subject to any UN Security Council decisions on the situation.[344]

If a neutral merchant vessel or civil aircraft has taken direct part in hostilities, *e.g.* by operating as a military auxiliary for enemy forces,[345] its officers and crew may be made prisoners of war. On the other hand, officers and crew of neutral ships or aircraft that have acquired enemy character by other means, *e.g.*, operating in an enemy convoy,[346] must be repatriated as soon as circumstances permit.[347] Enemy nationals who are armed forces members, employed in the enemy's public service or are suspected of service in the enemy's interests, may be prisoners of war. They may be removed from the neutral vessel or aircraft regardless of whether the platform is subject to capture as prize. Other enemy nationals are not subject to capture or detention.[348] These humanitarian law principles may be subject to Security Council decisions.[349]

*2. The Effect of Reflagging*

The law of the sea has developed detailed, if less than clear, provisions for vessel nationality and therefore when a vessel may fly a State's flag.[350] These do not apply during armed conflict.[351] During war a merchantman flying an enemy flag is conclusively presumed to have enemy character.[352] A merchantman flying a neutral flag is *prima facie* presumed to have neutral character.[353] The question of when there is a proper transfer of flag from a belligerent to a neutral is less than clear; prize court decisions go either way on whether the test is nationality or domicile.[354] This issue cannot arise if a neutral-flag vessel validly transfers its flag pursuant to the law of the sea to another neutral as long as the nature of the carriage does not change. These principles are subject to any Security Council decisions on the subject in a particular conflict.[355]

*3. Contraband Issues*

The law of contraband deals with cargoes inbound to a belligerent.[356] Outbound cargoes *from* a belligerent cannot be classified as contraband under traditional law.[357] However, they may be subject to other principles, *e.g.*, material that contributes to a belligerent's warfighting/war-sustaining capability.[358]

Traditionally goods shipped to the enemy have been divided into absolute contraband, goods whose character makes it obvious they are destined for use in war; conditional contraband, goods that can either be used for war or for other

purposes, *e.g.*, food; "free goods," cargo that is not considered contraband under any circumstances. Belligerents sometimes published contraband lists,[359] which often varied according to circumstances of the war.[360] Practice during the World Wars distorted differences between absolute and conditional contraband;[361] nevertheless, in some recent conflicts belligerents have published contraband lists.[362]

Treaties tried to define rules for absolute and conditional contraband and free goods. For example, the unratified 1909 London Declaration said these might be treated as absolute contraband without notice to other States:

(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.
(2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.
(3) Powder and explosives specially prepared for use in war.
(4) Gun-mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.
(5) Clothing and equipment of a distinctively military character.
(6) All kinds of harness of a distinctively military character.
(7) Saddle, draught, and pack animals suitable for use in war.
(8) Articles of camp equipment, and their distinctive component parts.
(9) Armour plates.
(10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.
(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

Articles used exclusively for war might be added to a list of absolute contraband, which had to be published.[363] The Declaration had a similar long list for conditional contraband, which could be captured without notice to other States if used for war purposes:

(1) Foodstuffs.
(2) Forage and grain, suitable for feeding animals.
(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.
(4) Gold and silver in coin or bullion; paper money.
(5) Vehicles of all kinds available for use in war, and their component parts.
(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts.
(7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.
(8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.
(9) Fuel; lubricants.
(10) Powder and explosives not specially prepared for use in war.

(11) Barbed wire and implements for fixing and cutting the same.
(12) Horseshoes and shoeing materials.
(13) Harness and saddlery.
(14) Field glasses, telescopes, chronometers, and all kinds of nautical instruments.

More items could be added to a conditional contraband list by notice to States.[364] Countries could also publish items for which they had waived status as contraband.[365] World War I belligerents soon rejected this list as all-inclusive.[366]

The Declaration also stated that "Articles which are not susceptible of use in war may not be declared contraband of war," *i.e.,* they would be considered free goods. It then attempted a comprehensive list of these:

(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.
(2) Oil seeds and nuts; copra.
(3) Rubber, resins, gums, and lacs; hops.
(4) Raw hides and horns, bones, and ivory.
(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.
(6) Metallic ores.
(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.
(8) Chinaware and glass.
(9) Paper and paper-making materials.
(10) Soap, paint and colors, including articles exclusively used in their manufacture, and varnish.
(11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.
(12) Agricultural, mining, textile, and printing machinery.
(13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral.
(14) Clocks and watches, other than chronometers.
(15) Fashion and fancy goods.
(16) Feathers of all kinds, hairs, and bristles.
(17) Articles of household furniture and decoration; office furniture and requisites.
(18) Articles serving exclusively to aid the sick and wounded, which in case of "urgent military necessity" and subject to payment of compensation could be requisitioned if not destined for the enemy.
(19) Articles intended for the use of the vessel in which they are found, as well as those intended for use of her crew and passengers during the voyage.[367]

These lists' very length and complexity articulates problems States discovered five years later when World War I began. As with weapons development and arms control agreements today, technology had already begun to outrun the lists.[368] Absolute contraband lists began to swell, and there were constant disputes over conditional contraband. The free goods lists shrank.[369] A modern list of free goods, reflecting recent humanitarian law conventions, includes:

(a) Religious objects;
(b) Articles intended exclusively for treatment of the wounded and sick and for disease prevention;
(c) Clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe such goods will be diverted to other purpose, or that a definite military advantage would not accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes;
(d) Items destined for prisoners of war, including individual parcels and collective relief shipments containing food, clothing, educational, cultural and recreational articles;
(e) Goods otherwise specifically exempted from capture by international treaty or by special arrangement between belligerents; and
(f) Other goods not susceptible of use in armed conflict.[370]

Modern LONW manuals and other publications have abandoned distinctions between absolute and conditional contraband.[371] US Navy World War I and II instructions published abbreviated lists of what was contraband, saying that articles and materials exempted by treaty provisions, *e.g.*, with still-extant bilateral agreements, would not be contraband, and that upon outbreak of or during hostilities the United States might publish lists of other items. This was followed by other States. There was no free goods list.[372]

Current US naval manuals take the position that if a State wishes to seize ships and goods for carrying contraband, all that is necessary is a publication of a free goods list.[373] The *San Remo Manual* takes the opposite view; a belligerent must publish a contraband list before goods may be seized on this account.[374] The London Declaration had required publication of all items not on its absolute or conditional contraband lists.[375] (The *Helsinki Principles* take no position on the issue.[376]) Now that the Declaration lists are obsolete, is the notice requirement also obsolete?

Given the uncertainty of what may or may not be contraband, and uncertainty of a publication requirement, a more prudent course is for States to publish contraband lists; this likely remains a requirement of international law.[377] They must publish lists of free goods despite treaty lists,[378] must publish notice of war zones,[379] must let neutrals know about areas of naval operations,[380] and must publish blockade declarations.[381] Proper publication of contraband and free goods lists would not limit applying a belligerent's other options, *e.g.*, visit and search, diversion, capture, attack, destruction, *etc.*, of neutral merchantmen that have acquired enemy character, *e.g.*, by serving as intelligence collectors for the enemy or sailing in enemy convoy.[382] Published contraband and free goods lists should begin with a general warning that a belligerent reserves rights to visit and search, divert, capture, attack, destroy, *etc.*, neutral merchant ships under the law

of naval warfare, if that is the case. Publishing a contraband list, and labeling items as absolute contraband, would inform all that these cargoes, and vessels that carry them, may be subject to condemnation as prize. Similarly, publishing a free goods list, with warnings that these goods, if used for enemy war-fighting or war-sustaining effort or for other reasons that would subject the vessel to visit and search, diversion, capture, attack or destruction, would clarify what is considered free goods. An option to the latter would be a general notice, to the effect that the proclaiming belligerent will observe its 1949 Geneva Conventions obligations and other humanitarian law the belligerent recognizes, *e.g.*, Protocol I.[383] Since much of the latter is customary law, a belligerent would be bound by it regardless of being a treaty party, but even here publication would clarify the issue. As in the case of cartel ships and similar vessels, belligerents could make special arrangements for the conflict;[384] while this might be likely for free goods, particularly those of a humanitarian nature, a special agreement on contraband is much less likely. Publishing contraband lists with warnings of alternatives the belligerent might pursue, could have a practical effect, from a proclaiming belligerent's point of view, of deterring shipping from accepting these cargoes. Such a proclamation could, of course, be a lightning rod for debates like those that erupted during World Wars I and II over contraband definitions.[385]

Yet another option is for belligerents to arrange for certificates of noncontraband carriage, *i.e.*, navicerts, aircerts and/or clearcerts, a customary practice of two World Wars and as late as the 1962 Cuban Missile Crisis. Under this procedure a belligerent agrees with a neutral State that the belligerent's consular officers may issue certificates stating that a ship's or aircraft's cargo has been found free of contraband. Issuance of these certificates may minimize visit and search by the issuing belligerent, although unneutral service of another kind, *e.g.*, serving as an intelligence collector for the enemy, *etc.*, may result in action by that belligerent. Certificates issued by one belligerent have no effect on visit and search, *etc.*, rights of other belligerents. A neutral vessel's or aircraft's accepting a certificate does not constitute unneutral service.[386]

The continuous voyage rule may apply to contraband issues. In 1856 the Paris Declaration laid down now-customary rules that neutral flags cover enemy goods, except contraband and that neutral goods except contraband are not liable to capture under an enemy's flag (free ships, free goods).[387]

The London Declaration declared absolute contraband liable to capture if destined to enemy or enemy-occupied territory or to enemy armed forces. "It is immaterial whether the carriage of goods is direct or entails transshipment or a subsequent transport by land." Conditional contraband is liable to capture if destined for enemy armed forces or an enemy government department, unless circumstances in the latter case show the goods cannot be used for the war in progress, currency and bullion excepted. Conditional contraband is not liable to capture

unless found aboard a vessel bound for territory belonging to or occupied by the enemy, "and when it is not to be discharged in an intervening port." The sole exception is where the enemy has no seaboard. The continuous voyage rule, as refined by the London Declaration, says that if goods declared absolute contraband, however defined, are bound for an enemy port or for a neutral port with provision for transshipment to the enemy, or if goods declared conditional contraband, however defined, are bound for an enemy that has no seaboard, those cargoes may be captured.[388]

Conditional contraband destined for a neutral's port, with provision for transshipment to the enemy, cannot be captured under the continuous voyage rule. This rule cannot apply to cargoes outbound from enemy or neutral ports, since contraband principles apply only to inbound traffic. The rule cannot apply if there has been no declaration of contraband. Finally, the rule as stated in the London Declaration may have become a relic of the past, given longstanding trends toward blurring distinctions between absolute and conditional contraband,[389] or not declaring contraband at all and relying on capture, *etc.*, for neutral merchant ships carrying goods supporting or sustaining the enemy war effort, or other bases of capture, *etc.*[390]

These principles are subject to UN Security Council decisions on the issue.[391]

*4. The Tanker War*

Neutral vessels carrying war-fighting or war-sustaining cargoes destined directly to Iraq or Iran, or invoiced to Kuwait, Saudi Arabia, the UAE or other neutral States for later transhipment, perhaps overland, to either of those belligerent States, were subject to visit and search.[392] Some of these neutral merchantmen acquired enemy character and became subject to possible attack and destruction.[393] Those sailing in coastal convoys organized, directed and physically protected by Iran were a clear example.[394] To the extent that they were convoyed, directed or protected by Iran, neutral tankers carrying oil from Kharg and other Iranian ports, and therefore lifting war-sustaining cargoes, also acquired enemy character and were likewise subject to attack.[395]

On the other hand, Iraq, having lost its coast and ports for most of the war,[396] could not ship oil direct by sea. It could only ship through pipelines to neutrals for eventual lifting through Gulf and Mediterranean Sea ports, and then only after oil had been sold to these neutrals and had become neutral property. The last points seem to be the factual record.[397] Under these circumstances, as a technical matter of law, if these were *bona fide* sales to neutrals, and the oil thereby became the property of neutral States or their nationals, vessels carrying this oil did not acquire enemy character. Any attacks on them were not valid under international law, and there was nothing invalid for neutrals to convoy, escort or accompany these ships. (On the other hand, if the sales were shams, or if Iraq retained title until final

destination, the rule would be the opposite. There is no indication that the transactions were anything but arms-length and that title passed on neutral territory, *e.g.*, in Kuwait.)[398]

Neutrals protested Iran's legitimate right to visit and search neutral flag merchant ships.[399] If these protests had led to active resistance to visit and search, Iran could have used forceful means, up to and including destruction, to overcome that resistance.[400] No Iranian attacks appear to have occurred on this basis.

Reflagging Kuwait-owned tankers to the US ensign, and others to other neutrals' flags, comported with the law of the sea. Since the tankers were registered with a neutral State, and re-registered with another neutral country, LONW rules on transferring flag from belligerent to neutral did not apply. The reflagging was valid under the LONW; it was valid under the LOS.[401]

The law of contraband had little impact on the Tanker War. First, since its principles can only apply to cargo inbound to a belligerent,[402] the law of contraband was not involved with shipments of oil outbound by the belligerents themselves. The contiguous voyage rule[403] cannot have applied to shipments through pipeline connections to neutrals (Kuwait, Saudi Arabia, Syria, Turkey for Iraq, perhaps the USSR for Iran); these too were outbound shipments, for which contraband law does not apply.

Only in January 1988 did Iran appear to publish a contraband list, the Iran Prize Law, which *inter alia* declared as prize merchandise and means of transport belonging to neutral States or their nationals, if the merchandise or means of transport could contribute effectively to the enemy's combat power, or if the means of transport, either directly or through a neutral intermediary, was an enemy of Iran.[404] This generalized statement was consonant with recent statements, either of situations where an opposing belligerent could attack a merchantman that had acquired enemy character because it carried war-fighting or war-sustaining cargo while under enemy direction or control,[405] or of the definition of contraband itself.[406] The Prize Law also appeared to recognize the foregoing principles, *i.e.*, contraband rules applied only to inbound traffic, and the continuous voyage rule.[407] To be sure, perhaps from caution, the United States and other countries declared their convoy, escort and accompanying operations did not involve contraband-carrying neutral merchantmen or goods contributing to belligerents' war efforts,[408] but there is no indication that these statements applied to more than inbound traffic, *e.g.*, tankers in ballast headed for Kuwait. There is nothing in these statements by neutrals to indicate there had been prior contraband proclamations by Iran or Iraq. They were merely statements of conformity with international law, which permits neutral warship convoy of neutral merchantmen not carrying contraband.[409]

Moreover, if it is accepted that publication of contraband lists is a requirement of international law,[410] any Iranian captures on claims of contraband before January

1988 were not valid. The same can be said for any Iraqi captures during the conflict, since apparently Iraq never published a contraband list. The record on these points is not clear as to whether there were any captures on this basis by either belligerent.

There is also no record of issues relating to free goods, and particularly items which should pass to a belligerent by sea under humanitarian law. Nor is there any indication of employing navicerts or similar procedures.[411] Similarly, there were no UN Security Council decisions affecting these LONW issues.[412] However, as analyzed earlier, it seems fairly clear that standards of necessity and proportionality were not observed, particularly by Iraq in its long range, fire and forget attacks. Moreover, the method of Iran's attacks on these merchantmen, even if warranted under the LONW, indicates that necessity and proportionality principles were not observed in all cases.[413]

## Part E. The Law of Blockade and the Tanker War

There were statements early in the war about "blockade" of Iraq's small coastline and Iraq's Kharg Island "blockade," mostly by commentators.[414] The theme of this Part is that neither belligerent could have effectively invoked the law of blockade during the war.

### *1. The UN Charter and the Law of Blockade*

The UN Charter, Article 42 declares that the Security Council may take action, including blockade, to maintain or restore international peace and security. Article 42 has never been formally invoked.[415] The Council authorized interdiction of petroleum bound for Rhodesia in 1965, but not a blockade,[416] although a commentator says the operation was a form of "pacific blockade," *i.e.*, blockading a coast during time of peace, probably not allowed as a measure for States under the UN Charter.[417] It may be argued, however, that Article 42 indirectly supported the UN forces' North Korea blockade, pursuant to Council decisions[418] to aid South Korea.[419] Since Council decisions may supersede at least treaty law,[420] the traditional law may not apply in blockade operations when Council decisions authorize or direct action.[421]

### *2. Blockade Under the Law of Naval Warfare*

The traditional law of blockade, recited mostly in custom or commentators' views,[422] may be stated fairly simply. Unlike issues related to contraband, which is concerned with traffic inbound to a belligerent,[423] blockade is a belligerent's right to prevent vessels or aircraft of all countries, enemy and neutral, from entering or leaving specified ports, airfields or coastal areas under the sovereignty, occupation or control of the enemy. Belligerent visit and search interdicts the flow of contraband goods; belligerent blockade tries to prevent ships and aircraft, regardless of

cargo, from crossing an established, publicized line separating an enemy from international waters and airspace.[424]

A belligerent or a belligerent's blockading force commander acting pursuant to the commander's government's order must declare a blockade.[425] At a minimum a declaration must include the date and time a blockade begins, its geographic limits, and a grace period within which neutral ships and aircraft may leave the area to be blockaded. Vessels whose registry has been changed from enemy to a neutral flag under the law of naval warfare may be restricted from leaving. If an area changes, or a blockade ends, these too should be declared. Under the London Declaration, notice should also be given local authorities, although this provision has been superseded by World War I and II and Korean War practice and realities of modern warfare.[426] If a blockade is interrupted, *e.g.*, by withdrawing blockading forces for gunfire support elsewhere, a belligerent retains a right of visit and search for contraband and other modalities of economic warfare, *e.g.*, attack and destruction of merchantmen serving as intelligence collectors for the enemy. However, the blockade at this point becomes a "paper blockade," unlawful under the LOAC since the 1856 Paris Declaration.[427]

If a blockade is interrupted, a blockading belligerent must declare a blockade again. If an enemy drives off blockading ships, the blockade ends and must be reinstituted. If a blockading power captures the blockaded port, the blockade ends; however, if a blockading power controls territory near a blockaded port or area, but not the blockaded port or area itself, a blockade remains in force. Temporary interruption, *e.g.*, by a violent storm, does not end a blockade. A blockading force may end a blockade by appropriate notice.[428]

A blockade may continue during an armistice unless there is an agreement to the contrary.[429] Although individuals who violate armistice terms, *e.g.*, by continuing blockade activity after an armistice suspends or ends it, may be punished if captured, there is no unanimous view on what a State may do in such a case. Some say it may reopen hostilities; others say it may denounce the armistice, the position of the Hague Regulations.[430]

A blockade must also be effective, *i.e.*, forces (air, surface, submarine, or a combination) must maintain it sufficient to render ingress or egress to a blockaded area dangerous. Effectiveness does not require covering every possible avenue of ingress or egress.[431] Although traditional law required a close-in and not a long-distance blockade, World Wars I and II and Korean War practice; perhaps military feasibility before then and developments in weapons systems and platforms, including submarines, high-speed aircraft, cruise missiles and missiles from the blockaded shore since; have rendered the close, in-shore blockade difficult if not impossible and therefore obsolete except perhaps in localized conflicts.[432] In a backhand way, extension of the territorial sea to 12 miles for most States has also helped eliminate the truly close blockade; a blockaded belligerent may

temporarily suspend innocent passage in its territorial sea if a strait is not involved,[433] and this may force more neutral merchantmen to use high seas passage. Thus a naval force may not have to approach enemy coasts as closely as before to enforce a blockade.[434]

Hague VIII says belligerents cannot lay mines off belligerents' coasts with the sole object of intercepting commercial shipping and must notify danger zones around anchored mines as soon as military exigencies permit; the 1913 *Oxford Manual* denounced mining to maintain a blockade. These rules were soon found impracticable and do not seem to have survived World War I and II practice, although laying anchored mines with a sole object of interrupting commerce by blockade with no naval forces to enforce a blockade may still violate international law.[435] In only that narrow context may the prohibition survive. The *San Remo Manual* says mining operations in a belligerent's internal waters, territorial sea or archipelagic waters "should" provide for free egress of neutral shipping when mining is first executed,[436] signaling the rule's total demise.

A blockade must be impartial; it must apply to all States' aircraft and ships. Discriminating against or in favor of some States, including a blockading State's ships, invalidates a blockade. However, particular aircraft or vessels or classes of them may be permitted to pass through a blockade, provided no distinction is made as to flag, either by agreement or unilateral act of a blockading belligerent. Examples might include cartel ships repatriating prisoners of war or permitting repatriation of merchant mariners of neutral nationality.[437] Although neutral warships and neutral military aircraft have no positive right of entry to a blockaded area, they may be allowed to enter or leave this area as a matter of courtesy, with length of stay and other conditions in the hands of a blockading force commander or higher authority.[438]

Humanitarian law imposes limitations on declaring, establishing or maintaining blockades. They cannot be established with a sole goal of starving the civil population, as distinguished from enemy armed forces. If the civil population is inadequately provided with food or materials essential for survival, or if medical supplies are needed for this population or wounded and sick enemy armed forces members, a blockading State must provide for passage of food, these materials or medical supplies. This is subject to a blockading State's right to prescribe technical arrangements, *e.g.*, visit and search, for blockade passage. A blockading State may also provide for distributing these supplies under local supervision of a Protecting Power or a humanitarian organization, *e.g.*, the ICRC, that can offer guarantees of impartiality and that food and other materials, as distinguished from medical supplies, do not support enemy armed forces. This might be accomplished by belligerents' agreement or a blockading belligerent's unilateral declaration.[439]

Blockades cannot bar ingress to or egress from neutral ports or coasts. Neutrals keep rights to engage in neutral commerce if it does not involve origin or destination in blockaded areas. Blockades cannot block international straits passage. A belligerent may blockade its own coasts if it is enemy-occupied.[440]

Breach of blockade, for which a vessel or aircraft may be subject to attack and destruction, occurs when a ship or aircraft passes through a blockade without the blockading belligerent's entry or exit authorization. Attempted breach, for which a vessel or aircraft may also be subject to attack and destruction, occurs from the time the platform leaves a port or airfield until the voyage is complete.[441] Knowledge of a blockade's existence is an essential element of breach of blockade or attempt to breach blockade. Knowledge can be presumed once a belligerent declares a blockade and notice has been provided other governments.[442] Under the continuous voyage rule,[443] even though the vessel or aircraft is bound for neutral territory at the time of interception, if its ultimate destination is a blockaded area, that platform is subject to principles governing attempted breach of blockade. There is a presumption of attempt if a vessel or aircraft is bound for a neutral port or airfield that is a transit point to a blockaded area.[444] Necessity, *i.e.,* distress, may excuse a merchantman's actions that would otherwise be breach of blockade.[445]

Besides being subject to UN Charter decisions,[446] blockades are also subject to general LOAC necessity and proportionality rules.[447]

### *3. The Tanker War and the Law of Blockade*

Insofar as the record shows, neither belligerent formally declared a blockade. If one was declared, there is no record of beginning times or area parameters, or grace periods for departure of neutral vessels and aircraft. Use of the term "blockade" appears only in commentators' and historians' statements.[448] An analogy to a wartime expression, "loose lips sink ships," might apply here. Loose use of blockade terminology by commentators, historians, the media or less than knowledgeable governments can muddy fairly well-established LONW principles, with a result that belligerents and perhaps neutrals later in the conflict, or these sources themselves, may be relied on as practice in future wars.[449] One great problem in researching the Tanker War has been relative availability of sources. In blockade issues, as in other aspects of the conflict, truth may have been the first casualty, and in many instances the facts are not available or are sealed in government archives.[450]

If perchance these secondary sources refer to official belligerent declarations, records of times, areas and grace periods have not surfaced. Without these, any blockade by the belligerents would have violated international law.[451] Any blockade Iraq declared would not have been effective; Iraq had no naval assets, *e.g.,* on-station surface warships, to enforce it.[452] Paper blockades have been invalid since the 1856 Paris Declaration.[453] If speedboats, fixed-wing aircraft and

helicopters are thrown into the equation along with its larger warships, Iran probably had enough platforms to enforce a blockade if it had been properly declared. Iranian acceptance of a proposal (which Iraq declined, citing sovereignty over the Shatt al-Arab) to allow neutral-flag merchantmen to leave the Shatt at the beginning of the war under a UN or Red Cross flag[454] could be said to be compliance with a requirement of allowing these ships egress, except those that had switched from an Iraqi to a neutral flag.[455] Iraq may have also justifiably refused on grounds of temporarily suspending territorial sea innocent passage, if the LOS applied,[456] on grounds of controlling its ports and at least its share of Shatt territorial waters during war, or restrictions on merchant ship movement in the immediate area of naval operations (albeit in the riverine warfare context),[457] if such was the case.[458] Iraq's LOS authority to temporarily suspend territorial sea innocent passage, in terms of time, disappeared not long afterward, and was replaced by the LOAC. By that time the war's course around Basra port and damage to the ships themselves undoubtedly made them immobile. Whether there was naval warfare in their vicinity throughout the conflict is not clear from the record. However, the law is clear that Iraq could not have used this derogation from freedom of navigation, if it applied in the riverine context, to permanently bar access to navigation. That is certainly the rule for high seas naval operations.

If either belligerent tried to blockade neutral coasts, *e.g.*, Kuwait's or Saudi Arabia's by sowing mines, or use of air or naval forces, that violated international law. Thus if somehow the law of blockade, as distinguished from LOS rules for entry into and exit from ports, applied, Iran was equally culpable under the LOAC. The UN Security Council was fully justified in passing Resolution 552 (1984), although its text did not mention blockade but LOS rights to enter and leave port.[459] To the extent that Iranian naval maneuvers occurred in Saudi territorial waters as a naval demonstration,[460] that operation violated the Charter's prohibition of threat of force against a neutral State as well as LOS territorial sea rules and LOAC principles governing belligerents' conduct toward neutrals.[461] There is no record of a belligerent's mounting a quarantine operation.[462]

There are no known instances of attempts to use cartel ships to return prisoners of war, *etc.*, during the Tanker War, nor are there any reports of neutral warships' attempting to pass through blockades (assuming that lawful blockades existed).[463] Although Iran accepted a proposal to allow merchant ships trapped in the Shatt in 1980 to depart under a UN or Red Cross flag, Iraq as the "blockaded" State declined.[464] Assuming a proper blockade of Iraq's coast then existed, which is unlikely,[465] departure of neutral nationality mariners aboard these vessels could have been accomplished as a humanitarian law exception to the law of blockade, since the purported blockading State (Iraq) approved as a matter of discretion.[466]

If it is assumed that either State established a lawful blockade, which is highly doubtful, many attacks on neutral merchantmen for alleged breaches of the

blockade were disproportionate, under the same general standards of necessity and proportionality applicable to attacks on neutrals generally.[467] In no instances are locations of these attacks relative to whatever blockade areas proclaimed, if there were any, available; no precise commentary on legitimacy of attacks on this basis can be made.

The UN Security Council did not address blockade directly; there were no UN-mandated interdictions.[468] Neither belligerent declared a blockade, as the LONW requires.[469] However, to the extent that mines belligerents laid[470] hampered access to neutrals' ports[471] and might somehow be considered related to blockade, Council Resolution 552 (1984) condemning lack of access[472] stands as a condemnation of the practice.

## Part F. Zones: Excluding Shipping, Aircraft from Area of Belligerents' Naval Operations; High Seas Self-Defense Zones; War Zones; Air Defense Identification Zones; Ocean Zones Created for Humanitarian Law Purposes

During the Tanker War, Iran and Iraq declared war zones, advising by NOTMARs and NOTAMs that any merchantmen in the zones might be attacked. Iran justified its zone on the basis of defending its Gulf coast and to assure safety of shipping. After first pledging that the Straits of Hormuz would remain open, Iran later announced that its Straits areas were a war zone, for which there were neutral State protests. Iraq said its zone (Gulf Maritime Exclusion Zone, or GMEZ) was a reprisal response to Iran's war zone declaration and that Iraq would attack any shipping in its zone, saying the zone would help discriminate among shipping in the Gulf, *i.e.*, any shipping in the zone was presumed a legitimate target.[473] Iran also conducted visit and search operations throughout much of the Gulf.[474] Iran announced or conducted naval maneuvers in its territorial waters, on the high seas, perhaps in the Strait of Hormuz, and in Saudi territorial waters.[475]

Neutrals' armed forces were also heavily involved in the waters of the Gulf and the Strait of Hormuz and the skies above them. There is some evidence Saudi Arabia may have allowed Iraqi military aircraft access to refueling on its territory. Midway through the war Saudi Arabia declared an air defense identification zone (ADIZ) over waters adjacent to its Gulf coast. Two weeks before the ADIZ proclamation Saudi Arabia had shot down an Iranian fighter over international waters.[476] The United States issued NOTMAR and NOTAM warnings to ships and aircraft about coming within certain distances and altitudes from its maritime forces on the high seas; these were later amended to omit specific distances, claiming a right to declare what I have characterized (and acronymed) as high seas self-defense zones (SDZs).[477] The US and other navies conducted naval operations, including mine clearance;[478] formation steaming and other air and surface evolutions;[479] escorting, accompanying or convoying neutral flag merchantmen

that did not carry contraband;[480] and defense of these ships and their naval forces.[481] Saudi Arabia announced a safety corridor throughout its and other Gulf States' territorial seas.[482]

This Part analyzes these issues in the LOAC context and the law of naval warfare in particular; Chapter III discussed self-defense issues,[483] and Chapter IV covered LOS aspects. Parts C, D and E of this Chapter considered issues related to visit and search, contraband and blockade with respect to attacks on and destruction of enemy and neutral flag merchantmen and aircraft.

### *1. Excluding Shipping and Aircraft from Immediate Areas of Belligerents' Naval Operations; High Seas Self-Defense Zones (SDZs)*

Although the law allowing exclusion of neutral merchant shipping and civil aircraft is fairly straightforward, principles regarding excluding neutral warships and military aircraft are less than clear. Application of UN Charter norms adds a further difficult dimension to these issues. Claims with respect to high seas defense zones (SDZs) are relatively new, but they have been implicit in the LOS authority to conduct peacetime naval operations. How SDZs interface with the LOAC right of a belligerent to exclude shipping and aircraft from the immediate area of naval operations presents further difficult questions. One more aspect of the problem has been, as for blockades, development of longer range weaponry that can expand threat zones many miles from a naval force.[484]

*a. Excluding Shipping and Aircraft from Immediate Areas of Belligerents' Naval Operations.* Custom allows belligerents to establish special restrictions, including total exclusion from waters near operations or requiring departure from the area, on neutral merchantmen and aircraft near an immediate area of high seas naval operations if hostilities are taking place or will occur in the near future, or where belligerent forces are operating, *e.g.*, conducting visit and search. These areas can include flight and submarine operations. A belligerent may not purport to deny territorial sea innocent passage access to neutral States' coasts or to close an international strait to transit or innocent passage unless another route of similar convenience is open to neutral traffic.[485] A belligerent may also impose similar restrictions on neutral merchantmen and aircraft in its territorial sea, an enemy's territorial sea where the belligerent occupies enemy coasts, or occupies an enemy's territorial sea but does not occupy the coast, consistent with LOS principles for temporary suspending innocent passage through the territorial sea and lack of a right of innocent passage in a belligerent's territorial sea.[486] A belligerent's right to restrict neutral maritime and air traffic on and over the high seas applies to high seas fishing zones; neutrals' contiguous zones, continental shelves, EEZs and fishing zones; and in the Area.[487] However, belligerents exercising this high seas right must pay due regard to neutrals' rights in these areas, including the high seas

where no contiguous zone, continental shelf, EEZ or fishing zone, or Area law applies.[488]

This customary right of restricting neutral activities does not apply to warships, naval auxiliaries, ships on governmental or noncommercial service or State or military aircraft, which continue to have complete immunity as under the law of the sea.[489] Consistent with LOS principles applying to the territorial sea and the LOS due regard principle,[490] a belligerent may ask these neutral platforms to leave the area. Consistent with LOS principles, neutral platforms should give due regard[491] to the request and a belligerent's right to restrict other neutral traffic in the immediate area of naval operations. Neutral military commanders may choose to leave a belligerent's area of naval operations, or be otherwise guided by rules of engagement, but these are matters of neutral force discretion and not a belligerent's right.[492] A belligerent's request should not be lightly denied, absent other considerations, *e.g.,* conducting one's own naval operations.

Policies allowing this "limited and transient" control over neutral merchant vessels and civil aircraft, which is a derogation from their navigation, overflight and other freedoms, are based on a belligerent's right to attack and destroy its enemy, its right to defend itself without suffering from neutral interference, and its right to ensure its forces' security.[493] On the other hand, when neutral warships, military aircraft, *etc.*, are concerned, these policies must be balanced against those platforms' navigation, overflight and other freedoms, their immunities, and the right of these neutral platforms to defend themselves and vessels or aircraft under their charge (*e.g.,* convoyed neutral flag merchantmen not carrying contraband), and a right to ensure neutral forces' security, and the security of platforms under neutral forces' charge.[494]

Consistent with customary blockade principles, a State exercising this high seas right must give notice appropriate under the circumstances, *e.g.* a naval commander's flaghoist or radio message but perhaps a commander's government NOTMAR or NOTAM if a major operation such as a Normandy-size amphibious landing is underway. The area to be cleared, or the distance to which a neutral platform must depart, should be defined with reasonable precision and should be proportional, *i.e.,* limited to that part of the high seas necessary for the evolution. If an operation has not begun, a start time should be given unless this compromises the belligerent's security. Similarly, and also consistent with not compromising the belligerent's security, notice of ending an operation should be given. Unlike blockade areas or war zones, which have definite geographic coordinates, these exclusion areas can be tied to mobile operations, unless the operation involves a relatively long-term location, *e.g.,* an amphibious landing.[495] The same principles should apply to military operations in a belligerent's territorial sea or in an enemy's territorial sea.[496]

In connection with this right of belligerent control, a belligerent naval commander may exercise control over communications of neutral civil aircraft or neutral merchantmen whose presence in the immediate area of naval operations might endanger or jeopardize these operations. A neutral civil aircraft or merchantman within that area that fails to conform to belligerent directions may thereby assume enemy character and risk capture or attack. Legitimate distress communications should be allowed to the extent that the operation's success is not prejudiced. Any transmission to an opposing belligerent concerning the belligerent's military operations, including the order to depart the area, is inconsistent with neutral duties of abstention and impartiality and renders the neutral merchantman or civil aircraft liable to capture or destruction.[497] Since a neutral warship, naval auxiliary, government ship on noncommercial service or a military or State aircraft is entitled to immunity,[498] a belligerent cannot exercise control over those platforms' communications and must give due regard[499] for these neutral platforms' rights to communicate, including their right to transmit distress messages. Due regard for an area of a belligerent's naval operations and common sense dictate that these neutral platforms should exercise discretion in what is communicated, on what frequencies, *etc.* Transmission to an opposing belligerent risks a self-defense response by the belligerent conducting the naval operation.[500] By the opposite token, if a belligerent force commits a hostile act against or attacks one of these neutral platforms after it rightly refuses to allow control of its communications, that belligerent risks a self-defense response.

A belligerent naval force may also exercise its right of self-defense against neutral forces that display hostile intent against or attack the belligerent force while it exercises a legitimate right to control an immediate area of naval operations. Thus if a neutral merchant ship legitimately ordered out of an immediate area of naval operations by a belligerent signals to a warship of its nationality requesting assistance, and that neutral warship fires on the belligerent force legitimately controlling the immediate area of naval operations that has ordered the merchantman to depart the area, the belligerent can respond in self-defense. Similarly, if a neutral warship or military aircraft observes one of its neutral-flag merchantmen legitimately ordered out of an immediate area of belligerent naval operations and fires on the belligerent naval force, the neutral platform risks self-defense responses by the belligerent. If a neutral military aircraft or warship, being asked to leave an immediate area of belligerent naval operations legitimately declared,[501] displays hostile intent or attacks the belligerent force, that neutral platform risks the belligerent's self-defense response. Where a belligerent has not legitimately declared such an area, a risk of self-defense response is also present, and lack of a legitimate claim of an area of belligerent operations may be a rejoinder to a belligerent's self-defense claim. In some cases a belligerent's claim of a legitimate area can be evaluated and decided by higher, perhaps executive level, authority. In other cases

the on-scene neutral commander may be required to evaluate and decide on the situation with advice of counsel if available and act, consistent with ROE guidance and the right of self-defense.

*b. High Seas Self-Defense Zones (SDZs).* The law of the sea provides that after due publication of a notice, a State may temporarily suspend, without discrimination in form or fact among foreign ships, the right of innocent passage for foreign ships in specified areas of its territorial sea if suspension is essential for protecting its security, including weapons exercises. A State has sovereignty over its territorial sea airspace and may totally exclude foreign aircraft. Transit or innocent passage through straits cannot be suspended, unless a treaty governing straits passage says so.[502] States cannot establish permanent security or military zones, purporting to regulate activities of other countries' warships and military aircraft, seaward from their coasts.[503] However, States may conduct high seas military operations.[504] For States concerned (*e.g.*, a State conducting a military operation, States exercising high seas freedoms, *e.g.*, freedom of navigation, fishing or overflight, States with EEZ or continental shelf operations), the LOS requires each to have due regard for others' oceans uses.[505] These LOS rules are subject to the inherent right of self-defense,[506] which gives States authority to declare a high seas defense zone (SDZ), also known as a "*cordon sanitaire,*"[507] on a temporary basis during naval forces' transit.

SDZs may be defined as a geographically limited area beyond the territorial sea including the water column, ocean bottom and airspace associated with it that a State unilaterally declares as a warning area, around its naval or air assets and within which other countries are warned of a heightened risk of self-defense response, including response in anticipatory self-defense, to attacks or hostile acts from aircraft, ships or submarines. The SDZ travels with a naval force and is not tied to geographical coordinates, as with territorial sea innocent passage suspension areas,[508] blockade areas,[509] war zones,[510] some but not all areas from which a belligerent would exclude shipping and aircraft while conducting naval operations during armed conflict,[511] or permanent security zones tied to a country's coastline and extending beyond the territorial sea, the latter of which violate international law.[512] The SDZ may or may not have time parameters, unlike rules for territorial sea innocent passage suspension areas (requiring publication of start and stop times)[513] or blockade areas (start times must be published, and when a blockade ends must also be published).[514] However, on a time line an SDZ-covered area usually will not be encumbered for long, due to a naval force's mobility.

An immediate precedent for mobility aspects of the SDZ was the UK "defensive bubble" employed as the UK task force deployed to the Falklands/Malvinas Islands during the 1982 war.[515] A close analogue is the well-established right of all States, belligerent or neutral, to conduct naval operations on the high seas, which

carries with it the right of self-defense.[516] The difference between these areas is one of notice in all cases for the SDZ and a warning to all States, not just a belligerent, of the right of self-defense in the SDZ notice, which a naval force has under the law of the sea in any event. By contrast, some naval operations the LOS permits are announced through NOTAMs and NOTMARs, *e.g.*, gunfire exercises in designated areas, while others are not, *e.g.*, flight or antisubmarine warfare exercises. In still other cases a naval force, perhaps steaming in formation, dispersed, or independently as separate units, may exercise high seas freedoms like any merchantman or civil aircraft;[517] these evolutions are almost never published, a major exception being flight plans for some aviation. Security concerns may dictate that no notice be published for areas where a force will be operating.[518]

The primary sources of an SDZ claim are the right of self-defense and the LOS, which is subordinate to the right of self-defense.[519] A right to establish an SDZ is limited to areas beyond the territorial sea and straits passage for the declaring State.[520] The further problem then arises as to conflicting uses of the high seas and straits navigation. Here LOS principles of shared high seas use, restated in the LOS due regard principle,[521] and the rule that straits passage cannot be impeded,[522] come into play. A State claiming an SDZ cannot operate so as to deny others' high seas rights, *e.g.*, to navigation or overflight freedoms, a coastal State cannot claim an SDZ so as to deny others their straits passage rights, and a naval force in straits passage cannot use an SDZ claim to deny coastal States their rights or other States' platforms their rights to pass the strait. Similarly, others using the high seas or straits, or straits coastal States, must have due regard for forces operating under an SDZ notice.

If an SDZ-publishing State exercises its right of self-defense, that exercise is governed by necessity and proportionality principles. Under no circumstances can an SDZ notice be a basis for free-fire attacks or reprisals involving use of force on neutral shipping or aircraft.[523]

Unless an SDZ notice says otherwise, publishing an SDZ notice does not limit that State's self-defense responses. For example, although an SDZ notice warns of a possibility of a self-defense response if an aircraft approaches within a stated distance, that does not bar self-defense responses at greater distances if the aircraft has launched an attack or has displayed hostile intent so as to trigger a self-defense right. A platform covered by an SDZ notice may respond to attacks or threats not covered by the notice, *e.g.*, responding to a submarine displaying hostile intent or a submarine attack when the SDZ notice covers only air or surface ship threats or attacks. A State whose platform is covered by an SDZ notice may respond in self-defense to threats to or attacks on other ships or aircraft, *e.g.*, a convoying warship covered by an SDZ notice may respond to threats to or attacks on a convoyed merchantman, a nearby unescorted merchantman of the same flag as the warship,

or a sister warship not involved in the convoy, even though these vessels are not covered by the SDZ notice.

An SDZ notice, unless it limits it, does not affect rights of collective self-defense, either by an SDZ notice-covered platform coming to the aid of a platform covered by a formal or informal self-defense arrangement, or a platform of a State aligned in a formal or informal self-defense arrangement with an SDZ notice-covered platform.[524]

Thus although use of SDZ notices seems to have begun with the Tanker War as a gloss on UK practice during the Falklands/Malvinas War, and earlier during Nyon Arrangement operations (1937),[525] their use, subject to the above-stated limiting principles, is consistent with the UN Charter and the law of the sea. A State conducting an attack based on unlawful use of an SDZ, *e.g.*, a country using an SDZ to establish a free-fire zone, risks self-defense responses, nonforce reprisals or retorsions by a State whose platforms are threatened or attacked under a claim based on an SDZ, and nonforce reprisals or retorsions for declaring but not using illegal SDZs.[526]

As the Falklands/Malvinas War suggests, belligerents may declare SDZs to advise their self-defense rights relative to non-belligerents, *i.e.*, neutrals. In this situation the LOAC applies to interactions between belligerents, but the law of self-defense applies to belligerent-neutral interactions. A belligerent considering declaring an SDZ to advise of self-defense intentions must weigh the SDZ notice, which may advise belligerents of its forces' whereabouts, against a factor of warning neutrals (and perhaps belligerents, as a courtesy to allied belligerents and as a threat to opposing belligerents who may wish to conserve military assets) of risks incident to coming near its forces. As with neutrals' SDZ declarations, international law does not require belligerents to operate under an SDZ. The inherent right of self-defense, subject to limitations, if any, in an SDZ notice applies in this situation with respect to neutrals. A belligerent does not gain any LOAC or self-defense rights by publishing an SDZ; *e.g.*, an SDZ declaration cannot give a belligerent a free-fire area within its geographic parameters.

Rules of engagement have no bearing on an SDZ declaration; ROE are guidance principles for a military force within its own units and personnel. Forces may or may not operate under ROE whether or not an SDZ has been declared. ROE should take SDZ standards into account, however. ROE and SDZs are independent concepts.

*c. Other Self-Defense and UN Charter Issues for SDZs.* A final set of issues deals with conflicting self-defense claims. Suppose, hypothetically, a naval force of country A issues NOTAMs and NOTMARs publishing a legitimate SDZ[527] for its forces in a high seas area whose waters are a scene of increasing tension. The NOTMARs and NOTAMs include defending neutral convoys carrying cargoes

not part of any State's war-fighting or war-sustaining capability, *e.g.*, medical supplies that could be used for civilians or armed forces personnel.[528] Country B attacks country C. Country A declares neutrality. Country C, as a self-defense measure, begins conducting naval operations and wishes to control a high seas area for these operations.[529] Country A's neutral forces are operating in the area, and to comply with the country C exclusion order will implicate A's announced self-defense measures. What principles guide this hypothetical situation, where there are conflicting self-defense claims that may have *jus cogens* status?[530]

Under these circumstances the proper response may lie in a due regard analysis of claims. The relative importance of each self-defense claim should be assessed. If, *e.g.*, country C's claim of control involves visit and search of merchantmen suspected of carrying materials for mass destruction weapons destined for its enemy, that claim should have priority over the country A claim, assuming the convoy is on a routine voyage to supply a neutral with replenishment material for its hospitals, and there is no urgent need for them. If country A's medical supply cargo convoy is destined for emergency humanitarian relief in country D, at war with country E which has authorized the shipment to country D,[531] and country C's naval operation is a routine neutral shipping visit and search, the balance tips in favor of the country A convoy. Where policies appear equal, the principle of first in time, first in right should apply to give the country A convoy primacy. Country A's SDZ claim was asserted before country C's self-defense claim based on LOAC principles for belligerent control of an immediate area of naval operations.

These are the "easy" cases, and real-world situations will be much more complex. States confronted with this situation should try to avoid escalation and instruct military commanders accordingly, perhaps through ROE. ROE might give advance guidance, although commanders retain the right to defend their forces.[532] The more difficult dilemma will be respective military commanders confronted with these circumstances, particularly where ROE give no guidance. Local communications should help. In the convoy hypothetical, assuming no self-defense claim from country C's government, the on-scene country C commander must, under principles governing control of the immediate area of naval operations, communicate with the convoy commander.[533] Similarly, the country A convoy commander must communicate the nature of the convoy.[534] At this point the respective commanders must use judgment, as they do daily on much more routine naval matters. Other situations may not be resolved so easily, *e.g.*, where aircraft are involved, because of relatively short decision time.

Another hypothetical situation might involve interaction between two belligerents in separate wars with different belligerents, and each belligerent wishes to control the immediate area of naval operations in separate evolutions that overlap in terms of ocean areas.[535] Yet another is the situation where two self-defense

zones overlap, a rarer circumstance given (thus far) the relatively small ocean areas claimed. The same kinds of analysis should be employed here as well.

If a belligerent proclaims an SDZ, the same rules apply between it and other countries not party to its war with opposing belligerents. As between allied belligerents, opposing belligerents and neutrals involved in that war, however, the LOAC will apply. In the latter situation the SDZ operates as an LOAC zone.

Under the hypotheticals posed in this sub-Part, as in other situations discussed in sub-Part b, ROE and the SDZ are independent considerations. States may operate under ROE without proclaiming an SDZ, and *vice versa*. An SDZ - proclaiming State should be sure that its ROE and SDZ are congruent, however.

The foregoing assumes no paramount Security Council decision, perhaps coming after the self-defense claim(s); in the latter case the decision prevails. Practice under the decision should follow these principles insofar as the letter of the decision does not give directives. If the issue is a belligerent's control of the immediate area of naval operations under the law of naval warfare, a Council decision also has priority. Similarly, practice under the decision should be informed by LOAC principles insofar as there is no conflict between them and the decision.[536]

International law does not require notice of an SDZ. States' naval forces may assume defensive, operational and armed conflict postures without announcement to anyone on the high seas, except where other principles, *e.g.*, directions to ships and aircraft to stay outside the immediate area of naval operations during armed conflict,[537] require notice and/or other action. If a State publishes an SDZ notice, a disclaimer analogous to the US Tanker War NOTAMs and NOTMARs, which warned mariners of the Iranian and Iraqi zones without expressing opinion on their legal validity, may be included.[538] Unless the contrary is intended, an SDZ notice announcing risks or warnings should advise that stated force actions are only among the options the naval force may exercise.

The foregoing legal analysis expresses no opinion on the strategic or tactical desirability of announcing an SDZ. To proclaim an SDZ declares a force's approximate location, more so than radio communications intercepts; this may be less than desirable from an operational perspective. On the other hand, an SDZ announcement may have advantages, *e.g.*, in psychological operations to warn an adversary of strong naval presence, or comity in advising a co-belligerent of the proclaiming State's intentions, but these must be balanced against the disclosure problem. Under international law there is no reason why a State cannot declare a "selective" SDZ, *e.g.*, announcing movement of some forces but not discussing covert operations, *e.g.*, those with submarines. Nor must an SDZ announcement publish a list, inclusive or otherwise, of options a force may employ.[539]

*2. War Zones*

During the Russo-Japanese War (1904-05) Japan declared the first of what have come to be known as war zones.[540] Japan declared them before the war; at the war's outbreak 12 or more of these areas were designated, the boundaries of which extended from Japan's coast into the high seas by up to seven miles. The United States designated similar areas after entering World Wars I and II.[541] In both cases the coastal State claimed a right to exclude merchantmen on the basis of self-defense. Commentators have said establishing these limited zones was legitimate under international law.[542] These defense areas were historical antecedents of later war zone claims.[543]

During the Spanish Civil War, the 1937 Nyon Arrangement divided much of the Mediterranean Sea into areas where danger from unknown submarines, or surface ships or aircraft, existed for neutral merchant ships. The UK Admiralty ordered that a submarine detected within five miles of a torpedoed merchantman to be hunted and sunk; *i.e.*, a five-mile war zone existed around an attack datum. Later ROE allowed attack on a submarine submerged within a specific sea area, *i.e.*, a war zone coupled with exercise of an anticipatory right of self-defense was created.[544] Nyon Arrangement orders were, in effect, a forerunner of the moving "defensive bubble" SDZ.[545]

In World War I, and again in World War II, both sides proclaimed war zones over wide areas, sometimes coupling them with policies of unrestricted submarine warfare or starvation blockades, and justifying them as reprisals for prior illegal acts of the enemy. This species of war zone was also a result of new and different methods and means of warfare, *e.g.*, the submarine and the aircraft. During and after the wars these zones were condemned as excessive;[546] although this gave zones a bad name, like using the word reprisal, the concept of a valid zone remained.

States have employed a war zone concept in some conflicts after World War II. During the Korean War the UN Command proclaimed a Sea Defense Zone (SDZ) in 1952, rescinding it a year later during armistice negotiations. The UN Command established the SDZ to "prevent . . . added attacks on the Korean Coast; secur[e] . . . the Command sea lanes of communication and prevent . . . introduction of contraband or entry of enemy agents into [the] Republic of [*i.e.*, South] Korea."[547] A blockade had been proclaimed in 1950 at the beginning of the war around North Korea's coast;[548] the SDZ affected South Korea's coast.

During the Algerian civil war France declared a 20 to 50 kilometer (11-28 mile) customs zone off Algeria for small craft, seeking to visit and search ships suspected of running war materials to rebels in Algeria. High seas interceptions occurred off Algeria but also 45 miles off Casablanca in the Atlantic Ocean and in the English Channel. France justified her actions on self-defense grounds. Flag States of vessels involved protested vigorously; compensation was paid for some ships wrongfully detained.[549] During the 1971 India-Pakistan war the Bengal Chamber of

Commerce advised neutral shipping it would not risk attack in the Bay of Bengal if it did not approach within 40 miles of the coast between dusk and dawn.[550] During the 1973 Arab-Israel conflict, shipping was warned about entering the region of conflict, at first with respect to Egyptian and Israeli territorial waters, but later parts of the Mediterranean Sea and Egyptian, Libyan and Syrian ports were listed.[551] During the Vietnam War, Operation Market Time patrol areas, originally part of a 12-mile defensive sea area, eventually extended to over 30 miles off the South Vietnamese coast.[552] These areas were not tied to a coast, like North Korea's security zone,[553] but were moving zones within which patrol vessels might operate. The concept of a "*cordon sanitaire,*" *i.e.,* an area around a peacetime naval force analyzed in Parts F.1.b-F.1.c, also developed at this time.[554]

In 1982's Falklands/Malvinas war Argentina and the United Kingdom proclaimed war zones after Argentina invaded South Atlantic islands, the Falklands/Malvinas group and others over which Britain exercised sovereignty, a claim Argentina disputed.[555] The first UK proclamation declared that Argentine warships and naval auxiliaries found in a Maritime Exclusion Zone (MEZ), a 200-mile radius of the islands, would be subject to UK attack. Argentina followed with a 200-mile defense zone (DZ) off its coasts and around the islands. The United Kingdom also proclaimed a Defensive Sea Area, a defensive bubble around its task force, then underway for the South Atlantic, warning that approaches by Argentine warships or naval auxiliaries, or surveillance by Argentine civil or military aircraft, would result in "appropriate" UK action. When fighting started in the islands, the UK changed the MEZ to a Total Exclusion Zone (TEZ), purporting to exclude all vessels and aircraft supplying the Argentine war effort. The TEZ area was the same as the MEZ; the declaration said any ship or aircraft, military or civil, found within the zone without UK authority would be regarded as operating to support the Argentine occupation and would be regarded as hostile. Like earlier UK announcements, the UK TEZ declaration said it was without prejudice to the UK's general self-defense rights under the UN Charter.[556]

Two days after the TEZ proclamation, the UK submarine *Conqueror* sank the Argentine cruiser *General Belgrano* with heavy loss of life 30 miles outside the TEZ; *Belgrano, inter alia* armed with Exocet surface to surface missiles, had appeared to turn in the direction of UK forces well over the horizon. The UK government justified the sinking on its MEZ warning that any Argentine ship or aircraft threatening the UK force would be dealt with.[557] The UK also boarded and sank *Narwal,* an oceangoing Argentine trawler with communications equipment and an Argentine communications officer aboard that had been shadowing the UK formation.[558] Justified on the basis of the threat language in the TEZ proclamation,[559] the *Narwal* capture was also lawful under the LOAC.[560]

Argentina then declared all South Atlantic Ocean waters a war zone, threatening to attack any UK ship therein. Perhaps the only neutral ship Argentina

attacked in the zone was *S.S. Hercules*, a Liberian-flag, US interests-owned tanker in ballast and steaming 600 miles off Argentina and 500 miles from the islands.[561] The United Kingdom responded to the Argentine proclamation by announcing that because hostile forces could cover distances involved in resupplying Argentine forces on the islands, particularly at night and in bad weather, UK forces finding any Argentine warship or military aircraft more than 12 miles off the Argentine coast would consider it hostile.[562] Because Argentina faces much of the South Atlantic below Uruguay and Brazil, this meant a substantial overlap of the last Argentine-declared area, which presumably extended from the Equator to Africa and Antarctica.

The war ended two months later, but the United Kingdom continued its TEZ. Ten days after hostilities ended, however, the United Kingdom lifted its TEZ but warned Argentina to keep military ships and aircraft away from the islands, declaring a 150-mile Protection Zone (PZ) around the islands. Argentina was required to seek UK agreement before Argentine civil aircraft or merchantmen went into the PZ.[563] The PZ continued for some time thereafter.

The Argentina-UK war is important for the Tanker War; it occurred in 1982, just before belligerent attacks on Persian Gulf shipping intensified. It was also the most recent intensive use of war zones since World War II. Commentators have analyzed the conflict from the perspective of the zones as proclaimed and employed; it is therefore appropriate to synthesize principles emerging from this war. In some cases the belligerents were correct in their actions, sometimes they were correct for the wrong reasons, and in a few cases there were actual or potential international law violations.

To the extent the UK MEZ and TEZ and the Argentine DZ declared opposing naval forces were subject to attack within the zones,[564] the claims were within actions international law permits. Attack on or capture of opposing naval forces, once there is a state of war, can occur anywhere except within neutral waters, and then under special circumstances.[565] The initial declarations were thus no more than declarations of intent to do what the law allowed. Under either theory, *i.e.*, limitation because of the MEZ or TEZ or the general law of naval warfare, UK interception of *Narwal* was proper.[566] Whether 200 miles was a reasonable distance is less than clear from facts at hand; later Britain declared the 150-mile PZ, but this was after hostilities ended, and it cannot be said whether 200 miles during the war was sufficient, any more than it can be said the 150-mile PZ was reasonable at the end. Argentina also included its territorial sea within its DZ, and the MEZ/TEZ and the DZ necessarily included these waters of the islands. Argentina could validly declare a DZ for its mainland territorial waters under the law of the sea, but only for a limited time.[567] It could make a similar claim under the LOAC for territorial seas on the mainland and around the Falklands/Malivinas that were immediate areas of military operations.[568] Britain, claiming sovereignty over the islands

(a claim Argentina disputed), could likewise assert LOS exclusion rights for the islands' territorial seas; the United Kingdom could also exclude neutrals from parts of the territorial seas around the Falklands/Malvinas and Argentina's mainland territorial sea while conducting military operations. Any Argentine territorial sea exclusion claim under the LOS for the Falklands would have been invalid, if it is assumed Britain had sovereignty over the islands.[569] The UK reservation of self-defense rights was proper but not necessary, except perhaps as a saving clause, or as a warning to third States. Argentina could have validly asserted the same claim. The right to self-defense is paramount.[570] Britain could reserve these rights as against others, *e.g.,* in hypothetical situations that Argentina might acquire an ally that mounted an attack against Britain, or if a future decision on the war as then fought would say that UK attacks on Argentine assets elsewhere were valid under this theory. The reality is that these assets would have been subject to attack, not on a self-defense basis, but pursuant to the LOAC.

The UK defensive bubble[571] was also proper; it had precedent under the Nyon Agreement and other declarations,[572] in that it was limited to a certain ocean area. Like the Nyon Agreement and similar procedures, the bubble was mobile, but that was no cause for concern; all high seas mariners have radar today, and they could have observed the task force, undoubtedly steaming in formation, on their screens. Moreover, the UK task force would have seen neutral ships and aircraft on its sensors and would have warned them if they got too close. A neutral ship blundering into the formation and aware of the bubble through a NOTMAR would be at risk, but mutual visual identification and signals were available.

The UK TEZ declaration that any ship or aircraft within the zone would be considered hostile could have come close to the line of illegality.[573] Britain could declare a presumption of hostility, but even here belligerents must observe necessity and proportionality principles as against vessels or aircraft that are not proper targets. Argentine air and naval assets, including ships and aircraft supplying its war effort, continued to be proper targets, but the UK blanket declaration meant that before attacking in the TEZ, Britain had to determine that the target was proper under the LOAC or under self-defense principles in the case of non-Argentine platforms. There is no indication that Britain did not do so. The self-defense statement analysis is the same as under the MEZ.[574] The *Belgrano* sinking 40 miles outside the TEZ was a legitimate act under the law of naval warfare, TEZ or no TEZ, and whether *Belgrano* appeared to turn toward the UK task force or not. There is no indication that Britain had declared it would not attack Argentine military forces elsewhere, and certainly no indication it would not attack ships like *Belgrano* if they appeared to be moving toward the UK force with ship-killing Exocet missiles aboard.[575]

The Argentine war zone declaration covering the entire South Atlantic[576] was disproportionate; in theory this stretched from the shores of South America below

Brazil and Uruguay to the continent's southern tip and across to Africa. The Argentine attack on the neutral tanker *Hercules* was unlawful because it was an attack inside a disproportionate war zone; even if the zone had been proportional and necessary, it is questionable whether Argentina observed proportionality and necessity in the attack, given the size of the Argentine navy, threats to it, its capacity for enforcement in all these waters, and the relative size of the conflict.[577] Neutral ships and aircraft did not lose protections just because they passed through a war zone.[578] The UK declaration came close to saying the same in terms of area, although limited to a presumption of hostility for Argentine flag aircraft and ships.[579] Under these circumstances, all the UK declaration did was to repeat LOAC standards for dealing with these platforms, wherever found on the high seas, and the declaration to that extent was lawful.

Britain could legitimately continue its TEZ after the end of hostilities;[580] the posture of the conflict being cooled down at that point was the same as when the conflict was heating up, and the UK task force organized and proceeded toward the islands. There is no indication the defensive bubble was abandoned; Britain could continue this proclamation, and indeed can declare a bubble, reasonable in area and the time it will take a UK force of any size to transit an area, to this day, anywhere to assert rights of self-defense.[581] As noted above, whether the 150-mile PZ was reasonable in area under the circumstances can only be determined by operational considerations, for which the record does not supply information. However, the UK PZ could continue after hostilities and until final resolution of the confrontation; if visit and search, blockade or a war zone may be maintained during an armistice or other cease-fire absent belligerents' contrary agreement,[582] a protection zone after the end of possible hostilities and before restoration of peace can likewise be continued. Neither a postwar TEZ nor a PZ can purport to operate like a security zone of the high seas, which would exclude all ships and aircraft seeking to exercise high seas rights. Security zones so structured are unlawful.[583]

The final problem of all these zones is relationship between them and LOS-permitted zones. It was unfortunate that the TEZ and the DZ coincided with the 200 miles the law of the sea allows for an EEZ.[584] The two concepts are mutually exclusive.[585] It was not necessary, either as an LOS or LOAC matter, that the two areas overlap geographically, and this is illustrated by the later UK PZ, 150 miles in breadth. A belligerent's assertion of a war zone cannot bolster an EEZ declaration for the same area, and an EEZ claim cannot bolster a war zone claim for the same area. Opposing belligerents must take into account EEZ installations, *etc.*, in necessity and proportionality calculations, however. Although no recent war has involved contiguous zone, continental shelf, fishing zone, *etc.*, demarcation lines, the same considerations apply. As to parts of a war zone in the territorial sea, under the LOS any State including a belligerent can limit neutrals' innocent passage temporarily.[586] The same rule applies during armed conflict, although the time

during armed conflict near shore may be different, and belligerents may also totally exclude neutral ships and aircraft from immediate areas of naval operations.[587] An opposing belligerent's military forces, including vessels or aircraft supporting the war effort, may be attacked there.

Argentina could not have closed its Straits of Magellan waters to neutral shipping; the treaties covering the Straits have no provision for it. Under both the LOS and the LOAC, these straits had to stay open.[588] If UK forces had transited the Straits (they did not use them), Argentina could not have attacked them in Chilean territorial waters in the Straits, nor could either belligerent have purported to close the strait to neutral navigation, either by sinking the other's assets to block passage, or to have closed the Straits by declaration of a war zone or an immediate area of naval operations. A naval engagement, or an exercise of self-defense (which might have occurred if a third State attacked either belligerent's forces in the Straits) would have invoked necessity and proportionality principles, which might have been the same or different for the law of armed conflict or self-defense,[589] depending on the circumstances. In either case necessity and proportionality considerations would have required consideration of neutrals' straits transit rights during war or peace. All of this is theoretical, of course, because no military actions are reported to have taken place in the Straits during the brief war.

In summary, then, it appears that the Falklands/Malvinas war zones were lawful, except as to the Argentine declaration for the entire South Atlantic and its attack on *Hercules*.[590]

A central purpose of these zones has been to avoid committing large forces to a task of cutting off enemies' seaborne and air commerce,[591] or for a measure of sea control where a belligerent has only limited forces to bring to bear on controlling enemy commerce. Undoubtedly they will be used more frequently as navies downsize in the wake of the end of the Cold War. Midway through the Tanker War, Fenrick attempted to sum up the developing norm for war zones:

> If belligerents use [war] . . . zones, they should publicly declare the existence, location, and duration of the zones, what is excluded from the zone, and the sanctions likely to be imposed on ships or aircraft entering the zone without permission, and also provide enough lead time before the zone comes into effect to allow ships [and one would add, aircraft] to clear the area. As with blockades, "paper" zones are insufficient. Belligerents declaring zones should deploy sufficient forces to the zone to make it "effective," that is, to expose ships or aircraft entering the zone to a significant probability of encountering submarines, ships or aircraft engaged in enforcing the zone. All militarily practicable efforts should be made to employ minimum sanctions, such as seizure instead of attack on sight. Similarly, all militarily practicable measures should be taken to ensure proper target identification and to ensure that only legitimate military objectives, such as military aircraft, warships, and ships incorporated into the [opposing] belligerent['s] war effort, are attacked. The emphasis on what is militarily practicable is important. Sometimes the

> minimum practicable sanction will be attack on sight; sometimes ships or aircraft that are not legitimate military objectives will be attacked because of errors in target identification. There must be a proportional and demonstrable nexus between the zone and the self-defence requirements of the state establishing the zone.[592]

Moreover, the same body of law, *i.e.*, the LOAC with its limitations (*e.g.*, necessity and proportionality, exemption of some ships, *e.g.*, coastal fishing craft, from attack as long as they do not contribute to the enemy war effort), and the overarching right of self-defense under the UN Charter, applies inside and outside the zone.[593] A zone's extent, location and duration and measures imposed may not exceed what is required by necessity and proportionality,[594] and should take into account one rationale for the zone, promoting safety of neutral merchant shipping and aircraft by keeping them a safe distance from areas of actual or potential hostilities.[595] If it is no longer necessary that a surface ship be on station to enforce a blockade, the same rule is true for a war zone. The only requirement is for forces sufficient to enforce the zone.[596]

The zone's location and extent need not coincide with other zones established under the LOS or the LOAC. For example, although some Falklands/Malvinas war zones extended about 200 miles from the South American mainland and the islands,[597] the same permissible distance the LOS allows for an EEZ,[598] war zone principles may dictate a zonal width broader, narrower or the same as LOS limits. The same is true for the law of naval warfare; for example, a blockade area might be the same as, greater than, or less than, a war zone laid on top of the area.[599] National security planning suggests that a war zone declaration should proclaim a zone different from other zone lines in the area, *e.g.*, those for the EEZ, commensurate with necessity and proportionality requirements. If a zone line must coincide with an LOS zone line, a declarant should state in the war zone proclamation that war zone lines are independent of any other zones, and that the war zone declaration should not be taken as an assertion of any other, *e.g.*, rights for an EEZ, and that declarant's EEZ rights are not affected in any way by the war zone declaration. This should help avoid other States' protests that the war zone proclamation is, in effect, claiming rights which when combined with other claims amounts to a security zone like North Korea's unlawful claim.[600]

Due regard[601] must be given neutrals' rights to uses of the oceans.[602] Necessary safe passage through the zone for neutral vessels and aircraft must be provided where the geographic size of the zone significantly impedes free and safe access to a neutral's ports and coasts, and in other cases where normal navigation routes are affected, except where military requirements do not permit it.[603] A war zone cannot bar straits passage, access to innocent passage through a neutral's territorial waters, or access to neutrals' territorial seas.[604] A belligerent is not absolved of its duties under the LOAC and international humanitarian law by establishing a war zone.[605] "In short, an otherwise protected platform does not lose that protection by

crossing an imaginary line drawn in the ocean by a belligerent."[606] Although belligerents must publish restrictive measures so that neutrals will know what is expected of them, publication of enforcement measures is not necessary, although a belligerent may choose to do so.[607] A neutral's complying with a belligerent's orders in the zone cannot be construed as an act harmful to an opposing belligerent.[608] These belligerent measures can include only those essential for passing through the zone, and do not include complying with a belligerent's order that effectively converts a neutral into part of a belligerent's war effort.[609]

UN Security Council decisions can override these principles, to the extent a Council resolution is in point.[610] These considerations apart, and despite some commentators' and countries' objections,[611] State practice before and after World War II confirms war zones' lawfulness if properly noticed, properly configured in duration and area, and properly employed so as to not violate universally-accepted principles of necessity and proportionality during armed conflict.[612]

*3. Air Defense Identification Zones (ADIZs)*

States may bar foreign aircraft or regulate their entry into national airspace, which includes the territorial sea as part of national sovereignty. Analogous to the law of the sea, the ICAO Convention allows countries to establish prohibited areas in their territories, over which foreign flag aircraft may not fly. Unlike the LOS, these prohibitions can be permanent. Aircraft flight through straits cannot be suspended temporarily or permanently.[613] Since this aspect of the territorial sea is also subject to the LOAC through LOS other rules provisions,[614] a belligerent may apply the LOAC to its territorial sea airspace. Any State, belligerent or neutral, has a right of self-defense of this airspace as well as its land territory, territorial waters and inland waters below the airspace.[615]

Belligerents and neutrals have a customary right to establish air defense identification zones (ADIZs) in international airspace, anchored to their territorial sea airspace, to establish reasonable rules of entry into their territory. The legal basis for an ADIZ is a nation's right to establish reasonable conditions for entry into its territory.[616] An ADIZ is not analogous to a sort of contiguous zone for the air, giving a coastal State a right to police airspace above that part of the high seas outside a contiguous zone. (Coastal States may, of course, police airspace above a contiguous zone for activities, *e.g.*, drug smuggling or customs violations, if the LOS permits such action and that State has laws claiming jurisdiction over such activities.)[617] An ADIZ cannot be a sovereignty claim over high seas airspace; freedom of navigation and overflight are high seas freedoms.[618] An ADIZ does not stand in the way of high seas freedoms.[619] An ADIZ is a reference area for initiating identification procedures for aircraft on a course that will penetrate an ADIZ State's national airspace.[620] States cannot combine an ADIZ proclamation with other LOS rights, *e.g.*, contiguous zone, EEZ, fishing zone, continental shelf, *etc.*, claims, to assert

greater rights over an ocean area, *e.g.*, combining an EEZ claim with an ADIZ claim to assert sovereignty over a high seas area. Each claim is separate in rights that can be asserted and cannot be thus lumped together. A proclamation for these rights may assert some or all of them in the same document, but claims for an ADIZ and LOS rights must be separately stated.

The ADIZ also differs from aircraft warning zones, which are legitimate and may be declared incident to military exercises on, under and over the high seas, which purport to warn but not to exclude,[621] or warnings concerning belligerents' immediate area of naval operations,[622] blockade areas,[623] SDZs[624] or war zones.[625]

An ADIZ can be an incident of self-defense, including anticipatory self-defense, in that entry presupposes communication with an aircraft that proposes to enter, by its identifying itself as it proceeds toward the ADIZ State or by a challenge and response system between an ADIZ State and an approaching aircraft. If an incoming aircraft displays a threat, *i.e.*, hostile intent, or begins hostile action amounting to an attack, an ADIZ State may initiate self-defense responses, including interception and anticipatory self-defense, subject to principles of necessity and proportionality and rules against attacking certain aircraft.[626] A belligerent may use its ADIZ during wartime to identify and intercept incoming enemy military aircraft and attack them, observing principles of necessity and proportionality, such that neutral States' aircraft, ships, persons or property that are not proper objects of attack; or enemy aircraft, ships, persons or property that are not proper objects of attack; are not endangered.[627] An ADIZ cannot be a justification for self-defense or belligerent attacks, however, any more than proclaiming, *e.g.*, a war zone can justify indiscriminate attacks.[628] The ICAO Convention has recently been amended to prohibit States from using weapons against civil aircraft, and in the case of civil aircraft interception, action so that lives of those on board and the safety of the aircraft cannot be endangered.[629] This does not detract from a State's inherent right of self-defense, but it does establish conditions of necessity and proportionality if a civil aircraft is involved.[630] Similarly, the amendment establishes conditions of necessity and proportionality in LOAC situations.[631]

Thus far the only requirements for a valid ADIZ are notice, claim of an area of international airspace for this purpose, and that the zone has been established for aircraft identification. ADIZs thus far have been relatively permanent in nature, but if a State modifies or ends an ADIZ, that should be notified as well. In that regard, ADIZ minimum requirements are similar to those for other zones.[632]

Analogous to the law of the sea, air law recognizes an exception for aircraft entry in distress. During peacetime, States must allow entry of any aircraft in distress.[633] During war neutrals must allow belligerent aircraft in distress entry, but their crews and the aircraft must be interned for the duration of the war; civilians must be allowed to return home.[634] Belligerents' aircraft entering an opponent's territory in distress may be captured or destroyed, and the crews made prisoners of war,

except neutral passengers who do not contribute to the war effort, who must be repatriated.[635]

*4. Ocean Zones Created for Humanitarian Law Purposes*

Humanitarian law allows establishing special hospital zones and neutralized zones by the parties' agreement. These zones may be on belligerents' territory and, "if the need arises," in occupied areas. A belligerent may propose establishing a neutralized zone to the enemy through a neutral country or a humanitarian organization, *e.g.*, the ICRC, in combat areas for sheltering wounded and sick and civilians playing no part in hostilities. A zone must be stated in a written agreement, which must reflect geographic area, zone administration, food supply and zone supervision.[636] Since belligerent territory and occupied areas can include the territorial sea as part of a belligerent's territory or a belligerent's occupied territory, these zones can include sea approaches to them, *e.g.*, landing facilities for a shoreside hospital.[637] (Hospital ships and similar craft, unless they contribute to the war effort, carry their exemptions with them whether they are on the high seas or elsewhere, *e.g.*, at a dock in territorial waters.)[638] Humanitarian law treaties do not provide for similar zones on the high seas. However, during the Falklands/Malvinas War, at Britain's suggestion the belligerents agreed on a high seas zone in addition to a neutralized zone in the center of the city of Stanley in the islands. The high seas zone, called a "Red Cross Box," was 20 nautical miles in diameter and north of the Falklands/Malvinas Islands. Argentine and UK hospital ships were stationed in the Box. Its primary purpose was exchange of sick and wounded. The Box agreement was not in writing.[639] Since 1982 no other high seas areas have been so designated.

The *San Remo Manual* suggests the possibility of establishing a high seas area for humanitarian purposes: "[P]arties to the conflict may agree, for humanitarian purposes, to create a zone in a defined area of the sea in which only activities consistent with those humanitarian purposes are permitted." Perhaps recognizing the informality of communications at sea, the *Manual* would not insist on a written agreement. Once established, the zone does not have to exist indefinitely but for the time agreed upon. No activity forbidden by the agreement, or inconsistent with the zone's purpose, should be conducted, *e.g.*, using the zone as a refuge for combatant vessels like submarines. Military craft, *e.g.*, helicopters, can traverse the zone to ferry sick and wounded.[640]

The *Manual* proposal is progressive development, not a customary norm. However, the idea has merit and should be followed in future wars. Like agreements on hospital and neutralized zones ashore, the agreement should be in writing if at all possible and should spell out terms analogous to those for shoreside zones.[641] Today, despite the fog of war inevitably accompanying armed conflict, worldwide communications (*e.g.*, facsimile for signed agreements) are such that belligerents

should be able to agree in writing, preferably government to government, rather than relying on naval commanders at sea who will have more pressing matters at hand.[642] Naval commanders should be consulted, of course. Location of the Box or any similar zone, its duration including whether it will continue during an armistice or other cease-fire, and the agreement's terms including its relationship with other zones (*e.g.*, war zones or ADIZs, discussed in Parts F.2-F.3), should be published, particularly by NOTAM and NOTMAR, also another omission of the *Manual* formula. Belligerents might consider language similar to that used in excluding neutrals from the immediate area of military operations, permitted as discussed in Part F.1.a, to encourage other countries' shipping to stay out of the Box and its vicinity, to avoid complicating situations. The agreement should consider the due regard principle, discussed in Part A, to assure other high seas users' rights are not unduly compromised.

Further, there seems no reason why neutrals cannot establish a Box, with belligerents' agreement, to succor sick, wounded and civilians who do not take part in the conflict. Given the likelihood of relatively small sea wars like the Falklands/Malvinas conflict and downsizing among the Earth's navies in the future, it is quite possible that many belligerents may not have resources (*e.g.*, hospital ships) for a Box although they would wish to establish one, and that other countries may have these assets and a willingness to deploy them to alleviate suffering and dislocations during the war. Military commands might prepare Box agreements in advance of any conflict, to be sure they are complete and ready for rapid use if armed conflict and the need for a Box or similar zone arise.

*5. The Tanker War*

There are no recorded belligerent claims to exclusion of neutral shipping from the immediate area of belligerent naval operations.

The United States proclaimed what amounted to SDZs in its NOTAM and NOTMAR warnings and its reversion to "zone defense" after the 1988 cease-fire.[643] US NOTAM and NOTMAR warnings referred to a specific area in the Gulf but did not mention any specific naval units; they warned of dangers incident to approaching US naval forces.[644] These warnings were lawful, in that they notified others of special dangers incident to approaching too close to US forces, *e.g.*, self-defense responses,[645] much as NOTAMs and NOTMARs notifying high seas users of naval maneuvers, like those Iran announced during the Tanker War, which were lawful high seas uses but not lawful in neutrals' territorial seas or in straits if straits passage would be impeded.[646]

The US SDZ claims for particular areas in the Gulf, at first limited to relatively small areas around its forces, and later redefined with no specific areas, appear reasonable in the context of the war. To be sure, there were mistaken firings on, *e.g.*, dhows and fishermen coming close to US forces and the Airbus, but there is no

evidence the United States violated necessity and proportionality principles, given information available at the time, or knowingly attacked ships or aircraft that were not lawful targets under the LOAC. These were situations of tragic collateral and other damage incident to self-defense responses, for which the United States paid compensation (without admitting fault, a common practice in tort settlements and releases in the common law) for some and probably all damage claims.[647] Although there appear to be no published SDZs as such for the war's neutral convoy, escort or accompanying operations, permitted under international law,[648] use of a published SDZ, whether communicated by diplomatic channels or perhaps as the need arose for the convoy commander, that was reasonable in terms and moving area covered, would have been compatible with international law. International law does not require establishment or notice of SDZs, however.[649]

Other neutrals and the belligerents did not proclaim SDZs. Iran could have published them for its convoy operations and projected naval operations and maneuvers, but apparently chose not to do so.[650] The convoys were subject to Iraqi attack.[651] An SDZ declaration could not have changed that. Iran had a right to conduct naval maneuvers in its territorial sea, as well as high seas naval maneuvers, the latter subject to due regard for others' oceans uses, but had no right to conduct maneuvers in Saudi territorial waters.[652] Publishing SDZs could not alter the legality, or lack thereof, of these operations. Both belligerents' military aircraft could overfly the Gulf's high seas, subject to due regard for others' high seas rights, but not neutrals' territorial seas, and an SDZ publication could not change these rules.[653] Nor could publishing an SDZ justify belligerents' mine or other attacks on neutrals.

Iran and Iraq published war zones.[654] They roughly corresponded with the general geographic area of some but not all military operations. The zones were not "paper" zones and were legitimate in terms of geographic scope, since Iran and Iraq had capability for operations over them,[655] except to the extent that Iran sought to control or restrict Strait of Hormuz transit passage. Iran could publish a Strait war zone to warn of risks of hostilities, but it could not use the zone proclamation to close the Strait or restrict straits passage by neutrals,[656] any more than North Korea could establish its security zone, purporting to limit high seas freedoms.[657]

The principal problem with the belligerent zones was with their misuse. Iran and Iraq made neutral ships their principal targets with a view to inhibiting oil exports that financed their opponent's war effort. Iran also attacked neutral shipping proceeding between neutral ports. These attacks occurred outside the zones as well. Both belligerents fired on neutrals' military aircraft and warships, both inside and outside the zones. There was an obvious disregard of target discrimination, failure to observe general principles of necessity and proportionality, and a

failure to avoid attacks on shipping that was exempt from capture or destruction. To that extent both States violated international law in use of otherwise valid zones.[658] To the extent mining was part of war zone operations, the zones were unlawful in use because they did not provide safe sea lanes for neutral shipping.[659] UN Security Council resolutions condemning indiscriminate Tanker War attacks on neutral shipping support this view.[660]

Saudi Arabia established an ADIZ during the war.[661] Establishing the zone was consistent with international law; it was noticed.[662] The record does not disclose the high seas area it covered, but presumably it was that part of the high seas off the Saudi Gulf coast, nor does the record say what the ADIZ notice recited in terms of identification. However, there were no recorded protests, and it must be presumed that Saudi Arabia acted in accordance with international law on these points.

Two weeks before establishing the zone, Saudi Arabia shot down an Iranian aircraft over the high seas of the Gulf.[663] The ADIZ would not have given a right to shoot it down, even though initial information for Iranian flights may have come through AWACS information procedures. The shootdowns were governed by the right of self-defense, including anticipatory self-defense, as well as principles of necessity, proportionality and admitting of no other alternative in the case of anticipatory self-defense.[664] There is nothing in the record to say the law was not observed.

There are reports Saudi Arabia allowed Iraqi military aircraft to use refueling facilities on its territory.[665] There is no evidence that these aircraft entered under distress conditions,[666] and it must be presumed that Saudi Arabia permitted entry, which it was allowed to do under the LOS and the law of the air.[667] Whether this could be claimed as a violation of Saudi obligations as a neutral was a separate issue. Depending on resolving the issue of whether a neutral may aid a country that is victim of an aggressor, and who was the aggressor in the war, the response could go either way. Commentators may differ on whether a neutral may aid a country believed to be a target of aggression, but the view seems to be that it is proper to assist the target with aid, including military aid.[668] If neutral Saudi Arabia could aid Iraq as a victim of Iranian aggression, then the assistance was proper. If Iraq was the aggressor, then the aid was improper. The difficulty, of course, is which country committed aggression. The reported facts may point toward Iran or Iraq; the issue is far from clear.[669]

Perhaps owing to the nature of the conflict, *i.e.*, isolated attacks on shipping or defense of shipping, or lack of seaborne assets dedicated to humanitarian use, *e.g.*, hospital ships,[670] no equivalent of a Red Cross Box was established during the conflict.[671]

## Part G. Weapons and Weapons Use; Mine Warfare

Unlike the land war, where Iraq used poison gas against Iranian forces in violation of the law of armed conflict,[672] no nuclear, biological or chemical weapons were employed in the Tanker War at sea.

Conventional weaponry in the sea war included all sizes of projectiles, from bullets sprayed on merchantmen's bridges to medium-size naval guns, surface to surface rockets, belligerent helicopter and fixed-wing aircraft fire and bombing, intermediate range land-based Silkworm missiles Iran fired against merchantmen in Kuwaiti port berths, and surface to air missiles and projectiles. Iran fired conventional weapons at Iraqi port facilities, neutrals' port facilities and neutral shipping; these attacks came from Iranian naval units and land-based aircraft. Iraq conducted aerial attacks on Iranian oil facilities and neutral shipping; the flights originated on land, because Iraq had no shipboard naval aviation capability. Neither belligerent bombarded its opponents' shores incident to a seaborne invasion. After giving occupants of Iranian offshore oil platforms, used for surveillance and harboring small, offensively armed boats, notice and an opportunity to leave them, US naval forces shelled these platforms in response to speedboat attacks on neutral merchantmen. US naval forces also used weapons fired from helicopters and surface ship weapons in self-defense responses against belligerent surface vessels. The *U.S.S. Vincennes* mistakenly shot down the Airbus with surface to air missiles. Other US warships mistakenly fired on dhows and fishing boats. At least one belligerent's attack jet was downed by a Saudi interceptor.[673]

Both belligerents laid sea mines during the Tanker War. All apparently were of the contact variety, *i.e.*, actuated by contact of a vessel with the mine. Iran laid them, probably tethered to the bottom, in approaches to Kuwaiti and other neutral ports. Iraq laid them in Iranian Gulf port approaches. Both States laid them in international shipping lanes, *i.e.*, in high seas areas where traffic generally sailed. Sometimes these were laid just before a ship was due to pass. Some were drifting mines, the result of anchored mines' having broken their moorings; others remained tethered. Neutral navies began to report, sweep and destroy or remove mines, sometimes individually, and in other cases cooperatively among several States' naval forces. The US Navy captured and later scuttled the Iranian minelayer *Iran Ajr*, and returned surviving crew to Iran. After hostilities ended neutral navies organized to sweep thousands of mines in the upper Gulf.[674]

Apart from mine warfare discussed in sub-Part 2, this Part concentrates on methods and means of belligerents' attacks on opposing enemy forces, shipping or facilities in the Tanker War. Analysis of belligerents' attacks on neutral military forces, neutral shipping or neutral facilities has been discussed in Chapter III and in Parts A.-F., and that analysis will not be repeated here.

No Tanker War participant, belligerent or neutral, employed weapons considered inherently unlawful under the LOAC or in self-defense. The central issue for the war is whether belligerents, or neutrals acting in self-defense,[675] used conventional weapons consistently with principles of necessity and proportionality and, for anticipatory self-defense, necessity, proportionality and admitting of no other alternative. What might be proportional and necessary under the LOAC between belligerents might or might not be necessary and proportional in a self-defense context, and *vice versa*.[676] Besides these general principles, there were few guideposts in treaty or customary law.

*1. Conventional Weapons Use, Apart from Mine Warfare*

Iran bombarded Iraqi shore facilities during the Tanker War, using land-based air and perhaps naval assets. Iraq bombarded Iranian shuttle convoys carrying oil that Iran sold to finance its war effort, Iranian vessels on the high seas, and Iranian port facilities and offshore oil installations. No international agreement specifically covers the circumstance of attacks on offshore oil platforms, which I would also characterize as "shore bombardment." Hague IX declares that military installations and warships in a harbor may be destroyed by bombardment, with consideration for historical, scientific and artistic monuments and hospitals, after summons to surrender and a reasonable time of waiting. No summons need be given if necessity (*i.e.*, surprise) dictates otherwise.[677] The Hague Air Rules have similar provisions for attacks from the air but omit requirements for a summons.[678]

Whether or which of these principles are customary law or are in desuetude is a debate among commentators. However, at the least these provisions today reflect customary rules of necessity and proportionality applying to attacks on military objectives under the LOAC or in self-defense responses. These principles of necessity and proportionality apply to military objectives within otherwise civilian areas, *e.g.*, oil platforms within an EEZ (a "civilian area") used for military surveillance or as launching pads for attacks on shipping (a proper military objective). Bombardment may not be used to terrorize the civil population or to wantonly destroy areas of concentration of civil populations. Today the rule seems to be notice should be given of an attack if the military situation permits it.[679] Besides historical and artistic monuments, medical facilities are off limits for attack unless used for military purposes.[680]

The record of belligerents' bombarding opponents' shore facilities as incidents of the Tanker War is sparse.[681] Whether notice if appropriate was given; whether Hague IX and Hague Air Rules standards were followed; whether civilian objects or historical, artistic, scientific or hospital sites were involved; whether belligerents attacked areas where the civil population was concentrated; whether attacks were designed to and did terrorize the civil population; or whether attacks

followed LOAC principles of necessity and proportionality, is less than clear.[682] If the War of the Cities and other aspects of the 1980-88 conflict on the land are any indicator, there is a high likelihood that there were LOAC violations, perhaps of the general principles of necessity and proportionality and perhaps of specific rules in Hague IX and the Hague Air Rules. We do not know from the available historical record of this aspect of attacks on land targets.

*2. Mine Warfare*

Mine warfare law is a mixture of one treaty dating from 1907, Hague VIII,[683] and custom developed from it[684] and elsewhere since introduction of sea mines, once known as torpedoes, over two centuries ago.[685] Although modern mine devices, *e.g.*, CAPTOR, which rises from the seabed to attack submarines by a modified homing torpedo, have been developed and were used in many wars in this century,[686] belligerents laid only bottom-moored contact mines during the Tanker War, although some of these may have broken loose from their moorings.[687] Analysis therefore concentrates on legal aspects of this weapon as used in the war.

A State laying mines must notify other States of the location of mines as soon as military exigencies permit.[688] Belligerents may not lay mines in neutral waters, *i.e.*, neutrals' territorial seas.[689] Anchored mines, *i.e.*, moored or tethered mines, must become harmless when they break their moorings or control over them is lost.[690] Unanchored mines, *i.e.*, those not fixed to or imbedded in the bottom, must become harmless after a mine layer loses control of them, *e.g.*, after a vessel drops them over the side or an aircraft deploys them.[691] As the foregoing indicates, these principles apply to mines and not to a delivery system; aircraft and submarines are bound by them like surface ships.[692]

Minefield locations must be carefully recorded to ensure accurate notification (and therefore appropriate action by other States, *e.g.*, to avoid them), and to facilitate removal and/or deactivation, perhaps after hostilities end. At the end of hostilities States must remove mines they have laid, except that States must remove mines in their waters, regardless of who laid them. Parties to a conflict may make other arrangements for removal, including arrangements with other countries for mine removal.[693] Neutral States do not commit an unneutral act if they clear mines laid in violation of international law'[694] unless to do so would violate other international law principles.[695]

Mines may be used to channel neutral shipping but not to deny straits or archipelagic sea lanes passage.[696] Mines cannot be laid off an enemy's ports and coasts with a sole objective of intercepting commercial shipping; however, they may be otherwise used in strategic blockade of enemy coasts, ports and waterways.[697] States cannot mine areas of indefinite extent in international waters, *i.e.*, the high seas. Reasonably limited war zones may be established if neutral shipping has an alternate route around or through the zone. Indiscriminate high seas

mining is unlawful. Minelaying States must have due regard for others' high seas rights and freedoms.[698]

Belligerents or neutrals may not lay mines in other neutrals' internal waters or territorial seas; this would violate that State's territorial integrity under the UN Charter as well as the LOAC.[699] Mines cannot be laid in international straits so as to impair or impede neutral passage unless alternate routes of equal safety and convenience are provided.[700]

Neutrals may lay mines in their territorial sea as a self-defense measure, but they are bound by rules for belligerents, *e.g.*, notice, leaving lanes open for shipping, not impeding shipping, *etc.*[701] When a threat ends, the LOS[702] and Hague VIII require that such mines be removed or rendered harmless.[703] Unless it is a case of self-defense by a neutral or a belligerent expecting or experiencing attack by a country with which that belligerent is not presently at war, and usually in circumstances of anticipatory self-defense, armed mines may not be laid on the high seas,[704] absent an armed conflict situation. If mines are placed on the high seas under these circumstances, a minelaying State must give prior warning by analogy to Hague VIII;[705] other Hague rules must be applied analogously, *e.g.*, mines must be removed expeditiously or rendered harmless once an imminent danger passes.[706]

Controlled mines, *i.e.*, those that cannot be actuated except by signal from a minelaying State's forces,[707] may be laid on the high seas as long as they do not interfere with other high seas uses, or uses involved with parts of the seas covered by EEZ, *etc.*, regimes.[708] Due regard principles apply here too.[709] Even if controlled mines are laid that would interfere with high seas freedoms, this may be permissible if there are published alternate safe and convenient routes for other high seas users.[710] Since most countries laying controlled mines would want controlled mine locations secret until there is a need to actuate them, it is not likely a minelaying State would notify other countries of their location by notice of an alternate route or risk entanglement with another high seas user, followed by diplomatic protest based on the due regard principle.[711]

### *3. Mine Warfare Principles and the Tanker War*

Chapter III analyzed the necessity and proportionality of self-defense responses, and that discussion will not be repeated here,[712] nor will the necessity and proportionality questions incident to LOAC issues, discussed in Parts A-F, be rehearsed anew here. In some cases, assuming that an objective was a proper military target, *e.g.*, neutral merchantmen under belligerent convoy with cargoes supporting an enemy war effort,[713] it is questionable whether the method of attack was necessary or proportional under the circumstances. Iranian forces in particular seemed to target merchant ship crews by aiming at personnel areas of ships.[714] The same can be said for belligerents' indiscriminate mining, resulting in casualties to merchantmen and warships alike.[715] Failure to publish location of minefields was

a factor in lack of discrimination, as was belligerents' failure to lay mines that became inoperative after losing their tethers.[716]

Besides failing to satisfy general principles of necessity and proportionality, including target discrimination and minimization of civilian and neutral military casualties, the belligerents, and Libya if involved in the 1984 Red Sea mining, violated many specific rules of mine warfare. Although belligerent ships probably laid most mines, the rules applied to mines laid by aircraft as well.[717] Minefield locations were not published.[718] Belligerents laid mines in neutral waters, a Charter violation and a violation of the LOAC.[719] Mines, particularly those Iran laid, failed to become harmless after breaking moorings.[720] Whether the belligerents recorded minefields carefully is unknown. What is clear is that an international postwar effort was required to clear northern Gulf mines, which could infer that neither belligerent, having laid mines, had the necessary means to retrieve them after hostilities, a Hague VIII requirement.[721] Iran's mines in the Strait of Hormuz also violated a principle of mine warfare, that international straits passage must not be impeded.[722] Iraq may have violated the rule against laying mines off a belligerent's coast, *i.e.*, the Iranian coast, for the sole purpose of intercepting commercial shipping.[723] Iran deliberately laid mines in international waters, with no minefield announced and no provision for alternate routing around or through the mined area, another LOAC violation. The belligerents showed little, if any, due regard for high seas users' rights.[724] There was no record of damage to EEZ facilities as a result of mines, however, other than the almost certain pollution from holed ships.

Throughout the Tanker War neutral navies were engaged in mine countermeasures, including sweeping, retrieving and destroying mines.[725] International law permitted this on the high seas and in neutral territorial waters where the neutral coastal State allowed entry for this purpose. Even if a neutral had not granted permission, and there was a mine threat (*e.g.*, a CAPTOR mine) to a third State's shipping, the third State could enter neutral waters to remove the threat if the neutral could not or would not do so.[726] For example, Saudi Arabia requested US assistance (and thereby gave permission) for mine sweeping and clearance of its waters during the 1984 Red Sea mining episode.[727] If it is assumed that minelaying in neutral territorial waters violates the UN Charter in addition to the law of naval warfare, it could be argued that the Saudi-US mine clearance agreement was an informal self-defense arrangement to respond to the mine invasion.[728] Another self-defense claim related to the US destruction of *Iran Ajr*,[729] an element of which was neutrals' customary right to remove mines, and devices involved with them (*i.e.*, the minelayer), from ocean areas, *i.e.*, the high seas, where mines have been unlawfully laid.[730]

Although the belligerents committed numerous LOAC violations, including failure to observe necessity and proportionality principles in surface and air

attacks on neutral shipping (warships and merchantmen alike),[731] their mine warfare programs take the prize for wholesale violations of international law. And although neither State is party to Hague VIII,[732] the rules of that treaty are grounded in custom, whose norms both belligerents violated.

## Part H. Other Humanitarian Law Issues

Chapter III and Parts A-G have discussed Tanker War humanitarian law issues in other contexts, *e.g.*, general principles of necessity and proportionality in self-defense or LOAC situations, including limitations on reprisals and when necessity and proportionality should be measured and the prohibition against perfidy;[733] visit and search or diversion, attack on and destruction of enemy vessels and vessels with enemy character, vessels exempt from attack unless they aid the enemy war effort, and goods exempt from designation as contraband because of their humanitarian nature;[734] blockade and exemptions from blockade because a vessel is carrying cargo for a humanitarian purpose;[735] creating various zones during war, including a Red Cross Box as a sea area where belligerents' sick and wounded may be transported for hospital ship treatment on the high seas;[736] bombardment and mine warfare.[737] Those analyses will not be repeated here. However, other humanitarian law issues arose during the war and are discussed in more detail in this Part.

### *1. Merchant Ship Crews Trapped in the Shatt al-Arab at the Beginning of the War*

The fate of crews trapped aboard neutral flag merchantmen in the Shatt al-Arab at the beginning of the war is not clear.[738] Those of the Iraqi merchant marine who fell into the hands of Iran, and Iranian merchant marine personnel who fell into the hands of Iraq, were entitled to at least prisoner of war status under the Third 1949 Geneva Convention. The same would be true of ships' crew if a neutral vessel acquired enemy character.[739] Crew of neutral flag ships that had not acquired enemy character, which probably accounted for personnel on most stranded vessels, were protected persons under the Fourth Convention: "Persons . . . who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." They should not have been detained and should have been allowed to return home promptly.[740]

Crew entitled to prisoner of war status were entitled to treatment as prisoners of war,[741] including repatriation before the end of hostilities for those seriously ill or wounded.[742] In any event these crews should have been repatriated "without delay after the cessation of hostilities."[743] There is no record of when or if these prisoners of war were repatriated. However, if part of those were still in captivity 10 years after the war,[744] the Detaining Power[745] (Iran or Iraq) may have been guilty of a

grave breach of humanitarian law.[746] The same can be said for the seriously ill or wounded who were not returned in accordance with the Third Convention.[747]

Fourth Convention-covered crew also had considerable protections even if internees.[748] Unless interned, these crews were entitled to leave unless their departure was contrary to Detaining Power interests.[749] Internees should have been released from internment as soon as conditions for internment no longer existed,[750] and then as protected persons they were entitled to rapid repatriation.[751] In no event could internment last longer than the end of hostilities, at which time any crew internees should have been repatriated as soon as possible unless there were outstanding penal proceedings against them.[752] There is no record of when Fourth Convention-protected crew were returned. However, if crew considered protected persons were not interned, they should have been repatriated. Interned crew should not have been held longer than the end of hostilities before repatriation, unless there were criminal charges against them. If any of these crew members were held longer, the Detaining Power was guilty of a grave breach,[753] particularly if they were among those held over 10 years after the end of hostilities.

*2. Rescue of Those in Peril on the Sea*

On at least three occasions neutral armed forces took custody of members of belligerents' armed forces after attacks on or over the high seas. A US Navy ship rescued an Iraqi pilot shot down by an Iranian air-to-air missile; the pilot was repatriated to Iraq during the war through Saudi Arabian Red Crescent Society auspices. US forces rescued 22 Iranian *Iran Ajr* crewmen after their minelayer was captured during a US self-defense response. The 22, and remains of 3 crewmen that died in the attack, were handed over to Omani Red Crescent officials, who sent them to Iran. US naval forces also rescued six Iranian Revolutionary Guards boat crewmen from the water during a US self-defense response; two died aboard a US Navy ship. The survivors and remains of the dead were turned over to Omani Red Crescent officials, who sent them to Iran. It is not known whether Iraq consented to repatriation of the Iranian service members, but it does not appear that Iraq objected to the procedure. Similarly, it is not known whether Iran consented to the Iraqi pilot's return or whether Iran objected to this procedure.[754] After the US attack on the Rostum platforms in response to attacks on neutral shipping, and a subsequent naval battle with Iranian surface combatants, there were heavy casualties. US forces permitted Iranian tugboats to engage in rescue operations without impediment.[755]

Undoubtedly there were survivors in the high seas after belligerents' numerous attacks on shipping by mines, aircraft or surface combatants.[756] Undoubtedly neutral naval forces or other merchant ships rescued many of them. There is no record of Iranian naval forces' succoring survivors; Iranian tugs picked up platform crew when US forces attacked them.[757] Since Iraqi fighter aircraft prosecuted high seas

attacks, these platforms could have not actively participated in rescue operations, although commensurate with security Iraq could have signaled to other platforms concerning survivors in the water. If Iraq had helicopters or surface ships in the area, they could and should have participated. There were apparently no belligerent minelaying units nearby that could have participated in rescue efforts when mines detonated against shipping.

There is a general obligation, under the law of the sea and the law of armed conflict, to rescue persons in peril on the sea.[758] Thus whether belligerent forces, neutral warships or aircraft, enemy flag merchantmen or neutral merchantmen, all had the obligation to rescue shipwrecked mariners. Apart from Iranian tugs' assisting Iranian nationals,[759] there is no record of belligerent ships or aircraft's helping to rescue persons in peril on the sea. Consistent with their security needs, these ships and aircraft should have done their utmost to assure safety of these persons, perhaps communicating their observations after reaching a place of safety. There is no indication as to whether this was done, or if it could have been done under the circumstances.

Some rescues, *e.g.*, that of the *Iran Ajr* crew, came after self-defense responses. It could be argued that since these did not occur during armed conflict as between rescuer forces and rescued persons, the LOS supplied the standard after self-defense measures ended.[760] Alternatively, it could be argued that these rescues were incidental to the right of self-defense;[761] *i.e.*, the LOS did not apply, and these rescues became part of the developing law of self-defense. Under this theory, a right of self-defense carries with it the responsibility of attempting to save life at sea under LOS and LOAC standards. Since the United States was a neutral, unless the LOAC in this particular instance applied to it,[762] the LOAC could not have governed these rescues.[763] These are distinctions without a difference, as they should be. Given the obligation's universality, it could be argued that a duty to rescue those in peril on the sea has achieved *jus cogens* status,[764] required in peace and war, subject to a rescuer's responsibility of protecting its own crew, passengers and platform.

### *3. Neutrals' Repatriation of Belligerent Armed Forces Members*

Sub-Part 2 discussed neutrals' rescue and repatriation of Iranian and Iraqi armed forces members during the war. Humanitarian law requires that neutrals into whose territory, including territorial waters, belligerent military personnel fall must intern them for the war's duration, so that they do not take further part in the conflict, according to the Second Convention, which is particularly in point for this issue.[765] With respect to the Iraqi pilot shot down, rescued by US forces, turned over to the Saudi Red Crescent and returned to Iraq, this may have technically violated humanitarian law standards unless Iran consented to the arrangement. The same could be said of the *Iran Ajr* crew rescued by US forces, turned over

to the Omani Red Crescent and returned to Iran, if humanitarian law applicable to the LOAC applied unless Iraq consented to premature repatriation. If it is assumed that the United States turned these persons over to Red Crescent representatives in good faith, the blame for premature repatriation arguably lies elsewhere than on the United States.

Since these attacks occurred in the context of US self-defense responses, it could be argued that the humanitarian law applicable during armed conflict did not apply of its own force, but only in the context of necessary and proportionate self-defense.[766] Under this theory, new standards of humanitarian law, not necessarily the same rules applicable during armed conflict, could apply during and after self-defense responses. If this is the case, returning Iranian crew and remains before the end of hostilities was not unlawful; there were no treaty rules to govern repatriation, since the Charter and its right of self-defense trumped the treaty law.[767] However, it could be argued that the same rules of humanitarian law applicable during armed conflict should be applied by analogy in the self-defense context.[768] A third argument would be that the law of self-defense ceased with the armed response, and that other norms, *e.g.*, the LOS and LOAC rescue at sea requirements and LOAC nonrepatriation principles then arose to supply the rules.[769] Under the first or third theories, and arguably what should be the law in the self-defense context, it was not proper to repatriate the rescued crew prior to termination of hostilies without opposing belligerent consent. However, since there was no protest from opposing belligerents, these States' acquiescence in these actions may be presumed.

## Part I. Deception During Armed Conflict at Sea: Ruses and Perfidy

Stratagems and ruses are allowed in sea warfare within the same general limits as land warfare; customary and treaty law denounce perfidy ("breaking of faith") or treachery in land, sea, air or space warfare. Ruses of war involve misrepresentation, deceit or other acts to mislead an enemy under circumstances where there is no obligation to speak the truth. Perfidy or treachery involves acts inviting an adversary's confidence that the actor is entitled to protection or must accord protection under international law.[770]

### *1. Legitimate Ruses of War and Actions Constituting Perfidy*

Although the LONW follows general rules for ruses of war in other arenas, there are principles peculiarly applicable to sea warfare and others that have more frequent application to sea warfare situations.

For example, most commentators say it is lawful for a warship to use a neutral or enemy flag when chasing an enemy vessel, when trying to escape, or to draw an enemy vessel into action. The warship must fly its national ensign immediately before it attacks, however. It is perfectly proper for warships to assume disguise, *i.e.*,

adding funnels or masts to simulate a merchantman. Aircraft, including naval aviation, may not use false markings, however. Use by a belligerent of neutral flags, insignia or uniforms during actual armed engagement is forbidden.[771]

Besides the false flag rule for warships, legitimate ruses of war for warships and naval auxiliaries, and vessels convoyed by a belligerent and other ships with enemy character, include camouflage, decoys, mock operations and misinformation, which might include false or misleading communications signals, acoustic or other emissions, paint except for the markings or pendent number the LOAC requires, and the like. These (but not the false markings rule) also apply to aviation operating over the oceans. Other lawful ruses include surprises; ambushes; feigning attack, retreat or flight from battle; simulation of quiet or inactivity; deception by bogus orders or plans; use of enemy signals or passwords; communications or orders to nonexistent units; deceptive supply or military unit movements; decoying through use of obsolescent or poorly armed military aircraft or warships to lure hostile forces into combat; dummy ships or aircraft; altering vessel or other equipment appearance by *e.g.*, adding fake funnels or masts; mock combat among friendly forces to lure an opponent into combat to aid its forces; flares or fires to mimic battle damage; smoke to conceal opposing forces' size and power; taking advantage of weather (*e.g.*, fog); removing or changing navigational aids; psychological methods to incite enemy personnel to rebel, mutiny, desert or surrender; and inciting an enemy population to revolt.[772]

Ruses can be unlawful or unlawful, depending on the situation. Although deceiving the adversary is generally lawful, deception that involves misleading or luring an adversary into what would otherwise be a treacherous or perfidious act is an unlawful ruse. For example, luring or misleading an adversary into attacking civilian objects or the civil population in that adversary's ruse-induced mistaken belief the target is a legitimate military objective is an unlawful ruse that the LOAC condemns.[773] While some unlawful ruses are common to all warfare modes, others have particular emphasis in naval warfare.[774]

Warships and naval auxiliaries may not simulate hospital ships, small coastal craft or medical transports; vessels on humanitarian missions; passenger ships carrying civilian passengers; vessels guaranteed safe conduct by parties' prior agreement, including cartel ships; vessels entitled to be identified by the red cross or red crescent emblem; or vessels carrying cultural property under special protection.[775] Although the *San Remo Manual* says this list is exhaustive,[776] it does not reflect the state of the law; *e.g.*, a warship may not simulate a vessel that has surrendered and is therefore exempt from attack, a perfidious act, as the *Manual* later recognizes.[777] In terms of aviation operating over the high seas, a similar list might be: medical aircraft; aircraft on humanitarian missions; civil airliners carrying only civilian passengers; aircraft granted safe conduct by parties' prior agreement; and aircraft entitled to be identified by the red cross or red crescent emblem;

aircraft carrying cultural property under special protection.[778] And as in the case of prohibitions on warships and naval auxiliaries, the list is not exhaustive;[779] *e.g.*, aircraft cannot display *any* false markings.[780]

The *Manual* would also bar belligerents from actively simulating status of a vessel flying the UN flag as part of its "exhaustive' list, noting that "It has not yet been determined precisely in which circumstances flying [UN] colours would indicate protected status .... [I]f UN forces are not taking part in the conflict ..., they are entitled to a form of protected status."[781]

The *Manual* standard, while perhaps appropriate as a general principle, may be deficient in several respects. First, in practice, when the UN ensign has been flown during peacekeeping operations, it has been subject to prior agreement.[782] Second, any such agreement is subject to Security Council decisions, which could supersede it.[783] Third, the rule does not take into account situations where a belligerent or neutral State is faced with a UN-flagged force of warships arrayed against it. While that country may be entirely in the wrong in opposing the force, perhaps operating under a UN - supported blockade,[784] that State may oppose, attack and destroy these UN flagged forces as it can under the present LOAC or law of self-defense. On the other hand, if the UN flagged force is used for humanitarian purposes, *e.g.*, to transport cargo through a blockade for humanitarian purposes,[785] the *Manual* principle would apply. The third point, where a UN force is used for combat purposes, invokes the false flag rule, a legitimate ruse of war at sea for warships as long as the false flag is hauled down before hostilities begin and true colors are flown, which the *Manual* also recognizes.[786] Under the false flag rule, a country opposing a UN combatant force could fly the UN flag as a ruse under circumstances described, and under LONW customary standards the UN flagged warships would not be entitled to protected status as the *Manual* suggests if the State's naval forces hauled down a false flag, hoisted true colors and attacked. If the UN operation is proceeding under a Council decision, as a technical matter the LONW rules might not apply of their own force, but in all likelihood the result, as a matter of international law under the Charter, would and should be the same.

The foregoing analysis suggests, as the *Manual* also does, that the law of UN flagging is less than complete. The best procedure in every case would be for States whose vessels would fly the UN flag to seek agreements with belligerents or be girded with a Council decision, particularly if a State would oppose the UN - flagged naval force with armed force.[787]

Perfidy includes feigning distress, particularly through misusing an internationally recognized protective sign, *e.g.*, the Red Cross or Red Crescent; feigning cease-fire, humanitarian negotiation (*e.g.*, a parley to negotiate removal of dead and wounded) or other truce; feigning incapacitation by wounds or sickness; or combatants' feigning civilian noncombatant status.

> Like lawful ruses, perfidy involves simulation, but it aims at falsely creating a situation in which the adversary, under international law, feels *obliged* to take action or abstain from taking action, or because of protection under international law neglects to take precautions which are otherwise necessary. Perfidy or treachery to kill, injure or capture has been prohibited in armed conflict under international law... to strengthen the trust which combatants should have in the international law of armed conflict.... [P]erfidy tends to destroy the basis for restor[ing]... peace and causes the conflict to degenerate into savagery.[788]

In naval warfare these include launching attack while feigning exempt platform status; feigning surrender or distress.[789] Air warfare rules allow an aircraft to feign disablement or other distress to induce an enemy to end its attack. There is no obligation to stop attacking a belligerent military aircraft that appears disabled. However, if it is known an aircraft is disabled so that it is permanently removed from conflict, attack should end to allow possible crew or passenger evacuation.[790] Submarines have feigned success of depth charge or torpedo attacks by releasing oil or debris; this practice has never been questioned as perfidious conduct.[791]

*2. Ruses and Perfidy During the Tanker War*

There are no reported ruses of war, lawful or unlawful, adopted by belligerents during the Tanker War. There are no reports of perfidious conduct.

US naval vessels began painting their combatants' pendent numbers in shades of black and grey, instead of the traditional white-on-black familiar to the world, to minimize reflective surfaces that might attract a missile.[792] Although there is no report of it, undoubtedly US and other aircraft may have used nonreflective paint and nonreflective markings, instead of the usually brilliant aluminum or other surfaces commonly seen during recent conflicts in which the United States has been involved.[793] Perhaps US and other countries' warships also began to use nonreflective paint. Undoubtedly US platforms, and those of other countries, employed emission controls and other devices to minimize detection and therefore to minimize attacks by belligerents. Toward war's end warships like *Vincennes* appeared in Gulf waters; these vessels had been designed from the keel up to minimize detection by their configuration and equipment. Neutral navies did not actively simulate hospital ships and other platforms the LOAC forbids.[794]

LOAC rules allowing ruses and forbidding perfidy did not apply to US and other neutrals' warships and military aircraft operating in the Gulf during the Tanker War. These countries were not belligerents. If these actions are seen as incidents of self-defense,[795] and if the LOAC rules are analogized to self-defense situations, these neutral naval forces' actions were legitimate. Apart from displaying a pendent number on ships or proper markings on aircraft,[796] international law does not require a ship or aircraft to be painted a particular color or with a particular kind of paint, and the law says nothing about the color of these markings.

Similarly, if emission control and other actions to minimize detection are legitimate ruses for belligerents, neutrals may employ them in self-defense. Warships like *Vincennes* or aircraft like Stealth bombers can be designed and built to minimize detection under the LOAC and the law of self-defense.

There were two potential uses of the UN flag during the war. Early in the war the Organization sought the belligerents' approval for allowing vessels trapped in the Shatt al-Arab to leave under the UN or ICRC flag. Although Iran approved, Iraq refused permission, and the vessels remained there for the duration of the conflict.[797] No subsequent Security Council decision addressed the issue. If the belligerents had agreed on terms of departure, that agreement would have governed. If the Council had issued a decision, that decision would have governed the situation.[798] Use of the ICRC flag, without UN action on its use, *e.g.*, by Council decision or suggestion of an agreement in absence of Council action, would have been subject to the parties' agreement. In the latter case the LOAC would have governed as to the ICRC, *i.e.*, Red Cross or Red Crescent, ensign.[799] None of these events occurred, and the scenarios posed are hypothetical, offering considerations for future wars.

Late in the war the USSR proposed a UN flotilla, perhaps flying the UN colors. The proposal came to naught, although the United States correctly insisted on a careful statement of terms.[800] However, this raises the issues of relative sanctity of the UN flag. If the flotilla had been created by Council decision, that decision would have determined the flag status. On the other hand, if the decision did not, and the flotilla engaged in operations against the belligerents, it should have been subject to the same rules, *e.g.*, false flags principles, that the LONW has developed.[801] As in the case of the UN or ICRC flag proposals for merchantmen,[802] these scenarios are hypothetical but offer thoughts for future wars.

During the Tanker War merchant ships began tailing neutral naval convoys or simulating convoys during night steaming.[803] Some merchant ships appeared in the Gulf painted grey, like warships.[804]

If these ships were neutral flagged and did not carry goods for belligerents' war efforts, no perfidy issues arose. Commensurate with safety on the high seas in the case of the convoys, there is no objection under the LOAC for merchantmen to sail close to neutral convoys, even if accompaniment suggests association with the convoy. If such a vessel was not formally part of the convoy, it could not claim convoy protection and was subject to visit and search as if it steamed alone on the high seas.[805] It could be defended like any other merchantmen by neutral warships.[806] The same principles apply to painting vessels grey, perhaps to simulate a warship. If ships tried to look like neutral warships in color, as long as they did not carry a pendent number required of all warships under the LOS and the LOAC,[807] they were not subject to attack as a belligerent target if the simulation approximated such. If the vessel contributed to the opposing belligerent's war effort, and thereby

acquired enemy character,[808] it was subject to capture and possible destruction on that account, and not because of its paint. On the other hand, if the simulation appeared to resemble a neutral warship, the belligerents had no justifiable reason to attack on account of the color simulation. Grey-painted merchantmen invited risks of mistaken attacks by a belligerent if a belligerent thought the ship was an opposing belligerent's warship,[809] or perhaps neutrals' self-defense responses if the neutral warship thought the grey-painted vessel was a warship approaching with hostile intent, however.[810]

## Part J. General Conclusions and Appraisal; Projections for the Future

Cessation of hostilities in 1988 did not end the war.[811] The belligerents' status when fighting stops is usually determined at the time of cessation and by terms of the cessation of hostilities, in this case a cease-fire. It does not dispose of parties' claims.[812] This was true for the Tanker War, the 1980-88 conflict's Persian Gulf aspects. The belligerents apparently did not settle matters for two more years; Iraq became involved with the crisis over Kuwait and Coalition war against it in 1990-91.[813] Tardy prisoner of war exchanges a decade after the cease-fire[814] may indicate that matters are not settled yet. There is litigation in the International Court of Justice over the US platforms attack,[815] for example; private claims may be in lawsuits or the espousal process[816] for years. New facts and records may change conclusions in this volume.

This Part advances general conclusions from the available record for developments in and projections of the law of armed conflict as it applied to the Tanker War. I do not propose to repeat full, separate analyses for each topic appearing in this chapter, however.[817]

### *1. Basic Principles: Necessity and Proportionality; ROE; the Spatial Dimension*[818]

The war illustrates the distinction that must be made between necessity and proportionality in self-defense situations and necessity and proportionality in LOAC situations. What is or is not proportional in a self-defense response may or may not be proportional in the same circumstances when the LOAC applies.[819] The same analysis must apply to the due regard principle, adapted from the law of the sea and promoted for LOAC situations where no LOAC rule applies, *i.e.*, belligerents should have due regard for neutrals' LOS rights.[820] Necessity and proportionality or due regard, like many terms in US and other legal systems, are "terms of art" for lawyers that may have different meaning and content depending on circumstances in which they are used. To cite an example from US law practice, "jurisdiction" can mean subject-matter jurisdiction, or competency; venue, or the particular court(s) within a judicial system that can hear a case; authority of a court over persons or things, *i.e.*, *in personam, in rem, quasi in rem* or status jurisdiction, or more generally "judicial jurisdiction;" standing, or the authorization the

Constitution or statutes give a particular claimant to bring a suit; *etc.* The word "trespass" is another example; it has one set of meanings for lawyers, another to those who are not lawyers, and yet another in the Lord's Prayer.[821]

The LOAC recognizes two ocean areas and the air above them, the high seas and the territorial sea as defined in the 1958 and 1982 LOS Conventions; special LOAC rules apply to neutrals' territorial waters. In general, belligerents may wage war in their territorial seas and on the high seas, subject to limitations, *e.g.*, the law of blockade,[822] principles of treaty interpretation and application and UN law under the Charter,[823] and a general principle of due regard for others' oceans rights. LOS rules for other ocean areas, *e.g.*, EEZs, do not apply of their own force, but belligerents must pay due regard to neutrals' rights in these areas.[824] In general belligerents may not wage war in neutrals' territorial seas, but here too there are exceptions, *e.g.*, the rule of necessity permitting a belligerent to attack, using necessity and proportionality qualifying factors, an enemy warship threatening it from neutral territorial waters when the neutral cannot or will not obtain movement of the ship from its territorial sea as the law of neutrality requires. As a general rule, belligerents may not impair or impede neutrals' straits passage.[825] As in self-defense situations, ROE may qualify LOAC responses.[826] A due regard principle, analogous to the same principle in the LOS, has been advocated for LOAC situations if there is no positive law governing oceans use between belligerents and neutrals.[827] In any case, the LOS other rules clauses, a customary norm, declare that this body of law must be read in the LOAC context in appropriate situations.[828]

The Tanker War record is slim on belligerents' recognizing or observing these principles. As Parts B-G suggest, Iran and Iraq failed to observe necessity and proportionality principles throughout the war, particularly in attacks resulting in damage to neutral shipping from mines, fire from aircraft and surface vessels, and missiles. Iran violated, or came close to violating, rules for neutrals' territorial seas and the straits transit regime.

*2. Visit and Search; Capture, Destruction or Diversion*

The Tanker War revisited traditional principles of visit and search, as distinguished from LOS approach and visit, and rules applicable to neutral warship-convoyed vessels and belligerents' convoys. As in prior wars, aircraft, particularly helicopters, played a role in visit and search, and this confirms use of other than surface combatants for this purpose. Belligerents have a right of visit and search of merchant shipping to determine if they are carrying goods for an opponent's war effort. If such goods are found, the merchant ship may be captured. Alternatively, belligerents may divert merchant ships for search in a more convenient and safe place. The traditional rule of *prima facie* validity of a neutral flag flown by a merchantman, and the conclusive presumption rule for merchantmen flying the enemy flag, still apply. Warships are never subject to visit and search. While

belligerents may convoy shipping with military aircraft and warships, those convoys are subject to attack. On the other hand, it is legitimate for neutral warships to convoy neutral-flag merchant shipping; those convoys are not subject to visit and search, and neutral convoying warship(s) or aircraft may respond in self-defense if a belligerent attacks the convoy.[829]

Iran was within its rights to conduct visit and search of neutral shipping to determine if it carried cargoes helping Iraq's war effort. Iran did not have the right to attack and destroy these vessels without warning or proof they carried such goods. While Iraq might have exercised visit and search by helicopters, it did not do so, and its indiscriminate attacks on neutral shipping also violated the LOAC. Iraq was within its rights to attack Iranian convoys shuttling oil down the Iranian coast for sale to finance Iran's war efforts. On the other hand, Iraq violated international law when it attacked neutral flag convoys carrying goods that did not contribute to Iran's war effort that were escorted by neutral flag warships. Neutral flag warships could legitimately respond in self-defense.

### *3. Belligerents' Seaborne Commerce; Belligerents' Convoys*[830]

Sub-Part J.2 discussed rules for belligerent convoying; these rules apply to merchantmen flying belligerent flags. Flying a belligerent's flag is a conclusive presumption of enemy character.

In determining whether or not an enemy merchant vessel is a lawful military objective, and therefore targetable, the US Navy manuals' "war-fighting or war-sustaining" approach appears to make sense. Protocol I's land warfare approach, copied for sea warfare in the *San Remo Manual* "effective contribution to military action" phrase, is similar but more restrictive. The US Navy and *Manual* approaches may be distinctions without differences; although the *Manual* analysis is said to be more restrictive, its application in practice may have the same result as the US Navy standard.

The London Protocol declares that belligerents should not destroy a merchant ship unless passengers, crew, ship's papers and, if feasible, passenger and crew effects are first placed in safety. State practice since 1909 appears to confirm that an absolute rule is impracticable, particularly in air and submarine attacks. The rule today should be that general LOAC principles of proportionality and necessity should be observed, and that the safety of passengers, crew, ship's papers and effects should be observed when at all possible, which should include advising by communications of the location of the sinking and of lifeboats. Separate rules, *e.g.*, those published in current military manuals, for air, surface and submarine platforms, should be consolidated in view of the reality that merchant ship interdictions may be coordinated among all three kinds of platforms. It makes no sense to have one set of rules for each kind of platform. The same principles, perhaps with different necessity and proportionality factors, should be observed in

self-defense situations.[831] I have proposed a nine-point analysis to attempt to clarify the rules. It is clear that belligerents failed to observe even these principles, but that neutrals, *e.g.*, the United States, attempted to do so in self-defense responses like the Airbus incident.

Certain enemy vessels and aircraft are exempt from attack unless they contribute to an opponent's war effort. There were no published instances of belligerent attacks on these platforms during the Tanker War. Neutrals fired at these vessels, *i.e.*, fishing craft, during mistaken self-defense responses.

*4. Neutral Flag Merchantmen; Enemy Character; Reflagging; Contraband*[832]

Neutral merchant ships can acquire enemy character if they aid the enemy, *e.g.*, by carrying war-fighting or war-sustaining cargo pursuant to enemy diretion or control or when under enemy convoy, or by supporting the enemy, *e.g.*, by signaling the location of an opponent's sea forces. Absent these considerations, a neutral flagged ship carries a *prima facie* presumption of neutral status. Reflagging during the Tanker War complied with LOAC standards as well as LOS standards.

Late in the war Iran published a contraband list covering goods inbound to Iraq. Its effect during the war is less than clear, but it did not apply to Iranian seizures, *etc.*, of neutral shipping before its publication. Contraband lists must be published before they are effective. Although the list was general, it was a valid list after its publication. The record of post-1945 wars, and indeed since the 1909 Declaration of London, demonstrates the impossibility of compiling and publishing lists of absolute and conditional contraband. Weapons development and commodities supporting a war effort, often locked in intelligence and defense agencies' national security classifications, are in constant change today as before. Any attempt to publish up-to-date contraband lists is doomed to failure before the ink is dry. Naval manuals continue to pay lip service to these concepts; a better approach is listing items that are not contraband, *e.g.*, humanitarian supplies, and treating the rest as goods for the war effort.

*5. The Law of Blockade and the Tanker War*[833]

Although there was loose talk, in the media and among some commentators, about Iran's blockading the Iraqi coast or Iraq's blockading Iran's Kharg Island, no blockade that the LOAC would recognize occurred during the Tanker War. Neither belligerent published any notification of a blockade and their sea mine campaigns could not have counted as a blockade with or without notification. In any event, it is doubtful if Iraq could have mounted an effective blockade of the entire Iranian coast with her air force alone. Iran's naval and air forces could have blockaded the small Iraqi coast effectively, but there is no evidence they did. Although the UN Security Council might have imposed a blockade under its Charter authority in Article 41, it did not do so.[834] The significance of blockade for the

Tanker War are two: (a) using the term, however loosely, is evidence the LOAC concept is still alive; (b) States wishing to impose a blockade must comply with the traditional law, even if it means that aircraft will mainly be used.

### *6. Zones*[835]

Although the *Manual* and current military manuals confirm the customary rule that belligerents may exclude neutrals from properly notified high seas areas that are an immediate area of naval operations which must be proportional in size, this procedure was not used in the Tanker War.

The United States proclaimed a high seas defense zone (SDZ), also known as a defensive bubble or *cordon sanitaire*, around its forces, thereby adding to customary law for this LOAC-related sea zone receiving modern emphasis in the 1982 Falklands/Malvinas War. The SDZ must be proportional in area. The SDZ need not be noticed like warnings of belligerents' immediate areas of naval operations. The SDZ is only an announcement of a State's intention to apply its inherent right of self-defense. Although they did not do so, Tanker War belligerents or other neutrals could have published these zones; if they had done so, they would have been subject to the same principles. An SDZ cannot justify conduct unlawful under the LOAC or the law of self-defense. Whether an SDZ is a tactically useful device is questionable; it advertises a naval force's approximate location. On the other hand, it may serve a useful political purpose in warning about naval presence. International law does not require notice of SDZs; they are grounded in the law of self-defense, which requires no publication.

Iran and Iraq proclaimed war zones. Modern military manuals and the *Manual* recognize high seas war zones as a customary norm, if they are properly notified, are proportional in area, give time of implementation and duration and allow a grace period for shipping to leave the zone. Like blockades, they must be effective; "paper" zones are inadmissible. Declarants must observe LOAC principles, *e.g.*, necessity and proportionality, exemption of certain vessels (*e.g.*, hospital ships) from attack, and enemy character rules for merchantmen. War zone declarations cannot create a high seas free fire area entitling belligerents to shoot on sight. Although the Tanker War belligerents' war zones were notified, proportional and effective, use of the zones as free-fire areas, including Iraq's notice to that effect, meant the zones were unlawful as applied. Belligerents' war zone misuse was among the most egregious LOAC violations during the Tanker War.

Saudi Arabia proclaimed an air defense identification zone (ADIZ) over Persian Gulf high seas midway through the war. If an ADIZ is properly notified and is proportional to its purpose, *e.g.*, as an identification device for incoming aircraft, an ADIZ is permissible under international law. ADIZs are lawful under the LOS and the LOAC. There is no indication the Saudi ADIZ failed this test.

During the Falklands/Malvinas War the United Kingdom proposed, and Argentina accepted, creation of a high seas Red Cross Box north of the Falklands/Malvinas, where hospital ships could operate and receive sick and wounded. The Box precedent was the First and Fourth 1949 Geneva Conventions, which allow belligerents to agree on hospital or neutralized zones for sick and wounded and civilians. There is no equivalent in the Second Convention on humanitarian law principles at sea. Despite subsequent lack of practice (none was established during the Tanker War), the concept is useful, if the Box is reasonable in size, other high seas users' rights are not prejudiced under the due regard principle, and belligerents notice the Box's duration and location. A Box agreement should follow the 1949 Conventions Annex form and be in writing if practicable.

*7. Weapons and Weapons Use; Mine Warfare*[836]

Whether Iran and Iraq followed necessity and proportionality principles in attacks on convoys, oil platforms and the like is less than clear. If the War of the Cities record is an indicator, it is highly likely that they did not adhere to these standards in Tanker War bombardments. As noted in Part J.5, they did not follow these rules in high seas attacks on merchantmen; it follows that they also probably did not do so for shore installations.

The belligerents' automatic submarine contact mine campaigns were among the most egregious Tanker War LOAC violations. Neither observed necessity and proportionality principles in mining. Iraq mined high seas areas; many Iraqi mines became unmoored and did not deactivate. The same appears true for Iranian mining. Iraq may have laid mines off the enemy coast for the sole purpose of intercepting commercial shipping. Iran laid mines in the high seas without publishing location of minefields. Iran may have laid mines in neutral waters, and mines appeared in the Strait of Hormuz, thereby threatening to impede or stop neutral shipping. Iran and Iraq also failed to show due regard for neutrals' rights to use the high seas or other ocean areas.

*8. Other Humanitarian Law Issues*

Besides humanitarian law issues related to attacks on shipping and shore facilities,[837] the Tanker War raised issues of evacuation of merchant ships and crews trapped in the Shatt al-Arab dividing Iran and Iraq, under a UN or ICRC flag; neutrals' repatriation of belligerent crew they rescued on the high seas; and repatriating prisoners of war at war's end.[838]

When Iraq refused, as humanitarian law allowed it to do, egress of trapped merchantmen under a UN or ICRC ensign, the issue was mooted. These issues may arise in future wars.

When the United States turned over an Iraqi pilot to a national Red Crescent Society, and when the United States turned over surviving Iranian *Iran Ajr* crewmen to

another Red Crescent Society, the United States acted in accordance with humanitarian law, which says that belligerents' armed forces members must not be returned to their countries during the war if a neutral rescues them on the high seas. Whether the Red Crescent Societies acted properly is another matter. Since opposing belligerents did not protest, it is presumed they acquiesced in the transactions. On the other hand, Iran's failure to repatriate prisoners of war until 10 years after the war's end violated humanitarian law, which says they must be repatriated promptly after hostilities end.

*9. Deception During Armed Conflict at Sea: Ruses and Perfidy*

Although there were no reported belligerent actions amounting to ruses of war, lawful or unlawful, or perfidy, there were actions related to these issues during the Tanker War.[839]

Late in the war the USSR proposed a UN flotilla of Gulf naval forces; when all Gulf naval interests did not agree with the proposal, the idea mooted. The issue remains for future wars, particularly in the peacekeeping context. The flag issue is the tip of the iceberg; underneath lie command and control structure issues for multinational naval operations. During the Tanker War navies cooperated to greater or lesser degrees, particularly in clearing mines, analogous to a more formal coalition opposing Iraq, ultimately with Security Council authorization, in the 1990-91 war. The USSR proposal may prove to have been a seed of future operations concepts.

Neutral warships and military aircraft probably began to adopt protective measures like non-reflective paint schemes. Warships like *U.S.S Vincennes* and some neutral military aircraft were built from the frames up to be less conspicuous on acquisition radars. Neutral shipping tagged along with neutral convoys; some ships were painted grey like warships, probably to simulate them and thereby deter belligerent attacks. None of these actions were perfidy or unlawful ruses; they were actions by neutrals.

*10. Summing Up: Projections for Future Conflicts*

Although on a worldscale basis the Iran-Iraq war was a small affair, it was a big war, a total war, for two medium-sized belligerents. It was fought far away from major neutral naval powers' home ports. It has not been and will not be the last of its kind. The 1990-91 Gulf War pitted a US - led coalition against one Tanker War belligerent, Iraq, and there was the potential and reality for a reprise of many Tanker War LOAC issues. Yugoslavia's disintegration, continuing to this day, began just after the Tanker War cease-fire. The same kind of issues, *e.g.*, interdicting high seas merchant traffic, arose in these conflicts.

A critical difference between the Tanker War and these later conflicts was the Cold War's end and perhaps a beginning of a new UN era, in which Charter law

issues besides the inherent right of self-defense, a major legal issue during the Tanker War,[840] will figure. To the extent the later conflicts were governed by Charter-based law, as a technical matter the LOAC did not apply; in all cases the LOAC informed the content of Charter-based law. The result thus far has been close approximation of LOAC standards under Charter law, but the law need not always be identical.[841] The difference between necessity and proportionality under the LOAC and necessity and proportionality in self-defense situations, the Charter recognizing the inherent right of individual and collective self-defense, can be great.[842] This was a major but disputed Tanker War issue. To take another issue related to the War, law governing a Security Council decision directing a blockade might include a "paper blockade," unlawful under the LOAC since the 1856 Paris Declaration.[843] For national decisionmakers, the question will be whether the LOAC should be part of the law governing UN operations; if not, what should be different? In many cases the old law has worked well; it is a matter of understanding and applying it. Tanker War examples of objections to legitimate visit and search or use of the term "reprisal" when self-defense should have been recited are not helpful in developing the law, traditional or otherwise.

The second problem will be interfacing the LOS with the LOAC. Universal acceptance of the 1982 LOS Convention will cure ambiguities in earlier law, *e.g.*, straits passage rules, and will strengthen customary norms already restated in the 1982 and 1958 Conventions. A narrow issue will be whether the customary and treaty-based rule, that the customary other rules clauses of the 1982 and 1958 Conventions, which mean the LOS is subject to the LOAC in appropriate situations, will be followed in the future. Properly read and applied, Article 88 of the 1982 LOS Convention, declaring the high seas are reserved for peaceful purposes, will not impede Charter-governed operations, LOAC-governed operations, or peacetime naval operations, for that matter.[844] A reverse-twist issue is whether the due regard principle, found in the LOS conventions as a rule for mutual use of, *e.g.*, the high seas, will apply as an LOAC concept in belligerent-neutral relations for oceans use if there is no LOAC rule.[845] This is not a firm LOAC principle but only commentators' proposals; should it become a rule of law?

The third issue is applying traditional rules, or perhaps variants of them under a Charter law regime, to new technologies. The Tanker War was the first where helicopters, as distinguished from fixed-wing aircraft, worked with warships in visit and search or diversion operations. The technique was employed again in the 1990-91 Gulf War and the Yugoslavia crisis. Missiles have been a feature of every war since the early Arab-Israel conflicts. New sea mines may be deployed; the technology of Tanker War mines dated back to the early Twentieth Century. New electronic or other devices may conjure up new ruses of war, with a possibility of claims of unlawful ruse or perfidy. How will Internet communications affect traditional LOAC rules? Will space technology and platforms be a factor? In many ways the

Iran-Iraq conflict was an old-fashioned war, replete with unrestricted (and unlawful) attacks on neutral merchantmen and grisly trench warfare on land, complete with gas attacks reminiscent of World War I. The next wars may not be simple in terms of weapons technologies and techniques. How will traditional LOAC rules, and necessity, proportionality and due regard principles, respond to these issues?

The interdependent world economy is another issue, largely outside the law, but it may promote problems, whether the law is Charter-based, the LOAC or the LOS. Besides seafaring nations, some of whom have substantial naval assets and others that do not, other countries' and their citizens' and businesses' interests will figure in decisionmaking, particularly in UN action, but maybe in individual sovereign State attitudes. The sketch of possible interests in maritime carriage of goods and passengers is a case in point.[846] Consider how political decisions might be different, depending on whose and which national interests are involved. These decisions have translated, and will translate, into the content of UN and individual States' actions. The history of support for the Tanker War belligerents in the absence of UN action illustrates the latter point.[847]

One final, new issue is the maritime environment during armed conflict. Tankers and other oceangoing vessels are larger today than ever before; they are matched by larger warships, all of which carry more bunkers, or can lift more oil, in the case of the tankers. There was one major reported spill during the Tanker War, in 1983, at Iran's Nowruz offshore facility, resulting from Iraqi attacks.[848] Undoubtedly high seas self-defense responses or belligerent attacks caused others. The maritime environment issue is the subject of Chapter VI, to which we now turn.

## NOTES

1. *E.g.*, LOS Convention, art. 87(2); High Seas Convention, art. 2 ("reasonable regard"); *see also* n. IV.75 and accompanying text.

2. *E.g.*, LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

3. *Cf.* High Seas Convention, Preamble; *see also see also* nn. III.952-67, IV.10-25 and accompanying text.

4. Vienna Convention, arts. 60-62; *see also* nn. III.927-51, IV.26-31 and accompanying text.

5. *Cf.* Hamilton DeSaussure, *The Laws of Air Warfare: Are There Any?*, NWC REV. 35 (Feb. 1971). This Chapter does not address the law of air warfare except as it affected the Tanker War, or land warfare issues, *e.g.*, those under the Geneva Gas Protocol, which figured in the 1980-88 land campaigns. However, this Chapter analyzes treaties, *e.g.*, Protocol I, or custom for other modes of warfare that might apply by analogy to naval warfare. There were no space warfare issues.

6. Most recently NWP 9A and its successor, NWP 1-14M, and the SAN REMO MANUAL. Although the NWPs are military manuals and reflect US policy, which may differ (sometimes significantly) from others' views, their influence has spread worldwide. Military manuals can reflect or restate international law. BROWNLIE, INTERNATIONAL LAW 5; W. Michael Reisman & William K. Leitzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, *in* Grunawalt 1. NWP 9A was used during the Gulf War, 1990-91, and was cited extensively in the MANUAL and by other commentators. NWP 1-14M will undoubtedly receive similar acceptance. NWP 9A has been translated into Arabic, Japanese and Spanish, and is on ships' bridges the world over. James H.

Doyle, Jr., *International Law and Naval Operations, in* LIBER AMICORUM 17, 21-23; Michael N. Schmitt, *Preface, in id.* xi; Ralph Thomas, *Sailor-Scholar, in id.* xv, xvii. To the extent countries use NWP 9A and similar manuals in military operations and recognize the practice as law, they evidence customary law. *Cf.* ICJ Statute, art. 38(1); RESTATEMENT (THIRD) § 102.

7. ICJ Statute, arts. 38(1), 59; RESTATEMENT (THIRD) §§ 102-03; n. III.10 and accompanying text.

8. Vienna Convention, arts. 53, 64; *see also* n. III.10 and accompanying text.

9. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

10. *See generally* RESTATEMENT (THIRD) §§ 102-03, n. IV.57 and accompanying text.

11. Vienna Convention, art. 61; *see also* nn. III.928, IV.26 and accompanying text.

12. Vienna Convention, art. 62, *see also* nn. III.929, IV.27 and accompanying text.

13. *E.g.*, Robertson, *Commentary*, n. III.930, 169 says Hague IX, apart from its rules forbidding bombarding undefended places, fell into desuetude almost as soon as the treaty was adopted. *See also* nn. III.930, IV.28 and accompanying text.

14. Vienna Convention, art. 60; *see also* n. III.927 and accompanying text.

15. *See, e.g.*, Hague VII, art. 6 ("as soon as possible"); Hague VIII, arts. 3 ("every possible precaution"), 5 ("do their utmost"); Hague IX, arts. 5 ("as far as possible"), 6 ("do his utmost"); Hague XI, arts. 1 ("least possible"), 2 ("absolutely necessary"); Hague XIII, art. 17 ("absolutely necessary"), 21 ("as soon as . . . circumstances . . . end").

16. *See, e.g.*, Hague VI, art. 2; Hague XIII, arts. 14, 21. For analysis of Hague VI, *see* NAVAL WAR COLLEGE, INTERNATIONAL LAW TOPICS AND DISCUSSIONS: 1905, at 9-20 (1906); NWIP 10-2 ¶ 503b(1); NWP 1-14M Annotated ¶ 8.2.2.1; NWP 9A Annotated ¶ 8.2.2.1; 2 OPPENHEIM § 102b, at 335; SAN REMO MANUAL ¶ 135 & cmts; TUCKER 74-74; 1917 Instructions ¶ 62; 1941 Tentative Instructions ¶ 67; 1943 *id.* ¶ 67. Many Convention parties did not observe it during World War I; France, Germany and Great Britain refused immunity during World War II. France and Britain denounced Hague VI, never in force for the United States; it is in force for about 28 nations with reservations to article 4 and a standard 1907 Hague provision in art. 6 that it does not apply except between contracting parties and then only if all belligerents are Convention parties. 2 OPPENHEIM § 102b; SCHINDLER & TOMAN 794-96; Andrea de Guttry, *Commentary, in* LAW OF NAVAL WARFARE 102, 108, 109 n.5, 110 n.22. Claims of wider acceptance through treaty succession might be made; *see* Symposium, *Treaty Succession;* Walker, *Integration and Disintegration*, but these might be countered by development of a contrary custom or desuetude of the Convention. However, the treaty might be considered as a secondary source, *i.e.*, a product of scholars. *See* nn. III.10, 930, IV.28 and accompanying text.

17. *E.g.*, Hague VI, art. 3 requires that enemy merchantmen leaving port before a war starts intercepted by a warship must be put in detention, with restoration after the war without compensation, and can be requisitioned or destroyed upon payment of compensation, but provision must be made for the safety of those on board and security of the ship's papers. If detention is not feasible, and a captor opts not to requisition or destroy the merchantman, that ship might be diverted instead of being detained. Impossibility of performance, or fundamental change of circumstances, *e.g.*, when a captor's suitable ports are in enemy hands, could excuse performance under Article 3 and permit diversion to a neutral port. Hague VI has fallen into desuetude and is not considered customary law. *See* n. 16 and accompanying text.

18. *See* nn. III.948, IV.30 and accompanying text.

19. First-Fourth Conventions, art. 2, also provide that they remain in effect even if a party to a conflict is not party to the treaties, if that party accepts and applies the treaties' terms.

20. *See* nn. IV.494-506 and accompanying text.

21. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

22. SAN REMO MANUAL ¶ 4, cmt. 4.3, citing NWP 9A Annotated ¶ 5.2; *see also* NWP 1-14M Annotated ¶ 5.2.

23. NWP 9A Annotated ¶ 5.2 nn.5,6; NWP 1-14M Annotated ¶ 5.2 nn.5,6; 2 OPPENHEIM ¶ 69; STONE 351-53.

24. NWP 9A Annotated ¶ 5.2, citing *inter alia* Protocol I, arts. 51(5)(b), 57(2)(a)(iii); MCDOUGAL & FELICIANO 525; NWIP 10-2, ¶ 220 (¶ 3 also known as principle of chivalry) (italics in original, notes omitted). SAN REMO MANUAL, ¶ 4, Commentary 4.2 quotes ¶¶ 1,2 with approval. *See also* NWP 1-14M Annotated ¶ 5.2, employing identical language; Hague IV, Regulation 23(b); Protocol I, art. 37(1); AFP 110-31 ¶ 5-3c; BOTHE *et al.*. 201-06, 299-300, 306-11, 359-63; OXFORD NAVAL MANUAL, art. 15; PILLOUD, COMMENTARY 430-36, 615-17, 623-26, 678-79, 683-85; SAN REMO MANUAL ¶¶ 46(d) & cmt. 46.5, 111. Legality of Threat of Nuclear Weapons, 1996(1) ICJ 245, said necessity and proportionality are customary international law norms in self-defense situations, although the Court's holding, *id.* 266, said *inter alia* that the threat or use of nuclear weapons "would generally be contrary to the rules of international law applicable in armed

conflict, and in particular the principles and rules of humanitarian law . . . [I]n view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." *See also* nn. III.486, 521 and accompanying text. Perhaps the opinion says more than it seems to say, 1996(1) ICJ 245, or the Court mixed the concepts of necessity and proportionality in self-defense situations with concepts labeled with the same words that apply during armed conflict. Assuming armed conflict between two States, LOAC necessity and proportionality principles would apply to this war; if a third State attacked a belligerent or a belligerent attacked a third State, self-defense necessity and proportionality principles would apply to these situations.

25. Other principles of war some armed forces recognize include unity of command, maneuver and offensive. Not all armed forces have the same list of Principles, and some (*e.g.*, the US Navy) have not adopted any. NWP 9A Annotated ¶ 5.2, Table ST5-1 & n.8; NWP 1-14M Annotated ¶ 5.2 & n.9. The Principles are not inflexible rules; "good tools to sharpen the mind," they are essential elements in successful military operations. HENRY E. ECCLES, MILITARY CONCEPTS AND PHILOSOPHY 113 (1965); *see also* WAYNE HUGHES, FLEET TACTICS 140-45, 290-97 (1986).

26. NWP 9A Annotated ¶ 5.2 n.7; NWP 1-14M Annotated ¶ 5.2 n.5, quoting Brussels Conference of 1874, Final Protocol, Aug. 27, 1874, 65 BFSP 1005, SCHINDLER & TOMAN 26.

27. Third Convention, arts. 30, 46-48, 109-19, to which Iran and Iraq were parties. TIF 437-38; *see also* Parts H.2-H.3.

28. *See* nn. II.488-90 and accompanying text.

29. *See* nn. II.368-72 and accompanying text; *cf.* Second Convention, arts. 12-13, 15-20; Third Convention, arts. 19-20, 30, 46-48, 109-19, to which the United States is party. TIF 437-38; *see also* Parts H.2-H.3.

30. *See* nn. III.9-10, 47-630, 916-18, 932-67, IV.6-25 and accompanying text.

31. *Compare* NWP 1-14M Annotated ¶ 4.3.2.1 & n.32, noting differences between this statement and *Caroline Case* principles, *with* NWP 9A Annotated ¶ 4.3.2.1 ("Anticipatory self-defense involves the use of armed force where there is a clear necessity that is instant, overwhelming, and leaving no reasonable choice of peaceful means," a restatement of *Caroline Case* principles); *see also* nn. III.357-484 and accompanying text.

32. SAN REMO MANUAL ¶ 4, cmt. 4.3, omits this provision from NWP 9A Annotated ¶ 5.2; rules for perfidy and lawful ruses appear at *id.* ¶¶ 109-11. An unlawful ruse of war should apply in the self-defense context as well as during combat. NWP 9A Annotated ¶¶ 4.3.2-4.3.2.1, NWP 1-14M Annotated ¶ 4.3.2-4.3.2.1 and other commentators appear to say nothing on the point. *See also* Part V.I.

33. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

34. SAN REMO MANUAL ¶ 46 (reference to *id.* § VI omitted; italics in original); *see also id.*, Commentaries, referring to Protocol I, arts. 57-58, and feasibility reservations to *id.* and Conventional Weapons Convention; *compare* NWP 1-14M Annotated ¶¶ 5.2-5.3; NWP 9A Annotated ¶¶ 5.2-5.3.

35. SAN REMO MANUAL ¶ 13(b) & cmts. 13.5-13.7, partly relying on Protocol I, noting its "attack" definition also applies in self-defense situations, and citing MANUAL ¶¶ 67, 70, which recite rules for attacking neutral merchant ships and civil aircraft acquiring enemy character, *see also* Second Protocol, art. 1(f).

36. *Cf.* Hague XI, art. 3; *see also* nn. 258-77 and accompanying text.

37. *See* n. 23 and accompanying text.

38. *See* nn. 23, 37 and accompanying text.

39. Hague XI, art. 3; *see also* nn. 274-77 and accompanying text.

40. *See* nn. III.591-616, 645-49 and accompanying text.

41. *See* nn. III.627-29 and accompanying text.

42. Belgium Declaration, May 20, 1986; Italy Declaration, Feb. 27, 1986; Netherlands Declaration, June 26, 1977; UK Declaration, Dec. 12, 1977, *in* SCHINDLER & TOMAN 706-07, 712-14, 717, regarding Protocol I, arts. 51-52, 57. *See also* nn. III.620-26, V.45 and accompanying text.

43. Conventional Weapons Convention, Mine Protocol, art. 2(6); Incendiary Weapons Protocol, art. 1(3). In 1999, Second Protocol, art. 1(f) defined military objective: "[A]n object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage[.]" The Protocol is not in force but is a

supportive secondary source for the principle. ICJ Statute, art. 38.(1); RESTATEMENT (THIRD) § 103. *See also* n. III.627 and accompanying text.

44. Table A5-1, n. III.628 lists 148 countries as Protocol I parties as of Oct. 15, 1997. The United States is not a party; *see* nn. III.622 and accompanying text. TIF 464 lists 70 States as parties to the Conventional Weapons Convention and its Protocols; the United States is not party to the Mines or Incendiary Weapons Protocols, but these are before the US Senate for advice and consent. *See also* nn. III.627 and accompanying text. Treaty succession principles applying to the former Yugoslavia may mean that more than 70 States are party to the Conventional Weapons Convention. *See generally* Symposium, *State Succession*; Walker, *Integration and Disintegration.*

45. Vienna Convention, preamble, art. 38; BROWNLIE, INTERNATIONAL LAW 5, 13-14; 1 OPPENHEIM § 10, at 28; RESTATEMENT (THIRD) § 102(3) & cmt. f. Some countries, *e.g.,* the United States, have declared that parts of these treaties state custom, *e.g.,* Protocol I, arts. 51(2), 51(5); art. 52, except for its art. 52(1) prohibition on reprisals against civilians; art. 57. *See also* nn. III.623-25 and accompanying text. Art. 52(2)'s military objective definition might be considered different in scope from definitions in the Helsinki Principles and US military manuals. *Compare* Protocol I, art. 52(2) ("objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage") *and* SAN REMO MANUAL ¶¶ 40, 46, 60(g) *with* NWP 1-14M Annotated ¶¶ 8.1.1., 8.2.2.2, at 8-12 (vessel "integrated into the enemy's war-fighting/war-sustaining effort"); NWP 9A Annotated ¶¶ 8.1.1, 8.2.2.2, at 8-12 (same); Helsiniki Principle 5.2.3 (similar). Although SAN REMO MANUAL ¶ 60, cmt. 60.10 rejects the NWP definition as "too broad," NWP citations to Protocol I, art. 52(2) indicate the United States views Protocol I, art. 52(2) as customary law. The MANUAL to the contrary notwithstanding, it would seem that US acceptance of art. 52(2) as custom means the NWP language is a distinction in wording without real differences for practice.

46. BOWETT, SELF-DEFENCE 131; *see also* ALEXANDROV 102.

47. *Cf.* VON CLAUSEWITZ, n. III.620, 117-21.

48. *See* nn. III.258-59 and accompanying text.

49. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

50. *See* NWP 1-14M Annotated, *Preface* at 2, ¶¶ 3.11.5.1, 4.3.2.2, 5.5; NWP 9A Annotated ¶¶ 3.1, 3.3.6, 3.11-3.11.1, 4.1, 4.3.2, 5.5; *see also* Christopher Craig, *Fighting by the Rules,* NWC REV. 23 (May-June 1984) (discussing UK ROE during Falklands/Malvinas War); n. III.258 and accompanying text. Craig's analysis involved Britain's war ROE, to which the LOAC applied, as distinguished from peacetime ROE, governed by the law of self-defense. During the Tanker War US and other neutral navies applied peacetime ROE in connection with self-defense and other responses. States also have ROE for peacekeeping or peacemaking operations. *See generally* HAYES, NAVAL RULES, n. II.341; O'CONNELL, INFLUENCE OF LAW 169-80; Duncan, n. II.341; Grunawalt, *The JCS,* n. II.341; Roach, *Rules of Engagement,* n. II.341; Shearer, *Rules of Engagment,* n. II.341; Stephen A. Rose, *Crafting the Rules of Engagement for Haiti,* LIBER AMICORUM ch. 11.

51. *See* Part B.

52. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

53. LOS Convention, art. 110; *compare* High Seas Convention, art. 22, permitting visit if a merchantman is suspected of engaging in piracy or the slave trade, or in reality flies the same flag as the warship; *see also* n. 76 and accompanying text.

54. *E.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

55. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

56. Chapter IV analyzed LOS issues in the Tanker War context.

57. COLOMBOS § 558; NWIP 10-2 ¶ 430; SAN REMO MANUAL ¶ 10; *compare* Robertson, New LOS 265-72 *with id.* 272-77. For specific analyses, *see* Parts B-G and accompanying text, which develop exceptions and interpretations of this broad statement.

58. LOS Convention, art. 87; High Seas Convention, art. 2; *see also* nn. IV.68-79 and accompanying text. As Parts A-G make clear, there are exceptions to this broad statement.

59. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

60. Robertson, New LOS 265-77 also analyzes archipelagic waters and the Area, but there are no archipelagoes or Area waters in the Persian Gulf. *Id.* 278-97, citing *inter alia* NWP 9A Annotated ¶¶ 7.3, 7.3.4.2, 7.3.5, 7.3.6, and refuting arguments *in* ELMER RAUCH, THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS FOR THE PROTECTION OF VICTIMS

OF INTERNATIONAL ARMED CONFLICTS AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE 34 (1984) and at UNCLOS III for the proposition that coastal States may extend neutrality to the EEZ and archipelagic waters as declared in the law of the sea.

61. *Compare* NWP 1-14M Annotated ¶¶ 7.3, 7.3.3-7.3.7.1 *with* NWP 9A Annotated ¶¶ 7.3-7.3.7.1; SAN REMO MANUAL ¶¶ 14-37.

62. Helsinki Principles 3.1, 4; SAN REMO MANUAL ¶¶ 10(b), 10(c), 34, 36-37; Robertson, New LOS 286, 291, 297, 303; Dietrich Schindler, *Commentary, in* LAW OF NAVAL WARFARE 211, 220; *see also* n. 58 and accompanying text.

63. *See* nn. 32, 41-47 and accompanying text; *see also* Part I.

64. UN Charter, arts. 51, 103; *see also* nn. II.459-68, III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

65. *See* n. 33 and accompanying text.

66. *See* nn. II.459-68 and accompanying text.

67. *See* nn. II.341-44, 452-53, III.258, 465 and accompanying text.

68. *See* n. III.258 and accompanying text.

69. *See* nn. II.341-44, III.258 and accompanying text.

70. *See* nn. II.104-06, 220, 277, 290, 325, 357, 375, 379-81, 463 and accompanying text.

71. NWP 9A Annotated ¶¶ 2.3.3, 7.3.5; NWP 1-14M Annotated ¶¶ 2.3.3, 7.3.5; SAN REMO MANUAL ¶¶ 23-33; *see also* Part IV. B.5.

72. LOS Convention, arts. 19(2)(a)-19(2)(c), 19(2)(f), 19(2)(*l*); Territorial Sea Convention, art. 14(4); *see also* nn. IV.372-75 and accompanying text.

73. Hague XIII, arts. 1, 5; NWP 9A Annotated ¶¶ 7.3, 7.3.2, 7.3.4, 7.3.4.2, 7.3.7; NWP 1-14M Annotated ¶¶ 7.3, 7.3.2, 7.3.4-7.3.5, 7.3.7; 2 OPPENHEIM ¶¶ 318, 325 n.1; SAN REMO MANUAL ¶¶ 14-18.

74. *See* n. 73 and accompanying text; *see also, e.g.,* nn. II.250-59, 309, 401-02, 434 and accompanying text.

75. *See, e.g.,* nn. II.250, 260, 334-35, 337-39, 362, 373, 393-94, 412, 421, 430-33, 446, 469, 519, V.58 and accompanying text.

76. LOS Convention, arts. 95-96, 109-10, 236; High Seas Convention, art. 22. Other agreements flesh out LOS principles, *e.g.,* Convention to Suppress the Slave Trade & Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 LNTS 253; Protocol, Dec. 7, 1953, 7 UST 479, 182 UNTS 51; Supplementary Convention on Abolition of Slavery, the Slave Trade & Institutions & Practices Similar to Slavery, Sept. 5, 1956, 18 *id.* 3201, 266 UNTS 3; Telecommunications Convention & Optional Protocol, Nov. 6, 1982, TIAS ——; Telecommunications Convention & Optional Protocol, Regulations, Oct. 25, 1973, 28 UST 2495, 1209 UNTS 32 & Radio Regulations, Dec. 6, 1979, TIAS ——; European Agreement for Prevention of Broadcasts Transmitted from Stations Outside National Territories, Jan. 22, 1965, 634 UNTS 239; (illicit radiobroadcasting; *see also* TIF 450-56); *see also* The Marianna Flora, 24 US (11 WHEAT.) 1 (1826); BROWN 294-95, 299-304, 309-10, 314; BROWNLIE, INTERNATIONAL LAW 237-44; COLOMBOS §§ 156A-56B, 333-37, 457-64, 470-83A; 1 HYDE § 227; MCDOUGAL & BURKE 887-93; NWP 1-14M Annotated ¶¶ 3.4-3.8; NWP 9A Annotated ¶¶ 3.4-3.8; 2 O'CONNELL, LAW OF THE SEA 802-03, 814-19; 1 OPPENHEIM §§ 292-93, 299-305, 429-30; RESTATEMENT (SECOND) § 34; RESTATEMENT (THIRD) § 522; HUGH THOMAS, THE SLAVE TRADE (1997); Eric Ellen, *Contemporary Piracy,* 21 CAL. W. INT'L L.J. 123 (1990); Samuel Pyatt Menefee, *"Yo Heave Ho!": Updating America's Piracy Laws, id.* 151 (1990); John N. Petrie, *Pirates and Naval Officers,* NWC REV. 15 (May-June 1982); Horace B. Robertson, Jr., *The Suppression of Pirate Broadcasting: A Test Case for Control of Activities Outside National Territory,* 45(1) L. & CONTEMP. PROBS. 73 (1982); Louis Sohn, *Peacetime Use of Force on the High Seas, in* Robertson 38, 39-59; Anna van Zwanenberg, *Interference with Ships on the High Seas,* 10 ICLQ 785 (1961).

77. *See* nn. IV.710-12 and accompanying text; COLOMBOS §§ 151-56. Because the United States abolished National Prohibition over 60 years ago, US Const., amend. XXI, these treaties may be headed toward desuetude in terms of their specific function, if that is not already true. *See* nn. III.930, IV.28 and accompanying text. They may have lingering vitality for LOS territorial sea issues as discussed nn. IV.710-12 and accompanying text.

78. *See* Convention Against Illicit Traffic in Narcotics Drugs & Psychotropic Substances, Dec. 20, 1988, art. 17,—UST—, *in* 28 ILM 493-518 (1989). The United States and other countries have concluded bilateral agreements on narcotics interdiction too. *See, e.g.,* Agreement to Facilitate Interdiction by the United States of Vessels of the United Kingdom Suspected of Trafficking in Drugs, Nov. 13, 1981, 33 UST 4224, 1285 UNTS 197. *Table of United States Bilateral Treaties Providing for the Prevention of Smuggling,* Doc. 17-7, 6E BENEDICT lists these and other US antismuggling bilateral agreements. *See also* BROWN 310-11; NWP 1-14M Annotated ¶¶ 3.11.4.1-3.11.6 & Table A3-1: *Maritime Counterdrug/Alien Migrant Interdiction Agreements* (Sept. 1, 1997), *in id.* 3-33; RESTATEMENT (THIRD) § 522, cmt.

d & r.n.4; Phillip A. Johnson, *Shooting Down Drug Traffickers,* LIBER AMICORUM ch. 4; Sohn, *Peacetime Use,* n. 76, 59-79. Smuggling people has been an issue too. *See, e.g.,* Gary W. Palmer, *Guarding the Coast: Alien Migrant Operations at Sea,* LIBER AMICORUM ch. 8.

79. Convention for Suppression of Unlawful Acts Against Safety of Maritime Navigation, Mar. 10, 1988,—UST—, *in* 27 ILM 668 (1988); Protocol for Suppression of Unlawful Acts Against Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988,—UST—, *in id.* 685 (1988); *see also* BROWN 304-09; NWP 1-14M Annotated ¶ 3.5.2.3 n.30; Malvina Halberstam, *The Achille Lauro, Piracy and the IMO Convention on Maritime Safety,* 82 AJIL 269, 270-71 (1988); Christopher C. Joyner, *Offshore Maritime Terrorism: International Implications and the Legal Response,* NWC REV. 16 (July-Aug. 1983).

80. UN Charter, arts. 51, 103; *see also* BROWN 313 (force used to interdict arms shipments); COLOMBOS § 337; NWP 1-14M Annotated, ¶ 3.11.5.1 (distinguishing force used in drug interdiction and measures taken in inherent self-defense right); nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text. *See* Parts F.2-F.5 for analysis of war zones, often claimed in connection with visit and search.

81. LOS Convention, art. 87(1); High Seas Convention, art. 2; Vienna Convention, arts. 60-62; *see also* nn. III.952-67, IV.10-33 and accompanying text.

82. The claim by BROWNLIE, INTERNATIONAL LAW 243 that the approach and visit regime has been destabilized because of self-defense and other claims related to approach and visit may indicate lack of appreciation of the law flowing from UN Charter, art. 51, 103, and that the LOS Convention confirms what had been developing trends in the law; *compare* 2 O'CONNELL, LAW OF THE SEA 801.

83. LOS Convention, art. 87(1); High Seas Convention, art. 2; Vienna Convention, arts. 60-62; *see also* nn. III.928-67, IV.10-33 and accompanying text.

84. *See* nn. 76-79 and accompanying text.

85. LOS Convention, arts. 95-96, 110(1), 236; High Seas Convention, arts. 8(1), 9; *see also* Helsinki Principle 5.2.7; NWP 1-14M Annotated ¶ 7.6; NWP 9A Annotated ¶ 7.6; 2 OPPENHEIM § 416; OXFORD NAVAL MANUAL, art. 32; STONE 591-92; 11 WHITEMAN 3; n. IV.794 and accompanying text; *but see* TUCKER 335-36.

86. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

87. Bring, *Commentary,* n. III.848, 843; Schindler, *Commentary,* n. 62, 221.

88. Hague XIII, arts. 1-2, 25; Stockholm Declaration, arts. 9; NWP 1-14M Annotated ¶ 7.6; NWP 9A Annotated ¶ 7.6; SAN REMO MANUAL ¶¶ 14-15, 16(d), 118; Bring, *Commentary,* n. III.848, 843; Schindler, *Commentary,* n. 62, 215, 218.

89. LOS Convention, arts. 1(1), 33, 58, 76(1), 78, 135, 137; Continental Shelf Convention, art. 3; Fishery Convention, arts. 1, 6; Territorial Sea Convention, art. 24; *see also* Parts IV.B.1 and B.2.

90. LOS Convention, arts. 1(1), 136-37; *see also* BROWN 18, 20, ch. 17; BROWNLIE, INTERNATIONAL LAW 252-57; 2 Nordquist ¶¶ 1.1-1.19; 1 O'CONNELL, LAW OF THE SEA 463-66; 1 OPPENHEIM § 350; RESTATEMENT (THIRD) § 523.

91. *See* nn. IV.75, V.58, 62 and accompanying text.

92. LOS Convention, arts. 2, 8; Territorial Sea Convention, arts. 1, 5; *see also* nn. IV.267-508 and accompanying text.

93. *See* nn. IV.75, V.58, 62 and accompanying text.

94. LOS Convention, art. 25(3); Territorial Sea Convention, art. 16(3); *see also* nn. IV.337, 349 and accompanying text.

95. Helsinki Principle 3.3, cmt.; NWIP 10-2 ¶¶ 430b & n.23; NWP 1-14M Annotated ¶ 7.8; NWP 9A Annotated ¶ 7.8; SAN REMO MANUAL ¶ 108; TUCKER 300-01; *cf.* Helsinki Principle 3.2. This right of belligerents to close an area of the sea incident to visit and search should be distinguished from an exclusion zone claim, discussed in Part F, which may involve larger high seas areas.

96. NWP 1-14M Annotated ¶ 7.8; NWP 9A Annotated ¶ 7.8; *cf.* London Declaration, art. 1; Paris Declaration ¶ 4; SAN REMO MANUAL ¶¶ 85, 106.

97. *See generally* Part IV.B.5 and nn. V.58, 62 and accompanying text. Some treaties have specific provisions, *e.g.,* Montreux Convention, n. IV.557, art. 19, 173 LNTS 225 (no visit and search or hostile act in Turkish Straits if Turkey not a belligerent); *see also* NWP 1-14M Annotated ¶ 7.3.5, 7-14; NWP 9A Annotated ¶ 7.3.5, 7-20; 1 OPPENHEIM § 213; Vignes, n. IV.555, 474.

98. Hague XIII, art. 1 requires belligerents to respect neutrals' sovereign rights. Belligerents must abstain from acts in neutral waters which if knowingly permitted by any State would be an act of belligerency; Maritime Neutrality Convention, art. 3 obliges belligerents "to refrain from performing acts of war in neutral waters or other acts which may constitute on the part of that State that tolerates them, a violation of neutrality." NWP 1-14M Annotated ¶ 7.6; NWP 9A Annotated ¶ 7.6 say the prohibition extends to "international straits overlapped by neutral territorial seas..."; SAN REMO MANUAL ¶ 15 uses similar language. *See also* Stockholm Declaration, art. 9(1); Helsinki Principles 1.4, 3.1; Bruce Harlow, *UNCLOS III and Conflict Management in Straits,* 15 ODIL 197, 205-06 (1985); Schindler, *Commentary,* n. 62, 220-21. This would be the situation of *e.g.,* the Strait of Hormuz if Iran, Oman and the UAE were neutral during a war involving other States; all are littoral States for the Strait. However, this was not the Tanker War case; Iran was a belligerent, and Oman and the UAE were officially neutral. Under these circumstances Iran should have been permitted to conduct visit and search in its territorial waters in the strait, so long as it did not interfere with neutral shipping transit passage rights. As a matter of theory, this may be the legally correct response, but a practical result of almost any kind of visit and search in this strait's confines will result in neutral shipping transit passage interference. On the other hand, in other straits, *e.g.,* those with a considerable high seas belt in the middle, as Hormuz might have been seen early in the war, *cf.* nn. IV.533-45, 562-65 and accompanying text, Iran could have conducted visit and search in the high seas area subject to the LOAC and the due regard principle, nn. 58, 62 and accompanying text, or in its territorial sea.

99. LOS Convention, arts. 38(1), 44-45; *see also* nn. IV.567, 582-600 and accompanying text.

100. *I.e.,* as a temporary security measure pursuant to LOS Convention, art. 25(3); Territorial Sea Convention, art. 16(3); *see also* nn. IV.308-09, 337, 349 and accompanying text.

101. NWP 1-14M Annotated ¶¶ 7.6, 7.8; NWP 9A Annotated ¶¶ 7.6, 7.8; *cf.* Helsinki Principle 5.2.9; London Declaration, art. 1; Paris Declaration ¶ 4; SAN REMO MANUAL ¶¶ 15, 85, 106. *See* Part F for analysis of exclusion and similar zones, which implicate wider high seas areas than the immediate area of naval operations for visit and search.

102. Although this is the US procedure, it is common practice among navies today. NWP 1-14M Annotated ¶ 7.6 (notes omitted); NWP 9A Annotated ¶ 7.6.1 (notes omitted), citing TUCKER 338-44. *See also* Helsinki Principles 5.2.1, 5.2.6; MCDOUGAL & FELICIANO 509-13; 1 W.N. MEDLICOTT, THE ECONOMIC BLOCKADE 70-85 (1952); NWIP 10-2 ¶ 631d n. 22; NWP 1-14M Annotated ¶ 7.4.2; NWP 9A Annotated ¶ 7.4.2; 2 OPPENHEIM §§ 418-21; OXFORD NAVAL MANUAL, art. 32; 2 O'CONNELL, LAW OF THE SEA 1147-48; SAN REMO MANUAL ¶¶ 122-24; TUCKER 280-82, 312-15, 322-23; W. Thomas Mallison, *Limited,* n. III.316, 389-90; US State Department Press Release, *U.S. Acts to Avoid Delays for Ships Transiting Waters in Vicinity of Cuba,* 47 Bulletin 747 (1962), on certificates of noncontraband carriage, *i.e.,* World War I and II navicerts and aircerts; clearcerts, used during the 1962 Cuban Missile Crisis. No aircerts, clearcerts or navicerts were reported during the Tanker War.

103. SAN REMO MANUAL ¶ 121 & cmt. 121.1. The merchantman may consent to diversion. *Id.* ¶ 119 & cmts. 119.1-119.2, citing *inter alia* COLOMBOS §§ 888-92; TUCKER 340; *see also* 2 OPPENHEIM §§ 421a-21b; 1 von Heinegg 301-04.

104. NWP 1-14M Annotated ¶ 7.6.2; NWP 9A Annotated ¶ 7.6.2; *accord,* 2 OPPENHEIM § 415.

105. *See* nn. 76-79 and accompanying text.

106. *Cf.* NWP 1-14M Annotated ¶ 7.6.2; NWP 9A Annotated ¶ 7.6.2.

107. *See generally* NWP 1-14M Annotated ¶¶ 7.6.1, 8.2.2.2-8.2.3, 8.3.1, 8.4; NWP 9A Annotated ¶¶ 7.6.1, 8.2.2.2-8.2.3, 8.3.1, 8.4; SAN REMO MANUAL ¶¶ 47, 136-37, 139-40, 146, 151.

108. *See* Parts C.4 and D.3.

109. Lieber Code, arts. 135-37, 141-42; OXFORD NAVAL MANUAL, art. 92; *see also* Howard S. Levie, *The Nature and Scope of the Armistice Agreement,* 50 AJIL 880, 903-06 (1956); Verri, n. IV.71, 337.

110. Cultural Property Convention, art. 14(2), to which the United States is not a party; *see also* COLOMBOS §§ 662-63; TOMAN 151-72; SAN REMO MANUAL ¶¶ 47(d), 136(d), 137, & cmts. 47.30, 136.1, 137.1; STONE 586; Doswald-Beck, *Vessels,* n. II.468, 253; 1 von Heinegg 312; Lyndel V. Prott, *Commentary, in* LAW OF NAVAL WARFARE 582, 585; n. V.262 and accompanying text.

111. Second Convention, arts. 22, 24-25, 29-33, 47; Protocol I, art. 22; BOTHE *et al.*. 142-45; COLOMBOS §§ 638-55; MALLISON 124-25; NWP 1-14M Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; NWP 9A Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; 2 O'CONNELL, LAW OF THE SEA 1119-22; 2 OPPENHEIM §§ 190, 206; OXFORD NAVAL MANUAL, arts. 41-42, 49; 2 PICTET 154-62, 164-69, 177-89, 252-56; PILLOUD, COMMENTARY 254-60; SAN REMO MANUAL ¶¶ 13(e), 47(a), 48(b), 136(a) & cmts. 13.16, 47.1-47.8, 48.10, 136.1; STONE 587; TUCKER 97, 117-34; Doswald-Beck, *Vessels,* n. II.468, 214-29; P. Eberlin, *Identification of Hospital Ships and Ships Protected by the Geneva Conventions of 12 August 1949,* 1982 INT'L REV.

RED CROSS 315; Steven L. Oreck, *Hospital Ships: The Right of Limited Self-Defense,* PROCEEDINGS 62 (Nov. 1988); L.R. Penna, *Commentary, in* LAW OF NAVAL WARFARE 534, 537; Arthur M. Smith, *Safeguarding the Hospital Ships,* PROCEEDINGS 56 (Nov. 1988); Verri, *Commentary,* n. IV.71, 334-35; 1 von Heinegg 313. These vessels may lose their exemption if they contribute to the war effort. *See* nn. 175, 243, 257-58, 273-76 and accompanying text.

112. ". . . [P]ostal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay. The[se] provisions . . . do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port . . . . [I]nviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible." Hague XI, arts. 1-2. Commentators divide on whether mail *ships* are among exempt vessels *Compare* COLOMBOS §§ 665-72 (mail ships not exempt); SAN REMO MANUAL ¶ 136, cmt. 136.2 (same), citing 2 OPPENHEIM § 191 (same); STONE 589-90 (restrictive interpretation, at best, in practice) *with* 2 O'CONNELL, LAW OF THE SEA 1123-24 (mail ships exempted); OXFORD NAVAL MANUAL, art. 53 (same); I.A. Shearer, *Commentary, in* LAW OF NAVAL WARFARE 183, 189 (same); 1 von Heinegg 313 (same); Verri, n. IV.71, 335 (same). Even the Hague XI correspondence exemption is subject to question and limitation through the practice of two world wars, although neutral diplomatic and consular correspondence and other mails may be exempt under other principles of international law. *See, e.g.,* Convention on Diplomatic Relations, Apr. 18, 1961, art. 27, 23 UST 3227, 3239, 500 UNTS 95, 108; Convention on Consular Relations, Apr. 23, 1963, art. 35, 21 *id.* 77, 99, 596 UNTS 261, 290; COLOMBOS § 673; 2 OPPENHEIM § 191; OXFORD NAVAL MANUAL, art. 53; STONE 589-90; C.D. Allin, *Belligerent Interference with the Mails,* 1 MINN. L. REV. 293 (1917); A.P. Higgins, *Treatment of Mails in Time of War,* 9 BYBIL 31 (1928); Shearer, 183-85; Verri, *Commentary,* n. IV.71, 335. The Hague Air Rules adopt the naval warfare rules, whatever they are, for air mail. Hague Air Rules, art. 56. The Hague Air Rules are considered customary norms and are generally regarded as declaring customary law, at least for naval warfare. NWIP 1-14 ¶ 7.3.7 n.82. The US Navy applied them during World War II. AFP 110-31 ¶ 4-3c, citing 1941 Tentative Instructions. (AFP 110-31 ¶ 5-2c says the Air Rules, arts. 22, 24-26 relating to air bombardment are not customary law as a total code, however; *see also* Part G.1.) The foregoing does not answer the question of what the naval warfare rule is; the Air Rules may incorporate nothing by reference when it comes to neutral mail. If a neutral mail ship exemption exists today, such a ship is subject to enemy character rules and consequences those entail. Hague XI and the general law of naval warfare make that very clear. *See* Part D.1. The "consideration and expedition" language of Hague XI, art. 2, if law today, might be considered an early statement of necessity and proportionality principles. *See* Part A. *See also* nn. 257, 271 and accompanying text.

113. This exemption is grounded in treaty and customary law. Hague XI, art. 3; The Pacquete Habana, 175 US 677 (1900); COLOMBOS §§ 656-59; 1 LEVIE, CODE 186; MALLISON 15-16, 126-28; NWP 1-14M Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; NWP 9A Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; 2 O'CONNELL, LAW OF THE SEA 1122-23; 2 OPPENHEIM § 187; OXFORD NAVAL MANUAL, arts. 47, 49; SAN REMO MANUAL ¶¶ 47(g), 136(f), 137 & cmts. 47.45-47.51; 136.1, 137.1; STONE 586; TUCKER 95-96; Doswald-Beck, n. II.468, 253-56; L.C. Green, *Comments, in* Grunawalt 223, 225-26; Shearer, *Commentary,* n. 112, 185; 1 von Heinegg 312; Walker, *State Practice* 129-30, 140, 146, 155, 187. As Hague XI, art. 3 and commentators emphasize, these vessels lose their exemption if they participate in hostilities. For further analysis of exempt vessels, *see* Part C.

114. COLOMBOS § 870; NWP 1-14M Annotated ¶ 7.6; NWP 9A Annotated ¶ 7.6; 2 OPPENHEIM § 416; OXFORD NAVAL MANUAL, art. 32; STONE 591-92; 11 WHITEMAN 3. Under the law of the sea these ships are also exempt from approach and visit. *See* n. 76 and accompanying text. 2 O'CONNELL, LAW OF THE SEA unfortunately uses the same terms, visit and search, for LOS approach and visit and LOAC visit and search.

115. COLOMBOS § 871-77; Helsinki Principles 5.2.8, 6.1; London Declaration, arts. 61-62; NWP 1-14M Annotated ¶ 7.6; NWP 9A Annotated ¶ 7.6; 2 OPPENHEIM § 417; OXFORD NAVAL MANUAL, art. 32; SAN REMO MANUAL ¶ 120; TUCKER 334-35; Frits Kalshoven, *Commentary, in* LAW OF NAVAL WARFARE 257, 268; Walker, *Anticipatory,* n. III.289, 379, 31 CORNELL INT'L L.J. 347 (US World War II convoy of UK-bound cargoes while US neutral); Walker, *State Practice* 128-29; 170; nn. IV.811-19, 826 and accompanying text. UK practice was once to the contrary. 2 OPPENHEIM § 425. Sweden's warships convoyed iron ore shipments in Sweden-flagged bulk carriers at least part way to Germany in 1915. PAUL G. HALPERN, A NAVAL HISTORY OF WORLD WAR I 204 (1994). Germany was dependent on iron ore, but the questionable nature of what was then absolute contraband clouded the issue of whether Swedish practice violated London Declaration convoying rules. *See also* Part D.3.

116. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

117. *See* nn. 115-16 and accompanying text.

118. *See* nn. 115-17 and accompanying text.

119. *See* Part C.1.

120. *Compare* Helsinki Principle 1.1; NWIP 10-2 ¶ 501; SAN REMO MANUAL ¶ 113; 1 von Heinegg 292; *cf.* NWP 1-14M Annotated ¶¶ 7.4, 7.5; NWP 9A Annotated ¶ 7.4, 7.5 (LONW rule), *with* LOS Convention, art. 91(1) (LOS rule); High Seas Convention, art. 5(1) (same); *see also* nn. IV.736-62 and accompanying text.

121. *E.g.*, LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

122. *See generally* COLOMBOS §§ 609-10; 3 HYDE § 786; London Declaration, arts. 55-56; NWP 1-14M Annotated ¶ 7.5; NWP 9A Annotated ¶ 7.5; OXFORD NAVAL MANUAL, art. 52; SAN REMO MANUAL ¶ 112; TUCKER 80-81; 1 von Heinegg 293; Kalshoven, *Commentary*, n. 115, 267; Verri, *Commentary*, n. IV.71, 335.

123. *See* nn. IV.736-62, 824-25 and accompanying text, concluding that reflagging from a Kuwaiti to a US ensign was valid under LOS principles.

124. *See* n. 120 and accompanying text.

125. 3 Nordquist ¶ 93.7(e), referring to LOS Convention, art. 97; *see* also LOS Convention, art. 93; High Seas Convention, art. 7; Protocol I, art. 38; nn. IV.807-10 and accompanying text.

126. *See* COLOMBOS §§ 605b-08; Declaration of London, art. 30; Helsinki Principle 5.2.3 & cmt.; NWIP 10-2 ¶¶ 631(c)(1), 633(a); NWP 1-14M Annotated ¶¶ 7.4-7.4.1.1; NWP 9A Annotated ¶ 7.4.1.1; 2 O'CONNELL, LAW OF THE SEA 1146-47; 2 OPPENHEIM § 92; SAN REMO MANUAL ¶ 148 & cmt. 148.4; STONE 486; TUCKER 267-68; Kalshoven, *Commentary*, n. 115, 263.

127. *See* nn. 76-81 and accompanying text; *see also* nn. II.305, 347 (terrorist attack potential considered in US NOTAMs, NOTMARs).

128. This included asserting visit and search rights after the ceasefire. *See* nn. II.177, 274-78, 288, 296-99, 306, 366, 420, 447, 491-92 and accompanying text.

129. *See* nn. II.104-06, 220, 277, 290, 325, 357, 375, 379-80, 463 and accompanying text.

130. *See generally* nn. II.177, 274-78, 288, 296-99, 306, 366, 420, 447, 491-92 and accompanying text.

131. LOS Convention, arts. 37-38, 87; High Seas Convention, art. 2; *see also* nn. IV.68-79 and accompanying text and Part VI.B.6.

132. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

133. *See, e.g.*, nn. II.179, 233, 250, 260, 334, 338-40 (attack on *U.S.S. Stark*, perhaps thought by Iraq to be a merchantman), 354, 357 (mine attacks on merchantmen), 359, 362, 368, 373, 393-94, 412, 420-21, 430-33 (mining *U.S.S. Samuel B. Roberts* in shipping lanes), 446, 469, 519 and accompanying text.

134. *See* nn. III.568-69 and accompanying text.

135. *See* nn. II.295, 304, 343-45, 349, 351-53, 359, 361-62, 438, 447-48, 454, 472 and accompanying text.

136. *See* nn. II.153-56 and accompanying text.

137. *See* nn. II.425-28 and accompanying text.

138. 3 Nordquist ¶ 93.7(e).

139. If a ship flies a UN ensign, perhaps in addition to its registry flag, the view is that only the registry State has jurisdiction over the ship. 3 Nordquist ¶ 93.7(e); *cf.* LOS Convention, art. 93; High Seas Convention, art. 7; *see also* nn. IV.835-37 and accompanying text. LOAC analysis is less clear; it is not certain which ensign prevails, the UN's or the flag State's. *See* nn. 120-25 and accompanying text.

140. Reparations for Injuries Suffered in Service of the United Nations, 1949 ICJ 174; BROWNLIE, INTERNATIONAL LAW 680-95; GOODRICH *et al.*. 619-20; 1 OPPENHEIM § 7, 18-19; RESTATEMENT (THIRD) § 223; SIMMA 1126.

141. UN Charter, arts. 25, 48; *see also* n. IV.57 and accompanying text.

142. LOS Convention, art. 93; High Seas Convention, art. 7; *see also* 3 Nordquist ¶ 93.7(e), at 133, quoting *Flag Etiquette Code to Be Followed on Naval Vessels Provided by Troop-Contributing Country to the United Nations Observer Group in Central America --- Practice Concerning the Use of the United Nations Flag on* Vessels, 1990 UN JURID. YB 252 (citation of use of ICRC ensign).

143. *Flag Etiquette Code*, n. 142, 3 Nordquist ¶ 93.7(e), at 133, contemplates a possibility that warships could fly the UN flag, alone or with the national ensign.

144. UN Charter, arts. 25, 48; *see also* nn. IV.57 and accompanying text.

145. *See* nn. III.308-48 and accompanyng text.

146. *See* nn. II.363, 412 and accompanying text.

147. *See* Part I.

148. *See, e.g.,* n. II.420 and accompanying text.

149. *See* nn. II.368-72 and accompanying text.

150. UN Charter, arts. 51, 103; Helsinki Principle 6.2; SAN REMO MANUAL ¶ 92; ; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text. *See* Parts G.2-G.3 for further LOAC mine warfare analysis.

151. This rule is subject to qualification, *e.g.,* warships that have surrendered cannot be attacked. COLOMBOS §§ 512, 516; NWIP 10-2 ¶¶ 430a, 441, 503a; NWP 1-14M Annotated ¶ 8.2.1; NWP 9A Annotated ¶ 8.2.1; 2 OPPENHEIM § 181; OXFORD NAVAL MANUAL, arts. 1, 31; SAN REMO MANUAL 68 & ¶ 10, 34-35; Verri, *Commentary,* n. IV.71, 330-31; n. 267 and accompanying text. Attacks on enemy targets invokes the military objective principle, restated for land warfare in Protocol I, arts. 48, 52(2) and for naval warfare in NWP 1-14M Annotated ¶ 8.1.1; NWP 9A Annotated ¶ 8.1.1; SAN REMO MANUAL ¶ 39; *See also* AFP 110-32 ¶¶ 6-3c; BOTHE *et al.*. 274-80, 282-86, 320-26; GREEN 161; 2 OPPENHEIM §§ 213, 214e, at 522-23; PILLOUD, COMMENTARY 585-96, 598-600, 630-37; Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict,* LIBER AMICORUM ch. 10.

152. *See* nn. 58, 62 and accompanying text.

153. Prize law does not apply to these captures; title vests immediately in the captor, under US law. COLOMBOS § 930, 801; NWP 1-14M Annotated ¶ 8.2.1; NWP 9A Annotated ¶ 8.2.1, reflecting Oakes v. United States, 74 US (32 How.) 778 (1863); *but see* COLOMBOS § 930 and A. Pearce Higgins, *Ships of War as Prize,* 6 BYBIL 103 (1925), reporting UK prize court cases on warships. Each country may establish its prize courts' jurisdiction, subject to international law rules; that explains the difference. COLOMBOS § 926; 2 OPPENHEIM §§ 192, at 484-85; 434; 656. It is legally proper for the United States to claim immediate title and for the United Kingdom to send warships to prize court adjudication. There is no international law rule on the subject.

154. If military exigencies permit, all possible measures should be taken without delay to search for, collect and identify the shipwrecked, wounded or sick and the dead. Warships may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for the wounded, sick or shipwrecked, and to collect the dead. Second Convention, arts. 16, 18-21; Protocol I, art. 33; BOTHE *et al.*. 171-75; COLOMBOS § 510; NWIP 10-2 ¶ 511b; NWP 1-14M Annotated ¶ 8.2.1; NWP 9A Annotated ¶ 8.2.1; 2 O'CONNELL, LAW OF THE SEA 1121; 2 OPPENHEIM §§ 204-205a; 2 PICTET 112-16, 129-53; PILLOUD, COMMENTARY 350-54; SAN REMO MANUAL ¶¶ 159, 161, 163-68; Doswald-Beck, *Vessels,* n. II.468, 225-26; Matheson, *Remarks* 424.

155. Second Convention, art. 15; *see also* 2 PICTET 107-12; n. 154 and accompanying text.

156. *See* Part B.

157. MALLISON 101; NWIP 10-2 ¶ 502a; NWP 1-14M Annotated ¶ 8.2.2.1; NWP 9A Annotated ¶ 8.2.2.1; SAN REMO MANUAL ¶ 135; TUCKER 103-04.

158. Hague VI, arts. 1-2, 4.

159. *See* n. 16 and accompanying text.

160. 2 OPPENHEIM § 102b, at 334; De Guttry, *Commentary,* nn. 16, 108; *Introductory Note, in* SCHINDLER & TOMAN 791.

161. Third Convention, art. 4(A)(5) (if they "do not benefit by more favorable treatment under any other provisions of international law," referring to Hague XI, art. 6); 3 PICTET 45-51, 65-66; SAN REMO MANUAL ¶ 165(d) & cmts. 165.5-165.9; TUCKER 112-15; *cf.* NWP 1-14M Annotated ¶ 8.2.2.1 & NWP 9A Annotated ¶ 8.2.2.1 ("may be made prisoners of war").

162. COLOMBOS §§ 909-10; NWIP 10-2 ¶ 502b(2); NWP 1-14M Annotated ¶ 8.2.2.1; NWP 9A Annotated ¶ 8.2.2.1; 2 O'CONNELL, LAW OF THE SEA 1115-16; 2 OPPENHEIM § 194; SAN REMO MANUAL ¶ 139; TUCKER 106-08.

163. SAN REMO MANUAL ¶¶ 59, 61; *see also* nn. 35-40 and accompanying text.

164. These categories have been derived from Protocol I, art. 52(2); London Protocol, Rule 2; *id.,* Rule 1, declaring that submarines must obey rules for other warships; NWIP 10-2 ¶ 503b(3); NWP 1-14M Annotated ¶ 8.2.2.2; NWP 9A Annotated ¶ 8.2.2.2; 2 OPPENHEIM §§ 181a, 356(1), 389; SAN REMO MANUAL ¶ 60 & cmts; *see also* nn. 45, 166-256 and accompanying text.

165. *Compare* NWP 9A Annotated ¶ 8.2.2.2 *and* NWP 1-14M Annotated ¶ 8.2.2.2 (identical with NWP 9A Annotated, ¶ 8.2.2.2 except citations) *with* SAN REMO MANUAL ¶ 60; *see also* NWIP 10-2 ¶ 503b(3). SAN REMO MANUAL,

cmt. 60.1 recites the NWP categories in the conjunctive ("and"). The NWP lists are neither disjunctive ("or") as my list has them nor conjunctive, but it is clear from NWP 9A Annotated ¶ 8.2.2.2; NWP 1-14M Annotated ¶ 8.2.2.2 that the disjunctive is meant. If read in the conjunctive, it means that all criteria, from persistently refusing to stop through integration into an enemy's warfighting/war-sustaining effort, must be meant. This is not the law; meeting any Category criterion is enough to subject an enemy merchantman to attack and destruction. NWIP 10-2 ¶ 503b(3) presents its criteria in a format similar to the NWPs.

166. London Protocol, Rule 2; NWIP 10-2 ¶ 503b(3); NWP 1-14M Annotated ¶ 8.2.2.2; NWP 9A Annotated ¶ 8.2.2.2; SAN REMO MANUAL ¶¶ 60(b)-60(e); *see also* MALLISON 122-23; Jon L. Jacobson, *The Law of Submarine Warfare, in* Robertson 205, 231.

167. NWP 1-14M Annotated ¶ 8.2.2.2 n.54; NWP 9A Annotated ¶ 8.2.2.2 n.49, citing NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 1930, at 9-19, 21-25 (1931); NWIP 10-2 ¶ 503b(3)(4); SAN REMO MANUAL ¶ 60(f) & cmt. 60.14; Levie, *Submarine Warfare,* n. III.439, 56; W.J. Fenrick, *Comments on Sally V. and W. Thomas Mallison's Paper, in id.* 110, 117-18.

168. *Compare* NWP 9A Annotated ¶ 8.2.2.2 n.49; NWP 1-14M Annotated ¶ 8.2.2.2 n.54 *with* SAN REMO MANUAL, cmt. 60.14; NWIP 10-2 ¶ 503b(3)4 used the formula, "offensive . . . use . . . against an enemy."

169. NWP 1-14M Annotated ¶ 8.2.2.2 n.54; SAN REMO MANUAL, cmt. 60.14.

170. NWP 9A Annotated ¶ 8.2.2.2; *see also* NWP 1-14M Annotated ¶ 8.2.2.2.

171. SAN REMO MANUAL ¶ 60(f).

172. *Compare* NWP 1-14M Annotated ¶ 8.2.2.2, n.54; NWP 9A Annotated ¶ 8.2.2.2, n.49, *with* SAN REMO MANUAL cmt. 60.14.

173. *Cf.* NWP 1-14M Annotated ¶ 9.2; NWP 9A Annotated ¶ 9.2 (mine technology); O'Connell, *International Law,* n. III.252, 52; Horace B. Robertson, Jr., *Modern Technology and the Law of Armed Conflict at Sea, in* Grunawalt 362, 370; Robertson, *New Technologies and Armed Conflicts at Sea,* 14 SYRACUSE J. INT'L L. & COM. 699 (1988); Service, n. III.439, 238-40.

174. In this regard NWP 9A Annotated ¶ 8.2.2.2; NWP 1-14M Annotated ¶ 8.2.2.2 follow the pattern of NWIP 10-2, ¶ 503b(3), which says, "Enemy merchant vessels may be attacked and destroyed, either with or without prior warning, in any of the following circumstances: . . . If armed, and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy."

175. On the other hand, "passive" electronic and similar defense equipment, *e.g.* electronic countermeasures gear, infrared decoy dispensers, and chaff, would be allowed. *Cf.* NWP 1-14M Annotated ¶ 8.2.3 n.66; Oreck, n. 111, approving similar devices for hospital ships, exempt from attack unless they lose protected status. *See* nn. 111, 240, 243, 257-58, 273-76 and accompanying text.

176. *See, e.g.,* nn. II.463-64 and accompanying text.

177. The author had experience with this while on naval service.

178. SAN REMO MANUAL ¶ 60(a).

179. Hague VII, arts. 1-6, restating custom; *see also* nn. IV.789-90 and accompanying text.

180. Paris Declaration, ¶ 1; *see also* n. IV.624 and accompanying text.

181. LOS Convention, arts. 100-07, 110; High Seas Convention, arts. 14-22; *see also* n. 76 and accompanying text.

182. *E.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-66, IV.10-25 and accompanying text.

183. *E.g.,* LOS Convention, arts. 109-10 (illicit radiobroadcasting); *see also* n. 76 and accompanying text.

184. *See* n. 164 and accompanying text.

185. *Cf.* SAN REMO MANUAL ¶ 60, cmt. 60.11.

186. NWP 9A Annotated ¶ 8.2.2.2; *see also* NWP 1-14M Annotated ¶ 8.2.2.2 (same); for analysis of the London Protocol requirements of providing for safety of passengers, crew and papers, *see* nn. 195-256 and accompanying text.

187. SAN REMO MANUAL ¶ 60(g).

188. *Id.,* cmt. 60.10; *see also id.,* cmts. 60.1-60.9, 60.11, referring to Protocol I, art. 52(2); n. 45.

189. Helsinki Principle 5.2.3; *compare* NWP 1-14M Annotated ¶ 7.4; NWP 9A Annotated ¶ 7.4, which distinguish between "commerce between a neutral . . . and a belligerent that does not involve the carriage of contraband or

otherwise contribute to the belligerent's war-fighting/war-sustaining capability." Helsinki Principle 5.2.3, cmt., says certain goods, *e.g.*, religious objects, may never be considered contraband; *see also* Part D.3.

190. Helsinki Principles 5.2.4-5.2.5; NWP 1-14M Annotated ¶ 7.4.1.1; NWP 9A Annotated ¶ 7.4.1.1; SAN REMO MANUAL ¶ 148; *see also* Part D.3.

191. *See, e.g.*, Doyle, *International Law*, n. 6, 21-23; Schmitt, n. 6, ix; Thomas, n. 6, xv, xvii; *see also* BROWNLIE, INTERNATIONAL LAW 5; REISMAN & LEITZAU, n. 6, 1; n. 6 and accompanying text.

192. Helsinki Principle 5.2.3; NWP 1-14M Annotated ¶¶ 7.4, n.88; 8.2.2.2, n.57; NWP 9A Annotated ¶¶ 7.4, n.90; 8.2.2.2, n.52; *see* also SAN REMO MANUAL ¶ 60, cmt. 60.10; n. 45 and accompanying text.

193. *See* Parts. A.1-A.2.

194. *See, e.g.*, LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* n. IV.75 and accompanying text. A similar, but not the same, due regard principle should govern LOAC issues where there is no positive rule of law and there is interface between the LOAC and neutrals' oceans use rights. *See* nn. 58, 62 and accompanying text.

195. The London Protocol declared that 1930 London Naval Treaty, art. 22, which would expire because not all signatories had ratified it, would remain in force "indefinitely and without limit of time." *Id.*, art. 22, had provided:

> . . . The following are accepted as established rules of international law:
>
> (1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface ships are subject.
>
> (2) . . . [E]xcept in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety . . . . [T]he ship's boats are not regarded as a place of safety unless the safety of passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

The 1922 Washington Naval Treaty had provided:

> . . . [A]mong the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, the following are deemed to be an established part of international law:
>
> (1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.
>
> A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning, or to proceed as directed after seizure.
>
> A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.
>
> (2) Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.

Anyone in a belligerent's service who violated the Treaty and Protocol rules would be liable to trial for piracy under any State's jurisdiction where that person might be found. Prohibiting submarines as commerce destroyers, as practiced during World War I, was recognized, as was the practical impossibility of using them as commerce destroyers without violating these rules. The goal was universal acceptance of prohibiting submarines as commerce destroyers. Washington Naval Treaty, arts. 1-4. The treaty failed of ratification. *Introductory Note,* SCHINDLER & TOMAN 877. 1917 Instructions, arts. 96-97, had provided: "In no case after a vessel has been brought to may it be destroyed until after visit and search . . . and all . . . on board have been placed in safety, and also, if practicable, their personal effects." Ship's papers were to be preserved. The 1909 London Declaration, arts. 49-50 had been to the same effect. *See also* Kalshoven, *Commentary*, n. 115, 272; Nwogugu, n. III.439, 353-54.

196. NWP 1-14M Annotated ¶ 8.2.2.2, n.47; Robertson, *U.S. Policy*, n. III.439, 351; Service, n. III.439, 241 n.9; *see also* W. Hays Parks, *Conventional Area Bombing and the Law of War,* PROCEEDINGS 186, 106 (May 1982).

197. Hague Air Rules, art. 24(1); *see also* 2 OPPENHEIM § 214c; *Introductory Note,* SCHINDLER & TOMAN 207; Remigiusz Bierzanek, *Commentary, in* LAW OF NAVAL WARFARE 396, 401, 406. The Hague Air Rules are considered customary law. *See* n. 112.

198. *See, e.g.*, LOS Convention, art. 98; High Seas Convention, art. 12; *see also* nn. IV.816 and accompanying text.

199. Second Convention, art. 12; Protocol I, art. 33; *see also* n. IV.816 and accompanying text.

200. *See* n. IV.816 and accompanying text.

201. COLOMBOS § 923; Levie, *Submarine Warfare,* n. III.439, 32-40.

202. COLOMBOS §§ 857, 923; Levie, *Submarine Warfare,* n. III.439, 48-54.

203. *See* nn. 263, 274-75 and accompanying text.

204. "... [T]he number of neutral seamen and vessels lost at sea by enemy action during the Second Great War exceeded by far those ... in the First Great War." COLOMBOS § 923, 794.

205. COLOMBOS §§ 857-58; NWP 1-14M Annotated, ¶ 8.2.2.2 n.47; 2 O'CONNELL, LAW OF THE SEA 1135-37, 1153; TUCKER 312-15; Mallison & Mallison, *The Naval,* n. III.439, 90-91.

206. 1 TWC 311-12 (Doenitz), 317 (Raeder); for widely differing interpretations of the judgments, *see* COLOMBOS § 259; NWIP 10-2 ¶ 503b(3) n.21; 1 O'CONNELL, LAW OF THE SEA 1137; Fenrick, *Comments,* n. 167, 113-16 (only successful *tu quoque* defense); L.F.E. Goldie, *Targeting,* n. II.262, 10-11; Mark W. Janis, *Comments on Sally V. and W. Thomas Mallison's Paper, in id.* 104, 106-08; Levie, *Submarine Warfare,* n. III.439, 91-97; Robertson, *U.S. Policy,* n. III.439, 342-43.

207. *E.g.,* TUCKER 63-70; Kalshoven, *Commentary,* n. 115, 272-74; Alex Kerr, *International Law and the Future of Submarine Warfare,* 81 PROCEEDINGS 1110 (Oct. 1955); Hersch Lauterpacht, *The Problem of the Revision of the Law of War,* 29 BYBIL 360, 374 (1952); O'Connell, *International Law,* n. III.252; Parks, *Conventional,* n. 196, 106. "[R]eferences of naval historians to the law of naval warfare and to the ... Protocol ... are less than flattering." Fenrick, *Comments,* n. 167, 111, citing THEODORE ROSCOE, UNITED STATES SUBMARINE OPERATIONS IN WORLD WAR II 19 (1949); J.E. Talbott, *Weapons Development, War Planning and Policy: The US Navy and the Submarine,* NWC REV. 53, 68 (May-June 1984).

208. Service, n. III.439, 238-40; *cf.* O'Connell, *International Law,* n. III.252, 52.

209. Fenrick, *Comments,* n. 167, 117; Goldie, n. II.262, 6, 9.

210. COLOMBOS § 535; 1 Levie, Code 162-63; 2 OPPENHEIM §§ 194a-94b; L.C. Green, *Comments on George K. Walker Paper, in* Grunawalt 223, 226; Janis, *Comments,* n. 206, 106-08 (London Protocol is "hard" law, the Nuremberg trials are opposing "soft" law); Levie, *Submarine Warfare,* n. III.439, 59; A.V. Lowe, *Comments on Howard S. Levie's Paper, in* Grunawalt 72, 77; Nwogugu, n. III.439, 353; Robertson, *U.S. Policy,* n. III.439, 352-53; Robertson, *Submarine Warfare,* JAG J. 3, 8 (Nov. 1956). "Soft law" refers to norms of persuasive impact, perhaps in international organizations' nonbinding resolutions, but below primary authority, *e.g.,* treaties, custom and general principles and secondary or subsidiary sources, *e.g.,* court decisions or commentators. *See generally* ICJ Statute, arts. 38(1), 59; BROWNLIE, INTERNATIONAL LAW 698-99; 1 OPPENHEIM § 16; RESTATEMENT (THIRD) §§ 102, 103 & cmt. c (international organizations' resolutions "some evidence" of custom), r.n. 2; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE CH. 6 (1991); Prosper Weil, *Towards Relative Normativity in International Law?,* 77 AJIL 413, 414-15 (1983); *see also* nn. III.10, IV.57 and accompanying text.

211. Fleck, *Comments,* n. III.439, 83.

212. Robertson, *U.S. Policy,* n. III.439, 351; *contra,* COLOMBOS §§ 535, 843, 914.

213. 1900 Naval War Code, art. 50 (adding "The imminent danger of recapture would justify destruction if there should be no doubt that the vessel was a proper prize"); 1917 Instructions ¶ 94.

214. 1917 Instructions ¶¶ 94-97.

215. 1943 Tentative Instructions ¶¶ 50, 98-102; 1941 *id.* ¶¶ 50, 98-102. 2 OPPENHEIM §§ 194a-94b (1952), says Germany violated London Protocol standards, which were customary law.

216. NWIP 10-2, iii.

217. *Id.* ¶ 110, whose n.1 indicates this statement tried to repeat, for *id.,* war crimes trials' opinions that declared that since military manuals were not legislative enactments, they could not bind a publishing State. NWP 1-14M Annotated, *Preface,* at 1, and NWP 9A Annotated, *Preface,* at 1, similarly declare: "This publication sets forth general guidance. It is not a comprehensive treatment of the law nor is it a substitute for the definitive legal guidance provided by judge advocates and others responsible for advising commanders on the law." Footnotes in *id.,* citing the war crimes trials, follow NWIP 10-2 to say neither the *Handbooks* (versions for commanders' use) nor NWP 1-14M Annotated or NWP 9A Annotated (annotated versions cited in this book) can be considered as legislative enactments binding upon courts and tribunals applying the rules of war, adding that their contents may possess evidentiary value on US custom and practice. *See also* BROWNLIE, INTERNATIONAL LAW 5.

218. TUCKER i, 357-422.

219. To be sure, the USSR navy was beginning to challenge it in size, particularly in submarine strength; other countries had considerable navies, *e.g.*, France, the United Kingdom and other US allies. Ten years before, at World War II's end, the US Navy had over 600 combatant ships, but by 1981 the number had shrunk to about 360 while the USSR navy had risen to 800 combatants, many of them submarines. WHITEHURST, U.S. MERCHANT MARINE, n. II.59, 135; *id.*, U.S. SHIPBUILDING, n. II.60, 27. Today the Russian navy may number more combatants on paper, but since the USSR's demise the US Navy undoubtedly is the most powerful on Earth. *See generally* WILLIAM E. ODOM, THE COLLAPSE OF THE SOVIET MILITARY 28-35, 80-81, 300-01(1998).

220. NWIP 10-2 ¶ 503b(2), *in* TUCKER 397; *compare* 1943 Tentative Instructions ¶¶ 50, 98-103; 1941 *id.* ¶¶ 50, 98-103; *see also* n. 215 and accompanying text.

221. NWIP 10-2 ¶ 503b(2) & n.20, *referring to id.*, ¶ 503b(3) n. 22, *in* TUCKER 397, 404-05.

222. *Compare* NWIP 10-2 ¶ 503b(2) & n.16, 21 (1974 version), *with* NWIP 10-2 ¶ 503b(2) & n.20, 22, *in* TUCKER 397, 404-05.

223. Robert W. Tucker, *Foreword, in* TUCKER iii, v.

224. He was on The Johns Hopkins University faculty when the volume appeared. *Id.* i.

225. *Compare* TUCKER 63-70 *with* NWIP 10-2 ¶ 503b(2) & n.20, 22, *in* TUCKER 397, 404-05. If so, the difference is a tribute to the intellectual independence accorded the College façulty, who speak for themselves and not necessarily for the Navy or the government. Thomas H. Robbins, Jr., *Preface, in id.* vii underscores the point for TUCKER'S volume in the *International Law Studies* series. I have been accorded the same academic freedom.

226. Vienna Convention, preamble, arts. 38, 61-62; *see also* nn. III.10, 928-30, IV.26-28 and accompanying text.

227. NWIP 10-2, ¶ 503b(3) n.22, *reprinted in* TUCKER 404-05 ("These rules, deemed declaratory of customary international law, have been interpreted . . . .").

228. *Compare* NWIP 10-2 ¶ 503b(3) & n.20, 22, *reprinted in* TUCKER 397, 404-05, *with* NWIP 10-2 ¶ 503b(3) & n. 16, 21; *see also* n. 216 and accompanying text.

229. *Cf.* Janis, *Comments,* n. 206, 106-08, writing nearly 40 years after NWIP 10-2's first publication.

230. *See* n. 210.

231. AFP 110-31 ¶ 4-4c.

232. *Compare* NWP 1-14M Annotated ¶ 8.2.2.2; NWP 9A Annotated ¶ 8.2.2.2, *with* NWIP 10-2 ¶ 503b(3); *see also* Second Convention, art. 16; Protocol I, art. 33; n. IV.816 and accompanying text.

233. There is no stated requirement for collecting the dead as required of surface warships. *Compare* NWP 1-14M Annotated ¶¶ 8.3, 8.3.1; NWP 9A Annotated ¶¶ 8.3, 8.3.1, *with* NWP 1-14M Annotated ¶ 8.2.2.2; NWP 9A Annotated ¶ 8.2.2.2; *see also* Second Convention, art. 16; Protocol I, art. 33; n. IV.816 and accompanying text.

234. There is no stated requirement for collecting the dead as required of surface warships. *Compare* NWP 1-14M Annotated ¶ 8.4 *with id.* ¶¶ 8.2.2.2, 8.3, 8.3.1; NWP 9A Annotated ¶¶ 8.2.2.2, 8.3, 8.3.1, 8.4; NWIP 10-2 ¶ 503b(3) & n.21; *see also* Second Convention, art. 12; Protocol I, art. 33; n. IV.816 and accompanying text.

235. SAN REMO MANUAL ¶ 60, cmt. 60.9 (one group of commentators' views).

236. *Compare* London Protocol *with* SAN REMO MANUAL ¶¶ 139-40; *see also id.* ¶¶ 13(b) (definition of attack), 13(i) (merchant vessel definition).

237. *Cf.* SAN REMO MANUAL, Part V, at 31, 187 ("Measures Short of Attack").

238. *Id.* ¶ 139, cmt. 139.1.

239. *See* nn. 163-65 and accompanying text.

240. Second Convention, arts. 22, 29-30, 32-33, 47; Protocol I, art. 22; *see also* n. 111 and accompanying text.

241. *Id.*, ¶ 139, cmt. 139.2. AFP 110-31 ¶ 4-4, at 4-5, in effect says as much, unfortunately injecting "political . . . factors" into the matrix. *See also* Parts A.1-A.2.

242. *See* nn. 163-65 and accompanying text. It does not seem appropriate to have some categories for some kinds of attack platforms, *e.g.*, differentiation between surface warships and aircraft, where there is a possibility that different platforms could participate in attacks for all reasons. *Compare, e.g.*, NWP 9A Annotated ¶ 8.2.2.2, at 8-11 - 8.12; NWP 1-14M Annotated, ¶ 8.2.2.2, at 8-11 - 8-12 *with* NWP 9A Annotated ¶ 8.4; NWP 1-14M Annotated ¶ 8.4, at 8-22. And

while it might be said that fixed-wing aircraft have different characteristics, the helicopter, often carried on a warship like fixed-wing craft were through World War II, is a projection of the ship's armament, like ship-based guns or missiles.

243. *See* nn. 111, 240, 257-58, 273-76 and accompanying text.

244. In some cases diversion may be mandated, *e.g.*, for passenger liners. *See* nn. 103-05, 236 and accompanying text.

245. *See* Parts A.1-A.2.

246. *See* n. 195 and accompanying text.

247. Service, n. III.439, 238-40.

248. London Protocol, Rule 2; Second Convention, arts. 12-21; Protocol I, art. 33; *see also* nn. IV.816, V.195 and accompanying text.

249. Service, n. III.439, 238-40.

250. *E.g.*, Covenant on Civil & Political Rights, arts. 4, 6(1). For analysis of human rights law in the context of the maritime environment, *see* Part VI.C.2.

251. *See* n. 26 and accompanying text.

252. *See* n. 242 and accompanying text. Although *e.g.*, Principle 5, n. 244 and accompanying text, only recites "warship," Principle 6 declares that all attacking platforms are included within the analysis.

253. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Parts A.1-A.2.

254. Second Convention, arts. 12-21; Protocol I, art. 33; London Protocol, Rule 2 ; *see also* Service, n. III.439, 238-40; nn. IV.816, V.195-256 and accompanying text.

255. UN Charter, arts. 25, 48, 103; *see also* nn. III.10, IV.57 and accompanying text.

256. *Cf.* n. 173 and accompanying text.

257. NWP 1-14M Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; NWP 9A Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; SAN REMO MANUAL ¶ 137.

258. Second Convention, arts. 22, 29-30, 32-33, 47; Protocol I, art. 22; *see also* nn. 240 and accompanying text.

259. *See generally* Second Convention, arts. 21, 24, 26-27, 38, 43, 47; Protocol I, art. 23; BOTHE *et al.*. 147-49; NWP 1-14M Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; NWP 9A Annotated ¶¶ 8.2.3. 8.3.2, 8.4.1; 2 PICTET 150-53, 164-67, 169-74, 212-15, 252-56; PILLOUD, COMMENTARY 262-78; SAN REMO MANUAL ¶¶ 13(e), 47(b), 136(b) & 13.17, 47.11-47.17, 136.1 (noting exceptions, conditions for exemption); TUCKER 97; Doswald-Beck, *Vessels*, n. II.468, 229-31; Philippe Eberlin, *The Protection of Rescue Craft in Periods of Armed Conflict*, 1985 INT'L REV. RED CROSS 140; 1 von Heinegg 313.

260. *See generally* Third Convention, art. 118 (requiring returning prisoners of war at end of hostilities); COLOMBOS § 660-61; MALLISON 126; NWP 1-14M Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; NWP 9A Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; 2 O'CONNELL, LAW OF THE SEA 1123; 2 OPPENHEIM § 225; OXFORD NAVAL MANUAL, arts. 45, 49; 3 PICTET 541-53; SAN REMO MANUAL ¶¶ 47(c)(i), 136(c)(i) & cmts. 47.18-47.23, 136.1; STONE 586; TUCKER 97-98; Doswald-Beck, *Vessels*, n. II.468, 239-41; 1 von Heinegg 312; Verri, *Commentary*, n. IV.71, 334-35; Part H.1.

261. *See generally* Third Convention, arts. 70-77; Fourth Convention, arts. 107-13; Protocol I, arts. 54, 70; COLOMBOS § 660; 2 O'CONNELL, LAW OF THE SEA 1123; OXFORD NAVAL MANUAL, arts. 45, 49; 3 PICTET 340-80; 4 *id.* 448-73; SAN REMO MANUAL ¶¶ 47(c)(ii), 136(c)(ii) & cmts. 47.24-47.29, 136.1; STONE 586; TUCKER 98; Doswald-Beck, *Vessels*, n. II.468, 242-48; 1 von Heinegg 312-13; Verri, *Commentary*, n. V.71, 334-35.

262. *See generally* Cultural Property Convention, arts. 12-14, to which the United States is not a party; *see also* nn. 110, VI. - - - and accompanying text.

263. *See generally* NWP 1-14M Annotated ¶¶ 8.2.3, at 8-18 & n.75, 8.3.2, 8.4.1; NWP 9A Annotated ¶ 8.2.3, at 8-20 & n.61, 8.3.2, 8.4.1 (although passenger ships normally an object of attack, loss of civilians would be clearly disproportionate to military advantage gained); SAN REMO MANUAL ¶¶ 47(e), 140 & cmts. 47.33-47.36, 140; Doswald-Beck, *Vessels*, n. II.468, 248-50.

264. First stated in treaties, the exemptions are generally considered customary law applying to public or private vessels. Ships gathering scientific data of potential military application are not exempt. *See generally* Hague XI, arts. 3-4; MALLISON 128; NWP 1-14M Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; NWP 9A Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; 2 O'CONNELL, LAW OF THE SEA 1123; 2 OPPENHEIM § 186; OXFORD NAVAL MANUAL, arts. 46, 49; SAN REMO MANUAL ¶¶

47(f), 136(e) & cmts. 47.37-47.44, 136.1; STONE 586, 589; TUCKER 96-97; Doswald-Beck, *Vessels*, n. II.468, 251-53; 1 von Heinegg 312; Shearer, *Commentary*, n. 112, 185-86; Verri, *Commentary*, n. IV.71, 334-35.

265. This exemption is grounded in customary and treaty law. *See generally* Hague XI, art. 3; n. 113 and accompanying text. As commentators, n. 113, make clear, these vessels lose exemption if they participate in hostilities. *See also* nn. 174-76 and accompanying text.

266. SAN REMO MANUAL ¶¶ 47(h), 136(g) & cmts. 47.52-47.55, 136.1 (these ships could not be deemed to contribute to war effort); Doswald-Beck, *Vessels*, n. II.468, 257-59.

267. Hague IV, art. 23(c); Protocol I, art. 41; AFP 110-31 ¶ 4-2d; BOTHE *et al.*. 219-24; NWP 1-14M Annotated ¶ 8.2.1; NWP 9A Annotated ¶ 8.2.1; 2 OPPENHEIM § 183; PILLOUD, COMMENTARY 480-91; SAN REMO MANUAL ¶ 47(i) & cmts. 47.56-47.57; Doswald-Beck, *Vessels*, n. II.468, 259-60. Generally vessels offer to surrender as a unit as distinguished from land warfare, where people often surrender individually. Land units' commands also may offer to surrender for an entire organization. Air warfare offers to surrender necessarily come from platforms or units and not individuals aboard aircraft; aircraft offers to surrender are generally not given, although it has occurred. *See generally* AFP 110-31 ¶ 4-2d; NWP 1-14M Annotated ¶ 8.2.1; NWP 9A Annotated ¶ 8.2.1; Horace B. Robertson, Jr., *The Obligation to Accept Surrender*, 46 NWC REV. 103 (Spring 1993).

268. Second Convention, arts. 12, 18; Protocol I, art. 8(b); BOTHE *et al.*. 95-97; 2 PICTET 84-92, 129-36; PILLOUD, COMMENTARY 115-16, 118-24; SAN REMO MANUAL ¶ 47(j) & cmt. 47.58 (citing war crimes tribunal judgments); Doswald-Beck, *Vessels*, n. II.468, 260.

269. NWIP 10-2 ¶ 503c; 2 OPPENHEIM § 218; OXFORD NAVAL MANUAL, arts. 48-49; TUCKER 98 n.10; *see also* Doswald-Beck, *Vessels*, n. II.468, 241-42; 1 von Heinegg 312; Verri, *Commentary*, n. IV.71, 334-35.

270. COLOMBOS § 664; 2 OPPENHEIM § 189; OXFORD NAVAL MANUAL, art. 34; 1 von Heinegg 313; *see also* nn. IV.494-506, V.20 and accompanying text.

271. A customary exemption for mail ships, *i.e.*, mail packets and the like, seems not to have developed, although there are contrary arguments. Neutral mail, especially diplomatic and consular correspondence, may be exempt from search. Hague XI, arts. 1-2; Convention on Diplomatic Relations, n. 112, art. 27, 23 UST 3239, 500 UNTS 108; Convention on Consular Relations, n. 112, art. 35, 21 *id.* 99, 596 UNTS 290; *see also* n. 112 and accompanying text.

272. *See* n. 263 and accompanying text.

273. *See generally* 2 OPPENHEIM § 188; SAN REMO MANUAL, ¶ 136, cmt. 136.2. Although Hague VI would afford some protection for enemy merchant ships in port and on the high seas, the convention is in desuetude. *See* n. 16 and accompanying text.

274. *E.g.*, coastal fishing or trading vessels, exempted from capture by customary law and Hague XI, art. 3, unless they contribute to the war effort; *see* nn. 113, 265 and accompanying text. This was the situation of *Narwal*, an Argentine fishing vessel the Royal Navy intercepted and destroyed on the high seas during the Falklands/Malvinas war. *Narwal* had military communications equipment and an Argentine communications officer aboard and was intercepted far at sea; attack and destruction was appropriate. NWP 1-14M Annotated ¶ 8.2.3 & NWP 9A Annotated ¶ 8.2.3, citing MAX HASTINGS & SIMON JENKINS, THE BATTLE FOR THE FALKLANDS 158 (1983); MARTIN MIDDLEBROOK, OPERATION CORPORATE: THE FALKLANDS WAR 186 (1985); *see also* COLOMBOS § 659; 2 O'CONNELL, LAW OF THE SEA 1122; OXFORD NAVAL MANUAL, art. 49; Howard S. Levie, *The Falklands Crisis and the Laws of War*, *in* COLL & AREND 64, 67; Verri, *Commentary*, n. IV. 71, 334-35; Walker, *State Practice* 153.

275. *E.g*, coastal fishing or trading vessels, exempted from capture by customary law and Hague XI, art. 3, lose their status as coastal craft if found on the high seas, far from the coast; *see* nn. 113, 265 and accompanying text. This was the situation of *Narwal*, an Argentine fishing vessel the Royal Navy intercepted and destroyed on the high seas during the Falklands/Malvinas war. It was also probably too large to be considered a coastal trawler. COLOMBOS §§ 658-59; 2 O'CONNELL, LAW OF THE SEA 1122-23; TUCKER 95-96; Walker, *State Practice* 153, 155. Destruction was also appropriate because *Narwal* carried Argentine military communications equipment and an Argentine communications officer; it was contributing to the Argentine war effort. *See* n. 274 and accompanying text.

276. *See* nn. 151-254 and accompanying text.

277. NWIP 10-2 ¶ 503c; TUCKER 98 n.10; *see also* n. III.258 and accompanying text.

278. *See generally* First Convention, arts. 36-37; Second Convention, art. 39; Fourth Convention, art. 22; Protocol I, arts. 8(j), 24-31; BOTHE *et al.*. 95-96, 101, 150-67; Hague Air Rules, art. 17; NWP 1-14M Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; NWP 9A Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; 1 PICTET 285-96; 2 *id.* 215-22; 4 *id.* 173-77; PILLOUD, COMMENTARY 115-16, 131-32, 279-337; SAN REMO MANUAL ¶ 53(a) & cmt. 53.1; TUCKER 97; Doswald-Beck, *Vessels*, n. II.468, 262-68; 1 von Heinegg 313; *see also* n. 258 and accompanying text.

279. NWP 1-14M Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; NWP 9A Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; SAN REMO MANUAL ¶ 53(b) & cmt. 53.2; Doswald-Beck, *Vessels*, n. II.468, 268-69; 1 von Heinegg 313; *see also* n. 260 and accompanying text.

280. NWP 1-14M Annotated ¶¶ 8.2.3, 8.3.2, 8.4.1; NWP 9A Annotated 8.2.3, 8.3.2, 8.4.1; SAN REMO MANUAL ¶ 53(c) & cmt. 53.3; *cf.* ICAO Convention, 1984 Protocol, art. 3 bis; *see also* TUCKER 110-11; Doswald-Beck, *Vessels*, n. II.468, 269-75; n. 263 and accompanying text; *but see* Hague Air Rules, arts. 33-34; 2 OPPENHEIM § 214f.

281. 2 OPPENHEIM § 214h; SAN REMO MANUAL ¶¶ 54-57 & cmts. 54.1-57.5.

282. UN Charter, arts. 51, 103; *see also* SAN REMO MANUAL ¶ 53(c) & cmt 53.3, citing ICAO Convention, 1984 Protocol, art 3 *bis*, declaring that although every State must refrain from using weapons against civil aircraft in flight and that persons' lives on board and aircraft safety must not be endangered, this does not modify rights and obligations under the Charter; nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

283. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

284. *Cf.* NWIP 10-2 ¶ 503c; TUCKER 98 n. 10; *see also* nn. III.258 and accompanying text.

285. *See* Part B.2.

286. *See* Part C.1.

287. Mallison 122; NWP 1-14M Annotated ¶ 8.2.2.2; NWP 9A Annotated ¶ 8.2.2.2; Jacobson, n. 166, 231.

288. Hague XI, art. 3. Thus in a scenario of a belligerent warship escorting coastal fishing vessels employed as such and not contributing to the war effort, the warship is subject to capture or attack but the fishermen are not. If, on the other hand, the fishing vessels are contributing to the war effort, they are subject to attack too. *See* nn. 265-66, 274-75 and accompanying text.

289. COLOMBOS § 760; Helsinki Principle 5.2.3; NWP 1-14M Annotated ¶ 7.4.1; NWP 9A Annotated ¶ 7.4.1; 2 O'CONNELL, LAW OF THE SEA 1144; SAN REMO MANUAL ¶ 148 & cmt. 148.1; TUCKER 263.

290. Helsinki Principle 5.2.5.

291. Part D considers issues related to neutral-flag merchantmen that may have assumed enemy character.

292. *See* nn. II.177, 274-78, 288, 296-99, 306, 366, 420, 491-92 and accompanying text; Part B.

293. Part D considers these issues.

294. *See* nn. 257-84 and accompanying text.

295. *See* n. II.240 and accompanying text.

296. *See* nn. 21-47 and accompanying text.

297. *See* nn. 24-40 and accompanying text.

298. *See* nn. 196-97, 252 and accompanying text.

299. Second Convention, art. 21; *see also* nn. IV.816, V.154-55, 206, 234, 254 and accompanying text.

300. *See* nn. 30-47 and accompanying text.

301. Second Convention, arts. 12-21; Protocol I, art. 33; *see also* nn. IV.816, V.154-55, 206, 234, 254 and accompanying text.

302. *See* nn. II.103, 280, 306 and accompanying text.

303. *See* nn. 286-87 and accompanying text.

304. *See* nn. 286-87 and accompanying text; Part D.1.

305. *See* Part B.2, n. 286 and accompanying text.

306. Second Convention, arts. 12-21; Protocol I, art. 33; LOS Convention, art. 98; High Seas Convention, art. 12; *see also* nn. III.948, IV.30, 816, V.154-55 and accompanying text; London Protocol, nn. V.195-257 and accompanying text.

307. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

308. *See* nn. II.295, 304, 342-44, 348, 350-52, 359, 361-62, 382, 437, 446-47, 453, 471 and accompanying text.

309. Second Convention, arts. 12-21; Protocol I, art. 33; LOS Convention, art. 98; High Seas Convention, art. 12; *see also* nn. IV.816, V.154-55 and accompanying text.

310. LOS Convention, art. 98; High Seas Convention, art. 12; *see also* n. IV.816, and accompanying text.

311. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

312. *E.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.10, 952-67, IV.10-25 and accompanying text.

313. LOS Convention, art. 98; High Seas Convention, art. 12; *see also* n. IV.816 and accompanying text.

314. In some cases, *e.g.,* the response was in error, for which the responding ship's country gave compensation. *See, e.g.,* nn. II.368-72, 391, 398, 410-11, 430-33, 459-68 and accompanying text.

315. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

316. Second Convention, arts. 12-21; Protocol I, art. 33; *see also* nn. IV.816, V.154-55 and accompanying text.

317. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

318. *E.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.10, 952-67, IV.10-25 and accompanying text.

319. LOS Convention, art. 98; High Seas Convention, art. 12; *see also* n. IV.816 and accompanying text.

320. *See* nn. II.367, 410-11, 459-68 and accompanying text; *see also* LOS Convention, art. 98; High Seas Convention, art. 12; n. IV.816 and accompanying text.

321. *See* nn. 151-55 and accompanying text.

322. Second Convention, arts. 12-21; Protocol I, art. 33; *see also* nn. IV.816, V.154-55 and accompanying text.

323. *See* nn. II.55-61, 71 and accompanying text.

324. *See* nn. II.112-14, 182, 473-74 and accompanying text.

325. *See* n. II.183 and accompanying text.

326. *See* nn. II.473-74 and accompanying text.

327. *See* nn. II.177, 274-78, 288, 296-99, 306, 366, 420, 447, 491-92 and accompanying text.

328. *See, e.g.,* nn. II.179 (mines), 233 (mines), 250 (mines), 260, 334 (mines), 354 (mines), 357 (mines), 359 (mines), 361, 368 (mines), 373, 393-94, 412, 420 (mines), 421, 446, 469, 519 and accompanying text.

329. *See* nn. II.144, 422-23 and accompanying text.

330. *See* LOS Convention, art. 110; High Seas Convention, art. 22; nn. 76-81 and accompanying text.

331. *See* Part B.1.

332. *See* Parts C.1-C.4.

333. NWIP 10-2 ¶ 501; NWP 1-14M Annotated ¶ 7.5; NWP 9A Annotated ¶ 7.5; 2 OPPENHEIM § 89 (flying enemy flag *prima facie* evidence of enemy character); SAN REMO MANUAL ¶¶ 112 & cmts. (conclusive evidence of enemy character), 117 & cmt.; TUCKER 76-86. The LOAC corporate-owned vessels control test may differ from corporate claims espousal rules. *Compare, e.g.,* Barcelona Traction (Belg. v. Spain), 1970 ICJ 3; RESTATEMENT (THIRD) §§ 213, cmt. d & r.n. 2,3, 711-13, *with* SAN REMO MANUAL ¶ 117, cmt. 117.1. *Compare* the nationality approach in LOS Convention, arts. 90-94; High Seas Convention, arts. 4-7, considered customary law. *See* Part IV.B.3. During war LOS principles do not apply because of the LOS conventions' other rules clauses. *See, e.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

334. NWP 1-14M Annotated ¶ 7.5; NWP 9A Annotated ¶ 7.5.

335. SAN REMO MANUAL ¶ 113 & cmts.; *compare* the LOS approach in LOS Convention, arts. 91-94; High Seas Convention, arts. 4-7, considered customary law. *See* Part IV.B.2. During war LOS principles do not apply because of the conventions' other rules clauses. *See, e.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

336. NWIP 10-2 ¶ 501a; NWP 1-14M Annotated ¶ 7.5.1; NWP 9A Annotated ¶ 7.5.1; SAN REMO MANUAL ¶¶ 67-68; TUCKER 319-21; *see also* nn. 156-256 and accompanying text.

337. NWP 1-14M Annotated ¶ 7.5.2; NWP 9A Annotated ¶ 7.5.2.

338. *See* Parts C.1-C.4

339. NWP 1-14M Annotated ¶ 7.10; NWP 9A Annotated ¶ 7.10; TUCKER 336-37; *see also* Parts C.1-C.4.

340. Hague Radio Rules, art. 6; NWIP 10-2 ¶ 503d; NWP 1-14M Annotated ¶ 7.10; NWP 9A Annotated ¶ 7.10; 2 OPPENHEIM § 409; SAN REMO MANUAL ¶¶ 98, 146, 153; TUCKER 321, 325-331, 336, 338. The foregoing synthesizes principles in these sources. The Hague Radio Rules are customary norms. *See also* Parts C.1-C.4.

341. NWIP 10-2 ¶ 503d n.25; NWP 1-14M Annotated ¶ 7.10 n.157; NWP 9A Annotated ¶ 7.10 n.152; TUCKER 13, 263, 325; *see also* n. IV.649 and accompanying text.

342. NWP 1-14M Annotated ¶¶ 7.10, 7.10.1; NWP 9A Annotated ¶¶ 7.10, 7.10.1; *see also* Parts C.1-C.4.

343. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part A.1-2.

344. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

345. *See* nn. 163-64, 205, 226, 233, 285-88 and accompanying text.

346. *See* n. 337 and accompanying text.

347. Hague XI, arts. 5, 8; Third Convention, art. 4A(5); COLOMBOS § 611; NWIP 10-2 ¶ 513a; NWP 1-14M Annotated ¶ 7.10.2; NWP 9A Annotated ¶ 7.10.2; 2 O'CONNELL, LAW OF THE SEA 1117; 2 OPPENHEIM §§ 85, 125a; 3 PICTET 45-51, 65-66; SAN REMO MANUAL ¶ 166; Shearer, *Commentary*, n. 112, 187.

348. Hague XI, art. 6; Third Convention, art. 4A; NWIP 10-2 ¶ 513; NWP 1-14M Annotated ¶ 7.10.2; NWP 9A Annotated ¶ 7.10.2; 2 O'CONNELL, LAW OF THE SEA 1117; 2 OPPENHEIM § 126a; 3 PICTET 45-68; Shearer, *Commentary*, n. 112, 187.

349. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

350. LOS Convention, arts. 90-94; High Seas Convention, arts. 4-7, considered customary law; *see also* Part IV.C.3.

351. *See, e.g.*, LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

352. *Compare* COLOMBOS § 559 (conclusive presumption); JAMES WILFORD GARNER, PRIZE LAW DURING THE WORLD WAR § 287 (1927); SAN REMO MANUAL ¶ 112 (same) *with* 2 OPPENHEIM § 89 (*prima facie* presumption). London Declaration, art. 57 (1909) says "[T]he neutral or enemy character of a vessel is determined by the flag which she is entitled to fly," a conclusive presumption. However, during World War I France and Great Britain abrogated the rule. GARNER §§ 106, 276; 2 OPPENHEIM § 89, at 280. The Declaration was never ratified as a treaty. Except for Britain, the art. 57 principle had been incorporated in belligerents' prize regulations or naval codes by the beginning of the war. GARNER §§ 106, 275. 1917 Instructions ¶ 56, however, said "The neutral or enemy character of a private vessel is determined by the neutral or enemy character of the State whose flag the vessel has a right to fly as evidenced by her papers," citing US bilateral treaties.

353. COLOMBOS § 604; GARNER, n. 352 §§ 280-86, 289 (prize cases); 2 OPPENHEIM § 89; SAN REMO MANUAL ¶ 113; *see also* n. 352 and accompanying text.

354. Although there is even less law with respect to transfer of aircraft registry, presumably the same rules will apply. NWIP 10-2 ¶ 501 n.5; NWP 1-14M Annotated ¶ 7.5 n.111; NWP 9A Annotated ¶ 7.5 n.110; 2 OPPENHEIM § 91; SAN REMO MANUAL ¶ 117, cmt. 117.1; Kalshoven, *Commentary*, n. 115, 267.

355. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

356. COLOMBOS § 760; Helsinki Principle 5.2.5; NWP 1-14M Annotated ¶ 7.4.1; NWP 9A Annotated ¶ 7.4.1; 2 O'CONNELL, LAW OF THE SEA 1144; 2 OPPENHEIM §§ 395, 399; SAN REMO MANUAL ¶ 148 & cmt. 148.1; TUCKER 263.

357. Helsinki Principle 5.2.5.

358. *See* Part C.1.

359. NWIP 10-2 ¶ 631a; NWP 1-14M Annotated ¶ 7.4.1; NWP 9A Annotated ¶ 7.4.1; 2 OPPENHEIM §§ 401-03; TUCKER 263.

360. MCDOUGAL & FELICIANO 482-83; NWIP 10-2 ¶ 631b; NWP 1-14M Annotated ¶ 7.4.1; NWP 9A Annotated ¶ 7.4.1.

361. NWIP 10-2 ¶ 631b; NWP 1-14M Annotated ¶ 7.4.1; NWP 9A Annotated ¶ 7.4.1; 2 O'CONNELL, LAW OF THE SEA 1144; TUCKER 266-67; Goldie, *Targeting*, n. II.262, 18.

362. *E.g.*, the 1965 and 1971 India-Pakistan wars. *See* 66 AJIL 386 (1967); 2 von Heintschel Heinegg 94-99; Walker, *State Practice* 143-44.

363. London Declaration, arts. 22-23.

364. *Id.*, arts. 24-25.

365. *Id.*, art. 26.

366. 2 OPPENHEIM § 393; *see also* HALPERN, n. 115, 202, 291.

367. London Declaration, arts. 27-29; *see also* 2 OPPENHEIM §§ 394, 396.

368. *See* n. 173 and accompanying text.

369. *See* n. 361 and accompanying text.

370. SAN REMO MANUAL ¶ 150 & cmts., citing Second Convention, art. 38, Third Convention; Fourth Convention, art. 59; Protocol I, arts. 69-70; *compare* NWP 1-14M Annotated ¶ 7.4.1.2; NWP 9A Annotated ¶ 7.4.1.2 (same, adding cultural items for prisoners of war, citing Second Convention, art. 38; Third Convention, arts. 72-75 & Annex III; Fourth Convention, arts. 23, 59; Protocol I, art. 70; *see also* BOTHE *et al.*. 432-37; Helsinki Principle 5.3, citing Fourth Convention, arts. 23, 59, 61; Protocol I, arts. 69-70 (relief to pass through blockade in accordance with humanitarian law); 2 PICTET 212-15; 3 *id.* 351-74, 664-68; 4 *id.* 178-84, 319-23; PILLOUD, COMMENTARY 816-29; TUCKER 263. The United States is not a Protocol I party but recognizes art. 70 principles as custom. Matheson, *Remarks* 426.

371. Helsinki Principle 5.2.3, cmt. (although distinction formally retained, has in fact been abolished); NWP 1-14M Annotated ¶ 7.4.1; NWP 9A Annotated ¶ 7.4.1; SAN REMO MANUAL ¶ 148; *see also* 2 OPPENHEIM §§ 392-93.

372. The US lists included items the London Declaration classified as conditional contraband and did not distinguish between conditional and absolute contraband. *Compare* London Declaration, arts. 22-29, *with* 1917 Instructions ¶¶ 23-25; 1941 Tentative Instructions ¶¶ 26-28; 1943 *id.* ¶¶ 26-28; *see also* TUCKER 266-27.

373. NWP 1-14M Annotated ¶ 7.4.1; NWP 9A Annotated ¶ 7.4.1 ("To the extent that international law may continue to require publication of contraband lists, recent practice indicates that the requirement may be satisfied by a listing of exempt goods.").

374. SAN REMO MANUAL ¶ 149.

375. *See* nn. 363-64 and accompanying text.

376. *See* Helsinki Principles 5.2.3, 5.3 & cmts.

377. SAN REMO MANUAL, ¶ 149; Green, *Comments*, n. 210, 228. 1917 Instructions ¶ 23; 1941 Tentative Instructions ¶ 26; 1943 *id.* ¶ 26, declared the United States would publish contraband items beyond those in the Instructions. The result would be that States, by referring to the unclassified Instructions and reading US notices, would know what was and what was not contraband throughout a war. If other States practiced this, as TUCKER 266-67 implies, the notice requirement came close to being, if it was not already, a customary norm.

378. NWP 1-14M Annotated 7.4.1.2; NWP 9A Annotated ¶ 7.4.1.2; *see, e.g.*, Fourth Convention, arts. 23, 59; *see also* 4 PICTET 178-84, 319-23; n. 373 and accompanying text. SAN REMO MANUAL ¶¶ 148-49 takes the opposite position; contraband lists must be published; otherwise goods not on lists may not be captured, and this would include free goods.

379. Helsinki Principle 3.3 & cmt.; NWP 1-14M Annotated¶ 7.9; SAN REMO MANUAL ¶ 106(e); *see also* Part F.2.

380. Helsinki Principle 3.3, cmt.; NWP 1-14M Annotated ¶¶ 7.8-7.8.1; NWP 9A Annotated ¶¶ 7.8-7.8.1; SAN REMO MANUAL ¶ 108; *see also* Part F.1.a.

381. Helsinki Principle 5.2.10; NWP 1-14M Annotated ¶¶ 7.7.2.1-7.7.2.2; NWP 9A Annotated ¶¶ 7.7.2.1-7.7.2.2; SAN REMO MANUAL ¶¶ 93-94; *see also* Part E.2.

382. *See* Part C.1.

383. While nearly all countries have ratified the First, Second, Third and Fourth Conventions, a few, *e.g.*, the United States, are not Protocol I parties; many States recognize parts of the Protocol as customary norms. *See* Table A5-1, n. III.628.

384. *See* nn. 260, 269 and accompanying text.

385. *See, e.g.*, COLOMBOS §§ 778-80; NWIP 10-2 ¶ 631b n.18; NWP 1-14M Annotated ¶ 7.4.1; NWP 9A Annotated ¶ 7.4.1; 2 O'CONNELL, LAW OF THE SEA 1143-44; TUCKER 266-67; *see also* nn. 361, 372 and accompanying text.

386. *See generally* 7 HACKWORTH, DIGEST 212; Helsinki Principle 5.2.6 & cmt.; MCDOUGAL & FELICIANO 509-13; 1 Medlicott, n. 192, 94-101; NWIP 10-2 ¶ 631d n.22; NWP 1-14M Annotated ¶ 7.4.2; NWP 9A Annotated ¶ 7.4.2; 2 O'CONNELL, LAW OF THE SEA 1147-48; SAN REMO MANUAL ¶¶ 122-24; TUCKER 280-82, 312-15, 322-23; G.G.

Fitzmaurice, *Some Aspects of Modern Contraband Control and the Law of Prize,* 22 BYBIL 73, 83-84 (1945); Mallison, *Limited,* n. III.316, 389-90.

387. Paris Declaration ¶¶ 2-3; *see also* 3 HYDE § 816; 2 OPPENHEIM § 177; SAN REMO MANUAL ¶ 147 & cmt.; Fujita, n. IV.624, 71.

388. London Declaration, arts. 30, 33-36; *see also* COLOMBOS §§ 766-70; Helsinki Principle 5.2.4, cmt.; NWIP 10-2 ¶ 631c (partially accepting London Declaration rules); NWP 1-14M Annotated ¶ 7.4.1.1 n.99; NWP 9A Annotated ¶ 7.4.1.1 n.99; 2 O'CONNELL, LAW OF THE SEA 1146; 2 OPPENHEIM §§ 400-03a; STONE 486-87; TUCKER, 268 n.9; Fujita, n. IV.624, 71-72; Kalshoven, *Commentary,* n. 115, 263-64.

389. In recent wars the doctrine was applied to extensive absolute contraband lists or to lists of contraband of all kinds. COLOMBOS §§ 771-74; 2 O'CONNELL, LAW OF THE SEA 1146-47; STONE 487; TUCKER 267-75; Kalshoven, *Commentary,* n. 115, 272.

390. *See* Part C.1.

391. UN Charter, arts. 25, 48, 103; *see also* SAN REMO MANUAL ¶ 150, cmt. 150.3; n. IV.57 and accompanying text.

392. *See* nn. 82-126 and accompanying text.

393. *See* nn. 333-49 and accompanying text.

394. *See* nn. II.103, 280, 306 and accompanying text.

395. *Cf.* nn. II.103, 183 and accompanying text.

396. *See* nn. II.111-12 and accompanying text.

397. Near the war's end Iran negotiated with the USSR for an oil export pipeline in USSR territory to the north. *See* nn. II.112-14, 182, 473-74 and accompanying text.

398. *See* nn. IV.668-79, 685-94 for descriptions of typical documentation and sale of goods in ocean commerce.

399. *See* nn. II.177, 274-78, 288, 296-99, 306, 366, 420, 447, 491-92 and accompanying text.

400. *See* nn. 337-44 and accompanying text.

401. *See* nn. II.332, IV.825, V.350-55 and accompanying text.

402. *See* n. 356 and accompanying text.

403. *See* nn. 387-90 and accompanying text.

404. Iran Prize Law, n. II.144; *but see* NWP 1-14M Annotated ¶ 7.4.1 n.96. *See also* nn. II.422-23 and accompanying text.

405. NWP 1-14M Annotated ¶¶ 7.5.1, 8.2.2.2; NWP 9A Annotated ¶¶ 7.5.1, 8.2.2.2; *compare* SAN REMO MANUAL ¶ 60(g); *see also* Parts C.1, D.1.

406. *Cf.* Helsinki Principle 5.2.3; *see also* Part D.3.

407. *See* nn. 356, 387-90 and accompanying text.

408. *See* nn. II.350-53 and accompanying text.

409. *See generally* nn. 114-18 and accompanying text.

410. *See* nn. 373-85 and accompanying text.

411. *See* nn. 368-70, 386 and accompanying text.

412. *See* nn. 344, 355, 391 and accompanying text.

413. *See* Parts A.1, A.2, A.5.

414. *See* nn. II.91, 110, 200 and accompanying text; *see also* n. II.236 and accompanying text. The United States once considered blockading Kharg but did not do so; *see* n. II.230 and accompanying text. The United States did not recognize Iraqi regulations, *etc.*, as law but warned of the danger of the Kharg area through NOTAMs and NOTMARs; *see* n. II.288, 420 and accompanying text. Kharg facilities were a frequent Iraqi target; *see, e.g.*, nn. II.232, 240, 272, 283. SAN REMO MANUAL, *Preliminary Remarks,* 176-77, notes MANUAL drafters differed on whether blockade law continues today or whether it is in desuetude. It says its rules apply "to blockading actions . . . regardless of the name given to such actions," trying to modernize the Paris and London Declaration rules. Other sources cited in this Part adhere to interpretations of the traditional blockade law as though it was still viable; that is the thrust of this Part,

although it cites the MANUAL where it coincides. Helsinki Principle 5.2.10, cmt. says the law of blockade is not in desuetude. For desuetude principles, *see* nn. III.930, IV.28 and accompanying text.

415. *See* GOODRICH *et al.* 314-17; SIMMA 628-36 (using UN Charter, art. 42, has been proposed only once); *see also* NWP 1-14M Annotated ¶ 7.7.2 n.131; NWP 9A Annotated ¶ 7.7.2 n.129. 2 OPPENHEIM § 49 believes art. 42 could be used for pacific blockade, *i.e.*, a blockade during time of peace. *See also id.* §§ 44-48, 52b-52e, 52*l*; nn. 416-21.

416. S.C. Res. 221, UN Doc. S/RES/221 (1965), *in* 5 ILM 534 (1966); *see also* CABLE 193-94; O'CONNELL, THE INFLUENCE 137-38, 174-75; Walker, *State Practice* 142-43.

417. 2 O'CONNELL, LAW OF THE SEA 1157-58, referring to UN Charter, art. 2(4), noting that even under traditional law a pacific blockade may not have enough practice to be customary law; *see also* COLOMBOS §§ 484-88B (hinting at legality of pacific blockade); 2 OPPENHEIM §§ 44-49, 52b-52e, 52*l* (same); NWIP 10-2 ¶ 632a, n.26. A related method, naval demonstration, *i.e.*, sending warships into neutral coastal waters to threaten a coastal State, violates UN Charter, art. 2(4), LOS principles governing innocent passage in the territorial sea, and the LOAC regarding belligerent conduct toward neutrals. LOS Convention, art. 19; Territorial Sea Convention, art. 14(4); Hague XIII, arts. 1, 5; COLOMBOS § 489; *see also* nn. III.47-157, IV.337-50, V.73 and accompanying text. Reprisals involving use of force, *e.g.*, firing on a neutral coast or other neutral territory to signal a belligerent's displeasure with a neutral's conduct, is equally invalid under UN Charter, art. 2(4); *see also* COLOMBOS § 491; nn. III.47-157 and accompanying text. A displeased belligerent may undertake nonforce reprisals or retorsions to influence neutral behavior, *e.g.*, embargo in violation of a trade treaty or withdrawing diplomatic relations, an unfriendly but lawful act. *See* COLOMBOS §§ 481-83; nn. III.396-417, 644-48 and accompanying text. Belligerents may also exclude merchantmen and civil aircraft from the immediate area of naval operations and may declare exclusion zones in high seas areas off any nation's coast. *See* Parts F.1-F.2. There is also nothing wrong with a country's using high seas off another country's coasts for freedom of navigation and overflight of its warships and military aircraft, or using these high seas areas for naval exercises. LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. IV.68-79 and accompanying text.

418. *Cf.* UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

419. The UN Command considered but rejected a blockade of the PRC as well. *See generally* Walker, *State Practice* 125-28. The Republic of China on Taiwan had declared a blockade against the PRC. Janis, *Neutrality*, n. III.831,149. *See also* nn. III.220-23 and accompanying text.

420. UN Charter, arts. 25, 48, 103; NWP 1-14M Annotated ¶ 7.7.2.1 n.131; NWP 9A Annotated ¶ 7.7.2.1 n.129; *see also* n. IV.57 and accompanying text.

421. Helsinki Principle 1.2; NWIP 10-2 ¶ 632 n.30; NWP 1-14M Annotated ¶ 7.7.2 n.131; NWP 9A Annotated ¶ 7.7.2 n.129.

422. NWP 1-14M Annotated ¶ 7.7.5; NWP 9A Annotated ¶ 7.7.5.

423. *See* n. 356 and accompanying text.

424. COLOMBOS §§ 813, 842, 844; 2 OPPENHEIM §§ 368, 370, 372; OXFORD NAVAL MANUAL, art. 30; NWP 1-14M Annotated¶ 7.7.1; NWP 9A Annotated ¶ 7.7.1; 10 WHITEMAN, DIGEST 861-64; Clark, n. III.322, 160; Swayze, n. III.322, 154. *See generally* COLOMBOS §§ 814-17; 2 O'CONNELL, LAW OF THE SEA 1150; TUCKER 283-87; Clingan, *Submarine Mines*, n. III.840, 353; Goldie, *Maritime War Zones*, n. II.519, 161-71; for histories of blockade. *See also* n. 417 and accompanying text, discussing legality of pacific blockades, naval demonstrations, reprisals and retorsions as related means of economic warfare.

425. A US decision to impose a blockade lies with the executive and not with naval force commanders. London Declaration, arts. 8-9; NWIP 10-2 ¶ 632b & n.30; NWP 1-14M Annotated ¶ 7.7.2.1; NWP 9A Annotated ¶ 7.7.2.1; 2 O'CONNELL, LAW OF THE SEA 1151; 2 OPPENHEIM §§ 375-76; SAN REMO MANUAL ¶ 93; TUCKER 287; Kalshoven, *Commentary*, n. 115, 260, 274; Swayze, n. III.322, 154-55.

426. The grace period has ranged from 2 to 10 days; ships were given 3 days to leave Haiphong in 1972 during the Vietnam War. London Declaration, arts. 8-9, 11-13, 16; ALFORD, n. IV.638, 345-51; COLOMBOS §§ 824-26; Helsinki Principle 5.2.10; CHARLES CHENEY HYDE, BLOCKADE 24, 36-37 (1918); NWIP 10-2 ¶ 632c & n.31, 32 (usual to notify local authorities); NWP 1-14M Annotated ¶¶ 7.7.2.1, 7.7.5 (same); NWP 9A Annotated ¶ 7.7.2.1, 7.7.5 (same); 2 O'CONNELL, LAW OF THE SEA 1151, 1156 (erroneously reporting Haiphong ships had only three hours to leave); SAN REMO MANUAL ¶¶ 93-94, 101 (*inter alia* stating no requirement to notify local authorities); TUCKER 287-92; Harry Almond, *Comments on Hugh Lynch's Paper, in* Grunawalt 264, 289; Clark, n. III.322, 172; Goldie, *Maritime War Zones*, n. II.519, 166-71; Kalshoven, *Commentary*, n. 115, 260, 274; Levie, *Submarine Warfare*, n. III.439, 33; Swayze, n. III.322, 154-55. The Korean War aside, there have been no formal blockades of consequence since 1945. The Republic of China declared one against the PRC in 1949, India proclaimed one in 1971, Egypt tried to blockade the Bab-el-Mandeb Straits in 1973, and Israel imposed one on the Lebanese coast in 1982. 1 ANTHONY H. CORDESMAN &

ABRAHAM R. WAGNER, THE LESSONS OF MODERN WAR 104-08, 216 (1990); CHAIM HERZOG, THE WAR OF ATONEMENT 266-69 (1975); 2 O'CONNELL 1154-55; O'CONNELL, THE INFLUENCE 101-02; Janis, n. III.831, 149; Walker, *State Practice* 137-38, 144. There were naval quarantines during the Cuban Missile Crisis and the Vietnam War. *See generally* HOWARD S. LEVIE, MINE WARFARE AT SEA 151-57 (1992); Clingan, *Submarine Mines,* n. III.840, 353, 358; Goldie, *Maritime War Zones,* n. II.519, 157; Janis 151; Lowe, *Commander's Handbook,* n. III.318, 128; Mallison & Mallison, *Naval Targeting,* n. III.262, 262-68; Walker 141, 145. The tendency has been to proclaim exclusion zones. *See* Part F.

427. Paris Declaration ¶ 4; COLOMBOS § 818; Helsinki Principle 5.2.10, cmt.; NWIP 10-2 ¶ 632b n.32; 2 OPPENHEIM §§ 177, 378; Fujita, n. IV.624, 69. The UN Security Council may proclaim a paper blockade, at least in theory. UN Charter, arts. 25, 42, 48, 103; *see* nn. 415-21 and accompanying text.

428. London Declaration, arts. 4, 12; HYDE, n. 426, 41-42; NWIP 10-2 ¶ 632d & n.33; NWP 1-14M Annotated ¶ 7.7.2.3; NWP 9A Annotated ¶ 7.7.2.3; 2 O'CONNELL, LAW OF THE SEA 1151; 2 OPPENHEIM §§ 378, 382; TUCKER 288-89; Kalshoven, *Commentary,* n. 115, 260, 274; *see also* n. 426 and accompanying text.

429. Lieber Code, arts. 135-37, 141-42; OXFORD NAVAL MANUAL, art. 92; *see also* Levie, *The Nature,* n. 109, 903-06; Verri, *Commentary,* n. IV.71, 337.

430. 2 OPPENHEIM § 239, citing 1899 Hague II, Regulations, art. 40; Hague IV, Regulations, art. 40; Lieber Code, art. 145; *see also* Levie, *The Nature,* n. 109, 901-03.

431. London Declaration, arts. 2-3; COLOMBOS §§ 818-21, 843-43; HYDE, n. 426, 5-6, 12-14; NWIP 10-2 ¶ 632d & n.33; NWP 1-14M Annotated ¶ 7.7.2.3; NWP 9A Annotated ¶ 7.7.2.3; 2 OPPENHEIM §§ 379-82; SAN REMO MANUAL ¶¶ 95-97; STONE 496; TUCKER 288-89; Kalshoven, *Commentary,* n. 115, 260, 274; Swayze, n. III.322, 154. The old rule, that at least one surface warship must be present, has been discarded. Helsinki Principle 5.2.10, cmt.; NWP 1-14M Annotated ¶ 7.7.5; NWP 9A Annotated ¶ 7.7.5; *compare* 2 OPPENHEIM 380a. Paris Declaration ¶ 4 invalidated Napoleonic era "paper" or constructive blockades that a State imposes by decree but does not have forces to enforce it. *See* n. 427 and accompanying text.

432. Paris Declaration ¶ 4; COLOMBOS §§ 837-41, 845-63; Helsinki Principle 5.2.10; HYDE, n. 426, 13-14; NWIP 10-2 ¶ 632a n.27-28; NWP 1-14M Annotated ¶ 7.7.5; NWP 9A Annotated ¶ 7.7.5; 2 O'CONNELL, LAW OF THE SEA 1151-56; 2 OPPENHEIM § 177; SAN REMO MANUAL ¶ 96 (force maintaining blockade may be stationed at distance determined by military requirements); TUCKER 290, 305-15, 317; Almond, n. 426, 289; Fujita, n. IV.624, 69, 73; Goldie, *Maritime War Zones,* n. II.519, 164-71, 178; Jacobson, n. 166, 233; Kalshoven, *Commentary,* n. 115, 260, 274; Levie, *Submarine Warfare,* n. III.439, 33; n. 173 and accompanying text.

433. LOS Convention, arts. 25(3), 45; Territorial Sea Convention, art. 16(3); *see also* nn. IV.337, 349 and accompanying text; Part IV.B.6, analyzing nonsuspendable straits passage.

434. 2 O'CONNELL, LAW OF THE SEA 1156.

435. Hague VIII, arts. 2-3; COLOMBOS §§ 821, at 720; 837-41, 845-63; OXFORD NAVAL MANUAL, art. 22; Goldie, *Maritime War Zones,* n. II.519, 166-71; Howard S. Levie, *Commentary, in* LAW OF NAVAL WARFARE 140, 143-44; Lowe, *The Commander's,* n. III.318, 137-38; Swayze, n. III.322, 163-65; *cf.* Nwogugu, n. III.439, 333, 340; *but see* Nicaragua Case, 1986 ICJ 112, 147-48, involving mining and not wartime blockade issues.

436. MANUAL commentary suggests the requirement is mandatory, not hortatory, as "should" might indicate. SAN REMO MANUAL ¶ 85 & cmts.

437. If a blockading force officer acknowledges a distress situation, a neutral-flag ship may be allowed to enter a blockaded place and leave it, provided the vessel neither discharges nor ships cargo. London Declaration, arts. 5-7; Helsinki Principle 5.2.10; COLOMBOS §§ 813, 822-23; HYDE, n. 426, 14, 35-36; NWIP 10-2 ¶¶ 632f & n.35, 632h; NWP 1-14M Annotated ¶¶ 7.4.1.2, 7.7.2.4, 7.7.3; NWP 9A Annotated ¶¶ 7.4.1.2, 7.7.2.4, 7.7.3; 2 O'CONNELL, LAW OF THE SEA 1151; 2 OPPENHEIM §§ 370; SAN REMO MANUAL ¶ 100; TUCKER 291-92; Kalshoven, *Commentary,* n. 115, 260, 274; *see also* nn. IV.494-506 and accompanying text.

438. The United States appears to have a view that neutral diplomatic agents are entitled to leave a blockaded place. COLOMBOS § 813; HYDE, n. 426, 37-39; 7 MOORE 854; NWIP 10-2 ¶ 632h(1); TUCKER 291; During the Korean War blockade, foreign warships except North Korea's could enter and leave North Korean ports. Walker, *State Practice* 126, citing *inter alia* US Deputy Director of State Department Office of Northeast Asian Affairs U. Alexis Johnson Memorandum of Conversation, July 8, 1950, 7 FRUS 1950, 332-33. Since imposing a blockade is a US executive decision, it is likely the executive will also make these decisions. US naval commanders, and force commanders with like national rules, perhaps stated in rules of engagement, should consult those rules and refer to higher authority as directed. *See* nn. III.258 and accompanying text for ROE analysis.

439. Second Convention, art. 38; Third Convention, arts. 72-75 & Annex III; Fourth Convention, arts. 23, 59, 61; Protocol I, arts. 69-70; Helsinki Principle 5.3; NWP 1-14M Annotated ¶ 7.4.1.2; NWP 9A Annotated ¶ 7.4.1.2; SAN

REMO MANUAL ¶¶ 102(a), 103-04, 150; TUCKER 263; Frits Kalshoven, *Noncombatant Persons, in* Grunawalt 300, 312-13; *see also* BOTHE *et al.*. 430-37; HYDE, n. 426, 39-41; 2 PICTET 212-15; 3 *id.* 351-74, 664-68; 4 *id.* 178-84, 319-23, 325-28; PILLOUD, COMMENTARY 812-29. Protecting Powers, a third, neutral State or an international organization parties to a conflict appoint to safeguard their interests, including interests of prisoners of war, *etc.*, are discussed and defined in First Convention, arts. 8-11, 23; Second Convention, arts. 8, 11; Third Convention, arts. 8, 11; Fourth Convention, arts. 9, 12, 14; Protocol I, arts. 2(c), 5-6, 11, 33, 45, 60, 70; Cultural Property Convention, art. 21. *See also* BOTHE *et al.*. 54-55, 64-84, 110-16, 172-75, 260-62, 387-89, 432-37; GREEN ch. 13; 1 PICTET 86-131, 206-26; 2 *id.* 60-65, 79-82; 3 *id.* 93-103, 123-27; 4 *id.* 81-92, 113-17, 120-28; PILLOUD, COMMENTARY 58-59, 61-62, 76-102, 150-63, 350-63, 544-59, 708-16, 816-29; TOMAN 222-26; Howard S. Levie, *Prisoners of War and the Protecting Power*, 55 AJIL 374 (1961). The United States evacuated civilians from North to South Vietnam in that conflict during offshore interdiction operations. Wounded and sick French armed forces members were repatriated to France and Morocco. 1 EDWIN M. HOOPER *et al.*, THE UNITED STATES NAVY AND THE VIETNAM CONFLICT ch. 12 (1976); Daniel M. Redmond, *Getting Them Out*, 116 PROCEEDINGS 44 (No. 8, 1990).

440. London Declaration, art. 18; COLOMBOS § 833; Helsinki Principle 5.2.10; NWIP 10-2 ¶ 632e; NWP 1-14M Annotated ¶ 7.7.2.5; NWP 9A Annotated ¶ 7.7.2.5; 2 OPPENHEIM § 373a; SAN REMO MANUAL ¶ 99; TUCKER 289-90; Kalshoven, *Commentary*, n. 115, 260, 274; *see also* Parts E.2-E.3.

441. COLOMBOS § 844; W.E. HALL, LAW OF NAVAL WARFARE 205-06 (1921); Helsinki Principle 5.2.10; HYDE, n. 426, 29-33; NWIP 10-2 ¶ 632g(2); NWP 1-14M Annotated ¶ 7.7.4; NWP 9A Annotated ¶ 7.7.4; 2 O'CONNELL, LAW OF THE SEA 1157 (noting this is UK-US policy, and that continental States follow an analogue of hot pursuit after a ship breaks a blockade cordon); 2 OPPENHEIM §§ 385, 389 (noting differences in State practice); SAN REMO MANUAL ¶¶ 98, 146(f), 153(f); TUCKER 292-95. *See also* LOS Convention, art. 111; High Seas Convention, art. 23; nn. IV.298, 326 and accompanying text (hot pursuit under LOS).

442. Declaration of London, arts. 14-15; COLOMBOS §§ 827-28; NWIP 10-2 ¶ 632g & n.36; NWP 1-14M Annotated ¶ 7.7.4; NWP 9A Annotated ¶ 7.7.4; 2 OPPENHEIM §§ 383-84; TUCKER 292-93.

443. *See* nn. 387-88 and accompanying text.

444. Declaration of London, arts. 14-15; Hague Air Rules, art. 52, as interpreted by its drafters; COLOMBOS § 835-36, 844; NWIP 10-2 ¶ 632g & n.36; NWP 1-14M Annotated ¶ 7.7.4; NWP 9A Annotated ¶ 7.7.4; 2 O'CONNELL, LAW OF THE SEA 1157; TUCKER 292-93, 316-17. *See also* Declaration of London, arts. 17, 19, considered by NWP 1-14M Annotated ¶ 7.7.4 n. 140; NWP 9A Annotated ¶ 7.7.4 n.138, as obsolete in light of State practice; Kalshoven, *Commentary*, n. 115, 261-62, 274.

445. 2 OPPENHEIM § 386; *see also* nn. IV.494-506, V.437 and accompanying text.

446. UN Charter, arts. 25, 42, 48, 103; Helsinki Principle 1.2; *see also* n. III.58 and accompanying text; Part E.1.

447. SAN REMO MANUAL ¶ 102(b) & cmts. 102.3-102.4; Goldie, *Maritime War Zones*, n. II.519, 178 (necessity behind changes in traditional blockade law); *see also* Parts A.1-A.2 and accompanying text.

448. *See* nn. II.91, 110, 200, V.414 and accompanying text.

449. A similar situation arose in the 1990-91 Gulf War; *see* Walker, *Crisis Over Kuwait* 36 n.53, commenting on S.C. Res. 66, UN Doc. S/RES 665 (1990), *in* 29 ILM 1329, 1330 (1990), authorizing interception of Iraq-bound cargoes, and the response of *Comprehensive Mandatory Sanctions Imposed Against Iraq*, 27 UN Chron. 5, 6-7 (No. 4, 1990); *Naval Blockade Endorsed, id.* 17, characterizing the operation as a blockade. *See also Vessels Intercepted, id.* 15. The UN Security Council never formally authorized a blockade; Coalition members never instituted one or treated Council authorizations under, *e.g.*, S.C. Res. 678, UN Doc. No. S/RES/678, *in* 1 Dispatch 298 (1990), as authority to impose one.

450. *See* nn. I.27-33 and accompanying text.

451. *See* nn. 425-26 and accompanying text.

452. Several Iranian warships, on order in Italy, never left the Mediterranean Sea; the rest of the Iraqi navy was bottled up in the Shatt al-Arab early in the war. There is no evidence Iraq used helicopters, which could have enforced a blockade, against Gulf shipping. *See* nn. II.130, 236, 322 and accompanying text.

453. Paris Declaration, ¶ 4; *see also* n. 427 and accompanying text.

454. *See* nn. II.153-56 and accompanying text.

455. *See* n. 426 and accompanying text.

456. *Cf.* LOS Convention, art. 25(3); Territorial Sea Convention, art. 16(3); *see also* nn. IV.337, 349 and accompanying text.

457. Helsinki Principle 3.3, cmt.; NWP 1-14M Annotated ¶¶ 7.8-7.8.1; NWP 9A Annotated ¶¶ 7.8-7.8.1; SAN REMO MANUAL ¶ 146; *see also* Part F.1.a.

458. The record is nonexistent on these points.

459. *See* nn. II.179, 233, 250-60, 334, 354, 357, 359, 362, 368, 373, 393-94, 412, 420-21, 446, 469, 519 and accompanying text; *see also* S.C. Res. 552 (1984), *in* WELLENS 473; Part IV.B.4; n. 440 and accompanying text. While many attacks Chapter II documents occurred outside neutral territorial waters, the citations are given to illustrate the frequency of mine and other attacks on neutral shipping, some of which occurred in neutral territorial waters.

460. *See* nn. II.365 and accompanying text.

461. UN Charter, arts. 2(4), 103; LOS Convention, art. 19; Territorial Sea Convention, art. 14(4); Hague XIII, arts. 1,5; *see also* nn. IV.371-73, V.73, 417 and accompanying text.

462. *See* n. 426 and accompanying text.

463. *See* nn. 437-38 and accompanying text.

464. *See* nn. II.153-56 and accompanying text. Neutral-flag ships could have left under another blockade principle, the right of egress during a grace period upon notice of blockade. *See* n. 426 and accompanying text.

465. *See* nn. 451-53 and accompanying text.

466. *See* Hague XI, arts. 5, 8; Third Convention, art. 4; nn. II.153-56, V.346-47 and accompanying text.

467. *See* Parts A.1-2 and accompanying text.

468. UN Charter, arts. 25, 42, 48; *see also* Part E.1.

469. *See* nn. 425-26 and accompanying text.

470. *See* nn. II.179, 233, 250, 334, 354, 357, 359, 368, 420 and accompanying text; *see also* Part G.2 for mine warfare analysis.

471. *See* Part IV.D.4.

472. S.C. Res. 552 (1984), *in* WELLENS 473; *see also* Part IV.B.5; nn. 440, 459 and accompanying text.

473. *See* nn. II.89-90, 101 (US NOTAM warning), 102, 109, 176 (US NOTMAR warning), 199-202, 208, 232, 288 (US NOTAM, NOTMAR warning of zones), 301, 420 (US NOTAM, NOTMAR warning of zones) and accompanying text.

474. *See* nn. II.177, 274-78, 288, 296-99, 306, 366, 420, 447, 491-92 and accompanying text.

475. *See* nn. II.364 (Persian Gulf), 365 (Saudi territorial sea), 379-81 (Gulf of Oman, Iran territorial sea, which may have included Strait of Hormuz), 410 (Iran territorial sea, Persian Gulf), 458 (Gulf of Oman, Persian Gulf) and accompanying text.

476. *See* nn. II.116, 261, 292 and accompanying text.

477. *See* nn. II.224, 305, 345, 347 and accompanying text; Parts F.1.b-F.1c. At the end of the war US naval forces assumed a "zone defense" posture. *See* n. II.4 and accompanying text. The characterization and SDZ acronym are mine.

478. *See, e.g.*, nn. II.335-36, 354, 357, 367-72, 384-87, 437-40 and accompanying text.

479. *See, e.g.*, nn. II.4, 146-48, 224, 305, 311, 338-41, 345, 347, 372, 383-86, 391-402, 425-28 (UN flotilla proposed, rejected), 430-33 and accompanying text.

480. *See, e.g.*, nn. II.295, 350-52, 361-62, 382, 384-86, 413, 437-40, 471 and accompanying text.

481. *See, e.g.*, nn. II.367-72, 391-402, 459-68 and accompanying text.

482. *See* n. II.262 and accompanying text.

483. *See* UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

484. Department for Disarmament Affairs, Report of UN Secretary General, *The Naval Arms Race*, UN Doc. No. A/40/534, at 24 (1986); n. 432 and accompanying text. Technology has been an issue for the law governing armed conflict as well. *See* nn. II.173 and accompanying text.

485. Hague Air Rules, art. 30; London Declaration, art. 1; Paris Declaration ¶ 4; GREEN 154; Helsinki Principle 3.3 & cmt.; NWIP 10-2 ¶¶ 430b & n. 17, 520a; 632a; NWP 1-14M Annotated ¶ 7.8; NWP 9A Annotated ¶ 7.8; 2 OPPENHEIM § 325b; OXFORD NAVAL MANUAL, art. 30; SAN REMO MANUAL ¶ 146; TUCKER 300-01; *cf.* LOS Convention, arts. 38, 45;

*see also* Part IV.B.5. The LONW applies to these situations through the LOS conventions' other rules clauses, *e.g.*, LOS Convention, arts. 2(3), 34(2); Territorial Sea Convention, art.1(2); *see also* nn. III.952-67, IV.10-25 and accompanying text. Ronzitti, *The Crisis* 23 says a rule forbidding hostilities in straits is not yet a customary norm; he is only partially correct. Certain aspects of naval operations, *e.g.*, the right of self-defense, continue to apply during straits passage as they do anywhere, but others are limited as noted above.

486. *Cf.* LOS Convention, arts. 2(2), 25(3); Territorial Sea Convention, arts. 2, 16(4). Under these circumstances the LOAC applies through the LOS other rules principles in, *e.g.*, LOS Convention, art. 2(3), Territorial Sea Convention, art. 1(2), but a restriction should conform as closely as necessity and proportionality allow to LOS standards. *See also* nn. III.952-67, IV.10-25 and accompanying text. Whether an enemy would choose to exercise similar restrictions is a matter for its decision as to its territorial sea and its opponent's territorial sea.

487. *Cf.* LOS Convention, arts. 1(1), 33, 55-58, 76-78, 135, 137; Continental Shelf Convention, art. 3; Fishery Convention, arts. 1(1), 3-4(1), 6, 8; Territorial Sea Convention, art. 24. As in the case of the territorial sea, n. 486 and accompanying text, the LOAC applies through LOS other rules principles in, *e.g.*, LOS Convention, art. 2(3), 34(2), 58, 78, 87(1), 138; Continental Shelf Convention, art. 3 (high seas rights unaffected); High Seas Convention, art. 2; Territorial Sea Convention, art. 1(2). Restrictions should conform as closely as necessity and proportionality allow to LOS standards. *See also* nn. III.952-67, IV.10-25 and accompanying text.

488. *Cf., e.g.*, LOS Convention, arts. 27(4), 39(3)(a), 54, 56(2), 58(3), 60(3), 66(3)(a), 78(2) ("unjustifiable interference"), 79(5), 80, 87(2), 142(1), 234; Continental Shelf Convention, art. 5(1) ("unjustifiable interference"); High Seas Convention, art. 2 ("reasonable regard"); Territorial Sea Convention, art. 19(4). As with belligerents' rights to restrict neutral traffic, nn. 486-87 and accompanying text, the LOAC applies through LOS other rules principles in, *e.g.*, LOS Convention, arts. 2(3), 34(2), 58, 78, 87(1), 138; Continental Shelf Convention, art. 3; High Seas Convention, art. 2; Territorial Sea Convention, art. 1(2); *see also* nn. III.952-67, IV.10-25 and accompanying text.

489. *Cf.* LOS Convention, arts. 42(5), 95-96, 110(1), 236; High Seas Convention, arts. 8-9; *see also* IV.794 and accompanying text.

490. *Cf., e.g.*, LOS Convention, arts. 27(4), 30 (request to leave territorial sea), 39(3)(a), 54, 56(2), 58(3), 60(3), 66(3)(a), 78(2) ("unjustifiable interference"), 79(5), 80, 87(2), 142(1), 234; Continental Shelf Convention, art. 5(1) ("unjustifiable interference"); High Seas Convention, art. 2 ("reasonable regard"); Territorial Sea Convention, arts. 19(4), 23 (request to leave the territorial sea); *see also* n. IV.75 and accompanying text. As with belligerents' right to restrict neutral traffic, nn. 486-87 and accompanying text, the LOAC applies through LOS other rules principles in, *e.g.*, LOS Convention, arts. 2(3), 34(2) 58, 78, 87(1), 138; Continental Shelf Convention, art. 3; High Seas Convention, art. 2; Territorial Sea Convention, art. 1(2); *see also* nn. III.952-67, IV.10-25, 75, V.58, 62 and accompanying text.

491. *Cf., e.g.*, LOS Convention, arts.27(4), 39(3)(a), 54, 56(2), 58(3), 60(3), 66(3)(a), 78(2) ("unjustifiable interference"), 79(5), 80, 87(2), 142(1), 234; Continental Shelf Convention, art. 5(1) ("unjustifiable interference"); High Seas Convention, art. 2 ("reasonable regard"); Territorial Sea Convention, art. 19(4); *see also* n. IV.75 and accompanying text. As with a belligerent's right to restrict neutral traffic, nn. 486-87 and accompanying text, the LOAC applies through LOS other rules principles in *e.g.*, LOS Convention, arts. 2(3), 34(2), 58, 78, 87(1), 138; Continental Shelf Convention, art. 3; High Seas Convention, art. 2; Territorial Sea Convention, art. 1(2); *see also* nn. III.952-67, IV.10-25, 75, V.58, 62 and accompanying text.

492. In exercising their right of discretion, these neutral platforms retain their right of self-defense; *see* UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

493. NWP 1-14M Annotated ¶ 7.8 n.144; NWP 9A Annotated ¶ 7.8 n.141.

494. There is apparently no custom or other law on the situation of neutral warships and military aircraft, *etc.*, in the vicinity of belligerent naval operations, but the foregoing statement of policies and principles appears to be a correct, if hypothetical, analysis.

495. *Cf.* London Declaration, art. 9, as modified by general LOAC principles of necessity and proportionality. *See also* Hague IX, art. 6 (naval commander conducting shore bombardment must do his utmost to warn local authorities if the military situation permits), an example of the general principle of necessity for the time the agreement was negotiated, but supportive of the notice principle in this context; Robertson, *Commentary*, n. 13, 170 (same, referring to Protocol I, art. 49); *but see* STONE 389 n.120 (clearly obsolescent principle); O'Connell, *International Law*, n. III.252, 19 (irrelevant today); Robertson 167 (art. 6 may serve no useful purpose today); nn. III.930, IV.28 and accompanying text (desuetude).

496. *See* nn. 486-87 and accompanying text.

497. Hague Radio Rules, art. 6; NWIP 10-2 ¶ 520a; NWP 1-14M Annotated ¶ 7.8.1; NWP 9A Annotated ¶ 7.8.1; TUCKER 300; *see also* nn. 338-44 and accompanying text.

498. *See* n. 489 and accompanying text.

499. *See* nn. IV.75, V.58, 62, 490-91 and accompanying text.

500. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

501. *See* n. 492 and accompanying text.

502. LOS Convention, arts. 2(2), 25(3), 38, 45; Territorial Sea Convention, arts. 2, 14-15, 16(3), 25; *see also* Parts IV.D.3, IV.D.5.

503. *See* nn. IV.309, 357-58 and accompanying text.

504. *See* nn. IV.16, 67 and accompanying text.

505. *E.g.*, LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* n. IV.75 and accompanying text. For LOAC due regard analysis, *see* nn. 58, 62 and accompanying text.

506. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

507. *See* Gilchrist, n. II.225.

508. *See* n. 502 and accompanying text.

509. *See* n. 426 and accompanying text.

510. *See* Part F.2.

511. *See* Part F.1.a.

512. *See* nn. IV.309, 357-58 and accompanying text.

513. *See* nn. IV.349, V.508 and accompanying text.

514. *See* nn. 426, 428 and accompanying text.

515. *See* Goldie, *Maritime War Zones*, n. II.519, 172; Ronzitti, *The Crisis* 39; Walker, *State Practice* 153.

516. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, 67, V.504 and accompanying text.

517. LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. IV.67-79 and accompanying text.

518. An SDZ or *cordon sanitaire* notice necessarily tells everyone where a naval force is or will be. *See generally* Gilchrist, nn. II.225, 60. Even if a notice just advises that forces are or will be operating in an area, that may trigger unwanted attention. Submarine patrols are almost never announced for security reasons. However, a submarine on patrol retains a right of self-defense.

519. UN Charter, arts. 51, 103; *see also* LOS Convention, preamble, arts. 138, 279, 298, 301; High Seas Convention, art. 30 (treaty subject to prior treaties; UN Charter is a treaty); Territorial Sea Convention, art. 25 (same); nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

520. A warship in innocent passage in the territorial sea retains its right to self-defense under UN Charter, arts. 51, 103; LOS Convention, art. 301; Territorial Sea Convention, art. 23 (convention subject to prior treaties, UN Charter is a treaty). However, the definitions of what is not innocent passage in LOS Convention, art. 19(2) and Territorial Sea Convention, art. 14(4), seem to come close to barring publication of SDZ notices for neutral territorial sea innocent passage. An argument can be made that since a warship keeps its self-defense right wherever it steams, merely announcing an SDZ for this purpose does not run afoul of LOS definitions on what is not innocent passage. SDZ publication might trigger LOS Convention, art. 19(2) or Territorial Sea Convention, art. 14(4)-based protests or bolster coastal State attempts to suspend innocent passage pursuant to LOS Convention, art. 25(3) and Territorial Sea Convention, art. 16(3) or to require the warship(s) to leave pursuant to LOS Convention, art. 30; Territorial Sea Convention, art. 23. *See also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part IV.B.4. The SDZ notices issue for neutral territorial sea innocent passage does not appear to have arisen.

521. *E.g.*, LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* nn. IV.75, V.505 and accompanying text. For LOAC due regard analysis, *see* nn. 58, 62 and accompanying text.

522. LOS Convention, arts. 38, 45; *see also* Part IV.B.6.

523. UN Charter, arts. 51, 103; Ronzitti, *The Crisis* 39; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

524. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

525. *See* Nyon Arrangement; Nyon Supplementary Agreement; O'CONNELL, THE INFLUENCE 80, 168, 172; Goldie, *Commentary, in* LAW OF NAVAL WARFARE 489, 493-95; Goldie, *Maritime War Zones,* n. II.519, 192; O'Connell, *International Law,* n. III.252, 54-56.

526. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

527. *See* Part F.1.b.

528. *See* Second Convention, art. 38; Third Convention, arts. 72-75 and Annex III; Fourth Convention, arts. 23, 59, 61; Protocol I, arts. 69-70; *see also* n. 439 and accompanying text.

529. *See* Part F.1.a.

530. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

531. *See* nn. 439, 528 and accompanying text.

532. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

533. *See* Part F.1.a.

534. *See* nn. 115 and accompanying text.

535. Even in total wars, *e.g.,* World Wars I and II, there was no total symmetry among belligerents. For example, during World War II the United States never was at war with Finland, whose conflict with the USSR was resolved before US entry. The United States never declared war against Turkey in World War I. While the United Kingdom and Argentina fought the Falklands/Malvinas War, Iran and Iraq were at war. Geography separated belligerents in these conflicts, but given a potential for small wars in the next century, a possibility of two or more small conflicts is as real, or perhaps more real, as it has been for much of the Twentieth Century.

536. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

537. *See* Part F.1.a.

538. *See, e.g.,* nn. II.305, 311, 345, 347 and accompanying text.

539. *See* nn. 515, 518 and accompanying text. Announcing the defensive bubble may have had psychological overtones for the Falklands/Malvinas War; it may have signaled Britain meant business and that the time for the UK task force to get to the Falklands/Malvinas was an opportunity for Argentina to leave the islands before being driven out. Undoubtedly the UK announcement that the Ghurkas, well known for their professional fighting competence, would be part of its armed forces, was another feature of that conflict's psychological warfare.

540. This analysis uses "war zone" to differentiate from other sea areas, *e.g.* security zones, which international law condemns, nn. IV.309, 357-58 and accompanying text; blockaded sea areas, Part E.2; sea areas from which belligerents may exclude neutral ships and aircraft, Part F.1.a; high seas defense zones (SDZs), Parts F.1.b-F.1.c; air defense identification zones (ADIZs), Part F.3; and areas the LOS permits, *e.g.,* exclusive economic zones (EEZs), offshore fisheries areas and contiguous zones, nn. IV.83-157, 296-300, 324-27 and accompanying text, all of which are styled as zones, and all of which have very different characteristics and uses. War zones (a German term for World Wars I and II areas) have been labeled as maritime exclusion zones (Falklands/Malvinas, Tanker Wars), total exclusion zones (Falklands/Malvinas War), protection zones (Falklands/Malvinas War), defensive sea areas (Russo-Japanese War, US coastal zones in World Wars I, II), defense zones (Falklands/Malvinas War), military areas (a World War I UK term), barred areas (a World War I German term), operational zones, maritime control areas (US practice, World Wars I, II), restricted areas (a World War I UK term), areas dangerous to shipping, theater of war (a World War I German term), and geographically (*e.g.,* Argentina's South Atlantic War Zone, Falklands/Malvinas War). *See* NWP 1-14M Annotated ¶ 7.9; SAN REMO MANUAL, *Introduction,* 181; STONE 572-73; TUCKER 296-97, 300 n. 41. The "zone defense" to which the United States reverted was an SDZ, since the United States was not a Tanker War belligerent. *See* n. II.4 and accompanying text; Parts F.1.b-F.1.c.

541. COLOMBOS § 558; 2 O'CONNELL, LAW OF THE SEA 1109; O'CONNELL, THE INFLUENCE 166; 2 OPPENHEIM § 319a; TUCKER 299-300; *see also* Stockholm Declaration, art. 2(1) (belligerent warships not allowed access to Nordic nation ports, roadsteads proclaimed naval ports or part of protection zones of coast defense works; wording varies); Bring, *Commentary,* n. III.848, 842.

542. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 642 (Pearce Higgins ed., 8th ed. 1924); 3 HYDE § 720; TUCKER 299-300; Goldie, *Maritime War Zones,* n. II.519, 156, 158-60; *cf.* OXFORD NAVAL MANUAL, art. 1 (theater of naval war includes high seas and belligerents' territorial waters); Nwogugu, n. III.439, 331. MACCHESNEY 603-04 published citations to US defensive sea areas; 11 were still in force in 1956.

543. STONE 572.

544. *See generally* Nyon Arrangement; Nyon Supplementary Agreement; O'CONNELL, THE INFLUENCE 80, 168, 172; Goldie, *Commentary*, n. 525, 493-95; Goldie, *Maritime War Zones*, n. II.519, 192; O'Connell, *International Law*, n. III.252, 54-56.

545. Goldie, *Maritime War Zones*, n. II.519, 192; *see also* Parts F.1.b-F.1.c.

546. COLOMBOS §§ 559-60, 845-59; NWP 1-14M Annotated ¶ 7.9; 2 O'CONNELL, LAW OF THE SEA 1109-10; O'CONNELL, THE INFLUENCE 166-67; 2 OPPENHEIM § 319a; STONE 572-74; TUCKER 301, 305-16; Fujita, n. IV.624, 72-73; Goldie, *Maritime War Zones*, n. II.519, 160-61, 168-70, 184-87; Kalshoven, *Commentary*, n. 115, 272, 274; William O. Miller, *Belligerency and Limited War*, NWC REV. 19 (Jan. 1969); Nwogugu, n. III.439, 341 n.6; *see also* HALPERN, n. 115, 49.

547. Acting US Representative note to UN Secretary-General, Mar. 11, 1954, transmitting *Seventy-sixth Report of the U.N. Command in Accordance with the Security Council Resolution of 7 July 1950 (S/1588)*, UN Doc. No. S/3185 (1954), *in* 4 WHITEMAN 1186; O'CONNELL, THE INFLUENCE 167; Walker, *State Practice* 127. The armistice ordered cessation of all hostilities. Levie, *The Nature*, n. 109, 890, referring to Agreement Concerning Military Armistice in Korea, July 27, 1953, ¶ 12, 4 UST 234, 239.

548. UN SCOR Supp. (June-Aug. 1950) at 50, UN Doc. S/1580 (1950), *in* 10 WHITEMAN 866-67; US Joint Chiefs of Staff July 1, 1950 message to Commander-in-Chief, Far East (General Douglas MacArthur), 1950(7) FRUS 271 (1976); MALCOLM W. CAGLE & FRANK A. MANSON, THE SEA WAR IN KOREA 281-83, 299-300, 304, 353-57, 370-73 (1957); JAMES A. FIELD, HISTORY OF UNITED STATES NAVAL OPERATIONS: KOREA 42 (1962); Walker, *State Practice* 125-27.

549. US Ambassador to France Amory Houghton Jan. 26, 1958 telegram to Secretary of State John Foster Dulles, US Embassy, Paris Nov. 6, 1959 telegram to Dulles, *in* 4 WHITEMAN 513-14; 2 O'CONNELL, LAW OF THE SEA 805-06; O'CONNELL, THE INFLUENCE 123; 2 von Heinegg 100-01; O'Connell, *International Law*, n. III.252, 36, 38-39; Walker, *State Practice* 141; Anna van Zwanenberg, *Interference with Ships on the High Seas*, 10 ICLQ 785, 791 (1961); Note, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction*, 22 VAND. J. TRANSNAT'L L. 1161, 1218 (1989); CHRISTIAN SCIENCE MONITOR, Dec. 28, 1960, 2. States also protested Republican Spain's Spanish Civil War proclamations. O'CONNELL, THE INFLUENCE 115-16; STONE 572 n.8; H.A. Smith, *Some Problems of the Spanish Civil War*, 18 BYBIL 17, 27 (1937).

550. 2 von Heinegg 98; Walker, *State Practice* 144; *see also* Goldie, *Maritime War Zones*, n. II.519, 190.

551. O'CONNELL, THE INFLUENCE 126-27; 2 von Heinegg 93; Walker, *State Practice* 137.

552. Republic of Vietnam, Decree on Sea Surveillance, Apr. 27, 1965, 4 ILM 461 (1965); 2 EDWARD J. MAROLDA & OSCAR P. FITZGERALD, THE UNITED STATES NAVY AND THE VIETNAM CONFLICT 518 (1986); Walker, *State Practice* 145.

553. North Korea's security zone violates the LOS. *See* n. IV.309, 357-58 and accompanying text.

554. Gilchrist, n. II.225, 60.

555. Reference to Falklands/Malvinas includes other islands in dispute, *e.g.*, South Georgia.

556. The USSR protested the UK TEZ but not the Argentine DZ, although it observed the TEZ. *See* 3 CORDESMAN & WAGNER 242-44, 249; HASTINGS & JENKINS, n. 274, 105, 119, 124-25, 133, 143, 147, 157; MIDDLEBROOK, n. 274, 97-98, 126; 2 O'CONNELL, LAW OF THE SEA 1110-11; Craig, n. 50; Goldie, *Maritime War Zones*, n. II.519, 172-73; Vojtech Mastny, *The Soviet Union and the Falklands War*, 36 NWC REV. 46, 49 (No. 3, 1983); Ronzitti, *The Crisis* 39-40; Walker, *State Practice* 153-54. For analysis of the war and general legal issues, *see* 3 CORDESMAN & WAGNER 238-61; James F. Gravelle, *The Falklands(Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 4 (1985); Marshall Hall, *Argentine Policy Motivations in the Falklands War and the Aftermath*, 36 NWC REV. 21 (No. 6, 1983); John Norton Moore, *The Inter-American System Snarls in Falklands War*, 76 AJIL 830 (1982); Michael Socarras, *The Argentine Invasion of the Falklands: International Means of Signaling*, *in* W. MICHAEL REISMAN & ANDREW R. WILLARD, INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 115 (1988); Harry D. Train III, *An Analysis of the Falkland/Malvinas Islands Campaign*, 41 NWC REV. 33 (No. 1, 1988).

557. 2 O'CONNELL, LAW OF THE SEA 1111-12; Craig, n. 50; Goldie, *Maritime War Zones*, n. II.519, 172-73.

558. *See* nn. 274-75 and accompanying text.

559. Goldie, *Maritime War Zones*, n. II.519, 200 n. 77.

560. Hague XI, art. 3; *see also* nn. 274-75 and accompanying text.

561. The United States issued warnings to maritime traffic two days before *Hercules* was hit. The tanker was scuttled on the high seas after making port and a determination that a dud bomb could not be removed safely. Argentine Republic v. Amerada Hess Shipping Corp., 488 US 428, 431-33 (1989), *rev'ing* 830 F.2d 421, 423 (2d Cir. 1987); HASTINGS & JENKINS, n. 274, 147, 157; MIDDLEBROOK, n. 274, 151; Fenrick, *The Exclusion Zone*, n. II.109, 109-12;

Goldie, *Maritime War Zones*, n. II.519, 174; Levie, *Methods and Means*, n. III.261, 735-38; Levie, *The Falklands Crisis*, n. 274, 65; Mallison & Mallison, *Naval Targeting*, n. III.262, 269; Mastny, n. 556, 49; Walker, *State Practice* 154.

562. The USSR protested this exclusion zone in principle because of the potential high seas expanse involved. Goldie, *Maritime War Zones*, n. II.519, 173.

563. 3 CORDESMAN & WAGNER 260; 2 O'CONNELL, LAW OF THE SEA 1112; Walker, *State Practice* 154.

564. *See* n. 555 and accompanying text.

565. *E.g.*, where a neutral territorial sea is used as a belligerent's place of sanctuary or a base of operations, and the neutral does not or cannot expel the belligerent forces; under such circumstances an opposing belligerent may attack these forces, observing principles of necessity and proportionality. Helsinki Principle 2.1 & cmt.; NWP 1-14M Annotated ¶¶ 7.3.4-7.3.4.1; NWP 9A Annotated ¶¶ 7.3.4, 7.3.4.2; SAN REMO MANUAL ¶ 22; *see also id.* ¶ 30; *see also* n. 57 and accompanying text.

566. *See* nn. 559-60 and accompanying text.

567. LOS Convention, art. 25(3); Territorial Sea Convention, art. 16(3); *see also* nn. IV.337, 439 and accompanying text.

568. *See* Part F.1.a.

569. *See also* n. 555 and accompanying text.

570. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

571. *See* n. 556 and accompanying text.

572. *See* nn. 544-45, 553 and accompanying text.

573. *Cf.* NWP 1-14M Annotated ¶ 7.9 ("... [A]n otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent."); *see also* n. 556 and accompanying text.

574. *See* n. 570 and accompanying text.

575. Ronzitti, *The Crisis* 40, who is not correct in saying that the TEZ declaration limited Britain's belligerent rights. It was a warning and not a limitation. Enemy warships like *Belgrano* are legitimate targets wherever found, except in neutral territory, and even there under certain circumstances. *See* nn. 57, 151 and accompanying text.

576. *See* n. 561 and accompanying text.

577. In 1982 probably only the US and USSR navies could have validly asserted such a broad claim, and then only on the basis of total forces that might have been brought to bear in a conflict. Because of the size and localization of the 1982 war for the islands, either belligerent's claim for all of the South Atlantic in a local war over the islands would have been excessive. If, on the other hand, there had been a general conflict between the two powers in the South Atlantic, a war zone of the entire ocean might have been lawful under these hypothetical circumstances. Similarly, if the United States and the Soviet Union had been engaged generally worldwide, given the probable range of aircraft, weapons and warships of the hypothetical protagonists, it is conceivable that all of the world's oceans could have been declared war zones. Even here rules applicable to targeting, *etc.*, would have applied. *See* Parts B-D.

578. Helsinki Principle 3.3; NWP 1-14M Annotated ¶ 7.9; SAN REMO MANUAL ¶¶ 105-06.

579. *See* n. 562 and accompanying text.

580. If visit and search or blockade can continue after an armistice or ceasefire, absent belligerents' agreement otherwise, war zone declarations can also continue. *See* nn. 109, 429 and accompanying text. *See generally* Levie, *The Nature*, n. 109, 888-906.

581. Whether announcing a bubble, analyzed herein as a high seas SDZ, is a policy matter and not a legal requirement. *See* Parts F.1.b-F.1.c. When there is no state of belligerency, or if a country is neutral, a defensive bubble announcement is but an assertion of self-defense rights. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

582. *See* nn. 109, 429, 580 and accompanying text.

583. *See* nn. IV.309, 357-58 and accompanying text.

584. LOS Convention, art. 57; *see also* nn. IV.147-57 and accompanying text.

585. The LOS is subject to other rules of international law, *i.e.*, the LOAC, through the other rules clauses of, *e.g.*, LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

586. LOS Convention, art. 25(3); Territorial Sea Convention, art. 16(3); *see also* nn. IV.337, 439 and accompanying text.

587. *See* Part F.1.a.

588. Helsinki Principle 2.3 & cmt.; NWP 1-14M Annotated ¶ 7.3.5; NWP 9A Annotated ¶ 7.3.5; SAN REMO MANUAL ¶¶ 27-30; Part IV.B.6.

589. For example, to exercise a right of anticipatory self-defense, there must be no other alternative to self-defense. *See* UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, V.22 and accompanying text.

590. *Accord,* SAN REMO MANUAL ¶ 106, cmt. 106.2; Fenrick, *The Exclusion Zone,* n. II.109, 116, 125; Goldie, *Maritime War Zones,* n. II.519, 174; Leckow, n. II.147, 635-36 (only UK zones considered); Walker, *State Practice* 154-55.

591. TUCKER 301.

592. Fenrick, *The Exclusion Zone,* n. II.109, 124-25; *accord,* Vaughan Lowe, *The Impact of the Law of the Sea on Naval Warfare,* 14 SYRACUSE J. INT'L L. & COM. 657, 673 (1988); *compare* COLOMBOS § 561; TUCKER 298, 301. SAN REMO MANUAL ¶ 106(e) requires belligerents to publicly declare and appropriately notify beginning, duration, location and extent of the zone, as well as restrictions imposed. *See also id.*, cmts. 106.3, 106.6, the latter stating that notification should include diplomatic channels and appropriate international organizations, in particular ICAO and IMO. Prudent belligerents should also instruct their UN Permanent Representatives and notify the Security Council, since some State will undoubtedly notify the Council and perhaps the General Assembly. *See* UN Charter, arts. 11-12, 14, 25, 31-42, 48, 51, 103; Chapter III; nn. IV.6-25 and accompanying text.

593. Helsinki Principle 3.3 & cmt.; SAN REMO MANUAL ¶ 106(a) & cmt. 106.1; *see also* UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text. SAN REMO MANUAL ¶ 108 illustrates the point of continuing LONW applicability in its correct statement that a war zone declaration does not derogate from a belligerent's customary right to control neutral vessels and aircraft in an immediate vicinity of naval operations. On this point, *see also* TUCKER 300; Parts A-E.

594. Helsinki Principle 3.3 & cmt.; SAN REMO MANUAL, ¶ 106(b) & cmt. 106.2; Fleck, *Comments,* n. III.439, 82. TUCKER 301 rightly complained in 1955 of the problem of zones with no duration or statement of area covered. Jacobson, n. 166, 234 suggests a treaty to establish negotiated rules balancing needs of protecting belligerent forces in an age of long-distance targeting, neutral shipping interests and humanitarian principles. It is a worthy thought but not practically attainable.

595. NWP 1-14M Annotated ¶ 7.9.

596. *See* Part E.2.

597. *See* nn. 555-56 and accompanying text.

598. LOS Convention, art. 57; *see also* nn. IV.147-57 and accompanying text.

599. *Cf.* Helsinki Principle 3.3 & cmt.; SAN REMO MANUAL ¶ 108 & cmt. 108.1 (war zone rules do not affect belligerent's right to exclude neutrals from immediate area of naval operations; in a particular case an immediate area might be larger than a war zone, or the two might overlap in part); *see also* TUCKER 300; Part E.2.

600. *See* nn. IV.309, 357-58 and accompanying text.

601. *See* n. IV.75 and accompanying text. For LOAC due regard analysis, *see* nn. 58, 62 and accompanying text.

602. Helsinki Principles 3.3, 5.2.9 & cmts.; SAN REMO MANUAL ¶ 106(c) & cmts. 106.2, 106.4; *see also* NWP 1-14M Annotated ¶ 7.9.

603. Helsinki Principles 3.3, 5.2.9 & cmts.; SAN REMO MANUAL ¶ 106(d) & cmts. 106.3, 106.5; *see also* NWP 1-14M Annotated ¶ 7.9.

604. LOS Convention, arts. 25(3), 38, 44-45; Territorial Sea Convention, art. 16(3); COLOMBOS § 561; Helsinki Principles 3.3, 5.2.9 & cmts.; NWP 1-14M Annotated ¶ 7.9; SAN REMO MANUAL ¶¶ 23, 27-32, 106(d); *cf.* Helsinki Principle 6.2 & cmt.; NWP 1-14M Annotated ¶ 9.2.3; NWP 9A Annotated ¶ 9.2.3; SAN REMO MANUAL, ¶¶ 85, 87-89 & cmts.; STONE 574 (whatever status of zones are for the high seas, "the right of a belligerent to establish such zones in neutral territorial waters cannot be seriously contended for"); TUCKER 303-04; nn. 586, 588-89 and accompanying text. To this extent a war zone differs from blockade. A blockading force may bar entry or exit of all ships and aircraft; neutral warships or military aircraft may pass a blockade with blockading force discretion. *See* Helsinki Principle 5.2.10 & cmt.; NWP 1-14M Annotated ¶¶ 7.7.1, 7.7.3; NWP 9A Annotated ¶¶ 7.7.1, 7.7.3; SAN REMO MANUAL ¶ 100 & cmt. 100.1; TUCKER 298; n. 438 and accompanying text. Thus a war zone might be considered "effective," *see* Fenrick,

*The Exclusion Zone,* n. II.109, 124-25, while a blockade of the same area might not be considered "effective" under law of blockade standards. TUCKER 298.

605. COLOMBOS § 561; Helsinki Principles 3.3, 5.2.9 & cmts.; NWP 1-14M Annotated ¶ 7.9; SAN REMO MANUAL ¶ 105 & cmt. 105.1; TUCKER 298 n. 38, 299 n.39.

606. NWP 1-14M Annotated ¶ 7.9.

607. Rules of engagement may give an enforcing belligerent's forces ranges of options and limitations on enforcing a war zone. Most States do not publish ROE. SAN REMO MANUAL ¶ 106, cmt. 106.1; n. III.258 and accompanying text.

608. SAN REMO MANUAL ¶ 107 & cmts. 107.1-107.2; this is the same rule applied to navicerts and aircerts. Helsinki Principle 5.2.6 & cmt.; NWP 1-14M Annotated ¶ 7.4.2; NWP 9A Annotated ¶ 7.4.2; SAN REMO MANUAL ¶ 123 & CMT. 123.1; n. 386 and accompanying text.

609. *E.g.* SAN REMO MANUAL ¶ 107, cmt. 107.2 says a belligerent may not force neutral merchantmen to join a convoy escorted by that belligerent's warships; this would subject the merchantmen to attack on sight. *See* n. 337 and accompanying text. On the other hand, forcing transiting neutrals to use navicert procedures should not be considered an act harmful to the enemy. SAN REMO MANUAL ¶¶ 107, cmt. 107.1; 123 & cmt. 123.1; *see also* n. 386 and accompanying text.

610. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

611. Rainier Lagoni, *Remarks, in* Panel, *Neutrality, The Rights of Shipping and the Use of Force in the Persian Gulf War (Part I),* 1988 ASIL PROC. 161, 163 (war zones lawful only if tied to coast of a State establishing it); Mastny, n. 555, 49 (USSR protest of UK zones during Falklands/Malvinas War); Ronzitti, *The Crisis* 10, 40 (USSR, Latin American States' protests; war zones enforced against neutrals unlawful even under pre-Charter law). 2 OPPENHEIM § 319a, writing in the World War I context but publishing in 1952, seems to be the last major treatise to condemn them, saying they can only be imposed as reprisal; *see also* Howard S. Levie, *Mine Warfare and International Law,* NWC REV. 27, 31 (Apr. 1972).

612. Helsinki Principle 3.3 & cmt.; NWP 1-14M Annotated ¶ 7.9; 2 O'CONNELL, LAW OF THE SEA 1111-12; SAN REMO MANUAL ¶¶ 105-08 & cmts.; Fenrick, n. II.109, 94, 113, 121; Goldie, *Maritime War Zones,* n. II.519, 194; Walker, *State Practice* 155. O'Connell may have changed his view after publishing THE INFLUENCE 167 (1975) and the Falklands/Malvinas War. Ronzitti, *The Crisis* 40-41 cites O'CONNELL, THE INFLUENCE for Ronzitti's view that high seas war zones during limited war, if permitted at all, are allowed only for belligerent operations among belligerents and not to molest neutrals, inferring the UK TEZ was inadmissible for that purpose. The UK TEZ did not affect neutral rights more than they would have been without a TEZ. *See generally* nn. 555-83 and accompanying text. O'CONNELL, THE INFLUENCE 167 wrote in the World War II context; Ronzitti quotes him in the Falklands/Malvinas context to support his view, Ronzitti, *The Crisis* 10, that these zones are unlawful. 2 O'CONNELL, LAW OF THE SEA 1111-12 was published in 1984, and *The Crisis* in 1988. O'Connell, *International Law,* n. III.252, 54-56, published in 1970, supports a view that O'Connell saw all postwar zones, properly limited, as lawful; THE INFLUENCE 167 undoubtedly refers to the excessive World War II claims.

613. *Compare* LOS Convention, arts. 2(2), 25(3), 44-45; Territorial Sea Convention, arts. 2, 16(3) *with* ICAO Convention, arts. 1-3, 8-9, not applicable to military aircraft; *see also* BROWNLIE, INTERNATIONAL LAW 119 (who errs in saying aircraft straits passage requires a treaty); 1 OPPENHEIM § 220; AFP 110-31 ¶¶ 2-5a, 2-6a; NWP 1-14M Annotated ¶¶ 2.5.1, 4.4; NWP 9A Annotated ¶¶ 2.5.1. 4.4; Parts IV.B.3, V.B.5. Treaties regulate admitting military aircraft. *See, e.g.,* Agreement Under Article VI of the Treaty of Mutual Cooperation & Security Regarding Facilities & Areas & Status of US Armed Forces in Japan, June 23, 1960, Japan-US, art. 5, 11 UST 1652, 1654, 373 UNTS 248, 252. During peacetime no military aircraft may enter another State's territorial airspace without specific permission or authority under a treaty; the same rules apply to neutral airspace. AFP 110-31 ¶¶ 2-5a, 2-6c; NWP 1-14M Annotated ¶¶ 2.5.1, 4.4; NWP 9A Annotated ¶¶ 2.5.1, 4.4. Special LOAC principles apply to medical aircraft; these also include notification and agreement rules. *See* First Convention, arts. 36-37; Second Convention, arts. 39-40; Fourth Convention, art. 22; Protocol I, arts. 8(j), 26-27, 29, 31; BOTHE *et al.* 95-96, 101, 153-56, 159-61, 165-67; 1 PICTET 285-96; 2 PICTET 215-25; 4 PICTET 173-77; PILLOUD, COMMENTARY 115-16, 131-32, 288-92, 294-98, 308-13, 326-37. These principles apply to LOS situations through the LOS other rules clauses. *See, e.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

614. *E.g.,* LOS Convention, art. 2(3); Territorial Sea Convention, art. 1(2); *see also* nn. III.952-67, IV.10-25 and accompanying text.

615. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

616. Whether coastal States can apply these regulations to aircraft passing through an ADIZ and not inbound is not settled. AFP 110-31 ¶¶ 2-1g; NWIP 10-2 ¶ 422b; NWP 1-14M Annotated ¶ 2.5.2.3; NWP 9A Annotated ¶ 2.5.2.3;

RESTATEMENT (THIRD) § 521, r.n. 2; 4 WHITEMAN, DIGEST 496-97; Note, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, 18 VJIL 485 (1978). US ADIZ are published in 14 CFR part 99. *Cf.* ICAO Convention, arts. 3, 8, 11, not applicable to State and military aircraft, requiring piloted and unpiloted aircraft to submit to rules for entering another State's territory.

617. AFP 110-31 ¶ 2-1f; NWIP 10-2 ¶ 422b; *compare* LOS Convention, art. 33; Territorial Sea Convention, art. 24, declaring contiguous zones are high seas areas subject to certain coastal State rights to use them for police purposes; *see also* 2 Nordquist ¶¶ II.8, 33.1; RESTATEMENT (THIRD) §§ 511, cmt. k; 521, r.n. 2; nn. IV.296-300, 324-27 and accompanying text.

618. LOS Convention, art. 87(1); High Seas Convention, art. 2; AFP 110-31, ¶ 2-1g; *see also* nn. IV.68-79 and accompanying text.

619. 2 O'CONNELL, LAW OF THE SEA 797.

620. AFP 110-31 ¶ 2-1g; NWP 1-14M Annotated ¶ 2.5.2.3; NWP 9A Annotated ¶ 2.5.2.3.

621. NOTAMs or NOTMARs may announce these. AFP 110-31 ¶ 2-1g & n. 13; *see also* n. IV.67 and accompanying text.

622. NOTAMs or NOTMARs may announce these. *See* Part F.1.a.

623. NOTAMs or NOTMARs may announce these. *See* Part E.2.

624. NOTAMs or NOTMARs may announce these. *See* NWP 1-14M Annotated ¶ 2.5.2.3, 2-32, referring to *id.* ¶ 2.4.4 n.68; NWP 9A Annotated ¶ 2.5.2.3, 2-41, referring to *id.* ¶ 2.4.4 n.56; Parts F.1.b-F.1.c.

625. NOTAMs or NOTMARs may announce these. *See* Part F.2.

626. UN Charter, arts. 51, 103; *see also* ICAO Convention, art. 3(d), requiring States to have due regard for safety of civil aircraft navigation; *id.* art. 3 *bis*, requiring States to refrain from using weapons against civil aircraft, and in cases of intercepting intruding aircraft, acting so that lives of those on board and safety of the aircraft are not endangered; First Convention, arts. 36-37 (medical aircraft); Second Convention, arts. 39-40 (same); Fourth Convention, art. 22 (same); Protocol I, arts. 8(j), 24-31, Annex I, arts. 1(2), 3-9 (same); AFP 110-31 ¶ 2-1g; BOTHE *et al.*. 95-96, 101, 150-67, 578-90; NWP 1-14M Annotated ¶¶ 4.4; 8.2.1; 8.2.3, 8-13, 8-15, 8-16, 8-18; 8.4.1; NWP 9A Annotated ¶¶ 4.4; 8.2.1; 8.2.3; 8.2.3, 8-13, 8-20; 8.4.1; 1 PICTET 285-96; 2 *id.* 215-25; 4 *id.* 173-77; PILLOUD, COMMENTARY 115-16, 279-342, 1137-51, 1159, 1174-1263; SAN REMO MANUAL ¶¶ 62-66, 70-71, 174-83; Gerald F. FitzGerald, *The Use of Force Against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident*, 1984 CYBIL 291; UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, V.58, 62 (LOAC due regard analysis) and accompanying text; Parts A.1-A.2. As in other circumstances necessity and proportionality principles in self-defense situations are different from these principles in LOAC situations. *See* n. 22 and accompanying text.

627. *See* ICAO Convention, art. 3(d), 3 *bis*; nn. 613, 626 and accompanying text.

628. *See* Part F.2.

629. ICAO Convention, art. 3 *bis*; *see also* nn. 613, 626 and accompanying text.

630. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, V.613, 626 and accompanying text.

631. *See* Parts A.1-A.2; nn. 613, 626 and accompanying text.

632. *See generally* n. IV.68 (high seas military operations), Part E.2 (blockade areas), Part F.1.a (vacating immediate area of naval operations), Part F.1.b (SDZs), Part F.2 (war zones).

633. ICAO Convention, art. 25; *see also* nn. IV.494-506 and accompanying text.

634. Hague V, arts. 11-15; Second Convention, arts. 5, 15; Protocol I, art. 31; Hague Air Rules, arts. 40, 42-43, 46; *see also* AFP 110-31 ¶ 2-6c; NWP 1-14M Annotated ¶ 7.11; NWP 9A Annotated ¶ 7.10; 2 OPPENHEIM §§ 337-38, 341a, 348a; 2 PICTET 41-45, 107-12; SAN REMO MANUAL ¶ 168; STONE 386, 614; TUCKER 251-52; nn. 613, 626 and accompanying text.

635. Third Convention, art. 4; Fourth Convention, art. 42; Protocol I, art. 75; Hague Air Rules, arts. 32-38; *see also* BOTHE *et al.* 456-66; NWP 1-14M Annotated ¶¶ 7.10.2, 8.2.2.1; NWP 9A Annotated ¶¶ 7.9.2, 8.2.2.1; 3 PICTET 45-73; 4 *id.* 257-59; PILLOUD, COMMENTARY 863-90; SAN REMO MANUAL ¶¶ 165-67; STONE 614, 619.

636. First Convention, art. 23; Fourth Convention, arts. 14-15 & Annex I (form draft agreement); *see also* G.A. Res. 2675 ¶ 6 (1970), *in* SCHINDLER & TOMAN 267, 268; AFP 110-31 ¶¶ 12-2B, 14-3; NWP 1-14M Annotated ¶ 8.5.1.5; NWP 9A Annotated ¶ 8.5.1.5; 2 OPPENHEIM § 124b; 1 PICTET 206-16; 4 *id.* 120-33, 627-39; STONE 669-70 (First Convention, art. 23 an innovation at the time), 689-90. Howard S. Levie, *Civilian Sanctuaries: An Impractical Proposal*, 1 ISRAEL Y.B.

HUM. RIGHTS 335 (1971) criticized civilian sanctuaries or refuges as G.A. Res. 2444 (1968), *in* SCHINDLER & TOMAN 263, proposed, saying existing humanitarian law supplied enough protection. These resolutions are not law but may recite law or evidence trends in the law. RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

637. *See* Part A.4.

638. *See* n. 111 and accompanying text.

639. SYLVIE-STOYANKA JUNOD, PROTECTION OF THE VICTIMS OF ARMED CONFLICT FALKLAND-MALVINAS ISLANDS (1982) 26, 33-34 (Int'l Comm. Red Cross ed. 1984); NWP 1-14M Annotated ¶ 8.5.1.5 n.121; NWP 9A Annotated ¶ 8.5.1.5 n.101; SAN REMO MANUAL ¶ 160, cmts. 160.1-160.3.

640. SAN REMO MANUAL ¶ 160 & cmts. 160.3-160.4; *see also* NWP 1-14M Annotated ¶ 8.5.1.5 n.121; NWP 9A Annotated ¶ 8.5.1.5 n.101.

641. *Compare* First Convention, art. 23; Fourth Convention, arts. 14-15 & Annex I *with* SAN REMO MANUAL ¶ 160 & cmts; *see also* nn. 636, 640 and accompanying text.

642. Insofar as possible a high seas Box should have the same terms, and be developed the same way, as those created under First Convention, art. 23; Fourth Convention, arts. 14-15 & Annex I. Suppose, *e.g.*, belligerents wish to create a Box whose area overlaps a belligerent's territorial sea or an area of territorial sea seaward of an occupied area. *See* nn. 636-37 and accompanying text. There should not be one standard for the territorial sea part and another for the high seas part. Given pervasive claims for a 12-mile territorial sea and its recognition for LOAC purposes (*see* Part A.4) and the nature of vessels available for hospital ships (*e.g.*, US hospital ships are converted oilers) or seaborne transport, there is more likelihood today than in earlier times (*e.g.*, 1949, when the First and Fourth Conventions were signed) that belligerents or perhaps neutrals as suggested above might wish to establish a zone including high seas and territorial sea areas. Hospital ships on the high seas, and limited to operating there because of their draft, might conduct triage and send patients to shore for further treatment, for example, in a zone that extends from the high seas to shore.

643. *See* n. II.4 and accompanying text.

644. *See* nn. II.224, 305, 345, 347 and accompanying text.

645. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

646. LOS Convention, arts. 19, 38, 45; Territorial Sea Convention, art. 16(4); *see* nn. II.364 (Iran naval maneuvers, Gulf high seas), 365 (Saudi territorial sea), 379-81 (Gulf of Oman, Iran territorial sea, may have included Strait of Hormuz), 411 (Iran territorial sea, Gulf high seas), 457 (Persian Gulf, Gulf of Oman), IV.17, 68 and accompanying text; Parts IV.B.4, IV.B.6.

647. The United States paid for the Airbus claims, and presumably did so for other mistaken attacks, *e.g.*, on fishing vessels and dhows, where there was loss of life, injury or property damage. *See also* UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

648. *See* nn. 114-16 and accompanying text.

649. *See* Parts F.1.b-F.1.c.

650. Whether it would have been wise for Iran to do so, and thereby announce presence, is another matter. *See* nn. II.103, 280, 306, 364-65, 379-81, 411, 458, V.515, 518, 539 and accompanying text.

651. *See* Parts C.3, D.1.

652. UN Charter, art. 2(4); LOS Convention, arts. 19, 87(1), 88; High Seas Convention, art. 2; Territorial Sea Convention, art. 16(4); *see also* nn. IV.68, 75, 301-13, 337-50 and accompanying text.

653. LOS Convention, arts. 2, 87(1); High Seas Convention, art. 2; Territorial Sea Convention, art. 1; *see also* Parts IV.B.1, IV.B.4.

654. *See* nn. II.89-90, 101 (US NOTAM warning), 102, 109, 176 (US NOTMAR warning), 199-202, 208, 232, 288 (US NOTAM, NOTMAR warning on zones), 301, 420 (US NOTAM, NOTMAR warning of zones) and accompanying text. This satisfied one requirement. *See* nn. 592-96 and accompanying text. SAN REMO MANUAL ¶ 106, cmt. 106.6 says notification should notify international organizations, but this does not appear to be a customary requirement. There is no record that the belligerents did not notify these organizations. The UN Security Council certainly knew about them.

655. Walker, *State Practice* 169; *see also* nn. 592-96, 612 and accompanying text. Yoram Dinstein, *Remarks*, *in* Panel, n. II.144, 608, said the zones were disproportionate in terms of naval assets and therefore disproportionate. However, he did not take into account belligerent air assets, which can be used to enforce a zone without use of surface or other

forces. The zones were therefore proportionate in area. Fenrick, *The Exclusion Zone,* n. II.109, 124-25; Walker 169; *see also* nn. 592-96, 612 and accompanying text.

656. *See* nn. 592-96, 604, 612, 657 and accompanying text.

657. *See* n. 600 and accompanying text.

658. NWP 1-14M Annotated ¶ 7.9; Almond, n. 426, 313-14; Boczek, *Law of Warfare,* n. II.154, 258; Fenrick, *The Exclusion Zone,* n. II.109, 121-22; Goldie, *Maritime War Zones,* n. II.519, 176; Goldie, *Targeting,* n. II.262, 16-17; McNeill, *Neutral Rights,* n. II.354, 636; Robertson, *U.S. Policy,* n. III.439, 344-45; Ronzitti, *The Crisis* 41; Walker, *State Practice* 168-69; nn. 605-09, 612 and accompanying text. Leckow, n. II.147, 639, says Iran's zone was lawful because it was more "defensive" in nature.

659. NWP 1-14M Annotated ¶ 9.7; NWP 9A Annotated ¶ 9.7; SAN REMO MANUAL ¶¶ 80, 87-89; Clingan, *Submarine Mines,* n. III.840, 359-60; Dinstein, *Remarks,* n. 648, 608; *see also* Part G.2 and nn. VI.222-30 and accompanying text.

660. S.C. Res. 552, 582, 598, UN Docs. S/RES/552 (1984), S/RES/582 (1986), S/RES/598 (1987), *in* WELLENS 452, 473, 454; *see also* Ronzitti, *The Crisis* 41.

661. *See* nn. II.261, 292, V.476 and accompanying text.

662. *See* Part F.3.

663. *See* nn. II.261, V.476 and accompanying text.

664. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part F.3.

665. *See* nn. II.116, V.476 and accompanying text.

666. *See* nn. 633-35 and accompanying text.

667. *See* n. 613 and accompanying text.

668. *See* Part III.C.

669. *See* nn. II.81-85 and accompanying text.

670. *See* nn. 111 and accompanying text.

671. *See* nn. 645-50 and accompanying text.

672. Iraq also used gas against its own citizens. *See generally* Geneva Gas Protocol; *see also* nn. II.14-15, 84, 300, 375, 486 and accompanying text.

673. The record is not clear on methods or means of some attacks, *e.g.,* Iranian attacks on Iraqi shore facilities, which probably included aircraft-launched weapons after flights over the Gulf. *See generally* Chapter II.

674. *See* nn. II.179, 233, 250, 334, 354, 357, 359, 368-72, 420, 436, 442, 454-56, 493 and accompanying text. Melia, n. II.6, 116-27, describes mine countermeasures operations from a US Navy perspective, reporting rumor that North Korean-manufactured influence mines were laid; none were discovered.

675. *Cf.* UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

676. *See generally* Parts A.1-A.2 and accompanying text.

677. Hague IX, art. 2. Other provisions regulate bombarding unfortified towns and notice to community authorities and prohibit pillage. Hague IX, arts. 1-7. *See also* Cultural Property Convention, establishing cultural property protections during war, to which the United States is not a party; Roerich Pact, a Western Hemisphere treaty to which the United States is party, also protectioning cultural property; TOMAN; nn. V.110, 262, VI.272-77, 300-52 and accompanying text.

678. *Compare* Hague Air Rules, arts. 22-26 *with* Hague IX, arts. 1-7.

679. COLOMBOS §§ 580-87 (inferring customary acceptance despite breaches of Hague IX rules); NWIP 10-2 ¶¶ 621b, 623 (recitation of treaty law as custom, statement of military objective principle, warning if military situation permits); NWP 1-14M Annotated ¶¶ 8.5.1-8.5.1.3, 8.5.2 (recitation of treaty law as custom, citing Protocol I, art. 52(2) by reference, warning if military situation permits, terror bombing forbidden); NWP 9A Annotated ¶¶ 8.5.1-8.5.1.3, 8.5.2 (same); 2 O'CONNELL, LAW OF THE SEA 1103, 1139 (same conclusion as COLOMBOS, Hague IX obsolete but restates military objective principle); 2 OPPENHEIM § 213 (Hague IX states military objective test); OXFORD NAVAL MANUAL, arts. 25-29 (repeating Hague IX rules); SAN REMO MANUAL ¶ 40 & cmts. (Hague IX not cited; citing *inter alia* Protocol I, art. 52); STONE 588 (Hague IX's art. 2 military objective principle); TUCKER 143-45 (military objective principle); O'Connell, *International Law,* n. III.252, 19; Robertson, *Commentary,* n. III.930, 166 (Hague IX in desuetude, citing military objective principle in Hague IX, art. 2; Hague Air Rules, art. 23; Protocol I, art. 52); Russo, *Targeting,* n.

III.624, 20 (rejecting Hague IX as custom); Verri, *Commentary*, n. IV.71, 333 (Oxford Naval Manual broke new ground in forbidding bombardment of unfortified undefended ports, *etc.*); *see also* First Convention, art. 50; Second Convention, art. 51; Fourth Convention, art. 147; Protocol I, arts. 51(2), 57(2)(c), 85(2); AFP 110-31 (general discussion, Hague Air Rules, arts. 22, 24-26 do not represent custom as total code); BOTHE *et al.* 299-301, 320-26, 360-61, 367-68, 511-14; Hague Air Rules, arts. 22-26; NWP 1-14M Annotated ¶ 7.3.7 n.82 (Hague Air Rules state custom); 2 OPPENHEIM §§ 214a-214e; 1 PICTET 370-72; 2 *id.* 267-70; 4 *id.* 597-602; PILLOUD, COMMENTARY 610, 612, 630-37, 678-79, 686-87, 991-93; SAN REMO MANUAL ¶¶ 83, 90, 106(e) (notice required for minefields, exclusion zones); Matheson, *Remarks* 426-27; Parts V.1-A.2; n. 112 and accompanying text. Neither Iran nor Iraq are parties to Hague IX, although most other Gulf War participants were. The Ottoman Empire, predecessor sovereign to what is now Iraq, and Persia, now Iran, signed but did not ratify Hague IX. *Signatures, Ratifications and Accessions*, SCHINDLER & TOMAN 815, 816; TIF 442. To the extent Hague IX states customary law, all participants were bound by its terms.

680. Hague V, Regulations, art. 27; Hague IX, art. 5; First Convention, arts. 19, 21; Second Convention, art. 34; Fourth Convention, arts. 18-19; Protocol I, arts. 12(4), 13; BOTHE *et al.* 118, 121; NWP 1-14M Annotated ¶ 8.5.1.4; NWP 9A Annotated ¶ 8.5.1.4; 2 OPPENHEIM §§ 120, 158; 1 PICTET 194-99, 200-02; 2 *id.* 189-93; 4 *id.* 141-56; PILLOUD, COMMENTARY 166-69, 174-80; STONE 657-77, 669, 687.

681. This analysis does not consider the land campaigns and air attacks incident to them. *See* Chapter II; n. 673 and accompanying text.

682. *See* nn. 675-79. Incidental terror to civilians is not prohibited; civilians will feel some fear and terror when a nearby military objective is hit. BOTHE *et al.* 300-01; 1 LEVIE, CODE 217-18; NWP 1-14M Annotated ¶ 8.5.1.2 n.112; NWP 9A Annotated ¶ 8.5.1.2 n.92; *see also* n. 679 and accompanying text. Thus if Iran or Iraq bombed an otherwise legitimate target, *e.g.*, an oil pumping facility with resulting fright to civilian population, that attack was lawful.

683. Hague VIII has been described as one of the least successful results of the 1907 peace conference. COLOMBOS §§ 508, 563-67; LEVIE 52-53; 2 O'CONNELL, LAW OF THE SEA 1138 (Hague VIII obsolete, but its principles are not); STONE 584 ("modest" provisions); TUCKER 303 ("worthless"); Levie, *Commentary*, n. 435, 140. Seabed Arms Control Treaty, art. 24 forbids laying nuclear-armed mines beyond the territorial sea limit; since none of these weapons were involved in the Tanker War, the Treaty will not enter into the analysis, except in terms of environmental concerns. The treaty does not affect the law affecting conventional mines. Nor does the treaty prohibit placing nuclear weapons in the water column above these waters, *e.g.*, nuclear-armed depth charges or torpedoes. LEVIE, MINE WARFARE, n. 426, 135-37; NWP 1-14M Annotated ¶ 10.2.2.1; NWP 9A Annotated ¶ 10.2.2.1. *See also* Part IV.B.3; nn. VI. 222-30 and accompanying text. The Tanker War did not involve Seabed Treaty principles; no nuclear mines were laid. Mine Protocol, art. 1 says it applies to mines laid on the land, including those laid to interdict beaches or waterway or river crossings but does not apply to anti-ship mines at sea. *See also* LEVIE 137-38; NWP 1-14M Annotated ¶ 9.3. There is no evidence Tanker War belligerents mined beach approaches as Iraq did in the 1990-91 Gulf War. *See* MELIA, n. II.6, 127-31. Whether belligerents mined river or water crossings, *e.g.*, in the Shatt al-Arab, is an issue beyond this book's scope.

684. Hague VIII generally remains valid as a restatement of custom applied to all kinds of sea mines. Some States might dispute applying it to other than automatic contact mines. 2 O'CONNELL, LAW OF THE SEA 1138; O'CONNELL, THE INFLUENCE 93 (UK admiralty questioned in 1939 whether it applied to magnetic mines); STONE 584 (acoustic, magnetic mines literally not within its coverage); Levie, *Commentary*, n. 435, 146. However, NWIP 10-2 ¶ 611 n.3 says Hague VIII must be extrapolated to include acoustic, magnetic and other new devices to achieve a goal of protecting peaceful shipping. Levie, *Mine Warfare*, n. 611, 29 reports that no World War I or II belligerent raised this point. Whether Hague VIII applies as treaty law to other types of mines, its terms can be used as a general principle along with other general principles of the LOAC, necessity and proportionality, to achieve the same result. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03; n. III.10 and accompanying text; *cf.* NWIP 10-2 ¶ 611 n.3.

685. *See generally* MELIA, n. II.6 for a history of US Navy mine countermeasures operations from the American Revolution through 1991 and the 1990-91 war in the Gulf. Mines have been proposed for naval warfare since 1585; belligerents' uncontrolled use of mines during the Russo-Japanese War (1904-05) led to Hague VIII. LEVIE, MINE WARFARE, n. 424, 9-23; NWP 1-14M Annotated ¶ 9.2; NWP 9A Annotated ¶ 9.2.

686. Other modern mines include acoustic influence mines, which detonate upon "hearing" a ship's underwater noise; mines that can count, *i.e.*, can be preset to detonate after screening ships have passed in order to attack a major target; pressure influence mines, which detonate with change in water pressure a passing ship causes; magnetic influence mines, actuated by a ship's magnetic signature; devices that choose between false and real targets; remote-control mines, a throwback to shore-based mines employed for centuries; and stealth mines, designed to blend into the underwater environment. Mines can be moored to the bottom; can rise on a cable or, like CAPTOR, attack like a torpedo; or be free-floating. Moored mines sometimes come loose from their tether and become free-floating. Mines can either be self-actuating, *i.e.*, once laid, they detonate in accordance with their sensors and

internal programming, or controlled, *i.e.*, an outside agency, *e.g.*, a shore station or ship, must send the actuation signal to the mine. Mines can have several characteristics, *e.g.*, an acoustic mine can be programmed to count ships and detonate below a more desirable target. *See generally* LEVIE, MINE WARFARE, n. 424, 97-133; MELIA, n. II.6, 5, 41-66, 114, 136; NWP 1-14M Annotated ¶¶ 9.2-9.2.1; NWP 9A Annotated ¶¶ 9.2-9.2.1; Levie, *Commentary*, n. 435, 142. The 1907 conference that produced Hague VIII gave little thought to the possibility of improved technology and development of new types of mines. Levie, *Mine Warfare*, n. 611, 29. As in other weapons development areas, it was a case of technology outrunning treaty law. *See* n. 173 and accompanying text. 2 O'CONNELL, LAW OF THE SEA 1101 wrote in 1984 that there had been and would be little future use of mine warfare; he was not correct. Mines are an inexpensive, easily developed substitute for other forces (*e.g.*, surface or air assets) that can be laid covertly with a possibility for great psychological effect. LEVIE, MINE WARFARE, n. 426, 173 & n. 146, quoting Charles C. Petersen, *Soviet Military Objectives in the Arctic Theater*, NWC REV. 3, 8-9 (Autumn 1987). Mines can be very indiscriminate in their effect, however.

687. *See* nn. II.179, 233, 250, 334, 354, 357, 359, 368-72, 420 and accompanying text. 2 O'CONNELL, LAW OF THE SEA 1138 says contact mines are obsolete; this has not proven to be true.

688. Hague VIII, art. 3; Corfu Channel, 1949 ICJ 22; Nicaragua Case, 1986 ICJ 46-48, 112, 147-48; NWIP 10-2 ¶ 611 (limited to automatic submarine contact mines, *but see id.* n. 3); LEVIE, MINE WARFARE, n. 426, 44-47; NWP 1-14M Annotated ¶ 9.2.3 (Hague VIII, art. 3 military exigencies latitude remains the law, criticizing, at n. 25, SAN REMO MANUAL approach); NWP 9A Annotated ¶ 9.2.3 (same); 2 O'CONNELL, LAW OF THE SEA 1138; 2 OPPENHEIM § 182a; SAN REMO MANUAL ¶ 83 & cmt. 83.3 (omitting military exigencies latitude in Hague VIII, art. 3, felt "not justified in the light of the general requirement imposed upon belligerents to limit as far as possible the effect of hostilities"; the MANUAL provides for this separately); Levie, *Commentary*, n. 435, 144. SAN REMO MANUAL ¶ 83 adds that there is no need to notify if deployed mines can only detonate against military objectives. This is consonant with the Hague VIII, art. 3 exigencies requirement, and would cover a circumstance, *e.g.*, when a belligerent warship is being chased by opposing belligerent forces and deploys mines instead of, *e.g.*, firing missiles or guns. Under these circumstances, however, the notification requirement would arise after the engagement, when exigencies permit, for mines deployed and not detonated. SAN REMO MANUAL ¶ 83, cmt. 83.2 says notification can be accomplished by NOTAM publication and communication with international organizations, naming IMO. Although Hague VIII deals only with automatic submarine contact mines, *see* Levie, *Commentary* 141-42, Hague VIII's principles have been applied through custom to other kinds of mines and are thus employed here for LOAC sea mine principles generally. They have been applied by analogy for defensive mining. *See* nn. 705-06 and accompanying text.

689. Hague VIII, arts. 1-2; LEVIE, MINE WARFARE, n. 426, 27-42; NWP 1-14M Annotated ¶ 9.2.3; NWP 9A Annotated ¶ 9.2.3; 2 OPPENHEIM § 182a; SAN REMO MANUAL ¶ 86; Levie, *Commentary*, n. 435, 142-43. OXFORD NAVAL MANUAL, art. 20, would generally forbid laying automatic contact mines, anchored or not, in the "open sea." Post-1913 State practice exploded any authority art. 20 may have had.

690. Although Hague VIII does not speak to it, conceivably a mine can lose its mooring and still be under belligerent control. Hague VIII, art. 1(2); COLOMBOS § 563; LEVIE, MINE WARFARE, n. 424, 101-02 (control by acoustic, electrical signal); NWIP 10-2 ¶ 611 (limited to automatic contact mines, *but see id.* n. 3); NWP 1-14M Annotated ¶ 9.2.3; NWP 9A Annotated ¶ 9.2.3; 2 OPPENHEIM § 182a; OXFORD NAVAL MANUAL, art. 21(2); SAN REMO MANUAL ¶ 81; STONE 584; Levie, *Commentary*, n. 435, 142-43.

691. Hague VIII, art. 1(1), declaring they must become harmless after an hour, the hour rule being superseded by practice; COLOMBOS § 563; LEVIE, MINE WARFARE, n. 424, 27-31; NWIP 10-2 ¶ 611 (limited to automatic submarine contact mines, *but see id.* n. 3); NWP 1-14M Annotated ¶ 9.2.3, 9-8 (US mines have self-neutralizing devices); NWP 9A Annotated ¶ 9.2.3, 9-7 (same); 2 OPPENHEIM § 182a; OXFORD NAVAL MANUAL, art. 21(1); SAN REMO MANUAL ¶ 82 (adding that mines must be directed toward a military objective, a truism for any weapons deployment); STONE 584; Levie, *Commentary*, n. 435, 142-43; *see also* Parts A.1-A.2.

692. *Contra*, STONE 585 ("Nor can any restriction on aerial as distinct from naval mine sowing be spelled out of treaties or practice.") Many commentators would disagree; *e.g.*, Helsinki Principles; LEVIE, MINE WARFARE, n. 424; NWP 1-14M Annotated; NWP 9A Annotated; SAN REMO MANUAL make no distinction among minelaying platforms.

693. Hague VIII, art. 5; *see also* BOTHE *et al.* 172-75; LEVIE, MINE WARFARE, n. 426, 49-51; NWP 1-14M Annotated ¶ 9.2.3, 9-8; NWP 9A Annotated ¶ 9.2.3, 9-23; OXFORD NAVAL MANUAL, art. 24; 3 PICTET 541-53; PILLOUD, COMMENTARY 350-63; SAN REMO MANUAL ¶¶ 84, 90-91 & cmts. (citing *inter alia* Third Convention, art. 118; Protocol I, art. 33); STONE 584; Levie, *Commentary*, n. 435, 144-45; *see also* n. 715 and accompanying text.

694. NWP 1-14M Annotated ¶ 9.2.3 n.29 (citing the right of self-defense); NWP 9A Annotated ¶ 9.2.3 n.23 (same); SAN REMO MANUAL ¶ 92 (declaratory of customary law); *see also* Helsinki Principle 6.2; UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

695. *E.g.*, a naval force may not enter a neutral coastal State's territorial sea to clear mines without that State's permission. *Cf.* LOS Convention, art. 19; Territorial Sea Convention, art. 14(4); *see generally* Part IV.B.3. An exception

to this in the mines context might be a CAPTOR-like mine laid in a coastal State's territorial sea, n. 686, that could actuate and attack the force, thereby triggering a right of self-defense for a neutral force or a right of necessity under the LOAC for a belligerent's force, if a coastal State is powerless to remove the CAPTOR or like device. Under these circumstances the force could enter a coastal State's territorial sea specifically and solely to deactivate or remove the CAPTOR as a self-defense measure. UN Charter, arts. 51, 103; Helsinki Principle 2.1 & cmt.; NWP 1-14M Annotated ¶ 7.3.4.1; NWP 9A Annotated ¶ 7.3.4.2; SAN REMO MANUAL ¶ 22; UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, V.694 and accompanying text.

696. NWP 1-14M Annotated ¶ 9.2.3, 9-9; NWP 9A Annotated ¶ 9.2.3, 9-9; 2 OPPENHEIM § 182a (commenting on contrary German World War I practice, Allied reprisals); *cf.* SAN REMO MANUAL ¶ 87; *see also* Part IV.B.5. The 1907 diplomatic conference considered but did not adopt a provision to ban straits mining. *See* LEVIE, MINE WARFARE, n. 424, 42-44.

697. Paris Declaration ¶ 4; Hague VIII, art. 2; London Declaration, arts. 1, 4-5; COLOMBOS §§ 563, 821 (Hague VIII, art. 2 useless on this point); NWIP 10-2 ¶ 611 (limited to automatic submarine contact mines, *but see id.* n. 3); LEVIE, MINE WARFARE, n. 424, 32-34; NWP 1-14M Annotated ¶ 9.2.3; NWP 9A Annotated ¶ 9.2.3; 2 OPPENHEIM §§ 182a (commenting on contrary German World War I practice, Allied reprisals), 380a; SAN REMO MANUAL ¶ 88; TUCKER 303; Fujita, n. IV.624, 70; *cf.* OXFORD NAVAL MANUAL, art. 22; *see also* LEVIE 144-47, 153-55 (Haiphong harbor mine blockade); Swayze, n. III.322, 163 (same); Parts IV.B.3-IV.B.4.

698. LOS Convention, art. 87(2); High Seas Convention, art. 2; NWP 1-14M Annotated ¶ 9.2.3; NWP 9A Annotated ¶ 9.2.3; 2 OPPENHEIM § 182a (commenting on contrary German World War I practice, Allied reprisals); SAN REMO MANUAL ¶ 80 & cmt. 80.1; TUCKER 303; *but see* LEVIE, MINE WARFARE, n. 426, 34-42; Levie, *Mine Warfare*, n. 611, 31-32; *see also* nn. IV.75 (LOS due regard), V.58, 62 (LOAC due regard) and accompanying text; Part F.2. The Seabed Arms Control Treaty does not apply to conventional mines. *See* n. 683. STONE 584 says Hague VIII does not forbid high seas mining, but this may lead to "exhortation."

699. UN Charter, art. 2(4); Hague VIII, arts. 1-2; NWP 1-14M Annotated ¶ 9.2.2; NWP 9A Annotated ¶ 9.2.2; SAN REMO MANUAL ¶ 85; Levie, *Commentary*, n. 435, 142-43; *see also* LOS Convention, arts. 2, 8 (territorial sea, inland waters part of coastal State sovereign territory); Territorial Sea Convention, arts. 1, 5 (same); Parts IV.B.3-IV.B.4.

700. The 1907 conference that produced Hague VIII considered but did not adopt a prohibition on straits mining. *See* n. 696 and accompanying text.

701. Hague VIII, art. 4 (notice for mines laid off neutrals' coasts, does not require notification for inland waters mining). There is no customary requirement, except necessity and proportionality principles applicable to self-defense, for notice. Other treaties might apply. UN Charter, arts. 51, 103; Hague VIII, art. 4; COLOMBOS § 568; LEVIE, MINE WARFARE, n. 426, 47-49; NWP 1-14M Annotated ¶ 9.2.2; NWP 9A Annotated ¶ 9.2.2; 2 OPPENHEIM § 363a; Levie, *Commentary*, n. 435, 144; *see also* Stockholm Declaration, art. 2(2) (denial of warship access to mined areas, Nordic inner waters; wording varies); Bring, *Commentary*, n. III.848, 842; nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Parts IV.B.4-IV.B.5.

702. LOS Convention, art. 25(3); Territorial Sea Convention, art. 16(3); *see also* Parts IV.B.4-IV.B.5.

703. Hague VIII, arts. 4-5; LEVIE, MINE WARFARE, n. 426, 47-51; NWP 1-14M Annotated ¶ 9.2.2; NWP 9A Annotated ¶ 9.2.2; SAN REMO MANUAL ¶ 86, cmt. 86.2.

704. UN Charter, arts. 51, 103; NWP 1-14M Annotated ¶ 9.2.2; NWP 9A Annotated ¶ 9.2.2; Clingan, *Submarine Mines*, n. III.840, 356; A.G.Y. Thorpe, *Mine Warfare at Sea—Some Legal Aspects of the Future*, 18 ODIL 255, 267 (1987); *but see* Levie, *Mine Warfare*, n. 611, 31-32; UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, V.696 and accompanying text. One necessity and proportionality factor is availability of and providing of alternate safe, convenient routes for neutral shipping. *Cf.* SAN REMO MANUAL ¶¶ 88-89.

705. *Cf.* Hague VIII, art. 3; *see also* n. 688 and accompanying text.

706. *Cf.* Hague VIII, art. 5; Corfu Channel, 1949 ICJ 22; Nicaragua Case, 1986 ICJ 46-48, 112, 147-48; *see* n. 693 and accompanying text.

707. *See* nn. 685-96 and accompanying text.

708. NWP 1-14M Annotated ¶ 9.2.2; NWP 9A Annotated ¶ 9.2.2; *see also* Parts IV.B.1-V.B.2.

709. *E.g.*, LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* nn. IV.75 (LOS due regard analysis, V.58, 62 (LOAC due regard analysis) and accompanying text. The Seabed Arms Control Treaty does not apply to conventional mines or nuclear mines in a high seas water column. *See* n. 683.

710. *Cf.* SAN REMO MANUAL ¶¶ 88-89; *see also* n. 698 and accompanying text.

711. *E.g.*, LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* nn. IV.75 (LOS due regard analysis), V.58, 62 (LOAC due regard analysis), 709 and accompanying text. OXFORD NAVAL MANUAL, art. 20, would forbid automatic contact mines "in the open sea." State practice and the authority of UN Charter, art. 51, 103 supersede this general aspiration. *See also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

712. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

713. *See generally* Parts B-D.

714. *See, e.g.*, nn. II.260, 361, 373, 393-94, 412, 421, 446, 469, 519 and accompanying text.

715. *See, e.g.*, nn. II.179, 233, 250, 334, 354, 357, 359, 368, 420 and accompanying text.

716. *Cf.* Hague VIII, arts. 1,3; *see also* nn. 688, 690-92 and accompanying text.

717. *See* n. 692 and accompanying text.

718. Hague VIII, arts. 3, 5; nn. 688, 693 and accompanying text.

719. UN Charter, arts. 2(4), 103; Hague VIII, arts. 1-2; NWP 1-14M Annotated ¶¶ 9.2.2 n. 23, 9.2.3 n. 26; n. 699 and accompanying text.

720. Hague VIII, art. 1(2); NWP 1-14M Annotated ¶ 9.2.3 n. 27; n. 690 and accompanying text.

721. There may have been agreements between belligerents and mine removal forces, but there is no published record. *Cf.* Hague VIII, art. 5; Levie, *The Nature*, n. 109, 903-06; nn. 109, 688 and accompanying text. LEVIE, MINE WARFARE, n. 424, 88 notes that as a practical matter parties who must remove mines may not be able to do so because of lack of resources or internal political conditions. Undoubtedly that was the case with the Tanker War belligerents.

722. *See* n. 700 and accompanying text; *see also* LEVIE, MINE WARFARE, n. 426, 168-69.

723. Hague VIII, art. 2; *see also* n. 697 and accompanying text.

724. Hague VIII, art. 3; LOS Convention, art. 87(2); High Seas Convention, art. 2; NWP 1-14M Annotated ¶ 9.2.3 n. 34; *see also* LEVIE, MINE WARFARE, n. 426, 168-69; nn. IV.75 (LOS due regard), V.58, 62 (LOAC due regard analysis), 698, 709, 711 and accompanying text.

725. *See, e.g.*, nn. II.436, 442, 454-56, 493 and accompanying text.

726. There were apparently no such threats during the Tanker War. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, V.694-95 and accompanying text.

727. *See* nn. II.264, 384 and accompanying text.

728. UN Charter, arts. 2(4), 51, 103; Hague VIII, arts. 1-2; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

729. UN Charter, arts. 51, 103; *see also* nn. II.368-72, UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

730. *See* nn. 693-98 and accompanying text.

731. *See generally* Parts A-G.1.

732. The Ottoman Empire, predecessor sovereign of the area that is now Iraq, and Persia, now Iran, signed Hague VIII but never ratified it. Most Tanker War participants were parties. *See Signatures, Ratifications and Accessions*, SCHINDLER & TOMAN 807, 808; TIF 441-42.

733. *See* nn. III.485-630 and accompanying text (necessity, proportionality in self-defense context); Part A (necessity, proportionality in LOAC context). Standards and criteria for necessity and proportionality are different, depending on whether the situation is a self-defense response or an attack during war. *See* nn. 21-22 and accompanying text.

734. *See* Parts B-D.

735. *See* Part E.

736. *See* Part F.

737. *See* Part G.

738. *See* nn. II.153-56 and accompanying text.

739. Hague XIII, arts. 5, 8; Third Convention, art. 4A(5); *see also* n. 347 and accompanying text; these mariners did not have Second Convention protections because their ships were not at sea. *See* Second Convention, arts. 12-21; 2

PICTET 84-153; *see also* NWP 1-14M Annotated ¶¶ 7.10.2, 11.3-11.4, 11.7; NWP 9A Annotated ¶¶ 7.10.2, 11.3-11.4, 11.7; SAN REMO MANUAL ¶¶ 161, 165-66; STONE 566-67, 674-75; *cf.* NWP 1-14M Annotated ¶ 11.4, at 11-5. For analysis, *see* nn. 740-41 and accompanying text.

740. Fourth Convention, art. 4; Protocol I, arts. 50 (presumption for civilian status), 75 (fundamental guarantees); *see also* BOTHE *et al.*, 293-96, 456-66; NWP 1-14M Annotated ¶ 11.3; NWP 9A Annotated ¶ 11.3; 4 PICTET 45-51; PILLOUD, COMMENTARY 610-12, 863-90; SAN REMO MANUAL ¶¶ 166(c), 167; STONE 704-05.

741. *See generally* Fourth Convention, arts. 7, 12-108; Protocol I, arts. 44-45; *see also* BOTHE *et al.*, 243-58, 260-62; NWP 1-14M Annotated ¶¶ 11.4-11.5, 11.7-11.7.4; NWP 9A Annotated ¶ 11.4-11.7.4; 4 PICTET 65-72, 113-455; PILLOUD, COMMENTARY 520-42, 544-59; STONE 446, 686-88, 695-706.

742. Third Convention, arts. 109-10; *see also* 3 PICTET 508-20; STONE 660-62; n. 746 and accompanying text.

743. Third Convention, art. 118; *see also* 3 PICTET 541-53; STONE 662-65.

744. *See* nn. II.489-90 and accompanying text.

745. A Detaining Power is the country that has responsibility for a prisoner of war. Third Convention, art. 12; *see also* 3 PICTET 128-39; GREEN 196-201; STONE 655-56, 666.

746. A Detaining Power wilfully causing great suffering or inhuman treatment of prisoners of war is guilty of a grave breach of the Third Convention; wilful unjustifiable delay in repatriating prisoners of war or civilians is a grave breach of Protocol I. Third Convention, art. 130; Protocol I, art. 85(4)(b); *see also* BOTHE *et al.* 511-13, 517-18; NWP 1-14M Annotated ¶ 6.2.5 n.58; NWP 9A Annotated ¶ 6.2.5 n.51; 3 PICTET 626-28; PILLOUD, COMMENTARY 991-92, 999-1001. Keeping prisoners of war 10 years after a war ends without a legitimate reason for doing so can be characterized as wilful action causing great suffering or inhuman treatment to persons so detained. The record is not clear whether Detaining Power actions were wilful and unjustifiable in not repatriating these persons, but 10 years' confinement under the circumstances comes very close to being a *per se* violation.

747. *See* nn. 739, 741 and accompanying text.

748. Fourth Convention, arts. 8, 13-34, 47-131; Protocol I, arts. 72-76; *see also* BOTHE *et al.* 441-73; NWP 1-14M Annotated ¶ 11.8; NWP 9A Annotated ¶ 11.8; 4 PICTET 73-80, 118-231, 273-510; PILLOUD, COMMENTARY 841-96; STONE 446, 686-89, 695, 700-06.

749. Fourth Convention, arts. 35-36; *see also* 4 PICTET 234-42; GREEN 196-201; STONE 688-90; n. 745 and accompanying text.

750. Fourth Convention, art. 132; *see also* NWP 1-14M Annotated ¶ 11.8; NWP 9A Annotated ¶ 11.8; 4 PICTET 510-14.

751. *See* nn. 742-47 and accompanying text.

752. Fourth Convention, arts. 133-34; 4 PICTET 514-17.

753. Protocol I, art. 85(4)(b); *see also* nn. 745-46, 749 and accompanying text.

754. *See* nn. II.358, 368-72 and accompanying text.

755. *See* nn. II.431-33 and accompanying text; *see also* Levie, *The Status*, 31 VJIL, n. II.410, 611-12.

756. *See* nn. II.179 (mines), 233 (mines) 250 (mines), 260, 334 (mines), 354 (mines), 357 (mines), 359 (mines), 362, 368 (mines), 373, 393-94, 412, 420 (mines), 421, 446, 469, 519 and accompanying text.

757. *See* n. 755 and accompanying text.

758. Second Convention, art.12; Protocol I, art. 33; LOS Convention, art. 98; High Seas Convention, art.12; *see also* nn. IV.816, V.198-200 and accompanying text.

759. *See* nn. 755, 757 and accompanying text.

760. LOS Convention, art. 98; High Seas Convention, art. 12; *see also* n. IV.816, V.758 and accompanying text.

761. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

762. Second Convention, art. 12; Protocol I, art. 33; *see also* nn. IV.816, V.198-200, 758 and accompanying text.

763. If this is the proper analysis, the LOAC applied through the LOS other rules principle. *See, e.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

764. *See* n. III.10 and accompanying text.

765. Hague V, art. 11; Hague XIII, arts. 3, 21, 24; Second Convention, art. 15; Convention on Maritime Neutrality, arts. 6, 17, Hague Air Rules, arts. 42-43; *see also* 2 PICTET 107-12; STONE 675; Schindler, *Commentary*, n. 62, 218-19.

766. UN Charter, arts. 51, 103, the latter stating that Charter law is supreme over all international agreements, including Hague V, Hague XIII and Second Convention. *See also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, V.760-63 and accompanying text, the last citation advancing a similar view in the context of rescuing these personnel on the high seas.

767. *See* nn. 760-63, 766 and accompanying text.

768. Corfu Channel (UK v. Alb.), 1949 ICJ 22; Nicaragua Case, 1986 ICJ 46-48, 112, 147-48; *see also* ICJ Statute, art. 38(1), RESTATEMENT (THIRD) §§ 102-03, n. 9 and accompanying text.

769. Second Convention, art. 12; Protocol I, art. 33; LOS Convention, art. 98; High Seas Convention, art. 12; *see also* nn. IV.816, V.198-200, 758, 760 and accompanying text.

770. Hague IV, Regulations, arts. 22-24; AFP 110-31 ¶¶ 8-3a, 8-3b; NWP 1-14M Annotated ¶ 12.1; NWP 9A Annotated ¶ 12.1; 2 O'CONNELL, LAW OF THE SEA 1140; 2 OPPENHEIM § 211; SAN REMO MANUAL ¶¶ 109-11.

771. A different rule for aircraft as distinguished from warships has been explained that aircraft once flying generally cannot change markings before attack as a warship can. Aircraft approach speed compared with ship speed through water would render ineffective any attempt to display markings at the instant of attack. AFP 110-31 ¶¶ 7-4, 8-4b(5); Hague Air Rules, arts. 3, 7; NWP 1-14M Annotated ¶¶ 12.3.1-12.3.2, 12.5.1-12.5.2; NWP 9A Annotated ¶¶ 12.3.1-12.3.2, 12.5.1-12.5.2; 2 OPPENHEIM § 211; SAN REMO MANUAL, *Preliminary Remarks* 184 & ¶ 110; STONE 337 n.10; TUCKER 142 & n.43; Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, NWC REV. 52, 53-54, 57-59 (Summer 1989). AFP 110-31 ¶ 8-3d recognizes the general rule but errs in not adding the special warship false flag rule. 2 O'CONNELL, LAW OF THE SEA 1140 recognizes the special rule but does not add that a warship must haul down false colors, and hoist its true colors, before it attacks.

772. Hague IV, Regulations, art. 24; Hague VII, art. 2; Protocol I, art. 37(2); AFP 110-31 ¶¶ 8-4a-8-4b; BOTHE *et al.*, 202-03, 206-07; NWP 1-14M Annotated ¶ 12.1.1; NWP 9A Annotated ¶ 12.1.1; 2 O'CONNELL, LAW OF THE SEA 1140 (recognizing admissibility of ruses but not distinguishing unlawful ruses); PILLOUD, COMMENTARY 430-32, 439-44; SAN REMO MANUAL ¶ 110, cmt. 110.1; Hall, *False Colors*, n. 771, 57-59; *see also* Part IV.C.4; nn. 770-71 and accompanying text. Modern deception tactics are often classified. NWP 9A Annotated ¶ 12.1.1 n. 2. International law does not require that these lists be published.

773. AFP ¶ 110-31 ¶ 8-5.

774. Hall, *False Colors*, n. 771, 56-57; *see* AFP 110-31 ¶ 8-6 for examples of unlawful ruses or perfidy in air warfare, some of which may apply in naval contexts.

775. SAN REMO MANUAL ¶¶ 110(a)-110(c), 110(e)-110(g) & cmt. 110.3, a list reflecting vessels exempt from attack. *See* nn. 110-11, 113, 258, 261-63, 265 and accompanying text; *see also* nn. IV.807-10 (UN, ICRC flagged vessels) and accompanying text. Any listed exempt vessel may lose protection if it contributes to the war effort. *See* nn. 274-76 and accompanying text.

776. SAN REMO MANUAL ¶¶ 110, cmt. 110.3.

777. *Id.* ¶¶ 47(i), 111; *see also* n. 267 and accompanying text for surrendered vessels analysis, nn. 110-13, 257-73 and accompanying text for analysis of other vessels exempted from attack. There is no cross-reference to ¶ 111, on the next page, or other MANUAL provisions in ¶ 110; only thorough reading of the MANUAL leads to this material. Unlawful ruse or perfidy claims have great potential for exacerbating emotions during war and in peace discussions; thorough cross-referencing would have helped. *See* n. 788 and accompanying text.

778. *Cf.* SAN REMO MANUAL ¶¶ 110(a)-110(c), 110(e)-110(g) & cmt. 110.3. As in the case of vessels, this list reflects aircraft exempt from attack. *See* nn. 278-80; *see also* nn. 775-76 and accompanying text. As with vessels, a listed exempt aircraft may lose protection if it contributes to the war effort. *See* nn. 274-76, 281 and accompanying text.

779. *See* nn. 776-77 and accompanying text.

780. *See* n. 771 and accompanying text.

781. SAN REMO MANUAL ¶ 110(d) & cmt. 110.3, citing Protocol I, art. 37(1)(d); *see also* BOTHE *et al.*, 202-03, 206-07; NWP 1-14 M Annotated ¶ 12.4 (application of art. 37[1][d] standards for UN flag to sea warfare as matter of US policy); NWP 9A Annotated ¶ 12.4 (same); PILLOUD, COMMENTARY 430-32, 439; nn. IV.807-10 and accompanying text.

782. *See* n. IV.809 and accompanying text.

783. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

784. UN Charter, arts. 25, 41, 48, 103; *see also* Part E.1.

785. *See* n. 439 and accompanying text.

786. SAN REMO MANUAL, *Preliminary Remarks* 184 & ¶ 110; *see also* n. 771 and accompanying text.

787. *Cf.* NWP 1-14M Annotated ¶ 12.4; NWP 9A Annotated ¶ 12.4, which say "The flag of the United Nations and the letters 'UN' may not be used in armed conflict for any purpose without the authorization of the United Nations," citing Protocol I, arts. 37(1)(d), 38(2), as agreeing with US policy and that the United States extends application of this policy to operations at sea. Presumably the UN authorization referred to is a Security Council decision, since other authorizations, *e.g.*, Council recommendations, are nonbinding unless they recite prior law, under the traditional view. *See* UN Charter, arts. 25, 48, 103; RESTATEMENT (THIRD) §§ 102-03; n. IV.57 and accompanying text.

788. AFP 110-31 ¶ 8-3a. These policies are also behind LOAC necessity and proportionality principles. *See* n. 26 and accompanying text.

789. Cultural Property Convention, arts. 17(3)-17(4); Hague IV, Regulations, arts. 23(b)-23(c), 23(f), 27, 32, 34; Hague V, art. 5; First Convention, arts. 21-22, 35-36; Second Convention, arts. 30, 34-35, 41, 45; Third Convention, art. 23; Fourth Convention, arts. 18, 20-22; Protocol I, arts. 37(1), 38(1); Roerich Pact, arts. 1, 3; AFP 110-31 ¶ 8a; BOTHE *et al.* 202-06, 208-11; Hague Radio Rules, art. 10; Lieber Code, art. 117; NWP 1-14M Annotated ¶¶ 12.1.2-12.2, 12.6-12.7.1; NWP 9A Annotated ¶ 12.1.2-12.2; 12.6-12.7.1; 2 OPPENHEIM §§ 211, 223; 1 PICTET 200-05, 280-93; 2 *id.* 179-81, 189-98, 226-32, 247-52; 3 *id.* 186-90; 4 *id.* 141-53, 157-77; PILLOUD, COMMENTARY 430-39, 446-59; SAN REMO MANUAL ¶ 111; TOMAN 185-94; Hall, *False Colors*, n. 771, 56-57; Matheson, *Remarks* 425. It is not perfidy to feign, *e.g.*, death, and then to rise and fight an attacking enemy. It is perfidy to gain the enemy's confidence and when the "body" is in enemy custody, rising to attack a custodian while backs are turned. NWP 1-14M Annotated ¶ 12.7 n.24; PILLOUD 438. This, of course, draws fine lines, and individual fact situations, like offers to surrender, may vary legal analysis. *See* Robertson, *The Offer*, n. 267.

790. AFP 110-31 ¶¶ 4-2d, 5-1g; NWP 1-14M Annotated ¶ 12.6; NWP 9A Annotated ¶ 12.6.

791. NWP 1-14M Annotated ¶ 12.6 n.21; NWP 9A Annotated ¶ 12.6 n.21.

792. Before the Gulf became a hot spot, it was traditional for US naval vessels permanently stationed there to be painted white with dark pendent numbers to give crews protection from solar heat. Probably for the same reason, and to increase visibility during peacetime steaming, US warships were painted white with black and tan trim before World War I. During wartime they were repainted haze grey, and this legacy of the Confederate States Navy became nearly universal during and after World War I. Submarines are painted black today, but they have been painted other colors for camouflage protection.

793. Military aircraft have been painted camouflage colors since the first days of aviation.

794. *See* nn. 775-80, 788-89 and accompanying text. This design did not avail *Vincennes* in Iran's speedboat attacks, whose crews relied on eyesight for final approach. *See* nn. II.459-68 and accompanying text.

795. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

796. Hague VII, art. 2; LOS Convention, art. 29; High Seas Convention, art. 8(2); *see also* nn. 771-72, 780 and accompanying text.

797. *See* nn. II.153-56 and accompanying text.

798. UN Charter, arts. 25, 48, 103; *see also* nn. IV.57, V.781-87 and accompanying text.

799. *See* SAN REMO MANUAL ¶ 110(f); n. 775 and accompanying text. If the Security Council had approved a decision on the point, the decision would have supplied the rules. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

800. *See* nn. II.425-28 and accompanying text.

801. UN Charter, arts. 25, 48, 103; *see also* nn. IV.57, V.781-87, 799 and accompanying text.

802. *See* nn. 797-99 and accompanying text.

803. *See* n. II.412 and accompanying text.

804. *See* n. II.363 and accompanying text.

805. *See generally* Part C.

806. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

807. Hague VII, art. 2; LOS Convention, art. 29; High Seas Convention, art. 8(2); *see also* Part IV.D.4.

808. *See* Part D.

809. Opposing belligerents' warships and naval auxiliaries are legitimate targets wherever found on the high seas or in belligerents' territorial waters. *See* n. 151 and accompanying text.

810. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

811. 2 OPPENHEIM § 262.

812. *Id.* § 263; Levie, *The Nature*, n. 109.

813. *See* nn. II.482-88 and accompanying text.

814. *See* nn. II.489-90 and accompanying text; Part H.3.

815. *See* nn. II.393-95 and accompanying text.

816. *See* n. IV.678 and accompanying text.

817. *See* Parts A-I.

818. *See* Part A for further analysis.

819. *See* Parts A.1-A.2.

820. *See* nn. IV.75 (LOS due regard analysis), V.58, 62 (LOAC due regard analysis).

821. The problem is common to many languages and linguistic contexts. *E.g.*, C.S. LEWIS, THE FOUR LOVES (1960) discusses multiple definitions of the word "love" in the biblical context as translated from original languages, which had different words for each context.

822. *See* Part E.

823. UN Charter, art. 103; *see also* nn. 7-20 and accompanying text; Part A.4.

824. *See* nn. 58, 62, 818-819 and accompanying text.

825. *See* Part A.4.

826. *See* Part A.3.

827. *See, e.g.*, LOS Convention, art. 87(2); nn. IV.75, V.58, 62 and accompanying text.

828. *See, e.g.*, LOS Convention, art. 87(1); *see also* nn. III.952-67, IV.10-25 and accompanying text.

829. *See* Parts B-C.

830. *See* Part C for further analysis.

831. *See* Parts A.1-A.2, J.1.

832. *See* Part D for further analysis.

833. *See* Part E for further analysis.

834. *See* Part E.1.

835. *See* Part F for further analysis.

836. *See* Part G for further analysis.

837. *See* Parts A-G.

838. *See* Part H for further analysis.

839. *See* Part I for further analysis.

840. *See* Chapter III for analysis of UN Charter law, particularly in the self-defense context.

841. *E.g.*, 1990-91 Gulf War ship intercepts, which initially had a blanket UN Security Council decision allowing interception of all goods, presumably including humanitarian supplies. *See* Walker, *Crisis Over Kuwait* 35-36.

842. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text.

843. *See* UN Charter, arts. 25, 41, 48, 103; Part E.

844. UN Charter, art. 103, trumping, *e.g.*, LOS Convention, arts. 87-88 (art. 87 includes one of many "other rules" clauses in that treaty) and the 1958 Conventions; *see also* nn. III.952-67, IV.10-25, 68 and accompanying text.

845. *See, e.g.*, LOS Convention, art. 87(2); nn. IV.75, V.58, 62 and accompanying text.

846. *See* Part IV.D.

847. *See* Chapter II.

848. *See* nn. II.210-14 and accompanying text.

# Chapter VI

# THE TANKER WAR AND THE MARITIME ENVIRONMENT

Persian Gulf armed conflicts during 1980-88 (the Tanker War) and 1990-91 (the Gulf War between Iraq and the Coalition after Iraq's invasion and occupation of Kuwait) resulted in environmental degradations of Gulf waters and the land and airspace over States party to the conflicts. Perhaps the worst of these was what a *Time* writer called a "Man-Made Hell on Earth"[1] when Iraq dynamited over 550 of 684 producing Kuwaiti oil wells in early 1991 during the Gulf War.[2]

This Chapter does not address the oil well destruction and other environmental issues related to land warfare and conflict in the skies over the lands of countries involved during either conflict, nor does it analyze the 1990-91 Gulf War's maritime aspects. Rather, this Chapter explores conflict at sea during the 1980-88 Iran-Iraq conflict, the Tanker War, in its environmental contexts.[3] In some instances the same issues arose in both conflicts, but the facts may point to different analyses for the overland air and land battles of both wars or the 1990-91 sea war.

In 1983 Iraqi rocket attacks hit Iran's Nowruz offshore drilling facilities, causing a 20-million barrel oil spill into the Gulf. Although early reports that the slick had equalled the size of Belgium and had caused permanent ecological damage were later discounted, it was big enough to threaten Bahraini, Qatari and Saudi desalination plants before strong winds blew it offshore and partially dispersed it. Fish imports into the UAE were stopped because of oil contamination in fishing grounds. Iraq rejected Iran's request for a partial truce so that oil cappers could try to stop the 2000-5000 barrels per day flow. The result was that the leakage lasted for nine months. US diplomacy may have been behind eventual capping of the flow.[4] The Nowruz attack may have been in response to Iran's attack on Iraqi oil terminals and ports early in the war, which resulted in their closure. There are no reports of significant pollution of the Gulf resulting from these attacks.[5] In 1986 Iraq bombed Iran's Sirri, Lavan and Larak oil terminals, and Iran attacked the neutral UAE's Abu al-Bakoush oil installations. There were also reports of attacks on Kuwaiti territory. There were no reports of significant spillage into the Gulf in any of these cases. Nor was there any report of oil slicks resulting from the 1984 Red Sea mining episode.[6] In 1987 US naval forces attacked Iranian offshore oil rigs used as an Iranian gunboat base in response to Iran's Silkworm missile strike on a reflagged tanker, *S.S. Sea Isle City,* in Kuwaiti waters. There is no report of petroleum spillage on the high seas resulting from these responses.[7]

Tanker War shipping losses from attacks by both belligerents were another source of marine pollution during that conflict. Although most tankers traveled in ballast to the Gulf, they and incoming cargo vessels had bunkers aboard. All outbound ships had bunkers aboard, and nearly all tankers leaving the Gulf departed with a full load. These vessels as well as inbound and outbound cargo ships were attacked by the belligerents. Iraq and Iran laid mines, either initially set adrift or which came loose from moorings. Several merchantmen, some of them neutral flagged, were mined. Iraq attacked tankers escorted by Iranian warships, and both countries conducted land-based air attacks on neutral-flag merchant ships, primarily tankers, some of which were convoyed by neutral warships. Iran's navy attacked these vessels as well. Iran saw its attacks as justified because of aid afforded Iraq. The UN Security Council twice condemned the attacks and the result on the environment. An Iraqi aircraft mistakenly launched two missiles at and seriously damaged another US warship, the frigate *U.S.S. Stark.* An Iranian-laid mine seriously damaged *U.S.S. Samuel B. Roberts,* also a US frigate. Another marine pollution source came from losses of naval vessels, principally Iran's, hit as self-defense measures following attacks on US naval vessels or after being caught laying mines, *e.g.* the *Iran Ajr.* Iran saw the US attacks as aggression. Undoubtedly there was contamination of the Gulf from petroleum cargoes and bunkers, although there is no report of such. The conflict was a major war, not a small one, particularly when the commitments of Iran and Iraq were measured. For the only time since World War II, deliberate, sustained operations were carried out against merchant ships.[8] Iran and Iraq attacked more than 400 merchantmen, sinking 31 with 50 more declared total losses. Write-off losses stood at nearly half the World War II tonnage sunk. Over 200 merchant mariners died.[9] (World War II lasted for just under six years for all combatants except the United States and other States entering the war in 1941 or later, *e.g.,* the USSR, and China, which had been Japan's object of aggression before 1939. The Iran-Iraq war ground on eight years. The reason for the disparity between the relatively small number of ships lost and huge tonnage losses is merchant vessels' relatively larger displacement in the Eighties.) The possible result when a tanker was attacked during 1980-88 was the risk of a considerably larger oil spill for each ship attacked than during World War II. There were also aircraft losses over the Gulf, notably the Airbus tragedy;[10] however, there are no reports of aviation fuel pollution.

If the belligerents who initiated tactics resulting in environmental degradation hoped to improve their fortunes by these tactics, they were mistaken. The Iran-Iraq war wore on for five more years after the 1983 Nowruz attack before ending in mid-1988. The Iraqi attack on Nowruz was not a war-stopper; leakage from stricken merchantmen did not even receive media attention, except what viewers could observe in occasional videos of burning vessels.

This survey does not include oil sent overboard in deballasting or from land-based sources not connected with armed conflict in the Gulf. Worldwide figures for this pollution rose from about a million metric tons annually in the 1960s to nearly 7 million tons in 1973, with over half from land-based sources and 35 percent from ships. Two-thirds of the latter have been said to be from "routine tanker operations."[11]

## Part A. Not a New Phenomenon

Environmental degradation during war, or international armed conflict as the use of force by one State against another is commonly styled today, is not a new phenomenon. Pollution of the sea on a measurable scale during war at sea has largely been an aspect of Twentieth Century conflicts, particularly after oil replaced coal as a primary source of energy for steam-powered ships, and the world began to consume petroleum as a primary fuel for transportation, a major source for heating and an ingredient for plastics and other products. The Persian Gulf has been a particularly busy highway for transporting petroleum; a high percentage of the Earth's proven reserves are within States bordering the Gulf. The ocean pollution problem is not new[12] or confined to the Gulf, however; the Tanker War merely underscored issues that have arisen on a world-scale basis, usually in the context of accidents through tanker collisions or groundings. These accidents, like loss of *R.M.S. Titanic* in 1912 and the resulting 1914 Convention for Safety of Life at Sea,[13] have been catalysts for treaties or other action to prevent recurrences.[14]

The world little noted warnings of the potential for environmental degradation of the seas before, during and after the Tanker War.[15] After the 1990-91 Gulf War, when the world focused attention on Iraqi actions that many claimed violated international environmental norms,[16] there were calls for action in the United Nations and other quarters for more treaties, *e.g.*, a Fifth or "Green" Geneva Convention to protect the environment during armed conflict.[17] These efforts largely came to naught, primarily because most participants concluded no new agreements were necessary if existing ones were enforced.[18] The question of belligerent culpability for environmental damage during international armed conflict at sea remains as a possible source of rhetoric, if not law, in future wars. Publication of the International Committee of the Red Cross Guidelines (1994), the *San Remo Manual* (1995) and *NWP 1-14M* (1997)[19] demonstrates that the issue remains alive within governments and in commentators' minds.[20]

This Chapter limits its coverage to the LOS, the oceans environment and how these sometimes overlapping bodies of law relate to the LOAC and self-defense at sea. Except as concepts spill over physically or legally, land-based aspects of environmental issues (*e.g.*, transborder air pollution), problems related exclusively to land warfare or war in the air or space above the land, are not discussed. Thus the air war from the sea, *i.e.*, air strikes from land-based Iranian or Iraqi aircraft flown

over the sea, or from neutrals' warships in the Gulf, are analyzed, but principles of air-to-air combat over land or attacks on land targets from the land without flight over the Gulf are outside the parameters.

Part B.1 attempts to place the law of the maritime environment in the context of the UN Charter; the law of the Charter was analyzed in more depth in Chapter III, to which reference will be made. Part B.2 reviews the LOS, particularly the 1982 LOS Convention and its and other conventions' relationship with the law of the maritime environment and the LOAC; this was explored in more depth in Chapter IV, to which reference will be made. Part B.3 discusses the LOAC, discussed in the general context of the war in Chapter V, as it relates to Tanker War environmental issues. Part B.4, drawing on current thinking in the *Restatement (Third), Foreign Relations Law of the United States*, US conflict of laws and recent publications on the LOAC appearing since the Tanker War, offers an analytical method for the complex relationship among these bodies of law.

## Part B. Charter Law, the Law of the Sea, the Law of the Maritime Environment, and the Law of Armed Conflict

There is an enormous volume of law related to the maritime environment, most of it in treaties appearing since the 1958 LOS conventions. If international agreements related to marine resources conservation [21] or maritime safety[22] are considered, insofar as observing these standards would promote a better oceans environment, there were scattered efforts at protection of the oceans well before 1958. The same is true with respect to the LOAC, where treaties negotiated to regulate aspects of warfare or humanitarian principles to be observed during war derivatively benefit the environment. Agreements of this nature include the 1907 Hague Conventions dealing with shore bombardment and mine warfare;[23] the 1925 Geneva Gas Protocol, whose prohibitions on gas and bacteriological warfare affect human and nonhuman inhabitants of the environment;[24] the 1935 Roerich Pact[25] protecting monuments, *etc.*, ashore; parts of the 1949 Geneva Conventions;[26] and the 1954 Cultural Property Convention,[27] which provides *inter alia* for safe sealift of protected objects during war. More recently the ENMOD Convention and Protocol I to the 1949 Geneva Conventions have included provisions that are protective of the environment.

The 1996 International Court of Justice *Legality of the Threat or Use of Nuclear Weapons* advisory opinion ruled 8-7 that threat or use of nuclear weapons would be contrary to international law except in self-defense situations where a State's survival is at stake.[28] In so deciding the Court said environmental considerations are an element to be taken into account in implementing the LOAC[29] and considered the impact of some of the foregoing international agreements in the nuclear warfare context.[30]

There is thus as deep a legacy of what today are called environmental concerns in the law of armed conflict as those agreements dealing with pollution or species protection, which today might be lumped under the same rubric.

*1. The UN Charter and the Environment*

Not surprisingly, given the era when it was drafted, negotiated and signed, the UN Charter has no direct reference to protection of the environment. Environmental protection might be subsumed under Articles 1(3)-1(4) and 55-56, particularly if the environment is considered a human right or if protection of health is involved. Article 55 has been the linchpin for the UN Environmental Programme, established through UN General Assembly Resolution 2994 (1972).[31] Like all General Assembly resolutions, Resolution 2994 as a recommendation is not law-making in and of itself, although it can restate existing law and thereby strengthen it, or contribute to development of custom.[32] However, if the UN Security Council resolution is a decision, that resolution binds UN Members; if the Council passes other resolutions, *e.g.*, recommendations, those are not binding on Members. The latter resolutions may also contribute to development of law, like General Assembly resolutions.[33]

During the Tanker War no Security Council resolution directly addressed environmental issues. The Council did pass resolutions, nonbinding like decisions, calling on the belligerents to observe international humanitarian law and condemning gas warfare,[34] the latter a feature of the land campaigns. As will be noted in the LOAC analysis, implementing these resolutions would have promoted a better environment.[35] Council Resolution 552 (1984), condemning attacks on ships exercising freedom of navigation and reaffirming the right of free navigation in international waters and shipping lanes en route to and from States not party to the conflict, likewise could have promoted a better environment. The resolution did decide to revisit the problem, but no further Council action on the freedom of navigation issue was taken.[36] If belligerents' attacks on ships had ceased, there would not have been the oil pollution problem associated with leakage after attacks.[37]

The inherent right to self-defense and the respect due States' territorial integrity[38] was also implicated in Tanker War environmental issues. Neutrals exercised the right to self-defense of their warships and aircraft in responding to belligerent attacks by sea (*e.g.*, mines, speedboat attacks) and the air (*e.g.*, missiles, aircraft attacks), including belligerent attacks on neutral convoys. Articles 2(4) and 51 of the Charter, like the rest of the Charter, do not speak to environmental protection in affirming the entitlement of States to respect for their territorial integrity or the inherent right to self-defense.[39] However, parties are obliged, under general principles of necessity and proportionality and admitting of no other alternative in the context of anticipatory self-defense, to have due regard for the potential for

environmental degradation in self-defense responses.[40] Observance of States' entitlement to their territorial integrity necessarily involves respect for what is on that territory, *i.e.*, its environment.

Iran's attack on neutrals' coastal facilities was an Article 2(4) violation, unless it was somehow excused, *e.g.*, by mistake as in the case of the Airbus tragedy. Whether States observed due regard for the maritime environment in self-defense responses is less than clear from the war's history, which has no record of spills incident to these situations. However, in the absence of binding Charter law, *i.e.*, Security Council decisions, States responding in self-defense should have had due regard for the environment in those decisions, such due regard being conditioned on information available at the time of decision.[41]

### 2. *The 1982 LOS Convention and Environmental Protection*

The 1982 LOS Convention is the first worldwide multilateral agreement attempting to deal comprehensively with maritime environmental problems. For those countries that are or become parties,[42] the 1982 LOS Convention will replace the 1958 LOS conventions.[43] With respect to countries involved in the Tanker War, Bahrain and Iraq ratified it in 1985, and Kuwait in 1986; others, *e.g.*, France and the UAE, were signatories. However, other countries with prominent roles in the war were not signatories or parties, *e.g.*, the United Kingdom and the United States.[44] Thus some States were obligated not to defeat the Convention's object and purpose during the war;[45] others were bound by custom the Convention restated.[46]

The LOS Convention has different provisions dealing with the welter of custom and treaties affecting the maritime environment; it continues 1958 convention provisions stating the relationship between the LOS and the LOAC and its component, the law of naval warfare. Part B.2.a analyzes the relationship among the 1982 Convention, other LOS conventions and other treaties related to protecting the maritime environment. Part B.2.b discusses exceptions to applying the Convention during armed conflict. Part B.2.c analyzes the Convention's provisions governing environmental protection. Part B.2.d offers general comments on these relationships.

*a. The Relationship Between the 1982 LOS Convention and Other Environmental Treaties.* The LOS Convention will be an effective if mild trumping device much as UN Charter, Article 103 declares that the Charter supersedes other treaties,[47] for agreements related to environmental protection, whether already in force or to come into force, which may have special terms but which "should be carried out in a manner consistent with the general principles and objectives of [the] Convention."[48] This is slightly different from art. 311(2), the Convention's general supersession provision, which declares it does not alter existing rights

"which arise from other agreements compatible with this Convention" and which do not affect enjoyment of other parties' rights or performance of their obligations.[49] The upshot is that all agreements in place or to be negotiated, if related to Convention environmental norms, must conform generally to these norms.[50]

Reading of Part XII of the LOS Convention,[51] as well as environmental standards scattered elsewhere throughout the Convention,[52] demonstrates that specifics are more often found in other agreements, perhaps bilateral but frequently regional in recent years. The latter have been often sponsored by the UN Environment Programme (UNEP), which developed after the Stockholm 1972 UN Conference on the Human Environment.[53] Examples of these include two particularly relevant to this analysis, the Kuwait Regional Convention and Protocol (1978)[54] and the Red Sea Convention and Protocol (1982).[55] (Although the Persian Gulf was the theater of maritime military operations during the Tanker War, Libyan mines were discovered in the Red Sea in 1984. US and other States cooperated in removing them.[56]) In many instances administrative bodies established by the treaties develop detailed regulations.[57] The LOS Convention contemplates this procedure.[58]

There is the possibility that a parallel but contradictory custom or other source of law may develop alongside Convention-based norms.[59] The developing customary norm might be the same as, and thereby strengthen, the Convention norm.[60] If in opposition, the custom will weaken the treaty norm.[61] However, no treaty, and probably no custom, can supersede the UN Charter, mandatory norms developed under it,[62] or *jus cogens* norms.[63]

*b. "Other Rules" Clauses in the Conventions.* The 1958 and 1982 LOS Conventions include clauses, sometimes overlooked in analysis or commentary, stating that rights under these agreements are subject to "other rules of international law" as well as terms in the particular convention.[64] For example, LOS Convention, article 87(1), declaring high seas freedoms, also says that "Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law." Four conclusions can be stated.[65]

First, the overwhelming majority of commentators including the International Law Commission (ILC), a UN General Assembly agency of international law experts, have said the "other rules" clauses in the 1958 and 1982 LOS Conventions refer to the LOAC,[66] a component of which is the law of naval warfare. Therefore, provisions such as 1982 Convention Article 88 state a truism, *i.e.*, the high seas are reserved for peaceful purposes,[67] but high seas usage can be subject to the law of naval warfare when Article 87(1)'s other rules clause is read with Article 88. As in the case of the 1958 conventions,

> That provision does not preclude... use of the high seas by naval forces. Their use for aggressive purposes, which would... violat[e]... Article 2(4) of the [UN] Charter...,

> is forbidden as well by Article 88 [of the LOS Convention]. See also LOS Convention, Article 301, requiring parties, in exercising their rights and p[er]forming their duties under the Convention, to refrain from any threat or use of force in violation of the Charter.[68]

This analysis is buttressed by the Charter's trumping clause; no treaty can supersede the Charter.[69] Thus the peaceful purposes language in Article 88 and other LOS Convention provisions[70] cannot override Charter norms, *e.g.*, those in Article 2(4), but also those in Article 51, *i.e.*, the inherent right of individual and collective self-defense.[71] Naval forces of neutral and belligerent States may use the high seas for military purposes (*e.g.*, for formation steaming) as part of the freedom of the seas, although these forces may be restricted in other maritime zones, *e.g.*, the territorial sea. Belligerents may also restrict high seas usage in the immediate vicinity of naval operations and establish other kinds of zones, *e.g.*, war zones, on and over the high seas.[72] The other rules clauses come into force for States engaged in armed conflict.

Second, there is no indication that the LOS Convention drafters thought that the other rules clauses referred to anything else, and particularly to a customary law of the environment. International environmental law was a gleam in academics' and futurists' eyes when the 1958 LOS Conventions were signed, with only a patchwork of treaties on the subject,[73] and there is no indication the International Law Commission considered the environment issue. By contrast, there was established law dealing with armed conflict situations, including naval warfare, at the time.

Third, other agreements dealing with protecting the maritime environment include clauses exempting, or partially exempting, their application during armed conflict or similar situations. Some speak of war,[74] others armed conflict or the need to protect vital national interests.[75] This includes the North Atlantic Free Trade Agreement.[76] This tends to confirm the view of applying the LOAC as a separate body of law in appropriate situations. To the extent that treaties dealing with the maritime environment do not have such clauses,[77] such agreements must be read in the light of the LOS conventions, which include such provisions. To the extent the 1958 LOS conventions today recite customary norms, *e.g.*, the High Seas Convention,[78] applying the LOAC as a separate body of law in appropriate situations as a customary norm must also be considered with LOAC treaties and other sources[79] when analyzing environmental issues in this context.

Fourth, principles of the law of treaties , *e.g.*, impossibility of performance;[80] fundamental change of circumstances;[81] desuetude, or lack of use of a treaty for a considerable time;[82] or war, the last applying only to parties to a conflict;[83] may suspend operation of international agreements during a conflict or other emergency situation, or may terminate them. Armed conflict does not suspend or terminate humanitarian law conventions or treaties governing conduct of hostilities,

including rules for neutrals.[84] The other side of the coin is *pacta sunt servanda, i.e.,* treaties should be observed;[85] manifestation of this principle is that States signing treaties should not behave so as to defeat their object and purpose.[86] The often-amorphous law of treaty succession[87] must be considered, particularly for older agreements, including those stating the LOAC, to the extent that such treaties are not customary law today. If treaties restate custom, and are subject to succession principles as to a particular country, that State is doubly bound.[88]

The conclusion is inescapable that the 1958 Conventions' other rules clauses, conventions carried forward into the 1982 LOS Convention, mean that these treaties' terms are subject to the LOAC, of which the law of naval warfare is a part. Since the High Seas Convention is generally regarded as restating custom,[89] its other rules clause is part of the customary norms governing oceans law during armed conflict.

*c. The LOS Convention and Provisions Governing the Maritime Environment.* Although the LOS Convention is prolix on the subject of the environment, the changes it proposes are neither great nor radical; it takes a holistic approach.[90] The core of marine environmental standards are in Part XII, which establishes for the first time a comprehensive legal framework for protecting and preserving the marine environment under the law of the sea.[91] Part II.B.3.c.i summarizes these rules. Other parts of the Convention state environmental principles for ocean areas;[92] Part II.B.3.c.ii discusses these. Part II.B.3.c.iii explores the relationship among two regional treaties, the Kuwait Regional Convention and Protocol and the Red Sea Convention and Protocol, the 1982 Convention and the LOAC. Part II.B.3.c.iv gives general observations, and Part II.B.3.c.v discusses the Tanker War and the environment.

**i. Part XII of the Convention.** Part XII begins by declaring that "States have the obligation to protect and preserve the marine environment."[93] The Convention does not define "marine environment," but the drafters generally understood that the atmosphere is included where relevant.[94] It also includes living resources, marine ecosystems and sea water quality.[95] The Convention defines "pollution of the marine environment;" it

> ... means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.[96]

The Convention also declares that States' "sovereign right to exploit their natural resources" pursuant to national environmental policies in, *e.g.*, the EEZ, is subject to a "duty to preserve and protect the marine environment"[97] against significant[98] damage.

States must act individually and jointly to prevent, reduce and control pollution of the marine environment from any source, using the best practicable means at their disposal, in accordance with their capabilities. They must harmonize national policies, *i.e.*, national laws, with this requirement.[99] In doing so, they must ensure that they do not damage other States or their environment by pollution, or that pollution does not spread beyond their areas of sovereignty or control,[100] *e.g.*, the EEZ or the territorial sea.[101] Required measures include those designed to minimize to the greatest possible extent releasing toxic, harmful or noxious substances, especially those that are persistent, from land-based sources, from or through the atmosphere or by dumping;[102] pollution from vessels, including accident prevention measures, dealing with emergencies, safety at sea, preventing discharges, and regulating the design, construction, equipping, operating and crewing of vessels; pollution from installations for exploring or exploiting natural resources of the seabed and subsoil; and pollution from other installations operating in the marine environment.[103] In so acting States must refrain from unjustifiable interference with other States' exercising their Convention rights and duties.[104] Measures taken must include those necessary to protect and preserve rare or fragile ecosystems and habitats of depleted, threatened or endangered species and other marine life.[105] In combatting pollution, States must not act to transfer damage or hazards from one area to another, or to transfer one type of pollution into another.[106] Technologies that alter or harm the environment, or introduce new or alien species that would significantly harm the environment must be avoided.[107] There are two distinct duties: avoiding use of harmful technologies, and "maintain[ing] the natural state of the marine environment," the latter an innovation in international law.[108]

The Convention requires environmental cooperation on global and regional bases.[109] Other provisions require cooperation in scientific research and in establishing scientific criteria for rules for pollution prevention, reduction and control.[110] States also must monitor, publish and assess the marine environment and provide scientific and technical assistance, with preference for developing States.[111] A State must notify other countries and competent international organizations (*e.g.*, IMO) of actual or imminent pollution damage to the environment.[112] Notification is a rule of customary international law.[113] Notice "also envisages that a notified State may wish to take preventive action to avert damage to itself . . . ."[114] States must jointly develop and promote contingency plans to combat pollution, cooperating with international organizations within limits of their capabilities.[115]

The Convention establishes standards for international rules and national laws to combat pollution.[116] States must adopt measures at least as effective as international rules and standards to prevent, reduce and control pollution from land-based sources; seabed activities, artificial islands and installations subject to "national jurisdiction;" the Area; and vessels of their registry or flag.[117] The phrase "national jurisdiction" includes internal waters, the territorial sea, the EEZ, the continental shelf and archipelagic waters.[118]

Similar principles govern ocean dumping.[119] Dumping in another State's territorial sea, EEZ or continental shelf waters requires the coastal State's express prior approval; it may regulate such dumping after consulting with other affected countries.[120]

Although some drafters thought that emergency fuel discharge from aircraft might not be an exception to prohibitions on ocean dumping without prior express approval, eventually the drafters concluded that general international law allows such on *force majeure* or distress theories as an exception to Convention compliance.[121] What is true for aircraft is also true for ships; distress and *force majeure* theories are recognized for innocent passage and straits transit passage regimes. Distress and *force majeure* can be valid claims during armed conflict situations, with different rules applying in relationships among States not party to a conflict, relationships between belligerents and States not party to a conflict, and relationships between belligerents.[122]

States must harmonize national policies at regional levels[123] and must work at the global level to establish rules, standards and recommended practices and procedures.[124]

**ii. Controlling Pollution and Protecting the Ocean Environment in Specific Areas.** The 1982 Convention, Part XII, recites standards related to specific ocean areas, *e.g.*, the territorial sea. In some instances, *e.g.*, the contiguous zone, there is no reference in Part XII.

The Convention has special rules for controlling pollution from vessels in the territorial sea. States may publish rules for foreign-flag ships' entry into port or internal waters after due notice. These can be cooperative arrangements. States may adopt rules for foreign-flag vessels in their territorial sea, including ships in innocent passage. No rule can hamper innocent passage.[125]

These provisions are consistent with the Convention's navigational articles, which declare that passage is considered prejudicial to the coastal State's peace, good order or security if a foreign-flag ship "engages in . . . any act of wilful and serious pollution contrary to [the] Convention[,]" and which allows the coastal State to adopt regulations, "in conformity with . . . this Convention and other rules of international law, relating to innocent passage . . . in respect of . . . conservation of the living resources of the sea [and] . . . preservation of the environment of the coastal

State and the prevention, reduction and control of pollution thereof..." with due notice of the rules. Foreign ships must comply with these rules.[126] Tankers, nuclear-powered ships and vessels carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to sea lanes established by the littoral State. These ships must also observe special precautions stated in international agreements.[127] As in other circumstances, coastal States cannot hamper innocent passage except pursuant to the Convention; in applying regulations adopted in accordance with it, the practical effect cannot be to deny or impair innocent passage. There can be no discrimination in form or fact against any State's ships or against vessels carrying cargo to, from or for any State.[128] However, coastal States may act to prevent breach of conditions attached to port calls or passage to internal waters, and some countries already have anti-pollution regulations.[129] Moreover, States may temporarily suspend innocent passage in specific areas of their territorial sea if essential for protecting their security after duly published notice of a suspension.[130] While this might arguably allow suspension for "environmental security" reasons, such is not the case. Repetition from the Territorial Sea Convention[131] and the LOS Convention drafting history[132] point to a different view. The right of temporary suspension balances between a coastal State's right to protect its territorial integrity through legitimate self-defense measures[133] and rights of navigation, *etc.*, under the territorial sea innocent passage regime. How protecting a coastal State's environment fits into the analysis is a different issue.

The same territorial sea rules for criminal and civil jurisdiction, and for immunity of warships and other government ships operated for non-commercial purposes, also apply to environment-related claims. For example, warships not complying with valid coastal State environmental regulations can only be asked to leave the territorial sea immediately. Flag States are responsible under international law for loss or damage caused by their warships or other noncommercial vessels.[134] The Convention innocent passage rules, insofar as they concern environmental protection, are also subject to "other rules of international law," *i.e.*, the law of naval warfare.[135]

Straits passage or innocent passage through straits is nonsuspendable.[136] Although coastal States may take appropriate enforcement measures against vessels "causing or threatening major damage" to the straits environment because they have violated navigational safety, maritime traffic or environmental laws while in transit passage (the regime for most straits), this does not apply to warships or other vessels entitled to sovereign immunity.[137] "Heavily used sea lines of approach, such as the Straits of Hormuz or the Malacca Straits are likely candidates for onerous environmental restrictions."[138] However onerous these restrictions may be, they are subject to LOS Convention rules on nonsuspendable transit or

innocent passage, sovereign immunity and other rules of international law, *i.e.*, the LOAC,[139] and the inherent right of self-defense.[140]

Convention Article 33, permitting a contiguous zone, does not mention environmental protection. It allows declaring a contiguous zone, which, if no EEZ has been claimed, is a high seas area contiguous to a territorial sea but no wider than 24 miles from territorial sea baselines. A coastal State may exercise control in the zone to prevent infringement of its customs, fiscal, immigration or sanitary (*i.e.*, health or quarantine) laws and to punish violations committed within the territorial sea.[141] Environmental protection claims might be made in connection with health law enforcement, but this has not been a traditional view of the zone's purpose.[142]

Article 33 is tied to Article 303, which sets standards for archeological and historical objects found at sea.[143] "Found at sea" seems to have a more comprehensive scope than "found in the marine environment." Another problem with Article 303 is that there is no agreed definition of the terms "archaeological" and "historical."[144] Article 303 says that its terms are also "without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature,"[145] a variant on the other rules clauses that make the Convention subject to the LOAC in appropriate situations.[146] In internal waters, the territorial sea and archipelagic waters, coastal State law governs for artifacts found there; beyond, out to the Area,[147] Article 303 controls but does not accord sovereign rights.[148] Objects found in the Area must be preserved or disposed of for humankind's benefit, with "particular regard" for a State of origin,[149] if it can be determined. As noted above, the latter principle does not apply to the Persian Gulf, which because of its depth has no Area.[150]

As in the case of the territorial sea, coastal States may adopt special laws for their EEZs;[151] this is consistent with the LOS Convention's navigational articles.[152] Although there is no explicit cross-reference to Convention continental shelf principles in this Part XII provision, a coastal State has the same environmental rights and responsibilities for its continental shelf activities where shelf sovereignty has been declared but there is no EEZ claim.[153] States often declare common EEZ and continental shelf boundaries; there can be a continental shelf without an EEZ, but there can be no EEZ without a corresponding continental shelf.[154] However, for the EEZ and the continental shelf, coastal States must have due regard for other oceans users' high seas rights, including navigation and overflight.[155] Both are subject to sovereign immunity exceptions for, *e.g.*, warships and the other rules principle in connection with environmental regulation.[156]

Provisions allowing coastal State regulation of pollution from vessels in the territorial sea, the EEZ and above the continental shelf are considered "innovati[ve] for the general law of the sea," which usually has looked to flag or registry States to control pollution from ships.[157] Whether considered established law or progressive development, these provisions are subject to qualifications. There must be a

balance of due regard for others' high seas rights, *e.g.*, freedoms of navigation or overflight; warships and other noncommercial vessels retain sovereign immunity; and any attempt at environmental regulation of these areas is subject to LOAC principles in appropriate situations through other rules clauses.

The 1982 Convention also provides for enforcing environmental standards. Countries must adopt laws implementing international norms for land-based pollution, pollution from seabed activities, ocean dumping and pollution through or from the atmosphere.[158] A pollution hazard must be significant.[159]

States in whose port a ship suspected of polluting that State's internal or territorial waters or EEZ in violation of international standards may investigate, detain or begin enforcement against that ship. These rights are subject to, *e.g.*, notice to a flag or registry State, nondiscriminatory enforcement and enforcement only through State vessels, *e.g.*, warships or vessels on authorized government service.[160] Enforcing States may not endanger navigational safety, create a hazard to an accused ship, bring it to an unsafe port or anchorage, or expose the marine environment to "unreasonable risk."[161] A detaining State is liable for unlawful enforcement measures, excessive "in the light of available information" at the time.[162] LOS Convention Article 221 also provides:

> 1. Nothing . . . prejudice[s] the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.
>
> 2. . . . "[M]aritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

Measures that may be taken under Art. 221(1) include destruction of the vessel. These provisions, also in other widely-accepted pollution prevention conventions,[163] may be close to acceptance as customary international law, if such is not already so.[164] Such an intervention right would have justified Gulf countries' acting to prevent oil pollution damage from attacks on oil terminal facilities or vessels during the Tanker War,[165] if there was a threat within the LOS Convention definition and leakage resulting from the attacks was a "casualty" within Article 221(2)'s meaning, *i.e.*, an "occurrence on board a vessel or external to it resulting in, or imminent threat of, material damage to a vessel or cargo." The provisions may not have applied to Iran and Iraq in 1980-88 because of the LOS conventions' other rules clauses, applicable at least as customary law,[166] but as between Gulf States not party to the conflict and either belligerent, or as among other neutral States and the belligerents, the LOS applied in this context. Neutrals would have been justified in using LOS intervention standards to deal with vessel spillages and, if "maritime

casualty" is construed to include the platforms, action to deal with situations like Nowruz.

In the context of the Convention's enforcement provisions, here too warships, naval auxiliaries and other vessels or aircraft on government noncommercial service may not be detained. They have sovereign immunity; this is qualified by requiring flag States to ensure, by adopting "appropriate measures" not impairing operations or operational capabilities of such ships or aircraft, that they operate consistently, so far as is reasonable and practicable, with the Convention. This policy repeats other Convention immunity rules except for the "appropriate measures" qualification.[167] It

> ... acknowledges that military vessels and aircraft are unique platforms not always adaptable to conventional environmental technologies and equipment because of weight and space limitations, harsh operating conditions, the requirements of long-term sustainability, or other security considerations. ... [S]ecurity needs may limit compliance with disclosure requirements.[168]

Some regional environmental protection agreements either omit[169] a declaration of the customary immunity rule or do not append LOS Convention limitations and requirements for appropriate measures. The Kuwait and Red Sea Conventions are examples of the latter.[170] To the extent the Convention binds parties in a given context, those treaties must be considered modified to that extent.[171] Since the LOS Convention's navigational articles restate custom, the longstanding customary rule of warship and naval auxiliary immunity[172] is a powerful factor for its application in these contexts as well.

Other LOS Convention divisions providing for environmental protection independently of Part XII include those dealing with vessel accidents on the high seas, high seas fishing, and the Area, also a part of the high seas, and marine scientific research. The Convention's high seas fishing provisions follow in part the 1958 conventions, but Area rules are unique to the 1982 Convention. Because there has been little technology capable of exploiting that part of the ocean, and because the Convention has only recently come into force, these provisions are largely theoretical in nature. Nevertheless, they may have impact in the 21st Century; many restate concepts in other ocean areas the LOS Convention regulates.

The LOS Convention requires more of flag States as to ships under their registry and operating on the high seas. Flag States must ensure "that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning ... prevention, reduction and control of marine pollution . . .."[173] The Convention also requires States to "cause an inquiry to be held ... into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing [*inter alia*] ... serious damage ... to the marine environment. The flag State and the other

State shall co-operate in the conduct of any inquiry . . . into any such marine casualty or incident of navigation."[174]

States bordering semi-enclosed areas, *i.e.*, a gulf or other body surrounded by two or more States and connected to another sea or ocean by a narrow outlet, *e.g.*, the Persian Gulf and the Strait of Hormuz, must coordinate managing, conserving, exploring and exploiting oceanic living resources and coordinate implementing their rights and duties for protecting and preserving the marine environment.[175]

The 1982 LOS Convention recognizes marine scientific research as a high seas right;[176] these operations must comply with relevant regulations adopted in conformity with the Convention, including those protecting and preserving the marine environment.[177]

Although high seas fisherfolk retain the traditional freedom to seek their catch,[178] the LOS Convention seines in that right to a certain extent, as it has been under earlier treaties and practice. It has never been an unfettered right.[179] The LOS Convention subjects high seas fishing rights to treaties limiting the right, and to cooperation in achieving agreements, as well as rules it sets for certain fish stocks and conserving high seas living resources.[180] To the extent these treaties impose environmental controls, the high seas freedom to fish is curtailed. The same is true for conservation measures coastal States or agreements impose.

The LOS Convention declares the Area, the seabed, ocean floor and subsoil beyond national jurisdictional limits,[181] and its resources are declared the common heritage of humankind.[182] There is no Area in the Persian Gulf as stated in the Convention; its waters are relatively shallow.[183] Area environmental issues are therefore nonexistent for Tanker War analysis.[184]

**iii. Regional Treaties, the LOS Convention and the LOAC.** The Kuwait Regional Convention, to which all Gulf countries are party including Iran and Iraq, covers the entire Gulf except bordering State internal waters. Similarly, the Red Sea Convention's geographic sweep includes the Red Sea and the Gulf of Aden, again excepting bordering State internal waters.[185] Both define "marine pollution" in nearly identical terms:

> introduction by man, directly or indirectly, of substances or energy into the marine environment resulting or likely to result in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of [the] quality of use for use of [the] sea and reduction of amenities[.][186]

Parties pledge cooperation to prevent, abate and combat pollution of the marine environment in the Gulf or the Red Sea, whether caused by ships, dumping from ships or aircraft, from exploring and exploiting the territorial sea and its subsoil and the continental shelf, or land reclamation activities.[187] The Convention

Protocols amplify this pledge.[188] The latter broadly define "marine emergency" to trigger application; it means

> . . . any casualty, incident, occurrence or situation, however caused, resulting in substantial pollution or imminent threat of substantial pollution to the marine environment by oil or other harmful substances and includes, *inter alia,* collisions, strandings and other incidents involving ships, including tankers, blow-outs arising from petroleum drilling and production activities, and the presence of oil or other harmful substances arising from the failure of industrial installations[.][189]

These Conventions and Protocols do not provide for anticipatory self-defense against imminent pollution threats, as the LOS Convention does.[190] The Protocols appear to contemplate such by allowing "every appropriate measure to combat pollution and/or to rectify the situation," provided that other countries are notified[191] of emergency responses, defined as "any activity intended to prevent, mitigate or eliminate pollution by oil or other harmful substances or threat of such pollution resulting from marine emergencies."[192] This broad authority must be tempered by the limitations of proportionality, *etc.*, in the LOS Convention.[193] This Convention language further justifies, subject to notice and proportionality principles, anticipatory reaction to imminent threat. And if this be so, might this support anticipatory self-defense in the Charter context?[194]

These regional treaties applied during the Tanker War. The Red Sea Convention and Protocol did not apply to the 1980-88 war, except to support common principles in the Kuwait Convention and Protocol, which did pertain, geographically,[195] to the Persian Gulf. It had direct application to the 1984 Red Sea mining incident, in which Libya laid mines.[196] The Conventions and LOS Convention principles, which are common with the Intervention Convention and Protocol, were justification for actions coastal States, perhaps in cooperation with other neutrals, took to clear mines from the Gulf and the Red Sea if they threatened coastal EEZs or States' shores. They supported self-defense actions States took to rid the Gulf of ships that laid mines, *e.g., Iran Ajr.*[197]

There were two belligerents in the Tanker War, Iran and Iraq. The Kuwait Convention and its Protocol may not have applied as between them, either because of the LOS other rules principles,[198] or because of law of treaties principles, *e.g.,* impossibility of performance, fundamental change of circumstances or armed conflict between them, may have been grounds for suspending international agreements. These treaty rules did apply if the treaties were part of customary law, however.[199] Except as these grounds applied as between belligerents and other Gulf States party to the Convention and its Protocol, their pledges to prevent, abate and combat pollution[200] of the marine environment remained in force. Undoubtedly it was in this context that Iran claimed that the 1983 Nowruz attack violated the Convention.[201] To the extent that the agreements' terms restated customary norms,

these too remained in force. Iraq's claim that the Convention and its Protocol did not apply during the war[202] may have been correct as to Iran, but it was not the case as to other States party.

Given drafting of the LOS Convention with its clauses paramount and terms virtually identical with the Kuwait Convention and Protocol, together with terms of other treaties around the world virtually identical with the Convention and the Protocol by 1983, there was at least a developing customary norm, and perhaps a customary rule, alongside treaty principles stated in the Kuwait Convention and its Protocol, by 1983.[203] If this is so, the belligerents were obliged not to act so as to pollute, or act to cause an imminent threat, to other Gulf States' interests, and to interests of countries using Gulf waters for freedom of navigation, through actions such as attacks on the Nowruz and other terminal facilities when the result at the time of decision was likely to be a substantial spill.[204] Under the Kuwait Convention Iran was arguably within its rights to ask for an opportunity to stop the outflow.[205] For the same reasons, there may have been Convention and Protocol violations with respect to spillage resulting from Iraqi and Iranian attacks on shipping during the war, if such could have been foreseen to have resulted in substantial risk to other States' environmental interests, and such risks occurred. The record is less than clear on this point.[206]

**iv. The LOS Convention and the Law of the Maritime Environment.** This summary of Convention terms for protecting the marine environment demonstrates that Part XII and those in other parts of the treaty are indeed prolix and comprehensive; there is little that is new law or unanticipated. Indeed, provisions related to the environment often repeat principles seen in other contexts: the due regard concept where there are two or more oceans uses at stake; confirming sovereign immunity of warships, naval auxiliaries and other government vessels on non-commercial service and State aircraft; confirming application of the LOAC in the context of environmental protection through the other rules clauses, which do not include customary law of the environment as part of "other rules;"[207] the same "peaceful purposes" language for the Area as on the high seas generally.[208] Approval of the use of anticipatory self-defense against an environmental threat, previously stated in earlier treaties, is some precedent for applying anticipatory self-defense in the context of the inherent right to self-defense mentioned in the Charter.[209]

**v. The Tanker War and the Environment.** Other Gulf States might have asserted EEZ or continental shelf claims during the Tanker War if belligerents' attacks on Gulf shipping caused slicks that threatened their interests, or if attacks on oil terminals, including that on Nowruz in 1983, raised the same threat.[210] A similar analysis obtains for the Kuwait Convention and Protocol.[211] Similarly, neutrals

could have raised these claims in connection with other neutrals' self-defense responses, and the belligerents could have raised the issue with the responding neutral as well. No environmental deprivation claims appear to have been raised in connection with self-defense responses; if they had, the law of self-defense and its necessity and proportionality standards, or the law of anticipatory self-defense with its similar qualifying factors,[212] and not LOAC necessity and proportionality principles,[213] would have been at issue. Any issues relating to neutrals' conduct toward other neutrals, not covered by the law of self-defense or the LOAC, would have been resolved under the LOS.

As more States ratify the LOS Convention, or it is accepted as custom, these claims may be raised in the future, particularly if the Convention is buttressed by similar terms in regional and bilateral agreements, although LOS Convention norms trump any to the contrary in these treaties.[214] To the extent LOS Convention rules are customary norms, however, the customary rules will apply without the encumbrance of treaty interpretation principles. Custom, however, has its own set of derogation principles, *e.g.*, the persistent objector rule.[215]

This review of a complex body of law raises the two issues of the relationship between the law of the maritime environment and the general LOS, perhaps under a "due regard" analysis, and the relationship between the law of the environment and the LOAC, perhaps also on a "due regard" basis. (The Convention carries forward and solves a third side of the problem by incorporating the other rules clauses of the 1958 LOS conventions.[216]) The response to the two remaining issues is complicated by the Convention's publishing some environmental norms in Part XII, the general standards, and sprinkling others throughout the treaty.[217] How do these bodies of law, the law of the maritime environment, the LOS and the LOAC, interrelate? The LOS Convention gives no clear answer.

*d. General Conclusions on the Law of the Sea, the Law of the Marine Environment, and the Law of Naval Warfare.* If the LOS Convention is a "constitution" for the LOS where the LOAC is not involved, its provisions for protecting the marine environment could be said to be a seagoing "bill of rights" for the environment. Treaties varying from Convention environmental protection provisions are subject to its terms for States party to it.[218] Custom may compete with the Convention in the future, and *jus cogens* and UN Charter norms may supersede part of it as well.[219]

Customary norms, first codified in the 1958 LOS conventions, confirming sovereign immunity for warships, naval auxiliaries and other vessels on government non-commercial service and State aircraft, are affirmed in the LOS Convention and have been repeated in regional agreements. Similarly, recognition of the LOAC and its component, the law of naval warfare, as applicable in certain situations, is confirmed in the Convention's navigational articles and its

environmental provisions. The due regard principle for competing oceans uses, particularly on the high seas, has been carried forward into the LOS Convention.

What is new is a complex, prolix protection for the maritime environment. The fundamental issue has become the relationship of this relatively new body of law with the general law of the sea and the law of armed conflict.

*3. Environmental Standards During Armed Conflict at Sea*

Although the 1990-91 Gulf War raised media attention and advocacy for protecting the oceans environment, the LOAC has dealt with aspects of the problem for years. Treaties first stated these norms, and they have become customary law, if they were not already thus, in many instances. Decolonization, countries' breakup during the Charter era, and the resultant effect of the law of treaty succession,[220] may bind many new States. Analysis begins with the 1907 Hague Conventions and runs through the 1949 Geneva Conventions, the 1977 ENMOD Convention and Protocol I to the Geneva Conventions, to more recent treaties. Lately the UN Security Council, with its authority to make binding decisions, has been active.[221] Recent compilations of the LOAC may be influential in the future.

*a. The Law of Naval Warfare as Part of the LOAC; Protection of the Environment.* Earlier treaties (*e.g.*, the 1899 Hague Conventions) dealt with environment-related issues; the 1907 Hague and other conventions have superseded them. This sub-Part examines the 1907 Conventions, later treaties and customary norms surrounding them, in the Tanker War context.

**i. The Hague Conventions of 1907 and the Oxford Naval Manual.** Two among the 1907 Hague Conventions deal with environmental problems in the maritime context; others arguably have rules that could raise these issues in particular situations.

*(I) Hague VIII and Mine Warfare.* Hague Convention VIII (1907) on automatic contact mines reflects customary law[222] and could affect environmental quality, in that mines improperly laid under the treaty might have implications for the oceans environment. Mines cannot discriminate between ships and the environment when they explode, although "smart" mines can differentiate among types and sequences of vessels.[223] Countries laying mines can try to determine the effect on the environment, however.[224] If a State publishes where it has placed mines as required by international law,[225] other States are on notice of their location, *etc.*, and may therefore be obliged to undertake protecting the environment by rerouting, *etc.*

Iran, Iraq and some States involved in the Tanker War were not parties to Hague VIII. Its terms applied as custom[226] and under principles of the law of treaty

succession for some States.[227] Iran and Iraq used moored mines that broke from their moorings, drifted down the Persian Gulf, and damaged neutral shipping when they detonated during the 1980-88 war, and Iraq deployed them and bottom mines, with the same result in 1990. In some cases Iraq may have deliberately set some mines adrift to damage Coalition ships or to disrupt naval operations. Some mines laid during the Tanker War also may have been set adrift.[228] Drifting mines, unless deactivated within an hour of loss of control over them, and moored mines that do not deactivate when they become unmoored, violate the Convention and customary law. If Iran and Iraq laid automatic mines off enemy coasts with a sole object of intercepting commercial shipping, or extensively mined high seas areas and thereby interrupted freedom of navigation, there were Convention and customary law violations.[229]

Although Iran and Iraq deployed many mines during the war, there were no accusations of environmental damage attributable to them, even though there must have been spillage from mined vessels; there is no record of environmental damage claims from this source. The same is true for the 1984 Libyan mining of the Red Sea. This is not to say that environmental damage did not occur; no reports seem to have surfaced. However, as Levie has perceptively observed,[230] there is always the possibility of damage, maybe significant damage, given modern tankers' size and their huge cargoes, or the size of ships and their large bunker capacity.

*(II) Hague IX and Bombardment.* Although Hague IX, stating rules for naval bombardment of undefended shoreside ports and facilities,[231] does not recite environmental protection principles as such, if Convention rules cover sensitive areas, the treaty will contribute indirectly to preserving the environment.[232] Among other things, Hague IX says:

> ... In bombardments ... necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, on the understanding that they are not used at the same time for military purposes.[233]

The naval commander must "do his utmost" to warn local authorities of the area before beginning bombardment if the military situation permits. In no case may a town or place be pillaged, even if taken by storm.[234] Thus if shore parties or marines follow up on a naval bombardment, they are subject to the same rules on pillage as forces approaching from the land.[235] The 1946 Nuremberg Judgment held Hague IV, dealing with pillage during land warfare, had become customary norms.[236] Where Hague IX's provisions parallel Hague IV's, they can be considered customary law also on this account.[237] Most importantly, Hague IX articulates general principles of military objective, necessity and proportionality,[238]

which when observed should take into account the environment in which bombardment occurs.

Iran, Iraq and some neutrals in the Tanker War were not Hague IX parties;[239] the treaty bound all in both wars as custom[240] or perhaps through treaty succession principles.[241] Iran and Iraq did not conduct shore bombardments from naval vessels during the Tanker War. However, Iraq struck Iranian coastal oil facilities from the air, notably Nowruz, and Iran bombed neutrals' coastal facilities. Apart from attacks on Nowruz, there is little evidence of environmental damage. However, given the Nowruz spill's magnitude, Iraq did not take into account proportionality and necessity that would have afforded protection to the environment. Iranian attacks on neutral facilities violated those States' territorial integrity; Iranian observance of Charter norms would have protected the environment.[242]

*(III) Exempted Vessels and Cargoes.* The Paris Declaration (1856), Hague XI and rules stated in the 1909 London Declaration also offer the potential for incidental environmental protection. If an environmentally valuable object sent in postal correspondence as Hague XI provides [243] is within contraband exemptions stated in the 1909 London Declaration or other agreements, *e.g.*, the Paris Declaration or practice governing contraband,[244] or is in a neutral ship's hold in a neutral warship convoy as provided in the London Declaration,[245] they would have been protected. Coastal fishing boats and their catch, and coastal traders, are exempt from capture if pursuing those occupations and not contributing to an enemy war effort under Hague XI;[246] there is no protection for offshore areas where they fish.[247] If environmental study vessels could be characterized as ships on scientific or philanthropic missions under Hague XI, they too would be exempt from capture unless collecting data of military application. (The *San Remo Manual* proposes that protection be extended to environmental cleanup vessels when engaged in pollution control.)[248] The *Manual* and current military manuals list other ships, *e.g.*, hospital ships, exempt from capture or possible destruction as long as they do not contribute to the enemy war effort.[249]

Iran, Iraq and some other countries involved in the Tanker War were not parties to the Paris Declaration or Hague XI; they were bound, insofar as these treaties state customary norms, by custom developed independently of treaties, and perhaps by the law of treaty succession.[250] Claims arising during the Tanker War concerned Iraq's declaration of contraband; mining of neutral flag vessels while under neutral flag warship convoy; destruction of *Iran Ajr*, an Iranian ship laying mines on the high seas, a vessel that might be characterized as a coastal trader but which was not engaged in its usual occupation; and occasional mistaken attacks on fishing vessels. Although there was some oil and perhaps other pollution from ships damaged during the Tanker War, no environmental deprivation claims have been reported.[251] However, to the extent these rules, whether as treaty or customary

norms, would have been observed, observance would have benefited the maritime environment through minimization of oil spillage from attacked ships or loss of environmentally valuable objects.

*(IV) Hague IV and Other Protections for the Environment.* Besides rules common with the law of naval warfare on bombardment and pillage,[252] the law of land warfare in Hague IV offers protections for an enemy State's occupied territory; these have an environmental component today. The right of belligerents to adopt means of land warfare is not unlimited. Private property except for transportation systems cannot be destroyed or confiscated, pillage is forbidden, and the occupying State is regarded as only administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile State, if "situated in the occupied country." An occupier must "safeguard the capital of these properties, and administer them [under] the rules of usufruct." Properties of municipalities; religious, charitable and educational institutions; and institutions of the arts and science, even if State property, must be treated as private property. "Seizure of, and destruction [of], or intentional damage done to[,] such institutions, to historical monuments, works of art or science, is prohibited[.]"[253] Some Hague IV provisions, *e.g.,* those exempting monuments, are directly related to environmental protection; attacks on a country's cultural heritage are forbidden, unless they are used for military purposes. Others, such as the rules on private property or usufruct, may give incidental protection to the environment if these properties would be considered environmentally sensitive.

There were no Hague IV issues on these points, insofar as maritime warfare is concerned, during the Tanker War, although Hague IV's provisions on protecting cultural, *etc.*, monuments would have supported the sea warfare rules on the same subject if that issue had arisen during 1980-88.[254]

*(V) Martens Clauses; Other Possible Rules for Environmental Protection.* The conventions' Martens clauses, *i.e.,* for cases not covered by the treaties, parties consider themselves bound by international law principles resulting from usages established among civilized nations, from the laws of humanity and from the dictates of the public conscience, can operate to carry forward customary norms related to environmental protection during war. A commentator has suggested that humanity and the public conscience could include environmental concerns.[255] There is no suggestion of claims under these clauses related to environmental protection during the Tanker War, however.

*(VI) The Oxford Naval Manual (1913).* Besides restating rules, mostly those in Hague IX, that can afford environmental protection if they are observed, the *Oxford Naval Manual* would apply this rule to naval warfare:

> Occupation of maritime territory, that is of gulfs, bays, roadsteads, ports and territorial waters, exists only when there is at the same time an occupation of a continental territory, by either a naval or a military force. The occupation, in that case, is subject to the laws and usages of war on land.[256]

Verri says that this applies Hague land warfare rules to a hostile coastal waters area only if there is simultaneous occupation of adjacent land territory; he cites no authority on whether this is a customary norm.[257] If a customary norm, the result is that protections for occupied land territory, *e.g.*, apply to coastal waters such as the territorial sea.[258]

The *Manual* did not restate a customary rule for that era. The 1899 and 1907 negotiators were careful to separate principles applicable to land and sea warfare into different treaties in most cases.[259] Land warfare rules for occupied territories carefully specify naval warfare rules where they intersect with the law of land warfare.[260] Moreover, the status of the territorial sea during peacetime as part of a coastal State's sovereign territory was not certain when the Hague Conventions were negotiated, being finally resolved, according to some, only by the 1958 LOS Conventions.[261] If such was the situation during peacetime, such a requirement is also illogical for armed conflict. These treaties went into force decades after the Hague Conventions, and thus Hague law could not apply *per se* to these waters, unless a contrary custom could be argued, and that may be the case today for this *Manual* provision, at least in terms of general protections, *e.g.*, for cultural objects.

Although Iran and Iraq occupied their opponents' land territory and perforce territorial sea areas adjacent to it during 1980-88, there is no record of environmental deprivation claims related to this *Manual* provision.

*(VII) Conclusions.* The record of claims of environmental deprivations during the Tanker War is scanty, the Nowruz attack being the only exception. However, Hague norms, and those recited in customary law flowing from other sources, *e.g.*, the London Declaration and the *Oxford Naval Manual*, show that observance of these rules, and general principles of the military objective, necessity and proportionality, would have enhanced protection of the maritime environment. Invocation of these principles in future wars should afford protection to the environment.

**ii. Between the Wars.** After World War I and before World War II's outbreak, reflecting the Great War experience, commentators prepared draft rules, and treaties were negotiated, that have direct or tangential impact on protecting the maritime environment during war.

*(I) Rules for Aerial Warfare.* Rules for air warfare, reflecting Hague principles (now also customary law) for bombardment from land and sea, were published in 1923.[262] Whether these rules articulate customary law today is debatable.[263] States

have, however, declared that some of the Rules will be followed in practice.[264] Thus, the Rules are analogous to the London Declaration;[265] some restate custom, particularly if they parallel Hague provisions, and others may not. Perhaps it is time to give the Rules a decent burial and rely on general LOAC principles, *i.e.*, military objective, necessity and proportionality, as Robertson recommended for Hague IX.[266]

Neither Iran nor Iraq had the capability to launch air attacks from the sea; they attacked land targets after overflying the Gulf, including Iran's attack on UAE installations. There is no record of environmental damage from these attacks, except for the Nowruz facility. Since the applicable Air Rules restate general principles of necessity and proportionality incident to any modality of attack, the same result in terms of legal analysis, whether from a general LOAC perspective or environmental law, applies here. Iran's attack on facilities in neutral territory raised the issue of a UN Charter, Article 2(4) violation.[267]

*(II) The Geneva Gas Protocol; the Roerich Pact.* Two treaties of the interwar era have implications for the maritime environment.

The 1925 Geneva Gas Protocol,[268] while banning gas and bacteriological warfare affecting humans, has environmental implications. Anthrax, for example, kills other mammals besides humans. The same is true for some gases; gases lethal to the environment can afflict humans.[269] The Protocol has no territorial limitations.[270] While Iraq used gas during the land campaigns of the 1980-88 war and was condemned for it by the Security Council,[271] there was no apparent use of gas or bacteriological weapons during the sea war. Wanton use of gas in the land campaigns, and a possibility of use of these outlawed indiscriminate weapons in new forms, suggests the Protocol may be invoked in naval warfare in the future. Any use of toxic gas may degrade the maritime environment as well.

The Western Hemisphere Roerich Pact, which includes the United States among its parties, declares protections for historic monuments, museums and scientific, artistic, educational and cultural institutions and their personnel. The Pact's "neutrality" for these facilities must be recognized "in the entire expanse of the territories of parties."[272] The Pact might be implicated in inshore operations involving naval bombardment or air operations if such sites are close to the coast. However, because of the territorial sea's uncertain status in 1935, it is not clear whether the Pact covers objects in it.[273] Unless contrary custom obtains, its principles could not apply to archipelagic waters, the continental shelf or EEZs, whose delimitations came with the 1958 and 1982 LOS Conventions, concluded years after the Pact.[274] The Pact is effective in peace and war,[275] and therefore applies in military operations other than war.

As a regional agreement among Western Hemisphere countries, the Pact could not apply of its own force to the 1980-88 war except to reinforce treaty and

customary norms in conventions of worldwide application, *e.g.*, Hague IX or the later Cultural Property Convention.[276] As analyzed under Hague IX bombardment principles, there do not appear to have been any issues related to destruction of cultural objects or sites during the Tanker War.[277]

**iii. The 1949 Geneva Conventions; Cultural Property Convention; Other Cultural Property Conventions.** After World War II treaty negotiators sought to proscribe excesses of that conflict through four new humanitarian law treaties, the Geneva Conventions of 1949; the nearly contemporaneous Genocide Convention, which did not present any issues during the Tanker War;[278] and the 1954 Cultural Property Convention. The 1972 World Cultural and Natural Heritage Convention[279] may also raise issues related to environmental protection during war.

*(I) The Geneva Conventions of 1949.* The 1949 Geneva Conventions, although primarily directed toward humanitarian law, have provisions protecting the environment directly or indirectly. The Conventions were in force for all States during the Tanker War.[280]

The Fourth Convention, supplementing the 1899 Hague II and 1907 Hague IV Conventions,[281] restates other customary rules and declares new standards in some cases, enlarging protections for civilians and property in occupied territory or an occupied country. "Territory" or "country" is not defined.[282] To the extent that it would include the territorial sea, which by 1949 was moving toward recognition under the LOS as subject to coastal State sovereignty,[283] there is a strong possibility the Convention applies to naval warfare in the territorial sea. On the other hand, since continental shelf sovereignty rights were in a state of flux in 1949 and not resolved until the 1958 LOS Conventions, and EEZ law was not established until the 1982 LOS Convention and thereafter,[284] the Fourth Convention could not apply to those sea areas except through custom; there is no record of such a claim. States cannot derogate from humanitarian treaties during armed conflict, but questions of territorial application of such law may arise.[285]

To the extent that Fourth Convention hospital and safety zones and localities for protecting the wounded, sick, aged, children, expectant mothers and mothers of young children or other noncombatants,[286] coincide with areas suitable for environmental protection, the Fourth Convention will contribute to saving the quality of the environment during armed conflict. While protected areas might be inland, some could be located in coastal areas subject to naval bombardment, many more might be within the range for air attack, and still others might be aboard vessels in territorial or inland waters. Similarly, a Convention-protected hospital[287] part of, *e.g.*, a park, might support protecting a surrounding area by its presence. A similar principle protects sick and wounded armed forces in hospitals or hospital ships in territorial or inland waters in previously-agreed neutralized zones.[288]

These buildings or vessels might be located near areas or objects otherwise deserving environmental protection. When wounded and sick armed forces members are convoyed through environmentally sensitive water areas pursuant to the Second Convention,[289] similar considerations apply. These provisions restate customary law.[290]

The Fourth Convention, Article 53, also prohibits:

> . . . destruction by the Occupying Power of . . . property belonging . . . to private persons, or to the State, or to other public authorities, or to social or cooperative organizations . . . , except where such destruction is rendered absolutely necessary by military operations.

Article 147 declares that extensive destruction and appropriation of property is a grave breach of the Convention.[291] To the extent that such property is within the scope of naval operations and is environmentally sensitive, Articles 53 and 147 would have a collateral effect of protecting the environment. The prohibition is broader than in earlier conventions.[292] Many of those provisions are customary law[293] and therefore were binding on belligerents in the Tanker War as custom as well as by treaty law. There is no evidence regarding application in this context, however. The story was different in the 1990-91 Gulf War.[294]

The Convention also gives limited protection to civil defense (CD) personnel during occupation.[295] Unless performing hostile acts, they are entitled to protection.[296] The corollary to this is that if such personnel are known to operate from certain facilities, and these are environmentally sensitive areas, the environment may thus be protected collaterally. No Tanker War incidents invoked these principles for naval warfare at sea or bombardment from the sea.

The Falklands/Malvinas War Red Cross Box innovation, not grounded in treaty or customary law[297] and First and Fourth Convention rules for hospital and similar zones,[298] suggests belligerents might agree on "Green Boxes" during war, *i.e.*, for environmentally sensitive areas not protected by existing law or areas not readily recognizable through intelligence or other sources. Areas or buildings flying prescribed warning flags or emblems may not be discernible from afar; it would be small comfort to protest destruction later, even though adequate warning, disproportionality, *etc.*, claims might succeed. These agreements should be in writing, definite in area, description and duration and adequately noticed, following Red Cross Box and 1949 Convention standards.[299]

*(II) The Cultural Property Convention.* The Cultural Property Convention (1954) was drafted with war at sea in mind[300] and supplements 1899 Hague II, Hague IV, Hague IX and the Roerich Pact on coverage, substituting its protective symbols for emblems in the earlier treaties. Unlike them, the Convention has no Martens clause.[301] It applies to declared wars or other armed conflicts between two or more

parties, even if a state of war is not recognized by one or more parties. It also applies to partial or total occupation of a party's territory, even if there is no armed resistance. Like the 1949 Geneva Conventions, if a party to a conflict is not a Convention party, it remains in force for Convention parties; if a nonparty accepts Convention terms, the acceptance binds Convention parties.[302]

Cultural property is defined broadly; it includes movable and immovable property, refuges for movables, and buildings or building complexes housing it.[303] Protection of Convention-covered property also includes safeguarding of and respect for it.[304]

Convention parties undertake to prepare for safeguarding cultural property against foreseeable effects of armed conflict by taking appropriate measures.[305] Refuges, "limited [in] number," for movable property and centers containing monuments, "and other immovable cultural property of very great importance," may be designated. However, refuges must be "at an adequate distance" from large industrial centers or "any important military objective constituting a vulnerable point, [*e.g.*,] . . . a port . . . of relative importance . . .." Refuges for movable property can be established anywhere if built to withstand bombing. Cultural property near an important military objective may be put under special protection if the State asking protection undertakes not to use the objective during armed conflict. For ports and other transportation hubs, this would mean diverting traffic from them. Centers containing monuments are deemed used for military purposes if used for moving military personnel or materiel, even if they are in transit. Use for military purposes includes activities directly connected with military operations, stationing personnel, or producing war goods, within the center.[306] There are procedures for designated improvised refuges during war by filing with UNESCO.[307]

The Convention provides for transporting cultural property to third States and from occupied territories. Transported property and the carrying vessel or other platform, *e.g.*, aircraft, is immune from seizure, being adjudicated a prize or capture. The Convention preserves a right of visit and search.[308] Although the Convention is silent on the point, customary law permits diversion instead of visit and search; aircraft, ships and cargo involved in transporting goods that are not cultural property within the Convention's meaning are subject to the law of prize after visit and search or diversion. In appropriate situations these ships or aircraft would also be liable to capture and perhaps destruction.[309] If cultural property is transported on a vessel devoted to scientific or philanthropic missions that does not contribute to an enemy's war effort, that vessel has the same protections as other ships engaged in scientific or philanthropic expeditions.[310]

The Convention also provides for a UNESCO-maintained International Register of Cultural Property Under Special Protection. Although States where property is located usually register it, occupying powers can do so. There is a procedure for parties' objections that an item is not Convention-protected cultural property

or that property does not comply with Convention conditions. Registrations can be cancelled if a State where the property is requests it, or where objection to the property's nature as cultural property or for Convention noncompliance is confirmed.[311] During war parties must appoint cultural property representatives, including ones for occupied territory, who will work with Protecting Powers[312] and a Commissioner-General for cultural property to administer protection.[313]

Convention parties agree to respect cultural property within their territories and in other parties' territory by refraining from using property and its immediate surroundings or its protective appliances protection for purposes likely to expose it to destruction or damage during war.[314] Parties agree to refrain from hostile acts against the property, particularly that registered under the Convention, unless "military necessity imperatively requires" it.[315] Parties agree to prohibit, prevent and stop thefts, pillage or misappropriation of and vandalism against cultural property. Reprisals against cultural property are forbidden.[316] Parties assume these obligations even though another State does not take protective measures before war.[317] States occupying another party's territory must support authorities in occupied territory in safeguarding and preserving cultural property. If these authorities cannot act to preserve it, an occupying power must cooperate closely with them to take "the most necessary measures of preservation."[318]

If cultural property is considered part of the human environment, the Convention applies of its own force; given the broad definition of cultural property, which includes scientific collections and buildings or centers to house them as well as property of great importance to people's cultural heritage, sometimes this may be the case.[319] If the environment is considered not to include cultural property, wanton destruction of the environment also risks violating the Convention.[320] Although most Convention issues involve land warfare, the Convention is a factor in cases of cultural property close to a shoreline and therefore susceptible to naval bombardment or missile or air attack. Provisions requiring location of cultural property away from transportation hubs such as ports could involve naval planners.[321] Rules for transporting movable cultural property, which might include sealift or ocean overflight, also implicate naval warfare planning. Because the Convention predates the 1958 Territorial Sea Convention, which settled the issue of territorial sea sovereignty, there may be an issue as to whether Cultural Property Convention coverage extends to territorial sea areas where it does not declare applicability, for those States that did not claim territorial sea sovereignty then.[322] The same problem may arise for coverage for the continental shelf, but not as to an EEZ; the 1982 LOS Convention resolved those issues well after 1954.[323] As with humanitarian law generally, there can be no derogation from the 1954 Convention because of war.[324]

Iran, Iraq and many countries involved in the Tanker War were parties to the Convention and Protocol.[325] Canada, the United Kingdom, the United States and other States that were not parties observed it in practice.[326]

There is no evidence of claims related to destruction of or moving cultural property during the Tanker War.

If cultural property is considered part of the environment, the Green Box concept suggested earlier might be considered in conflicts where countries, *e.g.*, the United States, are not party to the Convention. Even if cultural property as defined in the Convention is not considered part of the environment, defining a Box to include nearby cultural sites and property could be considered.[327]

*(III) Other Cultural Property Conventions.* UNESCO has sponsored two more cultural property conventions[328] that may have ramifications for environmental protection if a broad definition of the environment, to include creations of humankind and esthetics, is accepted.

In 1970 the Convention on Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property was opened for signature.[329] Iran and Iraq were parties in 1980, and Australia, Egypt, Kuwait, Saudi Arabia, Syria and the United States, among other countries involved in the Tanker War, had ratified it.[330]

Primarily designed to operate during peacetime,[331] the Convention seeks to prevent illicit import, export and transfer of cultural property.[332] The Convention cultural property definition is broader than the Cultural Property Convention, Article 1. Each 1970 Convention State may designate what it considers as cultural property.[333] The Cultural Property Convention requires property to be registered with UNESCO according to its criteria.[334] Article 11 of the 1970 Convention can apply to armed conflict: "[E]xport and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit." The Cultural Property Convention applies only to armed conflict and covers only export of property.[335] Toman claims that because the 1970 Convention defines illicitness in relation to national legislation for transfers, *etc.*, in situations other than armed conflict, "Article 11 defines the illictness arising from occupation without linking it with or referring to national law."[336] This is one possible reading; the other is that Article 11 illicitness is the same as Article 3 illicitness, *i.e.*, that only that which is defined as cultural property under the Convention, Article 1, by States is subject to Article 11. Besides the obvious application during war as to States not party to the conflict, *i.e.*, their responsibility under the Convention to refuse to accept import or transfer of Article 11 property from belligerents, the Convention would also seem to require refusal to accept import or transfer of this property from third States who wrongfully or perhaps unknowingly accept it.

Do obligations to "undertake . . . to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific [cultural patrimony affected by potential pillage]"[337] include use of force? Is use of force contemplated in the Convention obligation "to restrict by . . . vigilance, movement of cultural property illegally removed from any State Party to this Convention . . ."?[338] Recent analysis does not interpret the Convention to include this option in either case, but in an extreme situation, might use of force, *e.g.*, on the high seas to interdict Article 11 or other property shipments, be considered a Convention obligation?

There is no report of removal of Convention-covered property by sea during the Tanker War. The Convention is a treaty obligation of major maritime powers and may be invoked for seaborne shipments in future wars, however.[339]

The 1972 World Cultural and Natural Heritage Convention also has possible ramifications for the LOAC. Although also designed to operate only in peacetime,[340] it has been advocated for application during war as well.[341] The Convention provides that States must protect sites considered as cultural or natural heritage, and designated by them as such, within their territories.[342] "Territory" presumably includes the territorial sea and inland waters.[343] The Convention broadly defines "cultural heritage" and "natural heritage." Objects properly designated by States are considered "world heritage for whose protection it is the duty of the international community . . .to cooperate." Parties undertake "not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage," as defined in the Convention, "on the territory of other . . . Parties . . . ."[344]

While the Cultural Property Convention primarily protects cultural property with perhaps peripheral coverage for the natural environment,[345] the 1972 Convention goal is to protect the natural environment in areas States designate as the Convention provides.[346] Some have urged this for protecting these areas during war.[347] The Convention's World Heritage Committee has adopted an emblem, reminiscent of those required for Cultural Property Convention sites;[348] this may be prophetic for the future.

Perhaps because no designated sites were involved, there appear to have been no claims concerning the Convention in either Gulf conflict.[349] Iran, Iraq and nearly all States involved in the Tanker War were party to it by 1988;[350] by 1998, 148 countries were party,[351] pushing its terms close to recognition as customary norms.[352] Planners must take the Convention into account, particularly if the Convention is deemed to apply to armed conflict situations. If so, war in the territorial sea may implicate it; shore bombardment and air operations will also be affected.

**iv. Environmental Modification (ENMOD) Convention; Protocol I.** The ENMOD Convention and Protocol I to the 1949 Geneva Conventions, signed in 1977, have direct and indirect implications for the LOAC and the maritime environment.

*(I) The 1977 Environmental Modification Convention.* The ENMOD Convention is primarily a disarmament treaty but has environmental implications insofar as it limits risks of intentional environmental damage.[353] The Convention, Article 1, perhaps ratified with Kuwait's no first use reservation,[354] prohibits "military *or* any other hostile use of environmental modification techniques having widespread, long-lasting *or* severe effects as the means of destruction, damage *or* injury to any other State Party."[355] The Conference of the Committee on Disarmament, which prepared the Convention at the UN General Assembly's request, appended an understanding for Article 1:

> ... [F]or the purposes of this Convention, the terms "widespread"; "long-lasting" and "severe" shall be interpreted ... :
>
> (a) "widespread": encompassing an area on the scale of several hundred square kilometres;
>
> (b) "long-lasting": lasting for a period of months, or approximately a season;
>
> (c) "severe": involving serious or significant disruption or harm to human life, natural and economic resources *or* other assets.
>
> ... [T]he interpretation ... above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connexion with any other international agreement.[356]

Article 2 defines "Environmental modification techniques" as "any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere, and atmosphere, or of outer space."[357] The Committee appended an understanding to Article 2:

> ... [These] examples ... [illustrate] ... phenomena that could be caused by the use of environmental modification techniques as defined in article II: earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere.
>
> ... [P]henomena listed above, when produced by military or any other hostile use of environmental modification techniques, would result, or could reasonably be expected to result, in widespread, longlasting or severe destruction, damage or injury. Thus, military or any other hostile use of environmental modification techniques as defined in Article II, so as to cause those phenomena as a means of destruction, damage or injury to another State Party, would be prohibited.

> ... [T]he ... examples set out above [are] not exhaustive. Other phenomena, which could result from the use of environmental modification techniques as defined in Article II could also be appropriately included. The absence of such phenomena from the list does not ... imply that ... Article I would not [apply] ... to those phenomena, provided the criteria ... in that article were met.[358]

The Convention allows using these techniques for peaceful purposes, subject to "generally recognized rules of international law concerning such use."[359] Among these recognized rules is the overriding principle of self-defense.[360]

The Convention has worldwide application but is subject to limitations. First, insofar as there are no first use reservations, the Convention will not be in force as among reserving countries and those States not accepting the reservations.[361] Second, it applies only as a treaty among treaty partners;[362] Iran and Iraq, *e.g.*, were not parties.[363] Therefore the Convention could not apply as treaty law for the Tanker War. However, both countries signed the Convention and were bound to do nothing to defeat its object and purpose.[364] And if it restates customary law, as some argue,[365] its norms applied to the Gulf conflicts.

The most critical issue is the third: Whether ENMOD, whether stated as conventional or customary law, could have applied to the Tanker War.

ENMOD standards are triggered when there is a "deliberate manipulation of natural resources" by a State, according to Article 2;[366] simple negligence is not enough, but gross negligence or wanton conduct might establish a potential for liability. Examples of deliberate manipulation are in the Article 2 understanding; the list is illustrative, not all-inclusive.[367] Article 1 says there must be resulting "widespread, long-lasting *or* severe effects as the means of destruction, damage *or* injury" to a State.[368] ENMOD intends that there be nine alternatives for results because of the double disjunctive in Article 1, ranging from widespread destruction through severe injury. However, the understanding to the Article says that "widespread" means an area of several hundred kilometers; "long-lasting" means an effect lasting months, or about a season of three months; and "severe" means "serious or significant disruption or harm to human life, natural and economic resources *or* other assets."[369] Thus Article 1 as amplified by the understanding means that a result of a deliberate attack must extend over a considerable area, must last at least three months, but may be harmful to humans, the natural environment, or "other assets." Commentators have said the environmental modification, not the technique, must cause the damage.[370] Convention parties have expressed a different view, however, stating that an environmental modification technique is any technique having as its direct object modification of the environment.[371] Moreover, a State must be damaged.[372] However, Article 2's general language, speaking of the Earth and outer space,[373] the latter then and now part of the common heritage of humankind,[374] indicates a broader view, particularly because of the Article 2 understanding, which illustrates with examples of phenomena having no boundaries.[375]

If a narrow view is taken, no ENMOD violation could occur on the high seas beyond a State's sovereignty, unless high seas freedoms, *e.g.*, freedoms of navigation, overflight, fishing, *etc.*,[376] are within the meaning of "economic resources or other assets" in the Article 1 understanding.[377] The postulated view, that no ENMOD claim can arise because of impact beyond a State's sovereignty, is too narrow. There is a financial cost for being deprived of rights to shipping lanes, air traffic rights, or established fishing grounds, including deprivation of fish that must be thrown back, because of pollution. Similarly, navies have a right to conduct exercises on the high seas whether in belligerent status or otherwise;[378] these operations are not without cost. High seas pollution resulting in ending, changing or suspending them can trigger an ENMOD violation claim. Finally, since the understanding also defines "severe" as "involving serious or significant disruption or harm to ... natural ... resources,"[379] regardless of economic factors, high seas pollution where ocean quality is diminished might also support an ENMOD violation claim. In each situation other ENMOD criteria must be satisfied. If ENMOD claims can include high seas deprivations, damage to continental shelf, fishing zone, EEZ waters, contiguous zone and territorial sea rights[380] through pollution otherwise covered by Convention criteria will also support an ENMOD claim.[381] To the extent that an ENMOD claim involves damage to areas over which sovereignty or jurisdiction obtains under the LOS conventions, *e.g.*, the territorial sea, the continental shelf or the EEZ,[382] ENMOD clearly applies without resort to the foregoing analysis. To different extents under the LOS, these areas are considered part of sovereign territory as much as the land.

Although Kuwait and many States involved in the Tanker War were ENMOD parties, Iran and Iraq were not; as signatories they were committed not to defeat the Convention's object and purpose.[383] Therefore, liability for maritime pollution must be grounded primarily in custom parallelling the Convention. If ENMOD restates custom, and evidence points to that;[384] if the Convention covers techniques as well as environmental modifications;[385] and if States were damaged (*e.g.*, threatened with damage because of concern over closing desalination plants, or by not being able to exercise high seas navigation or other rights, *e.g.*, fishing),[386] then the Nowruz oil spill during the Tanker War resulted in widespread or severe damage, *i.e.*, serious or significant disruption or harm, under the Convention. If the slick lasted nine months as a commentator claimed,[387] this ENMOD requirement was also met; nine months is longer than a season.[388] On the other hand, if the pollution did not last three months, failure to meet the "long-lasting" criterion is not critical, since Article 1 speaks in the disjunctive; the Nowruz bombing met ENMOD Article 1 standards.[389] However, Article 2 requires intent to manipulate the environment, or perhaps gross or wanton conduct; mere negligence does not support an ENMOD claim.[390] Iraq probably attacked Nowruz with a goal of depriving Iran of use of the facility for transshipping petroleum to support

its war effort. If there was no deliberate attempt to harm the maritime environment, or if Iraq's action was not gross negligence or wanton conduct, the Article 2 standard was not met. For the Nowruz operation, the verdict must be "not proven" as to Iraq's liability, unless it is argued that Iraq, as a major oil-producing State with similar terminals, knew or should have known that indiscriminate attack on Nowruz had a high probability of producing a major spill. If this amounted to wanton or grossly negligent conduct, there was an ENMOD violation. There is no evidence of the extent, duration or effect of attacks on other terminals, or the intent behind them.[391]

Although there was spillage from Iranian and Iraqi attacks on vessels during the Tanker War,[392] there does not appear to have been widespread, long-lasting or severe damage to any State (except perhaps shipping losses, which were big, but these were largely covered by insurance) [393] or the environment generally; thus the Article 1 threshold was not met.[394] There is no evidence either State deliberately sought to manipulate the environment, the Article 2 trigger.[395] On the other hand, it could be argued that both were wanton or grossly negligent in attacks on shipping, by mines or other methods, and that the Article 2 criterion was thus satisfied. However, since there is no evidence of Article 1 durational requirements' having been met, there was no Convention violation as to belligerents' attacks on shipping. There were LOAC violations as to neutral merchant shipping not carrying war-fighting or war-sustaining cargo or contraband for either belligerent or not taking active part on behalf of a belligerent,[396] however. Belligerents' observing these principles would have contributed to a cleaner Gulf environment.

There is no record of widespread, longlasting or severe effects on the environment, or an attempt to deliberately manipulate natural processes when Libya sowed mines in the Red Sea in 1984.[397] However, Libya's conduct was wanton in nature, and but for the requirement that both criteria be met (Article 1 and Article 2 standards),[398] there would have been an ENMOD violation.

Tanker War neutrals acted pursuant to rights of self-defense, and this Charter-stated norm superseded treaty or customary norms, *e.g.*, those in the Convention,[399] in defending neutral shipping or in responding to belligerents' attacks that employed mines, aircraft or surface combatants. If the Convention could be said to supply customary norms for self-defense, there is no evidence that neutrals' conduct resulted in liability under ENMOD standards. There is no evidence that oil slicks resulting from self-defense responses resulted in "widespread, long-lasting or severe effects," or that neutrals deliberately manipulated natural processes, or acted wantonly or with gross negligence,[400] in responding in self-defense. States cooperating in removing the Red Sea mine threat also satisfied these standards.

*(II) Protocol I to the 1949 Geneva Conventions.* Protocols I and II to the Geneva Conventions were also signed in 1977. Many States involved in the Tanker War were not then Protocol I parties, *e.g.*, France, Iran, Iraq, the United Kingdom and the United States.[401] Protocol I did apply if it restated customary law.[402] Although Protocol I does not generally apply to naval warfare,[403] and Protocol II governs only non-international conflicts, *e.g.*, civil wars,[404] some principles in these agreements apply to war at sea; others restate customary norms. Some Protocol I principles might be adopted by analogy.[405] Other Protocol I provisions, if applicable to a conflict, offer indirect protection to the environment.[406] There are thus several overtones for application of Protocol I principles to sea warfare.[407] If parts of Protocol II use the same language as in Protocol I, they should have similar interpretation.[408]

*(A) Protocol I and Customary Law.* Some Protocol I provisions declare environmental protection standards; others restate principles for all armed conflict, and these may protect the environment when applied.

Article 35(1) declares the customary rule that "the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." This restates a general principle for all modes of warfare.[409] Article 35(1) could be invoked separately from Article 35(3)'s terms and thereby offer protection to the environment through its general principle. For example, if a State uses projectiles causing superfluous injury or unnecessary suffering, Article 35(2)'s principle would be invoked,[410] along with Article 35(1). If use of this weapon would also damage the environment, its protection would be enhanced by observance of Articles 35(1) and 35(2) without reference to Article 35(3) necessarily.

*(1) Protocol I Environmental Protections.* Protocol I, Articles 35(3) and 55, speak directly to the problem of environmental degradation during international armed conflict.

Article 35(3) "prohibit[s] . . . methods or means of warfare . . . intended, or may be expected, to cause widespread, long-term *and* severe damage to the natural environment."[411] Article 35(3)'s preparatory works reveal definitions for these requirements, which must be satisfied conjunctively, and which are therefore different from those in the ENMOD Convention, which has similar but disjunctively-stated requirements in its Article 1(1).[412] To come within Article 35(3), all three factors, widespread, long-term and severe as the Protocol defines them, must be present.

Unlike ENMOD, Protocol I's geographic definition, "widespread," can mean an area less than several hundred kilometers. "Long-term" has been defined as a time of a decade or more, and "severe" means damage prejudicing over a long term (*i.e.*, 10 or more years) continued survival of a civil population or risking causing it major health problems.[413] The Article 35(3) standard, as its preparatory works define it, is relatively high.[414] "The two texts [ENMOD, Article 1(1) and Protocol I,

Article 35(3)] should not be seen as redundant, but rather as distinct and complementary, since one [ENMOD] deals with geophysical warfare, and the other [Protocol I] with environmental warfare."[415] Despite the difference in the two treaties' purpose,[416] a State could wage environmental warfare that is geophysical in nature, for which ENMOD would be invoked, and could mount a geophysical attack degrading the environment and violate Protocol I, thus calling into question applying both treaties for the same situation.

Article 35(3) may or may not restate a customary norm.[417] The contemporaneously-completed ENMOD Convention states the same three criteria, widespread, long-lasting, severe, but disjunctively. Even if ENMOD declares a customary norm,[418] Protocol I's lumping them together conjunctively may not.[419] If ENMOD does not restate custom, as some argue, the debate remains as to whether Protocol I's Article 35(3) does, as some believe.[420] However, in a given context, commonly-accepted definitions of Article 35(3)'s terms may exclude a given armed conflict scenario from its coverage.[421]

Article 55 of Protocol I seems to repeat Article 35(3); however, Article 35(3) refers to methods and means of warfare, while Article 55, dealing mainly with land warfare,[422] is part of the Protocol declarations for protection of civilians:

> 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare... intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
>
> 2. Attacks against the natural environment by way of reprisals are prohibited.[423]

The Netherlands and the United Kingdom filed declarations to Article 55, stating that "military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources... available to them at the time,"[424] these interpretations[425] meaning that hindsight review of decisions covered by Article 55 is not admissible. Presumably the same interpretations of "widespread, long-term and severe" apply to Article 55(1) as to Article 35(3).[426]

Although it has been argued that Article 55(1) applies generally to naval warfare,[427] most commentators,[428] and the Protocol's terms, refute this. Protocol I, Article 49 provides:

> ... 1. "Attacks" mean acts of violence against the adversary, whether in offence or in defence.
>
> 2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse party.

> 3. The provisions of this Section [*i.e.*, Articles 48-67] apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.
>
> 4. The provisions of this section [*i.e.*, Articles 48-67] are additional to the rules concerning humanitarian protection . . . in the Fourth Convention, particularly in Part II [*i.e.*, Arts. 13-26] thereof, and in other international agreements binding . . . Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effect of hostilities.[429]

"Territory" and "national territory" in Article 49(2) are not defined, but this could mean the territorial sea as well as inland waters are covered,[430] particularly because Article 49(3) declares that Articles 48-67 of the Protocol "further" apply to "attacks from the sea or from the air against objectives on land but do not otherwise affect . . . armed conflict at sea or in the air." If attacks from the sea against the land are included within the Protocol, it is consistent that territorial seas bordering land attacked are also covered; they are part of the area subject to States' sovereignty. On the other hand, the EEZ, continental shelf, *etc.*, are not part of a State's sovereign territory.[431] Beyond this, Article 55(1) does not apply to the law of naval warfare.

The question remains as to whether either Article 35(3) or Article 55(1) standards, if applied as customary norms and however erroneously with respect to naval warfare in the case of Article 55(1),[432] were violated during the Tanker War. Both provisions require environmental degradation to be intended and widespread, long-term and severe, in the conjunctive.[433] Both define "widespread" as an effect covering several hundred square kilometers, "long-term" as 10 years or more, and "severe" as damage likely to prejudice, over a long term, a civil population's continued survival or risking causing major health problems.[434]

As to the 1983 Nowruz spill, there is no question that the effect was widespread and would have been severe if the slick had fouled the desalination plants or would have destroyed aquatic life upon which the Arabian peninsula depended. The record on results from other attacks on oil terminals during the Tanker War is not clear as to size, duration, severity or intent.[435] But did Iraq intend to destroy the environment? As noted in the ENMOD analysis, more likely than not this was a military operation against a permissible target, petroleum production facilities, that resulted in the potential for environmental degradation. Resolution of the intent issue is not easy, since most hard evidence is undoubtedly in classified files.[436] Even if intent is proven, the slick did not last a decade or more, the interpretation of "long-term." Thus the Nowruz attack will not support a claim under a customary standard applying Articles 35(3) or 55(1), assuming the latter applies to naval

warfare, nor could other attacks on terminals raise Article 35(3) or Article 55(1) issues.

Leakage from damaged merchantmen or warships Iran or Iraq attacked during the Tanker War would not support Article 35(3) or 55(1) claims. Like the Nowruz spill, undoubtedly these attacks were military operations against shipping, in some cases unlawful under the LOAC, and may not have been intended to degrade the environment. There is also no evidence that pollution was widespread, long-term and severe within the Protocol's meaning.[437]

Neutrals' self-defense responses involve different law.[438] There is no evidence that oil slicks from these responses, on oil platforms, aircraft downed at sea, or surface ships damaged or sunk at sea, was intended to degrade the environment or caused pollution that was widespread, long-term and severe within the Protocol's meaning,[439] if that standard would be assimilated to the law of self-defense, which governed these situations.[440]

*(2) Other Protocol I Provisions Whose Standards May Protect the Maritime Environment.* Many Protocol I provisions, if observed, may protect the maritime environment through application, even though most of the Protocol is concerned with land warfare, a major exception being air and missile attacks from the sea.[441] Often they restate custom common to all warfare.

*(a) Protocol I Provisions Applicable As Customary Law to All Modes of Warfare.* Article 35(2) prohibits weapons, projectiles and material and methods of warfare causing superfluous injury or unnecessary suffering. This principle, derived from the Hague Regulations, is customary law applying to all warfare. Weapons legitimate in one context have a potential for being used unlawfully in another.[442] Although this principle normally applies as between combatants, it could affect environmental quality, just as specific application of it, like specific prohibitions on certain weapons, *e.g.,* gas and bacteriological weapons and warfare, which can affect animals and plants as well as humans,[443] has environmental implications. If a belligerent fires at an area with dum-dum projectiles intending to injure the enemy, this violates Article 35(2) and customary rules.[444] The projectiles would not discriminate among combatants, civilians, animals and plants in the fire zone, and culpability would lie for the attack on humans. The deterrence value of denying use of these weapons will accrue to civilians and the environment.

There is no indication that weapons used in the 1983 Nowruz or other terminal attacks caused superfluous injury or unnecessary suffering.[445] Wildlife, *i.e.,* fish, may have experienced superfluous injury or unnecessary suffering, but Protocol I's purpose is to protect combatants, civilians or victims of international armed conflict[446] and not wildlife. However, since the Nowruz attack threatened water supply from neutrals' desalination plants,[447] a claim of a potential for unnecessary suffering to humans could be made. As to risk of injury to civilians through loss of water supply, however, Article 35(2)'s history is that it applies only to

combatants.[448] Although there was a risk to neutral civilian water supplies, there could be no claim under Article 35(2).

With respect to merchant ship attacks during the Tanker War,[449] Article 35(2) principles applied to attacks on vessels that were legitimate targets (and many were not), if there was deliberate firing at a crew when an attack's purpose was to stop a ship. There were reports, *e.g.*, of deliberate firing into crew areas when a ship could have been stopped by other well-placed shots.[450] However, the record is not clear as to whether these attacks, including mine attacks, caused unnecessary suffering among combatants.

Charter law governed neutrals' self-defense responses,[451] *i.e.*, neutrals' firing on oil platforms, warships and military aircraft. The same is true for belligerents' attacks on neutrals' petroleum facilities,[452] which were subject to Charter principles.[453] If Article 35(2) principles would be incorporated by reference into Charter law analysis, there are no reports of unnecessary suffering in these situations under Article 35(2) standards.

*(b) Other Protocol Terms, Applicable to Land Warfare As Restated Custom, Or As a Restatement of Norms Applicable to All Modes of Warfare.* Other Protocol I provisions besides Articles 35(1) and 35(2) recite customary rules of general application; like other Protocol I provisions, they have force as custom for two reasons: (1) for parties bound by the Protocol as a treaty, they apply only in respect of land warfare and attacks from the sea;[454] and (2) because many countries, including the belligerents, were not Protocol I parties during the Tanker War, and the Protocol could only apply as custom among those States, including the belligerents, involved in the Tanker War.[455] However, to the extent these principles repeat general customary rules for naval warfare, Tanker War participants were obliged to observe them.

*(i) Protocol I, Article 48: Basic Rule of Distinction.* Article 48 states a "basic rule"[456] of distinction:

> . . . [T]o ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall . . . distinguish between the civilian population and combatants and between civilian objects and military objectives and . . . shall direct . . . operations only against military objectives.

This restates custom.[457]

Tanker War attacks on neutral merchantmen, or ships otherwise entitled to protection from attack, offer examples of the customary norm Article 48 restates for naval warfare. If Iran and Iraq had observed this principle as to legitimate objects for attack,[458] protected vessels would not have been hit, and the environment would have been that much cleaner from less oil leakage into the Gulf from stricken or sunken ships. The Nowruz and other Iranian terminals were legitimate targets,[459] but one might ask whether collateral damage,[460] in terms of impaired

high seas navigation rights, fishing, and risk to desalination plants after the Nowruz attack,[461] was not excessive given the advantage expected at the time by the attack. Nor was proportionality observed in Iranian and Iraqi use of drifting mines during the Tanker War.[462]

Article 48 could not apply as a LOAC customary rule for belligerent attacks on neutrals' oil facilities, or for neutrals' self-defense responses to belligerents' attacks on neutral shipping. Charter law governed, and there is no indication that neutrals' self-defense responses were other than proportional under the Charter. On the other hand, belligerents' attacks on oil facilities in neutral territories was a violation of the Charter.[463]

Other Protocol provisions following Article 48 protect specific objects of attack. Depending on how the environment is defined, some or all of these objects might be said to be part of the environment. Even if not considered part of the environment, their proximity to environmentally sensitive objects may result in derivative protection, as has been seen in analysis of Hague and Geneva Conventions law, other treaties, custom and general principles.

*(ii) Protocol I, Articles 51, 52, 57: Protection for Civilians and Civilian Objects.* Articles 51-52 and 57 of Protocol I state protections for the civilian population, individuals, and civilian objects. Articles 51-52 and 57 in part restate custom, some of it longstanding and applicable to all armed conflict, including naval warfare; States and commentators differ on whether other provisions restate custom.

Article 51 declares that the civilian[464] population and individual civilians, unless they take direct part in hostilities, cannot be objects of attack. Acts or threats of violence, primarily intended to terrorize the civilian population, are prohibited. Indiscriminate attacks, *i.e.,* those not directed at a specific military objective, which employ methods or means of combat that cannot be directed at a specific military objective, or which employ methods or means of combat whose effects cannot be limited as the Protocol requires and thus are likely to strike military objectives, civilians or civilian objects without distinction, are prohibited. Indiscriminate attacks include bombardment treating as a single military objective clearly separated, distinct military objectives where civilians or civilian objects are concentrated, *e.g.,* in cities. They include attacks that may be expected to cause incidental loss of life or injury to civilians, damage to civilian objects, or a combination of such, excessive relative to a concrete, definite military advantage anticipated. Reprisal attacks against civilians are prohibited, as are use of civilians as human shields for military operations or military objectives.[465]

Four countries filed declarations to Article 51, stating understandings that military commanders and others responsible for planning, deciding upon or executing attacks necessarily must reach decisions on the basis of their assessment of information from sources available to them at the relevant time, *i.e.,* a judgment

cannot go against planners, *etc.*, based on hindsight.[466] Three defined "military advantage" as advantage gained from an attack as a whole.[467]

Article 52 is a general rule for protecting civilian objects:

> 1. Civilian objects shall not be the object of attack or reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
>
> 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
>
> 3. In case of doubt whether an object . . . normally dedicated to civilian purposes, such as a house . . . , is being used to make an effective contribution to military action, it shall be presumed not to be so used.[468]

As in the case of Article 51, four States interpreted Article 52 to mean that a planner or commander of an attack is responsible only for information from all sources available to the planner or commander at the relevant time;[469] *i.e.*, hindsight information does not apply. Three States interpreted Article 52 to allow attack on a specific area of land as a military objective if, because of its location or other reasons specified in Article 52, its total or partial destruction, capture or neutralization offers definite military advantage, in circumstances ruling at the time.[470]

Article 57 requires constant care to be taken to spare the civilian population, civilians and civilian objects in conducting military operations.[471] Those planning or deciding on attacks must

> (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by . . . this Protocol to attack them;
>
> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
>
> (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete military advantage anticipated[.][472]

Attacks must be canceled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection, or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of these, excessive relative to the concrete and direct military advantage expected. Effective advance warning must be given for attacks that may affect the civilian population, "unless circumstances do not permit." If there is a choice among several military objectives to attain a similar military advantage,

commanders must select the one that will cause the least danger to civilian lives and objects. In naval or air operations parties to a conflict must, consistent with their rights and duties under international law applicable during armed conflict, take reasonable precautions to avoid loss of civilian life and damage to civilian property.[473]

Six States filed reservations or declarations to Article 57. Austria's reservation said, "Article 57(2) of Protocol I shall available a military commander to reach any decision is determinant [sic]," which may have lost meaning in translation but seems to imply that the commander's determination is binding, which seems to be close to the Swiss declaration, that Article 57(2) obligations can only be imposed on commanders at battalion or group levels, and those of higher rank.[474] Four other countries added understandings identical with theirs for Articles 51 and 52, *i.e.*, commanders must decide on the basis of information from sources available to them at time of decision, and that "military advantage" refers to advantage expected from the totality of the attack and not just part of it, in assessing proportionality.[475]

Article 51(2) and 51(5) prohibitions on attacks on civilians, absent exceptions, *e.g.*, those who take up arms, restate customary law.[476] Civilians may not be used as human shields, nor may they be a subject of attacks intended to terrorize them, although otherwise legitimate attacks that happen to terrorize them are permissible. The specific intent to terrorize civilians gives rise to culpability.[477] Article 52 states a general customary norm, except the prohibition on reprisals against civilian objects in Article 52(1), for which there is a division of view.[478] The distinction, necessity and proportionality principles, with the concomitant risk of collateral damage inherent in any attack that are stated in Articles 51 and 57, generally restate customary norms.[479] These do not protect the environment by their terms, but observing protections for civilians and civilian objects can result in protection of environmentally sensitive objects and areas around them.

During the Tanker War neither belligerent observed distinction principles for attacks on neutral and other protected vessels. The collateral result was increased leakage of petroleum, bunkers and cargo, into the Gulf with higher potential for environmental damage.[480] A clear example of lack of distinction was the Iraqi missile attack on *U.S.S. Stark* in 1987. The same is true about indiscriminate mining of *U.S.S. Samuel B. Roberts* and merchant tankers.[481] The Nowruz facility was a legitimate military target,[482] but query whether Iraq observed proportionality principles, in terms of loss of freedom of navigation rights, fishing catches, and threats to desalination plants. The record is not clear as to belligerents' attacks on other terminals. However, Iran's attack on neutrals' shore facilities, if Iran was otherwise seeking a proper target, totally lacked discrimination.[483]

Neutrals' self-defense responses were governed by Charter law, not the LOAC.[484] There was no reported significant spillage from US naval responses to Iran's

Silkworm missile attack on a US reflagged tanker, on oil rigs serving as bases for Iranian gunboats. The US operation was proportional and necessary, in that the source of attacks on neutral shipping was removed.[485] Similarly, US proportional self-defense responses to the *Roberts* mining, the *Iran Ajr* minelaying, and to attacking Iranian naval units were justified. There was no reported major pollution of the Gulf resulting from these operations either, although there necessarily had to have been loss of bunkers.[486]

*(iii) Protocol I, Article 53: Protection of Cultural Property.* Article 53 declares, without prejudice to the Cultural Property Convention[487] and "other relevant international instruments," *e.g.*, the Roerich Pact,[488] that belligerents may not

> (a) . . . commit any acts of hostility against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
> (b) . . . use such objects in support of the military effort;
> (c) . . . make such objects the object of reprisals.[489]

Although Article 53 applies in some situations to the law of naval warfare, *e.g.*, in shore bombardment,[490] it restates a general customary norm applicable to all warfare, subject to the exception that such objects lose protection if they support enemy military effort.[491] Cultural Property Convention parties may also claim imperative military necessity,[492] since Article 53 is subject to it. According to Toman, "States which are not parties to the [Hague} Convention do not have the right of recourse to military necessity and must apply Article . . . 53 . . . in all circumstances."[493] Granted this interpretation, which assumes that a customary norm of military necessity could not apply, it would appear that Article 53 must be read in the context of Article 52, the general rule for protection of civilian objects, and that since, *e.g.*, a house of worship may be attacked if it is a legitimate military objective under Article 52(3), the same house of worship if a cultural object under Article 53(a) could likewise be attacked.[494]

These rules have little relevance for high seas operations, except for oceanic transport of cultural objects. There may be considerable application for inshore operations.[495]

Although cultural property issues abounded in the 1990-91 war, there appear to have been none connected with the Tanker War, the naval warfare aspects of the 1980-88 conflict.

*(iv) Protocol I, Article 54: Sustenance of the Civilian Population.* If the environment includes sustenance of human beings, Protocol I, Article 54 applies:

> 1. Starvation of civilians as a method of warfare is prohibited.
> 2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for [producing] . . . foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying

them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether to ... starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in ... 2 shall not apply to such of the objects covered by it as are used by an adverse Party:

(a) as sustenance solely for the members of its armed forces; or

(b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the object of reprisals.

5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions ... in ... 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.[496]

Article 54 applies in a limited way *per se* to naval warfare, *e.g.*, to shore bombardment, although inshore operations might involve all of it.[497] The law of blockade,[498] a high seas operation during armed conflict, could contribute to conditions covered by Article 54, but is another example of the law of naval warfare not covered *per se* by Protocol I, although some of its provisions, *e.g.*, relief convoys, may, in the future, be invoked by analogy.[499] Some countries and commentators say Article 54(1) does not restate custom; they also disagree as to whether Article 54(2) restates custom. All agree that Articles 54(3)-54(5) articulate customary norms.[500]

These might be cited if belligerents attack fisheries or aquaculture areas in the territorial sea where the catch or product is essential to the civilian population's survival and other Article 54 criteria are met. This may have been at stake in Iraq's 1983 Nowruz attack, if fishing grounds necessary to sustain populations were destroyed, and in other attacks on Iranian oil facilities.[501] The record is not clear on this point, and it is therefore unlikely that Iraq violated custom stated in Article 54. Attacks on neutral facilities[502] were Charter violations; Article 54 could not apply except perhaps to supply a standard in considering the situations.[503]

*(v) Protocol I, Article 56: Attacks Resulting in Releasing Dangerous Forces.* Article 56(1) is perhaps the most controversial provision in this part of Protocol I. It states rules for attacks on works or installations containing dangerous forces:

... Works or installations containing dangerous forces, namely dams, dykes and nuclear generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.[504]

These protections end if installations are used for other than normal functions, to support military operations, *i.e.,* impounded water behind a dam or power station acting as a moat between belligerents, and if attack is the only feasible way to end support of a belligerent. Nuclear power stations may be attacked if they supply power in regular, significant and direct support of military operations, and if attack is the only feasible way to end it. Other military objectives located at or near such installations may be attacked if they regularly, significantly and directly support military operations and if such attack is the only feasible way to end such support.[505] These installations cannot be an object of reprisals.[506] Four countries filed declarations interpreting Article 56 to say that a decision on whether to attack can only be based on assessment of information from all sources available to the decisionmaker at the relevant time;[507] hindsight judgments are not admissible in considering whether Article 56 is violated.

Article 56 does not apply to wartime defensive measures, *e.g.,* to deliberate flooding of a State's own territory to deny access to its advancing enemy,[508] nor by the majority view does it state customary norms.[509] However, for those States that do not ratify Protocol I or accept it as a customary norm, proportionality and necessity principles apply to attacks on these installations.[510]

Article 56 has slight relevance to the law of naval warfare, except for air or other attacks from the sea on shore installations.[511] It might be invoked for floating plants powered by nuclear fuel or tidal dams to generate electricity and located in the territorial sea, since the Protocol appears to apply in territorial waters.[512] Necessity and proportionality, which must be observed in all warfighting, apply to attacks on these installations too.[513] Article 56 does not apply to oil refineries and presumably other petroleum production facilities; these are natural military objectives.[514]

Article 56 could not have applied to Iraq's Nowruz attack[515] with a resulting threat to the desalination plants, during the Tanker War. First, Article 56 does not state a customary norm. Second, even if it did, by its terms it did not apply, unless there was a risk of explosion or similar reaction to oil being sucked into intakes. Third, and most importantly, the risk of damage was to neutrals, not Iran; it was neutral facilities that were at risk. Any threat to neutral facilities was covered by Charter law; Article 56 might have supplied the criteria for determining liability, but Article 56 could not apply of its own force.[516]

*(vi) Protocol I, Articles 59, 60, 62, 65: Undefended Localities, DMZs, CD Facilities.* If undefended localities, demilitarized zones (DMZs)[517] and CD facilities coincide with environmentally sensitive areas, Articles 59, 60 and 62 will protect these areas. Such localities, DMZs and CD facilities lose protection if they commit or are used to commit acts harmful to the enemy, outside their proper usage. Conversely, if an area loses, *e.g.,* its Article 59 protection, it retains other

Protocol I or custom-based protections it may have.[518] Undefended localities and DMZs must fulfil these conditions:

> (a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
> (b) no hostile use shall be made of fixed military installations or establishments;
> (c) no acts of hostility shall be committed by the authorities or by the population; and
> (d) no activities in support of military operations shall be undertaken.

For DMZs, military activity linked to the military effort must have ceased, and parties to a conflict must agree on interpretation to be given this requirement and those persons to be admitted to the DMZ. Acts not considered harmful to the enemy in the case of CD facilities include:

> (a) . . . civil defense tasks are carried out under the direction or control of military authorities;
> (b) . . . civilian civil defense personnel cooperate with military personnel in the performance of civil defense tasks, or . . . some military personnel are attached to civilian civil defense organizations;
> (c) . . . performance of civil defense tasks may incidentally benefit military victims, particularly those . . . *hors de combat.*

CD personnel may carry light weapons.[519] The Fourth Convention also gives some protection to these persons.[520]

Protocol I clarifies Hague rules against bombarding undefended localities; [521] it is a customary norm today.[522] Cities or towns behind enemy lines are not considered undefended; military objectives within them may be attacked.[523] Immunity of agreed-upon DMZs from attack is a customary rule.[524] Customary law also protects CD personnel and facilities so long as they do not engage in activity hostile toward the enemy.[525] Absent Protocol I protections for these areas and activities, they are covered by customary norms, some longstanding. And as with hospital or previously-agreed neutralized zones under the 1949 Conventions,[526] environmentally-sensitive areas or objects within or near these facilities, zones or areas protects them for another reason. Protocol I principles for DMZs were used by analogy during the 1982 Falklands/Malvinas War when the belligerents agreed on a "Red Cross box" on the high seas for transfer of sick and wounded.[527]

During the Tanker War none of these areas were involved in the conflict at sea. However, as suggested previously, the Red Cross Box concept for sick and wounded at sea might be considered for establishing Green Boxes to protect environmentally sensitive areas.[528]

*(B) Summary: Were Protocol I Protections Related to Protecting the Environment, or Related to the Law of Naval Warfare and Peripherally Related to Environmental Protection, Violated During the Tanker War?* The response to the first issue is clearly No,

since the Protocol did not apply to this conflict as a treaty. During the Tanker War Iran and Iraq and many Tanker War neutrals were not parties to it. To the extent Protocol I restated custom, they were bound by these principles.[529]

Assuming that Article 35(3)'s prohibitions against attacks involving damage to the environment restate customary norms, it was not violated during the Tanker War. To be sure, the environmental damage of the 1983 Nowruz attack was widespread and severe within the meaning of Article 35(3), but did it have a "long-term" effect? Moreover, did Iraq intend to disrupt the environment? Could Iraq have anticipated, at the time, that its attacks would produce the spill? If the effect was not long-term within the meaning of Article 35(3), then the conjunctive statement of requirements (widespread, long-term *and* severe) defeats its application. Even if that hurdle is cleared, the question of Iraqi intent at the time arises. If intent is the same under each article, then application of Article 35(3) as a customary norm fails, unless wanton or grossly negligent conduct suffices to trigger liability. Here too the record is less than clear. As an alternative to intent, Article 35(3) would predicate liability on Iraqi conduct at the time of decision that "may be expected" to cause environmental harm. Here too the record is less than clear, with part of the answer lying with documents and witnesses that are not available.

As to attacks on merchant shipping, including bulk petroleum carriers, the response is clearer. There is no evidence that the spills caused severe environmental degradation, were long-term, or were widespread, or that there was an intent to damage the environment, or that belligerents could have expected the environment would be damaged when decisions were taken. Thus there was probably no Article 35(3) violation during the Tanker War.

Similarly, there was no Article 55(1) violation, for the same reasons, but also because Article 55(1), and any customary norm flowing from it, does not apply to maritime warfare.

Belligerents' attacks on neutral petroleum facilities, *e.g.*, Iran's attacks on Kuwaiti and UAE installations were governed by UN Charter law, where there were violations of the prohibition on threats to or attacks on the territorial integrity of States,[530] and Protocol I standards might be used in determining liability in those situations. Similarly, US and other neutrals' self-defense responses were governed by Charter law;[531] any claims of damage covered by Protocol I must be considered in that context. There are no known environment-related claims related to these responses.

It might be argued that Iraq's Nowruz attacks, which might have disrupted neutrals' desalination plants, violated Article 54, as several have argued with respect to Iraq's attempt to disrupt the desalination plants by flooding the Gulf with oil during the 1990-91 war, in that fouling the plants would deprive the civilian population of an adequate water supply.[532] There are two difficulties with this claim. First, neither Article 54 in its entirety, nor Article 54(2), which deals with

materials essential to the civilian population's survival, restate customary law. Second, even if Article 54 does recite applicable custom, these norms apply only to the LOAC; Charter law governs attacks on neutrals;[533] Article 54 could apply only as a standard for possibly informing the content of Charter law.

Could Article 56's terms, dealing with assaults on nuclear power generating stations, be invoked to condemn these seaborne attacks? The response is threefold. First, most commentators say Article 56 does not now state customary norms. Second, as in the case of Article 54 and most of Protocol I, its terms do not apply to attacks on neutrals; this is governed by the Charter.[534] Third, unless an explosion of the plants could have released radioactive material or otherwise have triggered Article 56's standards, Article 56 could not apply under its own terms.

On the other hand, Article 48, 51-52 and 57 standards, which restate general principles of the military objective, target distinction, and proportionality were violated by both States in their indiscriminate mine and surface ship attacks on merchant shipping. Charter law governed neutrals' self-defense responses,[535] and there is nothing in the record to indicate that these responses were not necessary and proportional under the customary law of self-defense.

With Protocol I's continuing acceptance as treaty law, albeit with reservations and declarations and applicable as it is mainly to land warfare or air and missile attacks from the sea, the Protocol may come closer to restating custom for aspects of the LOAC except for persistent objectors. Perhaps further in the future, or alongside this development, the LONW as a separate component of the LOAC may feel Protocol I's influence, if not its displacement of traditional LONW standards in some instances.

**v. Other Applicable Law.** Since 1977 other treaties related to the LOAC have been ratified; these present the same kind of issues as Protocol I. The other development has been revitalization of the Security Council as a law-making institution, especially since the USSR's collapse.

*(I) The 1980 Conventional Weapons Convention and Its Protocols.* Arguments for applying the Conventional Weapons Convention, with its preamble language, "recalling that it is prohibited to employ methods or means of warfare... intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment," and its land mines and incendiary weapons protocols in particular,[536] as customary law governing naval warfare, may be advanced in future wars. Iran, Iraq and most States involved in the Tanker War were not parties to the Convention or its Protocols at that time.[537]

The United States ratified the 1980 Convention and 1980 Protocols I and II with four reservations or understandings in early 1995, and a condition rejecting applicability of the preamble language, which tracks Protocol I, art. 35(3).[538] Many

US allies have also ratified the Convention and its Protocols.[539] Moreover, a potential for review conferences means that the law of naval warfare may be implicated in the future.[540]

The Convention governs all modes of warfare,[541] but most Protocol provisions state norms for land warfare or the law of bombardment and not armed conflict at sea.[542]

The Mine Protocol to the Conventional Weapons Convention applies only to, *inter alia*, "mines laid to interdict beaches, waterway crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways."[543] By its terms this Protocol has little or no application for oceans warfare, except insofar as a commander might consider a mine-infested beach for amphibious landing, perhaps a factor leading to the faked shore landings during the Gulf War.[544] The Protocol would affect those operations and arguably could embrace mines, including those aircraft launched, laid at low tide ashore and covered by higher tides that push coastal waters over the "ground or surface area"[545] where mines are laid.

The Protocol's statement of principles of proportionality, the illegality of indiscriminate weapons, and reasonable warnings under the circumstances, is reminiscent of customary norms recited in the Hague Conventions and Protocol I:[546]

> ... It is prohibited in all circumstances to direct weapons to which this Article [3] applies in offence, defence or by ... reprisals, against the civilian population as such or against individual civilians.
>
> ... [I]ndiscriminate use of weapons to which this Article [3] applies is prohibited. Indiscriminate use is any placement of such weapons:
>
> (a) which is not on, or directed against, a military objective; or
>
> (b) which employs a method or means of delivery which cannot be directed at a specific military objective; or
>
> (c) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
>
> ... All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article [3] applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.
>
> ... It is prohibited to use weapons to which this Article [4] applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:
>
> (a) they are placed on or in the close vicinity of a military objective or under the control of an adverse party; or
>
> (b) measures are taken to protect civilians from their effects, [*e.g.*,] ... posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences.

The Protocol defines "military objective" as

> . . . any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

"Civilian objects" are objects not defined as military objects in the Protocol.[547] The Amended Mine Protocol has similar provisions, adding with respect to the military objective a presumption, from Protocol I, that in case of doubt an object normally dedicated to civilian purposes is not being used for effective contribution to military action.[548]

There are no provisions on mine warfare's environmental impact. However, the Protocol's statement of military objective, indiscriminate weapons, proportionality, military necessity, and notice principles reinforce those rules in other contexts. These principles, if observed, indirectly protect the environment as in the case of Protocol I standards and customary law defining the military objective and proportionality.

Although the Incendiary Weapons Protocol applies to war at sea in the context of attacks on civilians,[549] incendiary weapons, remain, in the US view,[550] a legitimate means of warfare against combatants at sea. However, these weapons are rarely seen in naval warfare.[551] The Protocol repeats, in slightly different language, principles of military objective, civilian objects, necessity and proportionality found in Protocol I but has no warning requirements.[552]

The Protocol also prohibits "mak[ing] forests or other . . . plant cover the object of attack by incendiary weapons except when such . . . are used to cover, conceal, or camouflage combatants or other military objectives, or are themselves military objectives."[553] This has been characterized as not imposing a severe restriction on legitimate military use of incendiaries.[554] It applies to shore bombardment or air or missile attack from the sea. While such plant cover is a feature of traditional landward forests, tropical or subtropical shores have mangroves or other trees extending into otherwise navigable territorial waters, particularly during high tides.[555]

The Protocol's approach, banning attack on a specific part of the environment, forests, unless used for military purposes or if the forest itself is a military objective, might be compared with the general standard of Protocol I's controversial Article 56, forbidding attack on dams, dikes and nuclear power generating stations unless they are used for military purposes or are military objectives.[556] These might be contrasted with Protocol I, Article 35(3)'s banning methods or means of warfare causing "widespread, long-term and severe damage to the environment," or the ENMOD Convention prohibition on "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any . . . Party." [557] The

generalized approach is better. During the 1990-91 Gulf War commentators attempted to analogize Protocol I provisions, of doubtful standing as custom, to cover situations its drafters did not contemplate.[558] Will this be the fate of Incendiary Weapons Protocol Article 2(4), the forests provision? What is a forest? Would claimants try to extend it to grasslands which have occasional coppices or trees along water courses? Does Article 2(4) protect a considerable acreage of young saplings, on the way to becoming a forest, on land formerly farmed but now reverting to woodland? These kinds of definitional problems may make Article 2(4) unworkable in practice.

The Conventional Weapons Convention and its Protocols are a restatement of, and therefore an enhancement for, customary definitions of principles of military objective, necessity and proportionality, and the prohibition on indiscriminate weapons, applying to all warfare. This is their principal value. In some respects they do not state customary norms, and for these provisions they must await ratification by major military powers.

Iran, Iraq, the United States and many other countries involved in the Tanker War were not parties to the Convention and its Protocols; by 1987, twenty-eight States had ratified them.[559] Therefore; they could have applied only as customary law for the Tanker War.

Insofar as the Tanker War is concerned, the Mine Protocol did not apply, by its own terms; there is no record of amphibious landings to which it might have applied. It did not apply to sea mine attacks. The Incendiary Weapons Protocol might have applied to attacks on shore installations, but there is no record of use of incendiary weapons in this context. There is also no record of weapons meeting Fragments Protocol criteria. The technical terms of the Convention and its Protocols did not apply to martime aspects to the extent they stated customary law. However, insofar as the Convention and its Protocols' recitation of customary norms of the military objective, discrimination, necessity and proportionality strengthened those principles for war at sea; belligerents observed or violated them to the same extent they would be said to have violated the identical terms in Protocol I, to the extent that those terms reflect customary law. The result is that customary norms restated in Protocol I have been strengthened.

Since the Convention and its Protocols are in effect a supplement to the 1949 Geneva Conventions and Protocol I and therefore govern LOAC situations,[560] they could not have applied to self-defense scenarios during the Tanker War. Charter law governed these,[561] although the general customary law of necessity and proportionality might have informed the content of these Charter norms. In any event, as noted in the Protocol I and earlier analyses, the record indicates neutrals did not violate these standards in the self-defense context.

*(II) Developments in the Law of Armed Conflict Under the UN Charter.* Before the Gulf War, UN interest in the relationship between war and environmental protection had resulted in treaties, *e.g.,* the Cultural Property Convention, ENMOD Convention, Conventional Weapons Convention and its Protocols, and the LOS Convention, among others. Action within UN principal organs was largely through non-binding General Assembly resolutions, *e.g.,* the Assembly's endorsing the UN Environment Programme after the 1972 Stockholm Conference and its Principles, which found their way into later treaties,[562] the 1982 World Charter for Nature,[563] and the 1992 Earth Summit.[564] UNEP has promoted many regional agreements subject to the LOS conventions and their other rules clauses, including the Kuwait and Red Sea Conventions.[565]

The Security Council, and later the Assembly during the Soviet veto era, voted resolutions dealing with actual or potential armed conflict situations.[566] However, there was little direct linkage with environmental protection in particular conflicts.[567] For example, during the Tanker War, Council Resolution 598 called for a cease-fire, "deplor[ed] ... attacks on neutral shipping ...," the violation of international humanitarian law and other laws of armed conflict, and demanded that belligerents "discontinue all military actions on land, at sea and in air." Prior Resolutions 540 (1983) and 552 (1984) had been in similar vein; 540 specifically called upon belligerents "to refrain from any action that may endanger ... marine life in the region of the Gulf."[568] If obeyed, these resolutions would have helped protect the environment, in that if no further shipping attacks occurred, Gulf waters would have been cleaner. To the extent that Resolutions 540, 552 and 598 incorporated by reference parts of the LOAC applying to belligerent naval operations in the Gulf that had ramifications for environmental quality, *e.g.,* attacks on oil terminals such as Nowruz,[569] they would have declared environmental protections if heeded.

Coincident with the USSR's demise, the Council began to assume a more active role in world affairs. During the Kuwait crisis and Gulf War, it passed resolutions with direct or indirect ramifications for the environment during war. These are beyond the scope of this book.[570] Two deserve particular attention, however.

Resolution 678, a Council decision authorizing the Coalition "to use all necessary means to uphold and implement resolution 660 (1990) [demanding Iraqi withdrawal from Kuwait] and all subsequent relevant resolutions and to restore international peace and security in the area[,]" incorporated earlier resolutions such as 664-67, 670, and 674 into its binding mandate.[571] When these resolutions' content is examined, it is clear that the Council meant to include the law of armed conflict in treaties and custom, and the Fourth Convention specifically, and therefore direct and indirect environmental protection principles in this law. This inclusion was subject to the resolution's "all necessary means" and "relevant resolutions" clauses. Participating governments considered that Resolution 678

incorporated by reference all the relevant LOAC applicable to the war.[572] This was consistent with the language, ambiguous as it was, of Resolution 678. However, the point remains, as noted with respect to the prewar resolutions, that the Council might decide on action to incorporate or supersede all or part of the established LOAC.

This is not the case with Resolution 687, where the Council directly addressed environmental degradation during armed conflict; it reaffirmed "that Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, . . . as a result of Iraq's unlawful invasion and occupation of Kuwait[.]" It also invited Iraq to reaffirm its obligations under the Geneva Gas Protocol.[573] As in prior Resolutions incorporating the LOAC and international agreements,[574] the Council appears to have done nothing more than incorporate conventional and customary norms into Charter law, without creating new liability, which may have been the case with other resolutions.[575] The Council properly reaffirmed its position; Resolution 687 had declared that prior resolutions continued in full force and effect, and demanded that Iraq "Accept in principle its liability under international law for any loss, damage, or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait" and "Immediately begin to return all Kuwaiti property seized by Iraq . . . ,"[576] thereby affirming cultural property conventions' policies, which arguably are protective of the total human environment.[577]

Resolution 687 continued the theme of Council resolutions with indirect effect on environmental quality during war through inviting Iraq to renew its Geneva Gas Protocol pledges. The same was true for Resolution 686's affirming prior resolutions that, if complied with, would have afforded environmental protection through observance of treaties and other international law incorporated by reference. Resolution 686's requiring Iraqi acceptance of liability under international law for loss, damage or injury to Kuwait, other countries and their nationals can be read as supporting liability for environmental damage as stated in international law.

These resolutions did not decide ultimate liability; there are still issues of proof and damages in individual cases. They do, however, powerfully affirm a potential for international liability for environmental damage during war.

The resolutions also demonstrate that belligerents risk a Council decision going beyond customary and conventional law if there is environmental damage during armed conflict. Moreover, the strength and quality of the law may be greater than the factorial approach common to international law analysis.[578] If a Council resolution governing environmental norms is part of a decision, it binds UN Members.[579] There is also a possibility that these resolutions, intrinsically binding or

not,[580] may approach or be declared *jus cogens,* trumping treaties and custom.[581] Resolutions may restate treaty or customary norms, thereby strengthening them.[582]

Future wars may find the Council more vigorous, and at the least States can expect more activity from it and the General Assembly.

*b. Final Thoughts.* Conclusions to the foregoing subparts demonstrate that there apparently were few LOAC violations, in terms of norms specifically addressed to environmental protection, or where existing law if observed would give collateral protection to the environment. However, part of the reason for this is the relatively meager record on environmental degradation during the Tanker War compared with the 1990-91 Gulf War, where world media attention focused on environmental outrages Iraq committed.[583] Is there a need for a specific treaty, *i.e.,* a "Fifth" Geneva Convention or a "Green" Convention, as some urged after the Gulf War?[584]

For now, the response is No. As the long foregoing analysis demonstrates, there are general terms in two treaties, ENMOD and Protocol I, as well as many other agreements, many of whose terms are now also customary norms, that, if observed, will protect the environment through compliance with them: the 1907 Hague Conventions, the Geneva Gas Protocol (condemning gas and bacteriological warfare), the 1949 Geneva Conventions, the cultural property conventions, and the Conventional Weapons Convention and its Protocols. These treaties, and customary norms paralleling them in many cases, recite general terms (*i.e.,* notice in some cases, discrimination, necessity and proportionality), limit or prohibit attacks on a wide range of specific objects, or limit or prohibit methods of warfare, all of which have the important tangential effect of safeguarding the environment. Moreover, the General Assembly and the Security Council have been active in promoting these norms through resolutions for general standards or specific issues. Although until recently most resolutions have been nonbinding unless they restated customary or treaty norms, this action has had the effect of strengthening these principles at the least. With the end of Cold War vetoes and revival of the Council so that it can function as the Charter drafters intended, there is the prospect of its passing situation-specific resolutions, including binding decisions, in future conflicts.

It seems unnecessary to add yet another international agreement now.[585] General standards in place should suffice until time has had its opportunity to settle out customary observance, perhaps with widespread acceptance of ENMOD and Protocol I. This is particularly true in the context of the LOS, since the 1982 LOS Convention, the first major agreement to include norms to govern the oceans environment, is now gaining wide acceptance as treaty law.[586] If a new "Green" treaty would recite technical rules, similar to administrative regulations accompanying US environmental legislation, there is the risk of their becoming outmoded before

the ink would be dry.[587] Developing custom will allow the flexibility that is helpful in a relatively new area of law.[588] The 20 new States that have appeared in the last five years may not have had time to assess policy positions with respect to treaty succession,[589] let alone a complex new agreement. The sheer number of parties to a new multilateral agreement on a controversial body of law may promote delay in negotiations, reservations or understandings that can cloud the treaty's meaning,[590] and engender delays in ratification.

There are counter arguments. Developing custom through State practice for wartime rules is an awfully expensive way to write law. Treaties are favored by many new States, carry with them the *pacta sunt servanda* principle,[591] and can parallel and thereby augment custom as a source.[592] Treaties can publish black-letter rules in the public domain,[593] whereas custom remains in classified private foreign ministry files and can be elusive to research.[594]

On balance, however, the time is not right for a general multilateral agreement, like the Geneva Conventions, on environmental protection during armed conflict.

*c. The San Remo Manual; Other Analyses of the Place of the Environment During War.* The *San Remo Manual* (1995) may be influential in its attempt to recompile the law of naval warfare on the order of the 1913 *Oxford Manual*; it is not a draft treaty like the London Declaration, although it could serve as a basis for future diplomatic conferences.[595] The *Manual* refers to environmental protection during armed conflict in several contexts. The ICRC developed Guidelines for protecting the environment during armed conflict, and these have had their influence. The 1997 *NWP 1-14M*, successor to *NWP 9A* for the US Navy, Marine Corps and Coast Guard, also refers to the need for environmental protection during armed conflict.

**i. A "Due Regard" Formula for Interfacing the LOAC and the LOS.** The *Manual* appears to endorse Robertson's view[596] that the relation of States not party to a conflict and belligerents should be in terms of "due regard" that belligerents must pay those States' LOS rights and obligations in, *e.g.*, the EEZ.[597] There may be a critical difference; Robertson would apply a due regard formula, which he extracted from similar principles in the LOS Conventions,[598] subject to preexisting rules of international law, *e.g.*, prohibitions on certain weapons or means of warfare, targeting, treatment of civilian persons or objects,[599] while the *Manual* is not as clear on the point in all cases,[600] *i.e.*, whether due regard should be applied where there are no preexisting LOAC rules, or whether it is a separate consideration along with the rules. In those situations where the *Manual* does not qualify its due regard formula, the context of other *Manual* provisions would appear to make it clear that its drafters meant that due regard would be subject to other LOAC rules. The *Manual* takes no position on how a due regard formula would factor into

situations Charter law governs, *e.g.*, the right of self-defense.[601] Part B.1 proposes that an analogous due regard formula be applied in these situations.

This sub-Part discusses the *Manual* provisions and comments on whether due regard should be applied in the absence of preexisting LOAC rules, which is Robertson's view, or whether due regard is a factor to be considered alongside the preexisting rules.

**ii. Due Regard Formula for Interfacing Law of Naval Warfare and Environmental Claims.** The *Manual* uses a due regard formula to describe the duty belligerents owe for protecting the marine environment,[602] except for sensitive areas of special importance. For the latter, the *Manual* provides:

> [P]arties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing:
>
> (a) rare or fragile ecosystems, *or*
> (b) the habitat of depleted, threatened or endangered species or other forms of marine life.[603]

This provision is hortatory, not mandatory, and reflects LOS Convention language.[604]

The environmental due regard formula must be integrated into the basic rules of methods and means of warfare, *i.e.*, general LOAC principles of military objective, necessity and proportionality, and that weapons cannot be indiscriminate or cause unnecessary suffering to humans,[605] to the extent specific rules are not stated in custom or treaties, *e.g.*, hospital ships employed in their normal role[606] or rules against gas and bacteriological weapons.[607] The specific example of homogenizing environmental protection with a method of naval warfare is the relationship of belligerent minelaying and neutral EEZ and continental shelf rights and duties.[608]

The *Manual*, recognizing "the growing number of treaty rules, international resolutions and constitutional provisions laying down the obligation of the State to protect the environment," declares that "at the very least . . . there is a general recognition of a need to protect the marine environment, and a duty upon every State to protect and preserve the marine environment."[609] However, proliferation of sources, and the generality of those most in point, led the *Manual* drafters to rely on a due regard formula in most cases.[610]

**iii. Limitations of and Omissions in the *San Remo Manual*; Its Strengths.** The *Manual* is not as specific as it might be for sea areas the LOS Convention recognizes. Part of the reason is that the traditional law of naval warfare recognizes only two divisions of the seas: high seas and coastal waters, *i.e.*, the territorial sea,[611] the

situation in 1907 when the Hague Conventions and later LONW treaties were signed. The result since then has been customary practice built around these treaties and independently of binding agreements, the circumstance of, *e.g.*, the 1909 London Declaration. Thus there is no specific consideration of the relationship of the law of naval warfare with environmental concerns, including conservation, in the Area, high seas fishing areas, offshore fishing operations where the coastal State has not declared an EEZ, the EEZ, the continental shelf, the contiguous zone, or the territorial sea.[612] To be sure, some of these ocean zones, but not the Area, a separate governance under the Convention,[613] are covered by the *Manual*'s high seas provision,[614] but the relationship of the Convention's subtleties as to them in terms of the environment and the law of naval warfare recited in the *Manual* is not discussed.

Another limitation was the drafters' decision not to include warfare related to the land, *e.g.*, shore bombardment from the sea or the air, except as these rules are part of LOAC general principles.[615] There is no statement of the relationship of the due regard formula generally applicable to environmental concerns in shoreward projection situations.[616]

On the positive side and somewhat apart from environmental issues, the *Manual* charts new courses by including material on the *jus ad bellum*, *i.e.*, the law of self-defense and situations where the UN Security Council has acted;[617] recognizing without approving the possibility of nonbelligerency status between belligerency and neutrality;[618] introducing the military objective concept into the law of naval warfare;[619] rules applicable to exclusion zones;[620] clarification of whether naval operations can be undertaken in certain sea areas under the law of the sea;[621] and principles of air war at sea.[622] All could interface with environmental protection claims.

**iv. Conclusions with Respect to "Due Regard"; Problems with Analysis.** In general, both positions of the *Manual*, *i.e.*, using a due regard formula for interfaces between the LOS and the law of naval warfare, and between the law of naval warfare and environmental concerns, are correct. There are three caveats.

First, any general due regard standard should be subject to specific customary, treaty or general principles norms. The *Manual* recognizes this in several contexts, *e.g.*, custom or general principles based rules of proportionality, *etc.*, and in citing treaties like the ENMOD Convention and its prohibition on military or other hostile use of environmental modification techniques having "widespread, long-lasting or severe effects" as the means of destruction, damage or injury to any other Convention party.[623] Such standards must be subject to law under the UN Charter;[624] this is implied but not specifically stated.

Second, the *Manual* does not indicate the content of either due regard standard; it declares a standard of due regard for the relationship between the LOS and the

LOAC and its law of naval warfare component, and a second due regard standard for the relationship between the LOAC and environmental norms. It does not discuss the content of due regard.

Third, the *Manual* does not say whether the two standards, or a due regard standard to be applied in situations governed by the Charter,[625] should be considered together as part of a general due regard principle, or whether they should be considered sequentially, *i.e.*, applying due regard in the LOS -LOAC context first, and then applying environmental norms against the result of this analysis, or the other way around, *i.e.*, applying due regard in analyzing the LOS and environmental norms, and then factoring this result into analysis with the LOAC.

*d. The ICRC Guidelines for Military Manuals.* In 1994 the ICRC published guidelines for military manuals and instructions on protection of the environment during armed conflict.[626]

The Guidelines publish a list of international agreements, many of which reflect custom, observance of which would assist in protecting the environment.[627] Besides specific rules, the general principles of international law applying to armed conflict, *e.g.*, distinction and proportionality, also provide protection for the environment. "In particular, only military objectives may be attacked[,] and no methods or means of warfare which cause excessive damage shall be employed. Precautions shall be taken in military operations as required by international law."[628] International environmental treaties "and relevant rules of customary law may continue to be applicable" during armed conflict,

> to the extent that they are not inconsistent with the applicable law of armed conflict. Obligations relating to the protection of the environment towards States not party to an armed conflict (*e.g.*, neighboring States) and in relation to areas beyond the limits of national jurisdiction (*e.g.*, the High Seas) are not affected by the existence of the armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict.[629]

In cases not covered by treaty rules, "the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[630]

The ICRC appears to recognize that some international agreements, but not all of them, related to environmental protection, may apply during war. This is consistent with the general law applying to suspension or termination of treaties during armed conflict, which delares that some treaties, *e.g.* humanitarian law conventions, continue to apply during war.[631] This also appears consistent with the other rules principle of the LOS conventions, which say that the LOS, now including many provisions protective of the peacetime maritime environment in the LOS

Convention, may apply during armed conflict.[632] In terms of the maritime environment, the LOS Convention declares that all treaties related to the LOS must be generally consistent with it, and particularly those related to environmental protection.[633] If these factors are taken into account, the ICRC Guidelines appear consistent with the general LOS-LOAC relationship contemplated by the LOS conventions and the general principles of international law. The Guidelines do not explicitly adopt a due regard formula like that the *San Remo Manual* drafters developed almost contemporaneously, but they do seem to say that the environment shall be a factor to be taken into account for applying general principles of the LOAC and specific rules. The Guidelines do not recommend principles for the *jus ad bellum, i.e.,* Charter law, which includes the right to self-defense.[634]

*e. NWP 1-14M and Environmental Protection During Armed Conflict. NWP 1-14M*, published nearly a decade after the Tanker War, has a slightly different approach to environmental protection during armed conflict:

> It is not unlawful to cause collateral damage to the natural environment during an an attack on a legitimate military objective. However, the commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent... practicable to do so consistent with mission accomplishment. To that end, and as far as military requirements permit, methods or means of warfare should be employed with due regard to the protection and preservation of the natural environment. Destruction of the natural environment not necessitated by mission accomplishment and carried out wantonly is prohibited.... [A] commander should consider the environmental damage which will result from an attack on a legitimate military objective as one of the factors during targeting analysis.

This reflects, to a certain extent, the ICRC Guidelines approach.[635] Like the *San Remo Manual, NWP 1-14M* appears to implicitly require compliance with a positive norm, a lawful military objective, but would qualify lawfulness of the objective by the environmental factor, along with other factors, during target assessment. *NWP 1-14M* does not appear to address the issue of due regard in the LOS-LOAC context, nor does it consider the environmental factor in the context of Charter law issues, *e.g.,* the right of self-defense.[636]

*4. The Tanker War; Proposed Resolution of Issues Raised by the San Remo Manual, the ICRC Guidelines and NWP 1-14M*

The Tanker War ended in 1988. The ICRC published its Guidelines in 1994; the *San Remo Manual,* developed contemporaneously with them to deal with environmental and many other issues in naval warfare, appeared in 1995; *NWP 1-14M*, also dealing with a broad spectrum (LOS, UN Charter issues, LOAC in all contexts) was published in 1997. Chapters II and VI demonstrate that there was little reportage of, or concern with, environmental issues during the Tanker War, the

Nowruz spill being a conspicuous exception. The 1990-91 Gulf War raised these problems to international attention, and the Guidelines, *Manual* and *NWP 1-14M* were among the reponses. Nevertheless, Tanker War scenarios can supply analysis to help resolve issues these sources appear to raise. This subPart attempts to resolve those issues.

Any general due regard policy must give way to a specific norm from the Charter, *e.g.*, the inherent right of self-defense[637] or other binding Charter-based norms, *e.g.*, Security Council decisions,[638] and *jus cogens* principles,[639] as well as treaties or other primary sources, *e.g.*, established custom. Examples of established norms include those under Hague IX relating to shore bombardment and general principles of proportionality and distinction, and the Geneva Gas Protocol and its no first use reservations, both of which are considered to state custom.[640]

There should be one, general due regard analysis, throwing both LOS due regard concerns, *e.g.*, those for an EEZ of a State not party to a conflict, and environmental concerns, into common analysis with other factors, if there are no binding LOAC rules, or there is no binding Charter law, governing a situation. There should be no *seriatim* analysis of the relationship of LOS standards and environmental concerns under a due regard rubric, followed by a second, similar analysis of the relationship of environmental concerns and the LOAC, or the other way around. A similar analysis should apply in Charter law-governed situations. This is so for five reasons:

(1) Some environmental principles are stated in treaties or custom whose geographic parameters may overlap but not coincide with LOS geographic coverage, the World Cultural and Natural Heritage Convention for example.[641] If such a treaty applies during war,[642] it would be legally ludicrous to say that protected species in the territorial sea would be subject to a double due regard standard, once under a LOS-environmental law analysis and a second time under a LOAC-environmental law analysis, while these species' neighbors would not be analyzed under LOS principles because they were on dry land or beyond LOS ken.[643]

(2) The degree of conflict between marine environmental protection treaties and the LOS Convention has not been sorted out through practice under the latter.[644] The LOS Convention is not yet treaty law for some countries, including the United States.[645] How analysis would proceed between the LOS Convention as custom and the environmental conventions, whether stating treaty norms or perhaps restating customary norms, is even more problematical.

(3) There are environmental standards in the LOS Convention's navigational provisions,[646] for which the *Manual* apparently states a separate due regard requirement.[647]

(4) There is a huge volume of recent bilateral and regional treaties[648] with a myriad of environmental norms. A double level due regard standard would further complicate analysis.

(5) Applying a single due regard formula can be more easily accomplished as part of the military planning process,[649] even as rules of engagement (ROE)[650] may be customized for particular military operations or scenarios.

*a. The Specifics of the Proposed Analysis.* The *Restatement (Third) of Foreign Relations Law of the United States* factorial analysis, combined with an earlier, similar approach in the *Restatement (Second), Conflict of Laws,*[651] offers a method for determining what law to apply where claims for applying the LOS, the LOAC, and international environmental law intersect. The *Restatement (Third)* approach to prescriptive jurisdiction, *i.e.,* a State's authority to apply its law to persons or activities outside its territory,[652] is particularly appropriate.[653]

To be sure, the *Restatement (Third)* analysis in a transnational context has its detractors.[654] Some US courts and academic critics have rejected the *Restatement (Second), Conflicts.*[655] Nevertheless, many US federal courts have adopted a *Restatement (Third)*-style analysis for transnational litigation involving federal law;[656] these courts use analyses similar to the *Restatement (Second), Conflicts* or the *Restatement (Third)* for admiralty and maritime cases.[657] Many US state courts use a variant of the factorial approach, if they do not accept verbatim the *Restatement (Second), Conflicts.*[658] Commentators and courts outside the United States have been less hospitable to US courts' extraterritorial reach under formulas like the *Restatements,*[659] but there has been a trend toward recognizing the effects doctrine in all but name.[660]

However that may be, the *Restatement* analysis proffered here is submitted in a different context, *i.e.,* conflict of different countries' public international law interests, the interests of international organizations in some situations, and the interests of three different bodies of public international law, the LOS, environmental law and the LOAC. Moreover, as distinguished from the courtroom context and its necessarily after-the-fact interest analysis that has generated opposition in some quarters to the *Restatements'* factorial approaches,[661] this kind of analysis can be a valuable planning tool before military operations[662] and may, if thoroughly and neutrally applied, be useful justification for the operation if claims arise during or after execution. In this regard the proposed methodology as a planning device is more akin to US NEPA requirements[663] or its Antitrust Guidelines.[664] The latter note participation of other countries in multilateral and bilateral negotiation processes[665] to avoid friction; this supports a view that this type of planning has justification in international law.[666] There is indication that factorial analysis may be gaining acceptance, claims and commentators to the contrary in other contexts notwithstanding,[667] particularly in the LOS context.[668]

*b. Method of Analysis.* Rather than proceeding directly to a factorial analysis to determine the due regard formula in a given context, as might seem to be

recommended by the *Restatement (Third)*, the first inquiry should be, by analogy to *Restatement (Second), Conflicts*, whether positive norms govern the situation.[669] If so, those norms should control.

The first step is to determine whether UN Charter[670] or *jus cogens*[671] norms apply; if so, they should apply without regard to customary, treaty or general principles norms. An example is the inherent right of self-defense.[672] If Charter or *jus cogens* based principles apply, they trump any due regard analysis unless, of course, the due regard principle is considered part of Charter law or *jus cogens* in a given context.

Second, if a state of armed conflict does not exist as between contending States,[673] a balance must be struck between competing international law norms, *i.e.*, the LOS and the law of the maritime environment. If positive principles govern this interface, *e.g.*, a coastal State's right to regulate innocent passage through its territorial sea[674] or perhaps a regional or global agreement to protect part of the marine environment that lays down rules or standards,[675] those norms, including those recognized in custom or general principles, would govern without recourse to a due regard formula. The analyst would employ the traditional factorial approach generally used for public international law issues to balance among these primary and secondary or evidentiary sources.[676] If the applicable law, usually in treaty format, prescribes due regard for the marine environment, then the proposed due regard formula, or one like it, would be taken into account. Charter and *jus cogens* norms would prevail over the balancing process.[677] The only time that a due regard formula would be employed in the absence of incorporation by either the LOS or the law of the maritime environment would be where the two bodies of law collide, and resolution cannot be had without a balancing process.

If an armed conflict situation exists, the same principles apply. If LOAC principles explicitly take into account environmental claims during war, those principles must be applied. The LOS, as stated in the LOS conventions, declares that it is subject to "other rules of international law," *i.e.*, the LOAC and its LONW component.[678] A traditional factorial analysis would be applied to sources of the LOAC bearing on the issue.[679] This would include sources protecting the maritime environment during armed conflict, *e.g.*, the ENMOD Convention.[680] Applying a due regard formula would have no place unless incorporated as part of the analysis of stated sources of law.[681] As with peacetime situations at sea, Charter and *jus cogens* norms will trump principles based on traditional sources.[682] As in the LOS-law of marine environment context, due regard analysis would only be applied, absent incorporation of due regard by positive law, where the LOAC and the law of the marine environment directly conflict, and there can be no resolution without a balancing process.

Belligerents must pay due regard to LOS rights of States not party to the conflict and have due regard for those States' marine environment rights and for the

maritime environment.[683] States not party to the conflict, *i.e.*, neutrals and nonbelligerents (if this status in international law exists)[684] must pay due regard to LOS rights of States not party to the conflict, and to such States' marine environment rights, and for the maritime environment, except insofar as the LOAC might apply as between them and belligerents' claims.[685] These States must do the same with respect to belligerents' LOS and environmental rights, and the maritime environment. However, as stated for other scenarios,[686] no due regard analysis would be necessary if positive principles of law, *e.g.*, the LOS, the law of the marine environment or the LOAC, require it, or if comparing these bodies of law produces a conflict, and a more refined analysis must resolve the issue.[687] Charter or *jus cogens* norms will trump traditional sources and due regard analysis.[688]

The reality of much of the foregoing is that, apart from Charter principles dealing with territorial integrity of States and the right of self-defense,[689] little Charter law will impact States' actions regarding environmentally-related issues unless the Security Council issues a decision.[690] *Jus cogens* is an amorphous concept at best and perhaps small in scope.[691] Apart from the LOS conventions' due regard formulas,[692] no declarations of that sort in positive law have been found in the LOAC or, more specifically, the law of naval warfare; the law of the maritime environment apart from the LOS conventions; or the law of the marine environment during war. The only other major source is the *San Remo Manual,* itself a secondary or evidentiary source[693] although purporting to recite established law most of the time.[694] There is a relatively wide potential for applying due regard (or reasonableness) principles in LOS-law of the marine environment interfaces, between belligerents in a naval warfare context, or in relationships among States not party to a conflict and belligerents.

*c. The Content of Due Regard; Factors to be Considered.* The final issue is the content of due regard, not discussed in the *San Remo Manual.*[695] Factors for the content of due regard, or reasonableness, a nonexclusive enumeration might include these, based on *Restatement (Third)* § 403(2):

> (a) Linkage of a belligerent's activity to the jurisdiction or sovereignty of a State not party to a conflict, *i.e.*, the extent to which belligerent activity takes place within that State's jurisdiction or sovereignty, or is perceived at the time to have substantial, direct and foreseeable effect on sovereign or jurisdictional interests of a State not party to a conflict;
>
> (b) Connections, *e.g.*, flag State of vessels or aircraft, nationality of persons involved on *e.g.*, offshore oil platforms or on vessels, or economic activity at the time between a belligerent and a State not party to a conflict;

(c) Character of the activity of a State not party to the conflict to be curtailed, regulated or eliminated; importance of that activity to that State; the extent to which other States have curtailed, regulated or eliminated that activity in the past; and the degree to which desirability of such curtailment, regulation or elimination is generally accepted by other States at the time;

(d) The extent of justified expectations, by States not party to a conflict and other interests, *e.g.*, shipping interests and their insurors, that might be protected or affected by a belligerent's actions at the time;

(e) The importance at the time of a belligerent's action or interests of a State not party to the conflict, to the international political, legal and/or economic systems;

(f) The extent to which a belligerent's action, or the response of a State not party to the conflict, is consistent at the time with traditions of the international system;

(g) The interest to which other States, or international governmental or nongovernmental organizations, may have in acting in the situation at the time;

(h) The likelihood of conflict with action by another State or an international governmental or nongovernmental organization at the time;

(i) The impact, from what is apparent at the time, that action by States, whether belligerent or not party to a conflict, will have on other States' duties or obligations with respect to the environment; and

(j) The impact, from what is apparent at the time, that action by States, whether belligerent or not party to the conflict, will have on the environment irrespective of any State's duties or obligations with respect to the environment.[696]

This proposed enumeration contemplates an armed conflict situation involving a State as a belligerent and therefore the LOS, the LOAC and its component the LONW, and the law of the marine environment, are involved. However, the same kind of analysis could be employed where contending States base claims solely on the LOS and its interface with the law of the marine environment. Similarity of interests and factors considered for the latter situation becomes apparent when the scenario of active intervention on the high seas to minimize pollution from a leaking tanker, whether after a grounding or following attack during armed conflict, is

considered. Assuming identical spillage in either case, the result for the environment will be the same unless action is taken, including anticipatory action.[697]

The factorial list has a two-State analysis in mind. Given a possibility of self-defense alliances,[698] interactions of States not party to a conflict through regional organizations, *e.g.*, those dealing with environmental problems, or more informal arrangements, *e.g.*, the Gulf War Coalition, probably many more than two States will be involved in armed conflict situations, where LOS and law of the marine environment issues mix with law of naval warfare problems, or scenarios involving the LOS and the law of the marine environment. For these circumstances, the law of treaty reservations might be consulted for analogous analysis.[699]

One critical refinement is inclusion of the phrase "at the time" in the analysis.[700] Taken from declarations to Protocol I,[701] two Conventional Weapons Convention protocols and the Second Protocol to the Cultural Property Convention,[702] and the *San Remo Manual* for naval warfare,[703] the phrase would limit culpability to what is reasonably known to participants when decisions involving the environment or others' LOS rights or responsibilities, and the LOAC if applicable, are taken. The same qualification should apply in self-defense situations; planners or actors should be held accountable for what they knew or should have known at the time of decision.[704] Although the foregoing sources and the proposed factorial analysis contemplate a war scenario, planners should not be liable for more than they know, or with reasonable investigation should know, when only the LOS and the law of the maritime environment apply.

*d. Testing the Proposed Analysis.* The Tanker War offers examples of how the suggested factorial analysis might apply in future conflicts. With one exception, the Iraqi attack on Iran's Nowruz facilities, situations taken from the Tanker War are largely hypothetical because of the incomplete factual record related to environmental issues in other instances. Analysis follows the same nonexclusive list proposed above. Three scenarios have been selected to illustrate how analysis might proceed: (1) Charter law, *i.e.*, self-defense, was involved in US responses to attacks on its warships and other platforms, and attacks on US-flagged merchant ships. (2) Belligerents' attacks on neutral shipping involved application of the LOAC in an LOS context. (3) Iraq attacked Iran's Nowruz facilities, resulting in a massive oil spill threatening fishing grounds, neutrals' desalination plants, and possibly high seas navigation; the LOS, including LOS-based treaty law, and the LOAC were involved in this situation as well.

**i. US Self-Defense Responses Against Iranian Warships.** If due regard for the environment is part of the self-defense norm, the record seems fairly clear that US responses against Iranian platforms involved no significant oil spillage. There necessarily was spillage in connection with sinking or disabling attacking Iranian

warships. Because the Charter, Articles 51 and 103, have no criteria beyond statements of the inherent right of self-defense and superiority of Charter law at least over treaties,[705] the nonexclusive indicia listed above are considered,[706] along with other self-defense criteria, necessity and proportionality and, for anticipatory self-defense, action that admits of no other alternative:[707]

(a) There was definite linkage of Iranian activity to a State not party to the conflict (the United States) when Iran began offensive naval operations against US warships. Threatening to fire, or firing, weapons against another country's men of war had a substantial, direct, foreseeable effect on that country's (*i.e.*, US) sovereign interests. Factor (a) clearly points to validity of the US response. Since the attack occurred on the high seas, there were no environmental interests of other States to consider, except insofar as the resulting slick from damaged or sunken ships might have impeded high seas freedoms or have fouled their shores. There is no record of such, and in any event Iran's action demanded immediate US response in anticipatory self-defense.

(b) Connections to the flag were strong as to both actors: warships were involved, and this factor is evenly balanced.

(c) As to character and importance of the activity of a State not party to a conflict, the United States had an inherent right of unit self-defense; US high seas freedom of navigation under the LOS was also at issue. Factor (c) strongly supports the US action.

(d) Given Iran's record of attacking neutral merchantmen carrying cargoes not destined for Iraq, clear violations of international law, and the near certainty that these attacks would continue in the future, the balance of this factor tips heavily in favor of the US action. Although leakage from damaged warships could be expected to pollute the maritime environment, this could be expected to be relatively slight compared with what could be expected if Iran hit just one fully-loaded large tanker.

(e) It was vitally important that the United States assert the right of countries not party to the conflict to high seas freedom of navigation; it was important that the right of self-defense be vindicated. It was also important that economic interests of ocean carriers, their consignees and insurers, which lie behind the freedom of the seas, be protected. Factor (e) weighs strongly in favor of the US action.

(f) Iran's action was not, and the US response was, consistent with traditions of the international system.

(g) Other States, and international governmental organizations, had expressed their policies by that time; the Security Council had passed resolutions deploring these attacks, and other countries' navies were engaged in actions to protect shipping.[708]

(h) There was no likelihood of conflict with other States or international organizations' actions; if anything, the US action was in line with what Iran might have expected if attacks on other countries' warships had occurred.

(i) The impact of US self-defense measures on other States' duties or obligations to the environment is not clear. The Iran-Iraq conflict ended soon afterward. This factor is neutral in application.

(j) The same is true with respect to what impact the US measures would have on the environment irrespective of other States' duties or obligations to the environment.

When these 10 nonexclusive factors are considered, it is relatively clear that environmental deprivation claims based on pollution from sunken or damaged Iranian warships would have been countered with strong policy arguments under the Charter and the LOS to justify US action and for finding that the United States observed due regard for other States' environmental interests and for the environment in its responses. If attacking Iranian warships had included a deep-draft naval auxiliary tanker with potential for a large slick if damaged or sunk, naval thinking and planning might have dictated different actions so long as US warships' fundamental security was assured.[709] For example, if the tanker were not in an immediate area of confrontation and was in the rear to replenish the Iranian destroyers, and it was otherwise militarily advantageous to remove the tanker from further participation as part of self-defense measures, disabling fire as distinguished from destruction might have been ordered. Towing the disabled tanker back to port might have had a salutory political-military side effect of "delivering a message" besides encouraging better law compliance.

**ii. Belligerents' Attacks on Neutral Shipping.** A second analysis from the Tanker War may illuminate issues where there are no self-defense norms or other Charter-based principles at stake. The record is not clear as to the extent of marine pollution that accompanied Iranian and Iraqi attacks on neutral shipping. If it had been considerable, and no treaty, *e.g.*, the Kuwait Regional Convention and Protocol[710] or other customary standards were directly involved, either with

respect to individual attacks or attacks taken as a whole, the 10-factor analysis might proceed thus:

(a) Belligerents' activities had clear and devastating effect on other countries' sovereign or jurisdictional interests. In the case of warship, *e.g.*, *U.S.S. Stark* and *U.S.S. Samuel B. Roberts* as noted in the first hypothetical, the only States involved were the belligerents and the United States. In the case of merchantmen, the issue is more complicated. To be sure, the law of the flag from the law of naval warfare[711] applied to the ships, but there were other significant interests involved, *e.g.*, nationality of beneficial owners of vessels, charterers, crew members, cargo owners, cargo consignees and insurers.[712] Moreover, there were seafaring States' interests using the Gulf for navigation, fishing and other high seas rights and freedoms; and coastal States' rights and jurisdiction in the EEZ, continental shelf, fishing zones, and territorial sea; and coastal States' interests in protecting desalination plants and their coastal environment in general.

(b) The same sort of connections were at stake with respect to these States' associations or economic activity. This is an example of the overlap of factors.

(c) Freedom of navigation and high seas fishing without concern for environmental factors such as polluted seas that would force curtailment of naval operations, diversion from regular shipping lanes or from some fishing grounds; the right of seafarers to pursue occupations in a clean environment; the right of coastal States and their peoples to potable drinking water and a clean environment; were all important interests.

(d) The interests in Factor (c) were justified in expectations for a clean environment, and these were affected by belligerent actions.

(e) The apparent justification of the attacks was to curtail shipment of goods to finance opponents' war efforts and to intimidate other Persian Gulf users.[713] On the other hand, interests of States not party to the conflict were strong, based on the LOS.

(f) Iran and Iraq did not act consistently with traditions of the international system, including Charter principles such as those in Article 2(4), nor did they behave consistently with well-established LOS rights of freedom of navigation and fishing, or equally well-established LOAC principles. On the other hand, States not party to the conflict were within their Charter rights (*e.g.*, the Article 51 inherent right of self-defense), the LOS, and the LOAC.

This weighs strongly against the belligerents in terms of significant environmental deprivations incident to their actions against Gulf shipping.

(g) Other States' interests, whether individually or in groups, in acting has been described.[714] In addition, Council Resolutions 552 and 598 condemned these attacks in 1984 and 1987.[715] Although these actions, individual and collective, by other States did not state environmental concerns, this strong manifestation of interest would be weighed against belligerents for any ensuing environmental damage.

(h) Based on the record summarized in Factor (g), there was little if any conflict with actions by other States or international organizations at the time.

(i) There was some potential for serious impact on coastal States' duties or obligations with respect to the natural environment, *e.g.*, obligations to protect their coastal areas or their obligation to provide potable water for their peoples, livestock and plants.

(j) Finally, it may have been apparent, at the time, that these attacks, individually or taken as a whole, would have deleterious effects on the environment.

In summary, if significant environmental degradations occurred in belligerent attacks on Gulf shipping during the Tanker War, and no norms based on treaties such as the Kuwait Regional Convention and Protocol had applied, evaluation under an expanded due regard analysis would have found the belligerents guilty of not having given due regard to environmental considerations for this aspect of the conflict. The factors would have weighed strongly against them.

**iii. The Iraqi Attack on Iran's Nowruz Facilities.** Analysis for the massive spill in the wake of Iraqi attacks on Iran's Nowruz facilities was different in three respects: there was a definite threat to the high seas environment and to neutrals' fishing grounds and desalination plants,[716] the Security Council did not act, and the Kuwait Regional Convention and Protocol, treaties governing offshore pollution,[717] were involved with respect to neutrals; they may have been suspended or terminated between Iran and Iraq, and perhaps as to neutrals.[718] If the Convention and Protocol did not apply because of treaty termination or suspension factors, any custom, perhaps based on the treaty or the general LOS, continued to apply.[719] The 10-factor due regard analysis might proceed thus:

(a) Although Nowruz was an Iranian facility and subject to Iranian sovereignty, the Iraqi attacks had clear linkage to States not party to the conflict through threats to their fishing interests, desalination plants and high seas freedom of navigation and other LOS rights. Whether Iraq could have known at the time that its attacks would result in substantial, direct and foreseeable effects is not known, but there is almost a conclusive presumption that Iraq as a major oil-producing country knew, or should have known at the time, that its attacks would likely have some or all of these effects. This factor weighs heavily against Iraq.

(b) There was a connection between Iraq and neutrals, *i.e.*, at least the customary LOS and perhaps the Kuwait Regional Convention and Protocol if it continued to apply. This cuts against Iraq.

(c) As in the case of high seas attacks on neutral shipping, there were very important interests of neutrals involved, including interests in having potable water and a source of food (fish), laying aside the additional right of neutrals to trade with Iran at the terminal. Although the Security Council did not act, the record indicates that neutrals, *e.g.*, the United States, expressed concern and may have tried to help curtail the spill. This factor weighs against Iraq.

(d) Neutrals' justified expectations were as high at the time of the Nowruz attacks as when their merchantmen were attacked on the high seas. This factor weighs against Iraq.

(e) As in the second scenario, neutrals' interests were high in being able to exercise freedom of navigation, to feed their peoples, and to have sufficient drinking water. On the other hand, depriving Iran of Nowruz, a legitimate target under the LOAC, was very important to Iraq. Without having the full facts for Iraq's or neutrals' positions, this factor is even in strength of policies.

(f) Iraq's actions, and neutrals' reactions, were both consistent at the time with traditions of the international system. In terms of factorial analysis, Iraqi sovereign interests in prosecuting its war effort was very strong; it was a total war for the belligerents.

(g) Other States had interests in acting in the situation at the time. Besides loss of an opportunity for legitimate trade at Nowruz, neutrals had interests in freedom of navigation in the Gulf, feeding their peoples, and preserving their water supplies, all threatened by the result of Iraqi attacks. There was

no official IGO or NGO action with respect to the attack. Nevertheless, this factor inclines toward the neutrals.

(h) Apart from Iran's attempts to defend Nowruz, at the time of the attack there seemed to be little likelihood of conflict with actions taken by another State or an international organization, although the Security Council or other international organization could have reacted to the attacks. This factor favors Iraq.

(i) Iraq's action had strong impact on other States' duties or obligations with respect to the environment, particularly those States' coastal environment. This factor cuts against Iraq.

(j) There was no impact, apparent at the time, of other States' action that would have involved the environment.

Thus under the 10-factor analysis two factors favor Iraq (f, h), six would oppose the Iraqi action (a, b, c, d, g, i), and two (e, j) were neutral. A nose-count vote would say that Iraqi action was unlawful under a due regard standard. However, as noted in the first two scenarios, the relative strengths of each policy must be considered. Here too the interest in a clean, safe Gulf environment outweighs the perceived advantages Iraq had in successfully attacking Nowruz. Seen as a proportionality analysis under the LOAC, the attack was not proportionate when environmental factors are taken into account.[720]

*e. Conclusions.* The foregoing analysis is quite tentative; the *Restatement*-based factors are not exclusive in enumeration and are submitted as a first brief to assist in solving issues made more knotty by confluence of four bodies of law: oceans law as stated in the LOS Convention with its major contribution of guiding principles with respect to the martime environment; international environmental law, relatively in its infancy and incorporated in part in the Convention; the LOAC and particularly the law of naval warfare, most of which is customary and which is incorporated in the LOS Convention, its predecessors and parallel customary norms, through the other rules clauses; charter law. Further thinking might apply this methodology to other events of the Tanker War or to other armed conflict situations, particularly when concrete facts related to environmental conditions are available. In any event, multifactor analysis, already a feature of modern military planning, should take environmental concerns into account.[721]

## Part C. General Conclusions and Projections for the Future

Ocean pollution is not a new phenomenon, nor has been the attempt to prevent it through international agreements and customary law. Oil largely replaced sail and coal as the propellant of choice for oceangoing vessels, and navies also became dependent on it early in this century. The motor vehicle and aircraft became the transportation of choice on land, and transoceanic flights were harbingers of the future. The world's largest oil reserves were discovered in the Middle East. During World War II the lifeblood of the combatants was petroleum, not only to fire ships' boilers but to propel aircraft and increasingly mobile armies and to lubricate the sinews of mechanized armed forces.

Since World War II, however, a veritable explosion in use of petroleum has occurred. Although nuclear power has replaced oil for some warships, petroleum remains the primary fuel for most navies, including countries with nuclear-powered warships, *e.g.*, China, France, Russia, the United Kingdom and the United States. Motor vehicle use and numbers have grown exponentially worldwide. Airlines have absorbed much of overland mass transit demands and have largely replaced ocean liners, except for the cruise line industry, for transoceanic travel. To satisfy this demand, steamship companies have built ever larger tankers, not necessarily more of them, to transport oil more cheaply in bulk. Although pipelines frequently carry oil across national borders, they must stop at the water's edge or perhaps offshore terminals built to accommodate huge tankers. Other types of merchant ships have also grown larger in tonnage, and the cargoes they carry sometimes include consignments as toxic to the environment as before the Second World War but are greater in relative size. The result is that each accident, incident of negligent navigation or attack by belligerents can result in more massive pollution than before the War, when typical tankers ranged between 5,000 and 10,000 tons displacement.[722] The same is true to a lesser extent for warships, which have also grown in size and therefore voracity and capacity for fuel, and the supply trains accompanying mobile task forces also include larger supply tankers. The result, as in the case of negligent navigation or accidents that befall merchant tankers, is a potential for larger slicks from damaged or sunken ships of war.

The law applicable to the ocean environment has also grown in size and complexity. While agreements concluded early in this century occasionally attempted to regulate oil pollution at sea, more often than not treaties tried to deal with principles, *e.g.*, SOLAS or COLREGS, which, if observed, would contribute to a cleaner environment. Since ratification of the Charter in 1945, however, there has been a sea change in environmental regulation. The old themes, represented by newer SOLAS and COLREGS versions, continued, but multilateral treaty responses to maritime disasters as they occurred, *e.g.*, losses of *Amoco Cadiz* and *Torrey Canyon,* began to promote environmental controls. The 1958 LOS conventions

represented a parallel development, restating in international agreements major components of the law of the sea, until then largely customary in format. The UN General Assembly began promoting a cleaner environment through nonbinding resolutions, particularly those resulting from the 1972 Stockholm Conference, and since then the UN Environmental Programme has promoted negotiation and ratification of many regional agreements for protection of the maritime environment. The 1958 conventions and regional environmental treaties preserved longstanding customary norms in most cases, *e.g.*, immunity of warships, naval auxiliaries, State vessels on noncommercial service, and State aircraft, or crystallized new customary norms, *e.g.*, the continental shelf. The 1958 conventions' other rules clauses declared that these treaties were subject to the LOAC and its law of naval warfare component in appropriate situations. The Vienna Convention on the Law of Treaties recognized traditional grounds for treaty suspension or termination, impossibility or fundamental change of circumstances but did not include rules for suspension or termination during armed conflict, the latter being left to customary norms.[723]

A major watershed came in 1982 with the LOS Convention, which went into force in 1994, and which has found increasing acceptance by ratifications and accessions since. Besides consolidating terms of the 1958 LOS conventions, much of which had become customary law by then, the 1982 LOS Convention recognized and regularized rules for innocent passage, straits passage, the EEZ (now a customary norm), the continental shelf and archipelagic waters while expanding the permissible reach of a territorial sea to 12, and a contiguous zone to 24, miles. The Convention's major innovations were rules for the deep seabed through terms establishing and governing the Area, and many provisions, including Part XII, to regulate the maritime environment. Countries such as the United States that have not ratified the Convention have recognized the customary nature of its navigational articles and therefore many provisions affecting the maritime environment encased within these terms. Much of Part XII of the Convention, the principal repository of environmental principles, repeats custom and is not innovative. The same is true of other Convention provisions; the principle of immunity for warships, naval auxiliaries, government ships on noncommercial service, and State aircraft is repeated, as is the other rules concept.[724]

The LOAC as it relates to the environment has followed a similar pattern. The 1907 Hague Conventions, and before them the 1899 conventions, provided for protecting historic monuments, universities, *etc.*, not connected with conflict, thereby codifying custom in some cases. Today many more Hague principles are customary norms binding all States. These agreements did not articulate environmental concerns any more than the first treaties governing navigation or safety at sea, but their effect, if observed, protects the environment. This trend continued through the mid-Twentieth Century with development of customary norms and

agreements, some of which limited or forbade means of warfare, observance of which promotes environmental protection (*e.g.*, the Geneva Gas Protocol); or further protected areas, objects or classes of persons (*e.g.*, the Roerich Pact, Hague Cultural Property Convention, Genocide Convention, and 1949 Geneva Conventions, particularly the Fourth Convention), which also contribute to environmental protection if observed during war. Most of these treaties affected land warfare or aerial bombardment, perhaps from the sea. For the most part, the law of naval warfare has remained customary in nature.[725]

Several developments late in the Twentieth Century pointed toward direct interest in regulating naval warfare as it relates to the environment, however. Protocol I includes provisions related to environmental protection, stated generally and perhaps not yet customary in nature, and the ENMOD Convention, probably accepted as custom today, relates directly to the oceans environment. Protocol I and the Conventional Weapons Convention and its protocols restate customary principles applying to all warfare: discrimination, proportionality and necessity, and Navies began revising their operational law manuals to reflect these LOAC developments as well as the LOS, chief among them *NWP 9*, and its successor, *NWP 1-14M*. In 1995 the *San Remo Manual*, the first compilation of rules of naval warfare since the 1913 *Oxford Naval Manual*, included environmental protections during war at sea and advanced a concept of requiring belligerents to have due regard for the environment and due regard for obligations and rights of States not party to the conflict with respect to the law of the sea. These ideas were taken from the LOS conventions' due regard principles. The ICRC Guidelines (1994) and *NWP 1-14M* (1997) also publish principles for environmental protection during war.[726]

The *Manual* did not expand on the due regard principle. A principal focus of this Chapter has been to advocate that due regard principles governing relationships between the LOS and the LOAC, and the LOAC and the law of the marine environment, should be considered together and not *seriatim* or separately. Due regard should be defined through a factorial approach similar to those used in the American Law Institute's *Conflict of Laws (Second)* and *Foreign Relations Law (Third) Restatements*, unless there are positive rules of law from the Charter, *jus cogens* or sources such as treaties or custom establishing a standard.[727]

The UN Charter, and development of law under it, has been another phenomenon of the second half of this century. This can have major implications for the LOS and the law of the marine environment, and the LOAC. After a Cold War hiatus since 1950, use of Security Council decisions binding UN Members under Articles 25 and 48 has been revived, particularly with respect to the 1990-91 Gulf War. Council and General Assembly resolutions may also be non-binding in nature, *i.e.*, as calls for action or recommendations, but they can restate and therefore strengthen other sources of law, *e.g.*, custom or treaties. This process was used during the Tanker War when Council resolutions condemned attacks on merchant

shipping. Council resolutions also superseded the traditional law. The Gulf War also marked the first time that the Council specifically condemned a country, Iraq, for environmental pollution and held it liable for damages. Other recent crises and conflicts, *e.g.*, the 1990-91 Gulf War[728] and crises in the former Yugoslavia[729] and Haiti[730] have also been influenced by Council resolutions, some binding and some hortatory. The Assembly has a long and strong record of activity related to environmental protection and the LOAC, the 1972 Stockholm Conference being a watershed. Assembly resolutions are nonbinding *per se*, but they can restate custom or treaty norms or influence later primary sources. This has been apparent in, *e.g.*, the 1982 LOS Convention and treaties stating rules for armed conflict.

Besides the Council and Assembly, UN specialized agencies, such as IMO, which sponsors environment-protective treaties for oceans travel and safety, and nongovernmental agencies, *e.g.*, the ICRC, sponsor of the Geneva Conventions and their Protocols, have contributed significantly to the legal milieu.

Yet another phenomenon since the end of World War II has been a worldwide communications and media revolution, particularly the use of television, and increased attention of national and worldwide publics on the environment. There is also near real-time coverage of wars.[731] Worldwide use of the Internet promises even more intense public interest in environmental affairs and armed conflict. The US Congress passed NEPA in 1972, and there has been a flood of more specialized national environmental legislation since then, much of it related to the condition of the oceans.[732] As this practice becomes more worldwide, these national statutes can also contribute to customary standards. Media war coverage has grown too, beginning with the Viet Nam conflict. As yet technical capacity and shipboard space and security have limited media reporting of ongoing environmental casualties at sea, especially during armed conflict, which is usually a matter of minutes, not days, as in the case of land warfare. There is little room aboard smaller naval vessels, *e.g.*, for media passengers, and during the Tanker War standard US NOTAMs and NOTMARs warned away vessels and aircraft (which might have been hired by media looking for a story) because of the risk of suicide attacks on US warships. One result has been lack of public sources to assess the nature of environmental disasters at sea; often these are locked in classified government files or reports, other unpublished sources, *e.g.*, arbitrations or otherwise unreported litigation results because of lawyer-client privilege related to private-party litigation or the national security exception to evidence disclosure, or in private company files. Moreover, in earlier instances massive pollution might occur, but media focus was on other aspects of the tragedy, a recent example being merchant ships attacked during the Tanker War. There were print reports and occasional television sound bites of flaming ships and dying merchant sailors, but there was no statement of the extent of pollution. Even the Nowruz oil spill received only scant attention. Whether this will change in the future is a matter of

technology, national security, the rules of evidence and interest of readers, viewers or Internet users.

If the impact of media coverage and public interest in pollution at sea, whether from merchant ship accidents or negligent navigation, oil pumping blowouts, or the result of conflict, is conjectural, there are other factors that must be considered for the future.

*1. The Proliferation of Players*

Although planners have been aware of the possible impact of Council decisions and the influence of other Council resolutions or those of the Assembly, and of the ICRC promotion of the Geneva Conventions and their Protocols, there is also a wide range of international governmental and nongovernmental organizations that are or would be connected with the law of the sea, the international law of the environment, and the law of armed conflict. These range from IMO, a UN specialized agency; regional organizations of countries such as those party to the Kuwait Regional Convention and its Protocol; the UN Environment Programme, sponsor of such agreements; Greenpeace, an environmental advocacy group that has urged a fifth Geneva Convention to protect the environment; to the International Institute of Humanitarian Law, which sponsored the *San Remo Manual.* Some of these, *e.g.*, IMO, can develop rules binding on member countries like the United States. All can produce policy documents and rules that may influence development of custom or treaties in the fluid legal environment. There are comparable groups within countries, such as the Maritime Law Association within the United States, analogous to the American Bar Association, composed of maritime lawyers, judges and academics and linked to the Comite Maritime Internationale in Brussels, Belgium, which sponsors treaties related to maritime law, or the Sierra Club, a US-based environmental advocacy group.

A recent phenomenon has been another spurt in newly independent States, primarily in Europe, matching the post-World War II decolonization movement. This may promote controversy because of the amorphous law of treaty succession.[733] Moreover, to the extent these countries have coastlines and navies and therefore interests in the LOS, the law of the maritime environment and the law of naval warfare, there is a potential for further uncertainty in these subjects because they may not have sorted out policies on these complex matters. This is one reason why the time is not ripe for a treaty on the environment during war.[734]

The sheer number of States today (there are over 180 UN Members, ranging from tiny Andorra, Liechtenstein and San Marino to powerful giants like China, Russia and the United States), when coupled with the development of regional agreements and perhaps varied custom around the world, raises the further problem of unanimity within the context of a particular military operation. For example, during the 1990-91 Gulf War, some States were parties to Protocol I; others,

*e.g.*, the United States, were not. This meant that Protocol standards could be applied only as custom. While that issue seems to have been resolved for that short conflict, the problem of different national or regional views and practices as to three intertwined bodies of law, the LOS, environmental law, and the LOAC, remains. Even if the law is the same on paper, how it is interpreted or practiced in the multinational context may provoke questions. Military planners must consider these factors in drafting clear, workable ROE for each operation.

*2. The Right to a Clean Environment as a Human Right*

Although not mentioned specifically in worldwide[735] or regional[736] human rights conventions as such, commentators have urged recognizing a decent environment as a human rights norm.[737] That trend is in its infancy; how it will develop, perhaps as customary law,[738] is not clear. International Labor Organization conventions concerned with a safe, healthful workplace[739] arguably could be seen as requiring a safe, healthful labor environment, even as European Union law, whose general policy has been creating a common labor market, has been held to require equal pay for women.[740]

If this trend becomes law, the next issue is the relationship of human rights norms to the LOAC. Humanitarian law, whether grounded in treaties or other sources, applies during armed conflict.[741] Its requirements may differ significantly from those of human rights law. Some human rights conventions, *e.g.*, the Civil and Political Rights Covenant, include derogation clauses limiting their scope to core rights during "time of public emergency."[742] Others may not.[743] While all human rights conventions are subject to Charter law, *jus cogens* norms and principles of the law of treaties, *e.g.*, impossibility, fundamental change of circumstances and armed conflict, there is the problem of a human right seen as a *jus cogens* norm balanced against Charter norms such as Article 51's right of self-defense, perhaps also recognized as a *jus cogens* norm. If a convention-based human rights norm ascends to *jus cogens* status, treaty suspension rules cannot apply. This could have important ramifications for applying humanitarian law and the law of naval warfare, whether in treaty or customary format, during armed conflict.[744]

Some countries, *e.g.*, the United States, may not be party to as many human rights agreements as other nations, some of which may have incorporated human rights norms into their national constitutions, thereby binding them to these standards in practice. There may be issues of conflicting norms among regional treaties, a problem mostly eliminated for environmental law because of terms' commonality in UNEP-sponsored treaties for the most part.

In any event, planners must be aware of a potential for human rights violation claims by opponents, or conditioning of responses by allies or coalition partners due to national human rights commitments. If a right to a safe, healthful

environment becomes a human right, another factor must be added to a decision matrix for conducting naval operations and naval warfare.[745]

*3. The Carryover of Land Warfare Concepts, Particularly from Protocol I*

Some provisions of Protocol I and the Conventional Weapons Convention and its Protocols, restate custom applying to all modalities of warfare, *e.g.*, discrimination, necessity and proportionality, although there may be disputes as to definition or scope of custom. However, there has been a trend, rejected by some commentators, to incorporate more of these treaties' norms into the law of naval warfare.[746] There is always a possibility of a reversal of direction.

*4. A New Treaty to Protect the Environment During Armed Conflict?*

During and after the Gulf War, there were calls from commentators and within the United Nations for a new international agreement directed toward protecting the environment during armed conflict. The ICRC advocated rejection of such a move, stating that the problem was not so much lack of law, but lack of observation and enforcement. Ultimately the United Nations took no action.[747] The ICRC was correct, as this Chapter demonstrates with respect to the law of the sea and the law of naval warfare as related to environmental protection. However, if there are wars in the future with significant environmental damage, whether covered by existing law or not, there may be further calls for another treaty if there is no enforcement against perpetrators of military or other actions degrading the environment. A principal factor here is availability of a veto-free Security Council as one vehicle for meaningful action.

*5. Final Thoughts*

This Chapter demonstrates that the environmental protection factor is a real issue for those who plan naval operations in peace and in war today and in the foreseeable future. While there are few bright navigational beacons to guide the way in terms of applicable law during armed conflict at sea, there is also a real opportunity to develop workable norms to assure maximum permissible use of the Earth's oceans, protect the maritime environment, and security to countries through lawful use of force at sea. Perhaps the factorial approach this Chapter suggests for according due regard to environmental concerns is a step in that direction.

## NOTES

1. Phillip Elmer-Dewitt, *A Man-Made Hell on Earth,* Time, Mar. 18, 1991, 36.

2. For other accounts, which sometimes rely on contemporary media reports, of assaults on the environment during the 1990-91 conflict, *see generally* SUSAN D. LANIER-GRAHAM, THE ECOLOGY OF WAR: ENVIRONMENTAL IMPACTS OF WEAPONRY AND WARFARE 43-51, 69-73, 123-36 (1993); DOD Report, n. II.8, 147, 624-25; William M. Arkin, *The Environmental Threat of Military Operations, in* PROTECTION OF THE ENVIRONMENT 116, 119-21; DeMarco & Quinn, n. II.210, 93-95; Jonathan P. Edwards, *The Iraqi Oil "Weapon" in the 1991 Gulf War: A Law of Armed Conflict Analysis,* 40

NAV. L. REV. 105, 108-10 (1991); Anthony Leibler, *Deliberate Wartime Environmental Damage: New Challenges for International Law*, 23 CAL. W. INT'L L.J. 67-68 (1992); Liesbeth Lijnzaad & Gerard J. Tanja, *Protection of the Environment in Times of Armed Conflict: The Iraq-Kuwait War*, 1993 NETH. INT'L L. REV. 169, 170-71; Robert E. Linhard, *Protection of the Environment During Armed Conflict and Other Military Operations*, *in* PROTECTION OF THE ENVIRONMENT 57, 59-60; Luan Low & David Hodgkinson, *Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War*, 35 VJIL 405, 410-12 (1995); John H. McNeill, *Protection of the Environment in Time of Armed Conflict: Environmental Protection in Military Practice*, *in* PROTECTION OF THE ENVIRONMENT 536-37; Okorodudu-Fubara, n. II.210, 129; Glen Plant, *Introduction*, ENVIRONMENTAL PROTECTION AND THE LAW OF WAR. A "FIFTH" GENEVA CONVENTION ON THE PROTECTION OF THE ENVIRONMENT IN TIME OF ARMED CONFLICT 3 (Plant ed. 1992); Adam Roberts, *Environmental Destruction in the 1991 Gulf War*, 32 INT'L REV. RED CROSS 538, 540-49 (1992); Roberts, *Environmental Issues in International Armed Conflict: The Experience of the Gulf War*, *in* PROTECTION OF THE ENVIRONMENT 222, 223, 247-50; Salter, n. II.210, 348-50; Walter Gary Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL L. REV. 1, 40-41 (1992); Rex J. Zedalis, *Burning of the Kuwaiti Oilfields and the Laws of War*, 24 VAND. J. TRANSNAT'L L. 711, 713 (1991); Laura Edgerton, Comment, *Eco-Terrorist Acts During the Persian Gulf War: Is International Law Sufficient to Hold Iraq Liable?*, 22 GA. J. INT'L & COMP. L. 151, 153 (1992).

3. For another general overview, *see* Roberts, *Environmental Issues*, n. 2. Parts A-B.2 are revisions of Walker, *Oceans Law*.

4. One commentator estimated leakage at 30,000 tons of crude a day, much more than in most accounts; another put the total spill at 250,000 barrels. *See* n. II.210 and accompanying text.

5. Walker, *State Practice* 158, citing 2 CORDESMAN & WAGNER 90-91, 101-02.

6. *See, e.g.*, nn. II.264, 306, 309, 384 and accompanying text.

7. *See* nn. II.393-97 and accompanying text.

8. S.C. Res. 514 (1982); S.C. Res. 540 (1983), *in* WELLENS 450-52; Fenrick, *Military Objectives*, n. II.202, 20; *see also* Fenrick, *Legal Aspects*, n. II.501, 260; nn. II.179, 233, 250, 260, 334, 338-40, 354, 357, 359, 362, 368-73, 393-94, 412, 420-21, 446, 469, 501, 519 and accompanying text.

9. Some reports put mariner deaths at over 400. *See* n. II.518 and accompanying text; *see also* Michael Harris Hoffman, *Neutral Mariners and Humanitarian Law: A Precedent for Protecting Neutrals in Armed Conflict*, 1992 INT'L REV. RED CROSS 274, 285-86.

10. *See* nn. II.459-68 and accompanying text.

11. 2 O'CONNELL, LAW OF THE SEA 984.

12. In 1926 the Preliminary Conference on Oil Pollution of Navigational Waters produced Final Act, Annex, Draft Convention, *in* 1926(1) FRUS 238, 245 (1941). No government signed it, but some shipowners formed a "gentleman's agreement" not to discharge oily water within 50 miles of a coast. The draft became a basis for the 1954 Oil Pollution Convention, later amended, Apr.11, 1962, 17 UST 1523, 600 UNTS 332; Oct. 21, 1969, 28 *id.* 1205; Oct. 12, 1971, 2 WALLACE 1693; Oct. 15, 1971, *id.* 1695; *see also* COLOMBOS § 445; 4 Nordquist 4. Environmental warfare has a long history. *See* Frank R. Finch, *This Land Is Our Land: The Environmental Threat of Army Operations*, *in* PROTECTION OF THE ENVIRONMENT 99, 100, 108, 111; Carlson M. LeGrand, *Framing the Issues*, *in id.* 23, 25; Okorodudu-Fubara, n. II.210, 142-43; Adam Roberts, *An International Relations Expert's Overview*, *in* ENVIRONMENTAL PROTECTION, n. 2, 151, 153; Roberts, *Environmental Issues*, n. 2, 224-26.

13. Convention for Safety of Life at Sea, n. IV.19.

14. *E.g.*, 1969 Civil Liability Convention, supplemented by Protocol, Nov. 19, 1976, *in* 16 ILM (1977), a response to the 1967 *Torrey Canyon* grounding. Nicholas J. Healy, *The C.M.I. and IMCO Draft Conventions on Civil Liability for Oil Pollution*, 1 J. MAR. L. & COM. 93 (1969). The Convention would be further modified by Protocol to Convention on Civil Liability for Oil Pollution Damage, May 25, 1984, *in* 6 BENEDICT, Doc. 6-4A; Protocol to the Convention on Civil Liability for Oil Pollution Damage, Nov. 27, 1992, *in id.*, Doc. 6-4B; neither are in force for the United States. The 1969 Intervention Convention also responded to *Torrey Canyon*; the Intervention Protocol amends the Convention. Intervention on the High Seas Act, 33 USC §§ 1471-78, implements the Convention and Protocol for the United States. *See also* 2 O'CONNELL, LAW OF THE SEA 1006-07; SCHOENBAUM § 16-1, 825. National legislation, if uniform worldwide, can be a predicate for customary law. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 26.

15. In 1970, however, Richard A. Falk told a Naval War College audience the *Torrey Canyon* spill was the Hiroshima of the Ecological Age. Falk, *New Trends in International Law: The Challenges of the Ecological Age*, NWC REV. 18, 21 (No. 7, 1970).

16. The UN Security Council passed Resolution 687, declaring Iraq "liable under international law for any direct damage, including environmental damage and in depletion of natural resources, or . . . injury as a result of [its] unlawful invasion and occupation of Kuwait." S.C. Res. 687, UN Doc. S/RES/687 (1991), *in* WELLENS 542; UN General Assembly Resolution 47/37 (1992) declared that existing international law prohibits environmental damage and depletion of natural resources, *e.g.*, destroying oil wells and releasing oil into the sea.

17. *See generally* BIRNIE & BOYLE 128; Michael A. Diederich, Jr., *"Law of War" and Ecology - A Proposal for a Workable Approach to Protecting the Environment Through the Law of War*, 136 MIL. L. REV. 137, 160 (1992); Dieter Fleck, *Protection of the Environment During Armed Conflict and Other Military Operations*, *in* PROTECTION OF THE ENVIRONMENT 529, 532; Hans-Peter Gasser, *The Debate to Assess the Need for New International Accords*, *in id.* 521, 524; Sebia Hawkins, *The Gulf War: Environment as a Weapon*, 1991 ASIL PROC. 214, 220-21; Lijnzaad & Tanja, n. 2, 189-200; Virginia Morris, *Protection of the Environment in Wartime: The United Nations General Assembly Considers the Need for a New Convention*, 27 INT'L LAW. 775 (1993); Sharp, n. 2, 3; Glen Plant, *Elements of a "Fifth Geneva" Convention on the Protection of the Environment in Time of Armed Conflict*, *in* ENVIRONMENTAL PROTECTION, n. 2, 37; Plant, *Governmental Proposals and Future Prospects*, *in id.* 170; Plant, *Legal Aspects of Marine Pollution During the Gulf War*, 7 INT'L J. ESTUARINE & COASTAL LAW 217, 229-31 (1992); Plant, *Responses to the London Conference and the Ottawa Conference of Experts on the Use of the Environment as a Tool of Conventional Warfare, 10-12 July 1991*, *in* ENVIRONMENTAL PROTECTION 161; Roberts, *Environmental Issues*, n. 2, 257-58; James P. Terry, *The Environment and the Laws of War: The Impact of Desert Storm*, 45 NWC REV. 60, 65 (No. 1, 1992). For comment on the London conference, *see* Plant, *Remarks*, *in* Panel Discussion, *State Responsibility and Civil Reparations*, *in* PROTECTION OF THE ENVIRONMENT 447, 459.

18. G.A. Res. 47/37, n. 16, 30; Fleck, *Protection*, n. 17, 532; Morris, n. 17, 780; Roberts, *Environmental Issues*, n. 2, 258.

19. *See* VI.B.2.

20. A 1996 US Naval War College Oceans Law and Policy Department symposium resulted in PROTECTION OF THE ENVIRONMENT, an example of continued interest in the subject.

21. *E.g.*, Convention for Regulating Police of the North Sea Fisheries, May 6, 1882, 160 CTS 219, supplemented by Agreement Regulating Allowances to Witnesses in Fishery Cases, Apr. 26, 1902, Neth.-Gr. Brit., 191 *id.* 150; Agreement, June 3, 1955, 310 UNTS 145, replaced by Convention on Power of Coastal States to Regulate Fisheries of Their Respective States, Mar. 9, 1964, 581 *id.* 57; 1931 Whaling Regulation Convention, n. IV.19, supplemented by 1946 Whaling Regulation Convention, n. IV.19, modified by Whaling Regulation Protocol, n. IV.19. There are many amendments to the Protocol Schedule. *See* TIF 466. Fishery Convention, arts. 1-8, is the overarching agreement. *See* also n. IV.19 and accompanying text.

22. *E.g.*, Convention for Safety of Life at Sea, n. IV.19, applying to passenger ships; 1929 SOLAS, n. IV.19; 1948 SOLAS, n. IV.19; 1948 COLREGS, n. IV.19; 1960 COLREGS, n. IV.19; 1960 SOLAS, n. IV.19; 1972 COLREGS, n. IV.19; 1974 SOLAS, n. IV.19. 1960 SOLAS and COLREGS have been superseded for most countries by 1972 COLREGS and 1974 SOLAS, although status of the amendments as to individual States will vary. *See generally* TIF 406-09. As the foregoing indicates, what began as a treaty in 1914 to regulate passenger liner safety, and thereby minimize losses by sinkings and therefore pollution of the sea from fuel (*e.g.*, oil) and cargoes, has expanded into two sets of international agreements, SOLAS (dealing primarily with internal safety of vessels) and COLREGS (establishing rules for safe navigation of vessels in relation to each other and thereby contributing to environmental protection through collision minimization), which contribute indirectly to a cleaner maritime environment. Before becoming party to these agreements, many States had legislation governing rules of the road, *e.g.*, Act to Adopt Regulations for Preventing Collisions at Sea, ch. 802, 26 Stat. 320, which collectively arguably could be custom on the point. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 26. Today national legislation implements the agreements for many countries, including navigation of internal waters, although 1972 COLREGS, rule 1(b) allows countries to declare national rules for internal waters. The United States has special internal waters rules. *See* Inland Rules, 33 USC §§ 2001-38; 33 CFR §§ 80.01-80.175 which publish demarcation lines. Of particular interest to navies in reducing collision risks, and therefore the risk of pollution resulting from accidents, are INCSEA treaties, *e.g.*, INCSEA Agreement and INCSEA Protocol, supplemented by Agreement on Prevention of Dangerous Military Activities, n. IV.19; *see also* n. IV.19 and accompanying text.

23. *E.g.*, Hague VIII, arts. 1-6; Hague IX, arts. 1-4; *see* Parts B.3.a(I)(A)-B.3.a(I)(B), B.3.a(I)(D)-B.3.a(I)(E).

24. *See* nn. 268-71 and accompanying text.

25. Roerich Pact, arts. 1-3; *see* nn. 272-77 and accompanying text.

26. *E.g.*, Fourth Convention, arts. 14-15, 18-19, 53, 147, 154, which along with Hague IX, protect the environment through provisions covering safe areas for the wounded, sick and aged, children, expectant mothers and mothers of

small children, hospital areas, convoys, and destruction of property, that may also benfit environmentally sensitive areas; *see* Part B.3.a(III)(A).

27. Cultural Property Convention, superseding and supplementing Hague IX and Roerich Pact for States party to it; *see* Part B.3.a(III)(B).

28. Legality of the Threat or Use of Nuclear Weapons, 1996(1) ICJ 266.

29. *Id.*, 1996(1) ICJ 241-43.

30. *Id.*, 1996(1) ICJ 241-42, also noting that environmental protection treaties could not deprive a State of its right of self-defense. *See also* UN Charter, arts 51, 103; nn. III.10, 486, 521 and accompanying text.

31. SIMMA 775-76, 779; Diederich, n. 17, 143-44, citing UN Charter, arts. 1(3)-1(4). An older standard commentary on *id.*, arts. 1(3)-1(4), 55-56 says nothing about protecting the environment. *See generally* GOODRICH *et al.* 34-36, 370-82. For analysis of UN action to protect the environment during the Tanker War, *see* nn. 34-37 and accompanying text. For analysis of the right to a clean environment as a human right, *see* Part C.2.

32. UN Charter, arts. 10, 14; *see also* n. IV.57 and accompanying text.

33. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

34. Resolutions also referred to States' UN Charter obligations without further elaboration. Succeeding resolutions incorporated earlier ones by reference. S.C. Res. 479 (1980), 514 (1982), 522 (1982), 540 (1983), 582 (1986), 588 (1986), 598 (1987), 612 (1988), *in* WELLENS 449-56. Reference to Charter obligations theoretically could mean those under UN Charter, arts. 1(3)-1(4), 55-56; *see also* n. 31 and accompanying text. Chapter II places these resolutions in their historical context.

35. *See* Part B.3.

36. S.C. Res. 552 (1984), *in* WELLENS 473; *see also* nn. II.251-59 and accompanying text.

37. This might be contrasted with Council action during the 1990-91 war; *e.g.*, S.C. Res. 687 (1991) *in* WELLENS 542, 547, reaffirmed that Iraq is liable for any direct loss, damage, including environmental damage, and depletion of natural resources as a result of its unlawful invasion and occupation of Kuwait.

38. UN Charter, arts. 2(4), 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, V.21 and accompanying text.

39. *See* n. 31 and accompanying text.

40. Necessity and proportionality in self-defense responses can differ from what is necessary and proportional in LOAC situations. *See* nn. V.22-32 and accompanying text. The same is true for standards of due regard for the environment in the self-defense context, which can be seen as part of the necessity and proportionality factors, and of the factor of admitting of no other alternative in an anticipatory self-defense context, although the latter situation's immediacy undoubtedly will admit of less time for consideration of this factor as in the reactive self-defense situation. What is due regard in LOAC situations may be different in the self-defense context. For analysis of LOAC and self-defense due regard situations, *see* Part B.3.

41. *See* nn. III.617-29 and accompanying text.

42. Guyana ratified the LOS Convention on Nov. 16, 1993, becoming the 60th nation to do so. One year later, *i.e.*, November 16, 1994, the Convention came into force for ratifying States. Although the United States did not then sign the treaty, it has since signed a protocol amending Part XI, dealing with deep seabed mining. The United States has recognized the Convention's navigational articles as representing customary law, has proclaimed and will recognize other States claims to a 12-mile territorial sea, and has claimed an EEZ in accordance with Convention principles. *See* n. IV.3 and accompanying text.

43. LOS Convention, art. 311(1), declaring the Convention prevails as among States party to it over the 1958 LOS Conventions; *see also* n. IV.44 and accompanying text.

44. NWP 9A Annotated, Table ST1-1; *see also* n. IV.3, 190.

45. Vienna Convention, art. 18; G.A. Res. 59A Annotated, 38 UN GAOR, Supp. No. 47, 48 (1983) (calling on States to refrain from actions undermining the LOS Convention); *see also* nn. IV.32, 60 and accompanying text.

46. The United States and commentators have said the LOS Convention's navigational articles restate customary law. *See* n. IV.3.

47. UN Charter, art. 103. This applies to UN Members' obligations under Security Council decisions pursuant to *id.*, arts. 25, 48. These supersede treaty obligations like the Charter itself. *See* n. IV.57 and accompanying text. Art.

103's rule, analogous to the US Constitution, art. VI supremacy clause as to the laws of the 50 states of the United States, is a variance on treaty construction rules. Later treaties on the same subject usually supersede earlier ones; the reverse, *i.e.*, an earlier treaty prevails over a later one, is not so unless a later agreement is subject to an earlier one. *Cf.* Vienna Convention, arts. 5, 30; *see also* n. IV.455 and accompanying text.

48. LOS Convention, art. 237, a *lex specialis* for LOS Convention, Part XII, its principal environmental protection provisions. 4 Nordquist ¶ 237.7(a). LOS Convention, art. 311(5) permits such. 5 Nordquist ¶ 311.11, 243; *see also* Charney, *The Marine Environment*, n. IV.49, 884. Art. 237(1) states a recognized way to preserve a prior treaty's force, subject to art. 237(2)'s consistency limitation. Vienna Convention, art. 30(2); 1 OPPENHEIM § 590, 1213; RESTATEMENT (THIRD) § 323(1); SINCLAIR 97-98; *see also* n. IV.455 and accompanying text.

49. LOS Convention, art. 311(2). Presumably this includes 1972 COLREGS and 1974 SOLAS, n. IV.19, the current treaties publishing rules of the road for navigation at sea and rules for safety of life at sea.

50. This might be contrasted with LOS Convention, art. 311(1), expressly superseding the 1958 LOS Conventions if LOS Convention parties are also parties to the 1958 treaties. If in a particular situation a State is a 1958 convention party but is not a LOS Convention party, and the other State is a LOS Convention party and was party to the 1958 conventions, the 1958 rules apply. Vienna Convention, art. 30(4)(b); RESTATEMENT (THIRD) § 323(3)(b); SINCLAIR 94. When custom, general principles or perhaps secondary sources such as judicial decisions or commentators conflict with a treaty norm in either the 1982 or the 1958 treaties, those conflicting rules will be thrown into the decision matrix. If a customary rule, principle or other source is the same as a treaty rule, the latter is strengthened. ICJ Statute, arts. 38, 59; Vienna Convention, preamble, arts. 38, 43 (recognizing custom's independent vitality); BROWNLIE, INTERNATIONAL LAW 12-19; ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 104-06, 114, 136, 164 (1971); GERHARD VON GLAHN, LAW AMONG NATIONS 23 (5th ed. 1986) (principles as gap-filler); 1 OPPENHEIM § 11, 33-36; RESTATEMENT (THIRD) §§ 102-03 (principles primarily a gap-filler); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 49-65, 74-81 (1991) (same); SINCLAIR 6, 9-10, 102-03; Akehurst, *Custom*, n. IV.56, 49-52; Robertson, *Contemporary*, n. III.358, 91-94. The High Seas Convention has been generally recognized as stating customary rules. *See id.*, preamble; n. IV.3. Where these principles carry forward into the LOS Convention, they stand on quite firm ground. This is particularly important for the relationship among the LOS, the LOAC, and the law of the environment applying to high seas operations.

51. LOS Convention, arts. 192-237.

52. *See generally, e.g., id.*, arts. 21(1)(f), 22(2), 23, 28(2), 33, 39(2)(b), 42(1)(a)-42(1)(b), 42(2)-42(5), 43(b), 44, 56(1)(b)(iii), 56(3), 60(1), 61-72, 80, 94(4)(c), 94(7), 116, 122-23, 145-46, 147(1), 147(2)(b), 147(c), 149, 233, 303, *see also* 2 Nordquist ¶¶ 22.1-22.9, 23.1-23.9, 39.1-39.10(l), 42.1-41.10(l), 43.1-43.8(e), 44.1-44.8(c), 61.1-61.12(k), 62.1-62.16(l), 63.1-63.12(f), 64.1-64.9)(f), 65.1-65.16(i), 66.1-66.9(g), 67.1-67.8(e), 68.1-68.5(b), 69.1-69.17(h), 70.1-70.11(d), 71.1-71.9(c), 72.1-71.10(h), 303.1-303.10; S. Doc. 103-39, n. IV.3, 23, 25-28, 51; RESTATEMENT (THIRD) §§ 457, r.n.7; 461, cmt. e; 512; 523(1)(b)(ii) & cmt. d. Some LOS Convention provisions echo the 1958 LOS conventions. *See, e.g.*, Fishery Convention, arts. 1-8, 13; High Seas Convention, arts. 10, 11(1).

53. The Conference "had a great influence for later deliberations on the protection and preservation of the marine environment" in UN Committees and in the LOS Convention drafting. *Introduction*, ¶ XII.11, 4 Nordquist 8-9; RESTATEMENT (THIRD), Part VI, *Introductory Note*, at 99; *id.* § 602, r.n.1; *see also* BIRNIE & BOYLE 39-53; Petsonik, n. II.62, 351. The Conference *Report* (Stockholm Conference Report) included a Declaration on the Human Environment (Stockholm Declaration), with 26 Principles, an Action Plan for the Human Environment, and various resolutions. *See* 11 ILM 1416 (1972). Principle 6 states in part that "[D]ischarge of toxic... or other substances and the release of heat in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted... to ensure that serious or irreversible damage is not inflicted on ecosystems." Principle 7 declares that "States shall take all possible steps to prevent pollution of the seas by substances... liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea..." Principle 21 says States must achieve a balance between exploiting their resources and responsibility so that exploitation does not harm others' environments:

> States have, in accordance with the [UN Charter] and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction[,]

*i.e.*, the high seas. Principle 22 would require "States [to] co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within their jurisdiction or control of such States to areas beyond their jurisdiction..." Principle 26 protested against nuclear weapons, and other weapons of mass destruction, with a plea for agreements to eliminate and destroy them. *Id.*

at 1418, 1420-21. United Nations Environmental Programme Participation Act of 1973, Pub. L. No. 93-188, § 2, 87 Stat. 713, declared US Congressional policy "to participate in coordinating efforts to solve environmental problems of global and international concern...." G.A. Res. 3281, *Charter of Economic Rights and Duties of States*, arts. 29-30, *in* 14 ILM 251 (1975) reiterated nations' duties to use the sea for peaceful purposes to preserve the environment. These resolutions, unless they restate customary or treaty law, do not bind U.N. Members. UN Charter, arts. 10, 14; *see also* n. IV.57 and accompanying text.

54. Kuwait Regional Convention, n. II.63; Kuwait Protocol, n. II.63. All countries bordering the Persian Gulf were parties: Baharain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, UAE. *See* n. II.64 and accompanying text. A related Protocol on Pollution Resulting from Exploration & Exploitation of the Continental Shelf, Mar. 29, 1989, has been signed. BROWN 355-56.

55. Convention for Conservation of the Red Sea & Gulf of Aden Environment, Feb. 14, 1982, *in* 2 WALLACE 2282 (Red Sea Convention); Protocol Concerning Regional Co-operation in Combating Pollution by Oil & Other Harmful Substances in Cases of Emergency, Feb. 14, 1982 (Red Sea Protocol), *in id.* 2293. Signatories include Jordan, Palestine Liberation Organization for Palestine, People's Democratic Republic of Yemen, Saudi Arabia, Somalia, Sudan and Yemen Arab Republic, all bordering the Red Sea and Gulf of Aden; any Arab League member can accede to it. Red Sea Convention, preamble, art. 26(2), *id.* 2282, 2291.

56. *See* nn. II.264, 384 and accompanying text.

57. *E.g.*, Kuwait Regional Convention, n. II.63, arts. 16-18, 1140 UNTS 159-60; Kuwait Protocol, n. II.63, arts. 3, 5-13, *id.* 202-06; Red Sea Convention, n. 55, arts. 16-20, 22, 24, 2 WALLACE 2287-90; Red Sea Protocol, n. 55, arts. 3, 5-13, *id.* 2295-98. Another recent example, involving US participation, is an agreement package governing protection of the South Pacific Ocean. Convention for Protection of Natural Resources & Environment of the South Pacific Region, Nov. 24, 1986, *in* 26 ILM 38 (1986); Protocol for Prevention of Pollution of the South Pacific Region by Dumping, Nov. 24, 1986, *in id.* 65 (1986); Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region, Nov. 24, 1986, *in id.* 59 (1986); *see also* US understanding, S. Treaty Doc. 101-21, 53.

58. *See, e.g.*, LOS Convention, arts. 23, 39, 41(5), 43(a), 94(4)(c), 94(5), 197, 200-02, 207-12, 217, 221-22, 303; *see also* 5 Nordquist ¶¶ 311.8.m, 311.11.

59. Vienna Convention, preamble, arts. 38, 43; *see also* ICJ Statute arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

60. Nicaragua Case, 1986 ICJ 31-38, 91-135; Corfu Channel, 1949 ICJ 22; *see also* n. III.10 and accompanying text.

61. Akehurst, n. IV.56, 49-52. LOS Convention, art. 221(1) seems to anticipate this possibility for proportionate anticipatory action to ward off pollution threats. *Id.*, art. 310 provides:

> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with ... this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of ... this Convention in [its] application to that State.

Art. 309 forbids reservations or exceptions to the Convention and is the reason for the agreement to amend the Convention, Part XI. *See* n. IV.3 and accompanying text. Such statements, taken collectively, arguably could articulate custom apart from the Convention. However, occasional presence of clear, contradictory authorizations for custom, *e.g.*, LOS Convention, art. 221(1), plus "obscurity and uncertainty" of art. 310's meaning, *cf.* 5 Nordquist ¶ 310.5, suggest custom and other sources can be considered alongside Convention norms. This is true for the largely customary law of naval warfare, which enters through LOS Convention' other rules clauses, with which the LOS Convention and the 1958 LOS conventions are replete. *See, e.g.*, LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text.

62. UN Members must comply with Security Council decisions under UN Charter, arts. 25, 48; these supersede treaty obligations. *Id.*, art. 103. The Council or the General Assembly may also recommend action or call upon States for action pursuant to *id.*, arts. 10, 14, 39-41, but these resolutions do not have the binding force of decisions, but they may restate custom or treaty norms and thereby strengthen them. *See* n. IV.57 and accompanying text; Part B.1.

63. *Jus cogens* theorizes a fundamental norm overrides rules in treaties and custom, two primary sources of international law stated in, *e.g.*, ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03. Its contours are vague and depend on commentators' views, ranging from expansive (*e.g.*, those of the former USSR, whose jurisprudence may still have influence) to totally deprecatory. *See* n. III.10 and accompanying text. National sovereignty is a competing factor. If UN Members give up freedom to make treaties to the measure of UN Charter, art. 103, that does not

necessarily mean they gave up a sovereign right to build custom that may contradict a treaty norm. *See, e.g., id.*, arts. 2(1), 2(7); LOS Convention, art. 157(3); nn. III.10 and accompanying text.

64. *Compare, e.g.,* LOS Convention, preamble, arts. 2(3) (territorial sea), 19, 21, 31 (innocent passage), 34(2) (straits transit passage), 45 (straits innocent passage, incorporation by reference of arts. 19, 21, 31), 52(1) (archipelagic sea lanes passage), 58(1), 58(3) (EEZs), 78(2) (continental shelf; coastal State cannot infringe or interfere with "navigation and other rights and freedoms of other States as provided in this Convention"), 87(1) (high seas), 138 (the Area), 303(4) (archaeological, historical objects found at sea; "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature"), *with, e.g.,* High Seas Convention, art. 2; Territorial Sea Convention, art. 1. Although two 1958 conventions do not have other rules clauses, they state that they do not affect status of waters above as high seas in the case of the continental shelf, or other high seas rights in the case of high seas fisheries. Continental Shelf Convention, arts. 1, 3; Fishery Convention, arts. 1-8, 13.

65. For citations to these conclusions, recited in this Chapter for the reader's convenience but previously analyzed in Chapters III and V, *see* nn. III.10, 952-67, IV.10-34 and accompanying text. Citations in this Chapter are limited to necessary primary sources.

66. ILC Report, n. III, 192, 267-68. A few commentators miss the point, but those who say the other rules clauses mean the LOAC are in the majority. *See also* nn. III.955-56 and accompanying text.

67. LOS Convention, art. 88. Area use is reserved for peaceful purposes; marine scientific research must be conducted for peaceful purposes. *Id.*, arts. 141, 143(1), 147(2)(d), 155, 240(a), 242(1), 246(3). *See also* nn. III.956, IV.15 and accompanying text.

68. RESTATEMENT (THIRD) § 521, cmt. b, citing UN Charter, art. 2(4); LOS Convention, arts. 88, 301; referring to RESTATEMENT (THIRD) § 905, cmt. g; *see also* nn. III.958, IV.16 and accompanying text.

69. UN Charter, art. 103; *see also* n. IV.57 and accompanying text; Part B.1.

70. *See* nn. III.957-60, IV.15-18 and accompanying text.

71. UN Charter, arts. 2(4), 51, 103; *see also* S. Doc. 103-39, n. IV.3, 51. There is a debate on whether anticipatory self-defense, as opposed to "reactive" self-defense, where an aggressor strikes the first blow, is permitted in the Charter era. The US view, supported by many commentators, is that anticipatory self-defense is permissible in the Charter era. Iran and the USSR had the opposite view. *See generally* Chapter III and Part B.1.

72. *See* nn. IV.16, 67 and accompanying text; Part V.F.

73. *Cf.* nn. 12-14, 21-22 and accompanying text.

74. *E.g.,* 1969 Civil Liability Convention, art. 3(1). ICAO Convention, art. 89 says it does not affect parties' freedom of action during war and for a state of emergency if the country declaring the emergency notifies ICAO. *See* also n. IV.20 and accompanying text.

75. *E.g.,* 1954 Oil Pollution Convention, art. 19; Treaty of Rome, n. III.819, arts. 223-26, 298 UNTS 88-89; *see also* n. IV.21 and accompanying text.

76. NAFTA, n. III.949, art. 2204, *in* 32 ILM 702 (1993). NAFTA has many environmental protection provisions. NAFTA, arts. 104, 709-24, 901-15, 1101, 1114, 2005, 2014-15, 2101, *id.* 297-98, 377-83, 386-92, 639, 642, 694-97, 699, analyzed *in* DANIEL MAGRAW, NAFTA & THE ENVIRONMENT: SUBSTANCE AND PROCESS ch. 1 (1995); Stewart A. Baker, *After the NAFTA,* 27 INT'L LAW. 765, 769 (1993); Jack I. Garvey, *Trade Law and Quality of Life — Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment,* 89 AJIL 439 (1995); Raymond B. Ludwiszewski, *"Green" Language in the NAFTA: Reconciling Free Trade and Environmental Protection,* 27 INT'L LAW. 691 (1993); Richard B. Stewart, *The NAFTA: Trade, Competition, Environmental Protection, id.* 751 (1993). NAFTA has a national security exception, stating *inter alia* that nothing in NAFTA may be construed to prevent a party from taking actions it considers necessary to protect its "essential security interests," during war or other emergency in international relations, or to prevent a party from acting pursuant to its Charter obligations for maintaining international peace and security. NAFTA, arts. 2102(1)(b)-2102(c), 32 ILM 699-700. *See also* nn. III.949, IV.22 and accompanying text.

77. *E.g.,* Kuwait Regional Convention and Protocol, n. II.63; Red Sea Convention and Protocol, n. 55.

78. High Seas Convention, preamble; *see also* nn. III.962, IV.24 and accompanying text. The LOS Convention's navigational articles also reflect custom. *See* nn. III.963 and accompanying text; Chapter IV.

79. ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

80. Vienna Convention, art. 61; *see also* nn. III.928, IV.26 and accompanying text.

81. Vienna Convention, art. 62, *see also* nn. III.929, IV.27 and accompanying text.

82. *See* nn. III.930, IV.28 and accompanying text.

83. *See* nn. III.938-51, IV.29 and accompanying text.

84. *See* nn. III.948, IV.30 and accompanying text.

85. UN Charter, art. 2(2); Vienna Convention, art. 26; *see also* nn. III.934, IV.31 and accompanying text.

86. Vienna Convention, art. 18; *see also* n. IV.32, 60, VI.45 and accompanying text.

87. *See* Symposium, *State Succession*; Walker, *Integration and Disintegration.*

88. ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

89. High Seas Convention, preamble. The LOS Convention navigational articles are also said to reflect custom; these have numerous other rules clauses. *See* n. 78 and accompanying text.

90. "In at least one respect [its terms] are more restrictive than customary international law, namely in the case of the territorial sea." 2 O'CONNELL, LAW OF THE SEA 994; *see also* Charney, *The Marine Environment,* n. IV.49, 887.

91. S. Doc. 103-39, n. IV.3, 19.

92. *E.g.,* LOS Convention, arts. 1(1)(4)-1(1)(5), 21, 23, 39, 41, 43, 54, 56(1)(b)(iii), 60(3), 63, 66-67, 94(7), 116, 123(b), 145-47, 155(2), 162, 165.

93. LOS Convention, art. 192; *compare* Stockholm Declaration, n. 53, Principle 7, 11 ILM 1418 (1972); *see also* 4 Nordquist 36-43. The US Department of Defense and the US Navy view Convention art. 236 and Part XII "as a mandate to ensure responsibility for environmentally sound practices." William J. Schachte, Jr., *The Value of the 1982 UN Convention on the Law of the Sea: Preserving Our Freedoms and Protecting the Environment,* 23 ODIL 55, 61 (1992). *See also* NWP 1-14M Annotated¶ 8.5.1; nn.19-20 and accompanying text; Part B.2.

94. *See generally* 2 Nordquist ¶ 1.23, arguing for an evolving conceptual definition; 4 *id.* ¶ 192.11(a); Daniel Tolbert, *Defining the Environment, in* ENVRONMENTAL PROTECTION, n. 2, 259.

95. S. Doc. 103-29, n. IV.3, 19.

96. LOS Convention, art. 1(1)(4); 2 Nordquist ¶¶ 1.1-1.15, 1.22-1.24, 1.26-1.31. The LOS Convention definition means the environment is human and nature centered. *See* Tolbert, n. 94, 259.

97. LOS Convention, art. 193; *compare* Stockholm Declaration, n. 53, Principle 12, 11 ILM 1419 (1972); *see also* 4 Nordquist 45-49. Jose Luis Vallarta, *Protection and Preservation of the Marine Environment and Marine Scientific Research at the Third United Nations Conference on the Law of the Sea, in* Symposium, *The Law of the Sea: Where Now,* 46 L. & CONTEMP. PROBS. 146, 149 (1983) said the duty to preserve and protect the environment is a *jus cogens* norm. *See also* nn. III.10, VI.63 and accompanying text.

98. This part of the LOS Convention does not state "significant" as part of the duty, but other LOS Convention provisions, regional agreements, and commentators have added terms like "major," "serious," "significant" or "substantial." *E.g.,* LOS Convention, arts. 94(7), 233; Kuwait Protocol, n. II.63, art. 1(2), 1140 UNTS 201; Red Sea Protocol, n. 55, art. 1(2), 2 WALLACE 2294; RESTATEMENT (THIRD) §§ 601(1)(b)-601(3), 603(1)(a), 603(2); Low & Hodgkinson, n. 2, 422-23. Such sources, combined, can evidence custom. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3).

99. LOS Convention, art. 194(1); *see also* RESTATEMENT (THIRD) § 603(2). The "prevention" theme was partly derived from High Seas Convention, arts. 24-25, and limitation to "capabilities" from Stockholm Declaration, n. 53, Principle 7, 11 ILM 1418 (1972). 4 Nordquist ¶¶ 194.1, 194.10(b). Diligent prevention and control are probably binding norms. *Cf.* BIRNIE & BOYLE 95.

100. LOS Convention, art. 194(2); RESTATEMENT (THIRD) §§ 601(1)(b), 601(2), 603(1)(a), 603(2).

101. 4 Nordquist ¶ 194.10(e); *see also* Parts IV.B.2-IV.B.3.

102. LOS Convention, art. 1(1)(5) defines dumping; *see also* 2 Nordquist ¶¶ 1.1-1.15, 1.24, 1.26-1.31.

103. LOS Convention, art. 194(3); *compare* MARPOL 73/78, art. 2(2), Annex II, defining "harmful substance," not explained in the LOS Convention. 4 Nordquist ¶ 194.10(j). Art. 194(3) sweeps more broadly than MARPOL 73/78. Language in MARPOL 73/78, Annex II, art. 2(2) defining pollution is the same as LOS Convention, art. 1(1)(4). MARPOL 73/78 parties represent 92 percent of world merchant tonnage. BOWMAN & HARRIS 293 (11th Cum. Supp. 1995). It is fair to assume that its terms represent custom; similar terms used in similar circumstances in the LOS Convention also restate custom. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3). The injury must be significant, however. *See* n. 98 and accompanying text. Act to Prevent Pollution from Ships, 33 USC §§ 1901-08, implements MARPOL 73/78 for the United States, imposing greater environmental

obligations on warships than do the treaties. William H. Wright, *Naval Warfare and the Environment, in* PROTECTION OF THE ENVIRONMENT 35, 38.

104. LOS Convention, art. 194(4), restating custom. 4 Nordquist ¶ 194.10(n); RESTATEMENT (THIRD) § 601 & cmt. a, r.n.1, citing *inter alia* Draft Articles on State Responsibility, art. 19(3)(d), *Report of the International Law Commission*, 2(2) YB INT'L L. COMM'N 96, 31 UN GAOR, Supp. No. 10, 226 (1976).

105. LOS Convention, art. 194(5). Ice-covered areas, governed by *id.*, art. 234, are an example of a sensitive environment. 4 Nordquist ¶ 194.10(o), noting International Law Commission, *Report on the Work of the 42d Session*, ch. IV, ¶ 312, § C, item 2, art. 22, *Commentary*, ¶ (2), 45 UN GAOR, Supp. No. 10 (1990), *in* 2(2) YB INT'L L. COMM'N 57 (1990) defines "ecosystem" as "an ecological unit . . . of living and non-living components that are interdependent and function as a community." The LOS Convention does not define the term.

106. LOS Convention, art. 195; *see also* 4 Nordquist ¶¶ 195.2, 195.6.

107. LOS Convention, art. 196.

108. 4 Nordquist ¶¶ 196.1, 196.7(a).

109. LOS Convention, art. 197, partly based on Stockholm Declaration, n. 53, Recomm. 92, 11 ILM 1456-57; 1972 Dumping Convention. 4 Nordquist ¶ 197.3.

110. LOS Convention, arts. 200-01; *see also* 4 Nordquist ¶¶ 200.1-200.6, 201.1-201.7; RESTATEMENT (THIRD) § 603(2). High seas freedoms include a right to conduct scientific research, subject to high seas users' rights, coastal State continental shelf and other rights, under other LOS provisions and the due regard principle. LOS Convention, art. 87; *see also* Part IV.B.1. High seas oceans research is generally accepted as a customary right. 1 BROWN 429. It is subject to the LOS other rules principle, however. *See, e.g.*, LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text; Part B.2.b.

111. LOS Convention, arts. 202-06, based in part on Stockholm Declaration, n. 53, Principles 16, 21, 11 ILM 1419-20; National Environmental Policy Act, 42 USC § 4332 (NEPA). 4 Nordquist ¶¶ 201.1-202.6(b), 203.1-203.5(c), 204.1-204.8(d), 205.1-205.6(c), 206.1-206.6(c). At the time of the Tanker War NEPA was not applied extraterritorially except in Antarctica. Bruce A. Harlow & Michael E. McGregor, *International Environmental Law Considerations During Military Operations Other than War, in* PROTECTION OF THE ENVIRONMENT 315, 326, citing Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993). Exec. Order No. 12,114, 3 CFR 356 (1979) requires environmental impact analysis for certain federal actions affecting the environment of the global commons or of foreign nations. DeMarco & Quinn, n. 2, 88-89; Harlow & McGregor 326.

112. LOS Convention, art. 198. "IMO is as important in its particular fields of interest—maritime safety and protection of the marine environment—as is the UNEP at global level." BIRNIE & BOYLE 53.

113. 4 Nordquist ¶ 198.1; *see also* RESTATEMENT (THIRD) § 601, cmt. e & r.n.4, citing *inter alia* Memorandum of Intent Concerning Transboundary Air Pollution, Aug. 5, 1980, Can.-US, 32 UST 2521, 1274 UNTS 235.

114. This "to some extent anticipates" LOS Convention, art. 221. 4 Nordquist ¶ 198.1.

115. LOS Convention, art. 199; *see also* 4 Nordquist ¶ 199.1, noting that High Seas Convention, art. 25(2), requires States to cooperate with competent international organizations to prevent radioactive materials contamination of the seas or airspace over them. The LOS Convention covers a wider spectrum of required cooperation.

116. This "to some extent anticipates" LOS Convention, art. 221. 4 Nordquist ¶ 198.1.

117. LOS Convention, arts. 207(1)-207(2), 208(1-208(3), 209(2), 211(2); *see also* 4 Nordquist ¶¶ 207.7(a)-207.7(b), 208.10(a)-208.10(d), 209.10(a), 211.15(f); RESTATEMENT (THIRD) § 603(1)(a). As *id.* r.n.7 shows, the United States like many nations has marine pollution legislation that may need amendment to align with LOS Convention standards. If enacted worldwide, such laws can evidence custom. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 26.

118. 4 Nordquist ¶ 208.10(a). NWP 1-14M Annotated ¶ 1.4; NWP 9A Annotated ¶ 1.4 define "national waters" as internal waters, territorial seas and archipelagic waters, and "international waters" as contiguous zones, EEZ waters and the high seas.

119. LOS Convention, arts. 210(1)-210(3), 210(6); *see also* 4 Nordquist ¶ 210.11(b); RESTATEMENT (THIRD) § 603. National laws, *e.g.*, those in *id.* r.n.7, if similar around the world, can evidence custom. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 26.

120. LOS Convention, art. 210(5); *see also* 4 Nordquist ¶¶ 210.11(c)-210.11(g), noting 1972 Dumping Convention, art. 4 requires prior approval.

121. 4 Nordquist ¶ 210.11(g) & n.14, citing *inter alia* International Law Commission, *Report on the Work of Its Thirty-First Session: Draft Articles on State Responsibility*, art. 32, UN Doc. A/34/194 (1979), *in* 18 ILM 1557, 1568, 1576

(1979), saying these are not defenses if an offending country contributes to a situation of material responsibility. *See also Commentary* to Draft Articles on State Responsibility *in* International Law Commission, *Report on the Work of Its Thirty-First Session,* UN Doc. A/34/10 & Corr. 1 (1979), *in* 2(2) YB INT'L L. COMM'N 122-36 (1979). Practical experience is that air-jettisoned fuel dissipates quickly and does not present an emergency. 4 Nordquist ¶ 210.11(g) & n.14. RESTATEMENT (THIRD) § 603 cmt. g & r.n.8 discuss aircraft noxious and noise emissions.

122. LOS Convention, arts. 18(2), 39(1)(c); *see also* Territorial Sea Convention, art. 14(3). As NWP 9A Annotated and NWP 1-14M Annotated ¶¶ 1.4.1, 2.3.1, 3.2, 3.2.2, 7.3.2, 7.3.7, demonstrate, this customary LOS norm follows different principles during war. *See also* Hague VI, art. 2; Hague XIII, art. 21; Convention on Maritime Neutrality, art. 17; Nyon Arrangement, art. 5; Stockholm Declaration, arts. 4, 7, 11 ILM 1418; OXFORD NAVAL MANUAL, arts. 31, 34, 37; SAN REMO MANUAL ¶¶ 21 (Hague XIII rule); 136, cmt. 136.2 (Hague VI considered to be in desuetude); 168, cmt. 168.6 (Hague XIII rule); Schindler, *Commentary,* n. V.87, 221 (Hague XIII restates custom with minor exceptions); *see also* nn. IV.494-506, V.16, 20 and accompanying text. This is an example of the other rules principle in operation. *Cf.* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25, V.2-3 and accompanying text; Part B.2.b.

123. LOS Convention, arts. 207(3) (land-based pollution), 207(4) (seabed activities subject to national jurisdiction).

124. LOS Convention, arts. 207(4), 208(5), 209(1), 210(4), 211(1), 212(3).

125. *Id.,* arts. 211(3)-211(4); *see also* RESTATEMENT (THIRD) § 604(3). LOS Convention negotiating history demonstrates that coastal States cannot require warships to give notice or get prior consent before entering the territorial sea on innocent passage. For this and other innocent passage principles, applying equally to merchantmen and warships, except that submarines must navigate on the surface and show their flag, *see* LOS Convention, arts. 17-26, 45, 52(2); Part IV.C.3. Ports & Waterways Safety Act, 33 USC §§ 1221-36 regulates safety and environmental measures enforcement in the US territorial sea. A worldwide pattern of these laws can evidence customary standards. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 26.

126. These rules cannot apply to foreign ship design, construction, manning or equipment unless they effectuate generally accepted international rules or standards. LOS Convention, arts. 19(2)(h), 21; *see also* 2 Nordquist ¶¶ 19.1-19.11, 21.1-21.12, noting some States' continued opposition to warships' right of innocent passage and linkage between LOS Convention, art. 21(1)(f), and *id.,* art. 192, analyzed nn. 93-94 and accompanying text. The art. 19(2) list is exclusive, although *id.,* art. 19(2)(l) ("any other activity not having a direct bearing on practice") could be read expansively. *See* 2 Nordquist ¶ 19.11, citing Joint Interpretation, n. IV.341, art. 3, *in* 28 ILM 1446 (1989), noting Russia has accepted this statement; NWP 1-14M Annotated ¶ 2.3.2.1; nn. IV.337-50 and accompanying text. Aside from a special rule for fishing craft, Territorial Sea Convention, arts. 4-5, uses a general reasonableness rule to define innocent passage. *See also* nn. IV.301-13 and accompanying text. For other rules clause analysis, *see* nn. III.952-67, IV.10-25, V.2-3 and accompanying text; Part B.2.b.

127. These ships must carry special documentation. LOS Convention, arts. 22(2), 23; *see also* 4 Nordquist ¶¶ 22.1-22.9, 23.1-23.9, noting link with LOS Convention, arts. 24(1)(b), 25(3), 227; RESTATEMENT (THIRD) § 513(2)(b) & cmt. d. Joint Interpretation, n. IV.341, arts. 5, 20, 28 ILM 1446 (1989), clarify LOS Convention, art. 22's Russian text; coastal States may designate sea lanes and traffic separation schemes "where necessary to protect the safety of navigation." 2 Nordquist ¶ 22.9.

128. LOS Convention, art. 24; *see also* 2 Nordquist ¶¶ 24.1-24.8, noting parallel language ("form or fact") in LOS Convention, arts. 25(3), 42(2), 52(2), 227; *see also* nn. IV.337-50 and accompanying text.

129. Wright, n. 103, 38.

130. LOS Convention, art. 25; *see also* 2 Nordquist ¶¶ 25.1-25.9, noting that Joint Interpretation, n. IV.341, applies to art. 25, taken directly from Territorial Sea Convention, arts. 16(1)-16(3); RESTATEMENT (THIRD) § 513(2)(a) & cmt. c, which say there should be no discrimination among different countries' vessels during temporary suspension; it should apply to ships of all flags; *see also* nn. IV.337, 439 and accompanying text.

131. 2 Nordquist ¶ 25.1, citing Territorial Sea Convention, art. 16(3).

132. *See generally* 2 Nordquist ¶¶ 25.1-25.9; RESTATEMENT (THIRD) §§ 513, cmt. c.

133. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, V.21, VI.38-40 and accompanying text.

134. LOS Convention, arts. 27-18, 30-32; *see also* RESTATEMENT (THIRD) §§ 457, r.n.7; 461, cmt. e; 513(2)(b) & cmt. c, e, h & r.n.2.

135. LOS Convention, art. 2(3); *see also* Territorial Sea Convention, art. 1(2); nn. III.952-67, IV.10-25 and accompanying text; Part B.2.b.

136. LOS Convention, arts. 38(1), 45(1)(b), 52-54; *id.*, art. 54 incorporates by reference *id.*, arts. 39-40, 42, 44. LOS Convention nonsuspendable straits passage rules reflect custom. *See generally* Part IV.B.6.

137. LOS Convention, art. 233, incorporating by reference *id.*, arts. 42(1)(a)-41(1)(b), 236, would appear to apply, strictly speaking, to straits transit passage regimes because of references to art. 42; the straits innocent passage regime and provisions governing territorial sea innocent passage have no similar intervention provisions, although such might be inferred from coastal State authority to enact environmental laws that might include authority to intervene. Warships, naval auxiliaries, *etc.*, have sovereign immunity as in the case of transit passage. *See generally id.*, arts. 17-32, 45, 236; S. Doc. 103-39, n. IV.3, 11-15, 23, saying that by extension these principles apply to straits passage. The US Navy has the position that a straits passage regime also applies to approaches to straits. This view, that warships operating in their normal mode (*i.e.*, submarines traversing these straits), may employ formation steaming and conduct air operations as incidental to normal navigation practices, so long as there is no threat to the coastal State(s), is consistent with the transit passage regime. Alexander, n. IV.523, 92; Clove, n. IV.597, 105; Schachte, *International Straits*, n. IV.558, 184-86; n. IV.585 and accompanying text; *but see* Lowe, *The Commander's*, n. III.318 on naval operations in transit straits. If this is accepted as practice, an environmental protection regime appurtenant to straits passage applies to this area too. The issue of straits passage for belligerents illustrates the LOS-LOAC interface preserved by the LOS conventions' other rules clauses. *See generally* NWP 1-14M Annotated ¶¶ 2.3.3-2.3.3.2, 2.5.1.1; NWP 9A Annotated ¶¶ 2.3.2-2.3.3.2, 2.5.1; SAN REMO MANUAL ¶¶ 23-33; Akira Mayama, *The Influence of the Straits Transit Regime on the Law of Neutrality at Sea*, 26 ODIL 1 (1995); nn. III.952-67, IV.10-25 and accompanying text; Part B.2.b.and accompanying text.

138. Wright, n. 103, 38.

139. *See* nn. 136-37 and accompanying text.

140. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25, V.21, VI.38-40 and accompanying text.

141. LOS Convention, art. 33; *compare* Territorial Sea Convention, art. 24, providing for a 12-mile zone. The contiguous zone outer limit means States asserting a territorial sea less than the extent the LOS Convention allows, 12 miles, or under custom for 1958 Convention parties, may declare a contiguous zone up to limits permitted by the convention in force for them. *See also* nn. IV.296-300, 324-27 and accompanying text.

142. *See generally* 2 Nordquist ¶¶ 33.1-33.8(i).

143. LOS Convention, arts. 303(1)-303(2) provide:

> 1. States have the duty to protect objects of an archeological and historical nature found at sea and shall co-operate for this purpose.
>
> 2. . . . [T]o control traffic in such objects, the coastal State may, in applying article 33 [of the LOS Convention, permitting a 24-mile contiguous zone, n. 141 and accompanying text], presume that their removal in the contiguous zone . . . without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

144. *See generally* 5 Nordquist ¶¶ 303.1-303.10.

145. Art. 303 also does not affect identifiable owners' rights, salvage law or other admiralty rules, or cultural exchange laws and practices. LOS Convention, arts. 303(3)-03(4). Under admiralty law shipwrecks and objects found at sea are finders' property, unless their national law or the law of the salvor provides otherwise. *See generally* RESTATEMENT (THIRD) § 521, r.n.6; SCHOENBAUM ch. 14; S. Doc. 103-39, n. IV.3, 51, citing US legislation that may alter these rules. Warship or government aircraft title is never lost until a flag State officially abandons or relinquishes it. If an aircraft or ship is captured, title vests in the captor State. *See* nn. IV.793-96 and accompanying text; *see also* Agreement Concerning Wreck of CSS Alabama, Oct. 3, 1989, Fr.-US, TIAS No. 11687.

146. *See* nn. 136-37 and accompanying text. For analysis of treaties protecting cultural property during armed conflict in the environmental context, *see, e.g.*, nn. 272-77 and accompanying text; Part B.3.a(III)(B).

147. LOS Convention, arts. 136-37 define the Area as the abyss beyond the continental slope; it is declared the common heritage of humankind. There is no Area in the Persian Gulf because of its shallow depth. *See also* nn. II.66-69, IV.240 and accompanying text.

148. 5 Nordquist ¶ 303.10.

149. LOS Convention, art. 149.

150. *See* n. 147.

151. LOS Convention, art. 211(5). A qualification to this rule is *id.*, art. 234: Coastal States may adopt and enforce nondiscriminatory laws for preventing, reducing and controlling pollution from ships in ice-covered areas to their EEZ limits where particularly severe climatic conditions and ice create obstructions or exceptional navigational hazards, "and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance." Such laws must have "due regard to navigation and the protection and preservation of the marine environment . . . . " Antarctic Treaty, n. III.957, art. 4, 12 UST 796, 402 UNTS 74 froze territorial and territorial sea claims for Antarctica. Until the next Ice Age, art. 234 only applies to Arctic Sea States, *e.g.*, the United States. States concerned, Canada, the former USSR and the United States, negotiated art. 234 to provide a basis for implementing provisions for commercial and private vessels in the 1970 Canadian Arctic Waters Pollution Prevention Act consistent with art. 234 and other LOS Convention provisions while protecting "fundamental U.S. security interests" in Arctic navigational rights and freedoms. S. Doc. 102-39, n. IV.3, 24. *See also* 2 O'CONNELL, LAW OF THE SEA 1022-25.

152. LOS Convention, arts. 55, 56(1)(a), 56(1)(b)(iii)-56(c), 57-58 (defining the EEZ as extending 200 nautical miles from territorial sea baselines, providing that coastal States have "sovereign rights for . . . conserving and managing their natural resources, . . . living or non-living, of the waters subjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, [*e.g.*,] . . . production of energy from the water, currents and winds; [and] . . . jurisdiction as provided for in . . . this Convention [for] . . . protection and preservation of the marine environment; [and] other rights and duties provided for in this Convention"). *See also id.*, art. 60 (coastal State exclusive rights and jurisdiction over artificial islands, other EEZ installations), arts. 61-72 (standards for conserving, use of living resources; stocks occurring within two or more countries' EEZs; various kinds of sea life; landlocked and geographically disadvantaged States' rights), art. 73 (standards for enforcing coastal State EEZ laws). *See also* 2 Nordquist ¶¶ 55.1-55.11(d), 56.1-56.11(e), 57.1-57.8(b), 58.1-58.10(f), 60.1-60.15(m), 61.1-61.12(k), 62.1-62.16(l), 63.1-63.12(f), 64.1-64.9(f), 65.1-65.16(i), 66.1-66.9(g), 67.1-67.8(e), 68.1-68.5(b), 69.1-69.17(h), 70.1-70.11(d), 71.1-71.9(c), 71.1-71.10(b), 73.1-73.10(h); S. Doc. 103-39, n. IV.3, 25-27. As of 1992 86 States had EEZs; 20 more claimed fishing zones. The EEZ "is now widely considered to be a part of general international law." 2 Nordquist ¶ V.33; RESTATEMENT (THIRD), § 514, cmt. a. While *id.* § 514(1) generally follows Convention criteria as to EEZ sovereignty and jurisdiction, *id.*, *Source Note* says "authority" is used instead of "jurisdiction," because the RESTATEMENT characterizes jurisdiction differently in other contexts; *see, e.g.*, Part V.C. *Id.* § 514, cmt. b's declaration, the Convention "does not explicitly designate the [EEZ] as part of the high seas." Note, however, that LOS Convention arts. 55, 58, specifically referring to *id.*, arts. 87-115, declare *inter alia* that high seas freedoms of navigation and overflight apply in the EEZ. Some countries would prohibit naval operations in their EEZs, but other LOS Convention terms allow these maneuvers. Wartime operations are permitted under the Convention's "other rules" principle. States therefore cannot exclude warships on environmental grounds from their EEZs. Stephen A. Rose, *Naval Activity in the EEZ—Troubled Waters Ahead?*, NAV. L. REV. 67, 73-76 (1990); nn. IV.147-57 and accompanying text.

153. *See* n. 152 and accompanying text. *See also* LOS Convention, arts. 76-78, 80, (shelf can extend outward the same distance, 200 nautical miles, as the EEZ, along the ocean bottom, or to the edge of the continental margin, whichever is greater, but not over 350 miles); 2 Nordquist ¶¶ 76.1-76.18(m), 77.1-77.7(d), 78.1-78.8(d), 80.1-80.9 (adaptation of Continental Shelf Convention, arts. 2-5); RESTATEMENT (THIRD) § 515; *see also* Part IV.B.2.

154. 2 Nordquist ¶ 57.8(b), citing Continental Shelf (Libya v. Malta), 1985 ICJ 13, 33; Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. US), 1984 ICJ 245, 294; Delimitation of Maritime Areas Between Canada and France (Can. v. Fr.), 31 ILM 1145, 1163 (Arb. 1992). *E.g.*, the United States claimed continental shelf rights, Proclamation No. 2667, 3 CFR 67 (1943-48) in 1945, before asserting fishery management rights in what eventually became its EEZ through the FCMA n. IV.143, or claiming full EEZ rights, n. IV.3. The United States had claimed some offshore fishing rights in 1945 along with the continental shelf. *See* nn. IV.143, 193-94 and accompanying text.

155. LOS Convention, arts. 55, 56(1)(b)(iii), 56(2), 58(3), 60(3), 60(7), 78-80, also stating a "must not infringe - unjustifiable interference" formula for shelf and high seas rights interfaces and a "reasonable exploration" - "may not impede" rule for interfacing shelf and submarine cable and pipeline rights. *See also* 2 Nordquist ¶¶ 56.11(e)-56.11(f), 58.10-58.10(f), 60.15(f), 60.15(j), 66.9(d), 78.8(c), 79.8(e), 80.9; RESTATEMENT (THIRD) §§ 514, cmt. e; 515(2). "Due regard" or similar phrases also appear elsewhere in the LOS Convention, *e.g.*, art. 87(2) (due regard for others' high seas rights and freedoms, Area activities); Continental Shelf Convention, arts. 4-5 ("reasonable measures . . . , may not impede"; no "unjustifiable interference with navigation, fishing," *etc.*); High Seas Convention, arts. 2, 26(2) ("reasonable regard" for others' high seas freedoms); Territorial Sea Convention, art. 19(4) (balancing navigation

interests with right of arrest for crimes committed in territorial sea). *See also* Bernard H. Oxman & Anatoly L. Kolodkin, *Stability in the Law of the Sea, in* BEYOND CONFRONTATION, n. III.358, 165, 175-76, 181-82.

156. LOS Convention, arts. 58(1)-58(2), 78, referring to *id.*, arts. 86-115; High Seas Convention, arts. 2, 8; *see also* nn. III.953-67, IV.10-25, 794 and accompanying text; Part B.2.b.

157. 4 Nordquist ¶ 211.15(b); *see also* Oxman & Kolodkin, n. 155, 176-79.

158. LOS Convention, arts. 213-14, 216, 222; *see also* 4 Nordquist ¶¶ 213.1-213.7(f), 214.1-214.7(c), 216.1-216.7(d), 222.1-222.8.

159. RESTATEMENT (THIRD) § 603; *see also* n. 98 and accompanying text.

160. LOS Convention, arts. 217-20, 223-24, 226-31, expanding on rules in the navigational articles, *id.*, arts. 21(1)(f), 28(2), 56(1)(b)(iii), 56(3), 60(1), 80; *see also* 4 Nordquist ¶¶ 217.1-217.8(j), 218.1-218(9)(h), 219.1-219.8(d), 220.1-220.11(n), 223.1-223.9(c), 224.1-224.7(e), 226.1-226.11(e), 227.1-227.7, 228.1-228.11(h), 229.1-229.5, 230.1-230.9(c), 231.1-231.9(c); RESTATEMENT (THIRD) §§ 457, r.n.7; 461, cmt. e; 512.

161. LOS Convention, art. 225; *see also* 4 Nordquist ¶¶ 225.1-225.9; RESTATEMENT (THIRD) § 513, cmt. e.

162. LOS Convention, arts. 232, 235; *see also* 4 Nordquist ¶¶ 232.1-232.6(c), 235.1-235.10(g); RESTATEMENT (THIRD) § 604, r.n.3; Oxman & Kolodkin, n. 155, 176-79. Art. 235 was derived from the Stockholm Declaration, n. 53, Principle 56, 11 ILM 1418. 4 Nordquist ¶ 235.1. The knowledge standard is the same as for self-defense and LOAC attack situations. *See* Parts III.A.1.b(IX), V.A.2.

163. LOS Convention, art. 221; Charney, *The Marine Environment,* n. IV.49, 892 n.79; *see also* 4 Nordquist ¶¶ 221.1-221.9(h); RESTATEMENT (THIRD) § 603, r.n.3 (similar provisions in 1969 Intervention Convention, art. 1; Intervention Protocol, to which many countries are party), *see* TIF 400-01; Declaration of Principles Governing the Sea-Bed & Ocean Floor, & Subsoil Thereof, Beyond Limits of National Jurisdiction, G.A. Res. 2749 (1972) ¶ 13(b), *in* 10 ILM 220, 223 (1973) (Seabed Declaration).

164. *Cf.* BIRNIE & BOYLE 286; BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3), cmts. f, i, r.n.5.

165. *See* nn. 4-8 and accompanying text.

166. *See* nn. III.952-67, IV.10-25 and accompanying text; Part B.2.b.

167. *Compare* LOS Convention, art. 236 *with id.*, arts. 42(5), 96; *see also* High Seas Convention, arts. 8(1), 9; 3 Nordquist ¶¶ 95.1-96.6(c); 4 *id.* ¶¶ 236.1-235.6(f). Warship and naval auxiliary immunity is an accepted international law rule. 3 *id.* ¶ 95.1; 4 *id.* ¶ 236.1; *see also* Part IV.C.4.

168. S. Doc. 103-39, n. IV.3, 24.

169. *E.g.,* Convention on Protection of the Environment, Feb. 19, 1974, arts. 1, 13, 1092 UNTS 280, 296, 298, among Denmark, Finland, Norway and Sweden.

170. Kuwait Regional Convention, n. II.63, art. 14, 1140 UNTS 159; Red Sea Convention, n. 55, art. 14, 2 WALLACE 2287.

171. *See* LOS Convention, arts. 237, 311(2). Other regional treaties are subject to the LOS Convention, *e.g.,* Convention for Protection of the Mediterranean Sea Against Pollution, Feb. 16, 1976, art. 3(1), 1102 UNTS 27, 46, and protocols. *See* nn. 48-50 and accompanying text.

172. *See* n. IV.3 and accompanying text.

173. *Compare* LOS Convention, art. 94(4)(c) *with* High Seas Convention, art. 10.

174. *Compare* LOS Convention, art. 94(7) *with* High Seas Convention, art. 11(1). *See also* 3 Nordquist ¶ 94.8(k); Part IV.B.2.

175. LOS Convention, arts. 122-23; 3 Nordquist 344; *see also id.* ¶ 123.12(e), listing *inter alia* Kuwait and Red Sea Regional Conventions, nn. II.63, VI.55 among regional coordination treaties for semi-enclosed areas; Oxman & Kolodkin, n. 155, 179-81. *See also* Part B.2.c(III).

176. *Compare* LOS Convention, art. 87(1) *with* High Seas Convention, art. 2; *see also* Part IV.B.1.

177. LOS Convention, art. 240(d). *Id.*, art. 87(1)(f) declares that the right to conduct scientific research is subject to the Convention, Parts VI and XIII. Part VI declares continental shelf rules; Part XIII states general marine environmental protection principles. *See* Part IV.B.2 and accompanying text. Subject to other LOS Convention provisions, States conducting research must give other countries reasonable opportunity to obtain information necessary to prevent and control damage to human health and safety and to the marine environment. LOS

Convention, art. 242. Research installations and equipment are subject to rules for conducting research. *Id.*, art. 258. *See also* 2 O'CONNELL, LAW OF THE SEA ch. 26. The LOAC protects enemy ships collecting scientific data from capture during war; if engaged in data collection for likely military application, they are not protected. Hague XI, art. 4; *see also* nn. V.264, 274-76 and accompanying text.

178. *Compare* LOS Convention, arts. 87(1)(e), 116 *with* High Seas Convention, art. 2; RESTATEMENT (THIRD) § 521(2)(c); *see also* Part IV.B.1.

179. S. Doc. 103-39, n. IV.3, 27.

180. LOS Convention, art. 116, incorporating *id.*, arts. 63(2), 64-67, 118-20; *compare* Fishery Convention, arts. 1-8, 13; *see also* RESTATEMENT (THIRD) § 521, cmt. e; S. Doc. 103-39, n. IV.3, 27-28, listing treaties regulating or prohibiting high seas fishing. LOS Convention, arts. 56, 61-73 regulates EEZ fishing. *See also* 3 Nordquist ¶¶ 116.1-116.9(g); Charney, *The Marine Environment*, n. IV.49, 896-901.

181. *Id.*, art.1(1)(1); *see* 2 Nordquist ¶¶ 1.1-1.19, 1.26-1.31; RESTATEMENT (THIRD) § 523, cmt. b, declaring that *id.*, § 523(1)(a) recites custom: "[N]o state may claim or exercise sovereignty or sovereign or exclusive rights over any part of the sea-bed and subsoil beyond the limits of national jurisdiction, or over its mineral resources, and no state or person may appropriate any part of that area . . . ." *Id.*, § 523(1)(b) states the US view of the law:

> . . . unless prohibited by international agreement, a state may engage, or authorize any[one] to engage, in . . . exploration for and exploitation of that area, provided . . . activities are conducted (i) without claiming or exercising sovereignty or sovereign or exclusive rights in any part of that area, and (ii) with reasonable regard for the right of other states or persons to engage in similar activities and to exercise the freedoms of the high seas; . . . minerals extracted . . . become the property of the mining state or person.

National jurisdiction means, *inter alia*, a declared EEZ or continental shelf. Legal status of the water column or airspace above the Area is not affected by LOS Convention provisions dealing with it. LOS Convention, art. 135; *see also* RESTATEMENT (THIRD) §§ 521, cmt. i; 523.

182. LOS Convention, arts. 136. 140(1). The Antarctic Treaty, n. III.957, began the "common heritage" concept; it has been copied in treaties on outer space. RESTATEMENT (THIRD) § 523, cmt. b & r.n.2 adopted the then US position that deep seabed mining was a high seas freedom, rejecting the "common heritage" Convention view. If the Convention is accepted generally, "without dissent by . . . important . . . states, the sea-bed mining regime . . . may become effective also as custom . . . ." *Id.* § 523, cmt. e. *See also* BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3).

183. *See* Part II.A.6.

184. LOS Convention, art. 137(2) vests Area governance in an Authority. *Id.*, arts. 156-91 are the Authority's constitutive provisions; the Convention protocol, n. IV.3, would modify them in amending LOS Convention, Part XI. *See* S. Doc. 103-39, n. IV.3, 34-43. The Authority must adopt rules and procedures to prevent, reduce and control pollution and hazards to the marine environment, including coastlines, that interfere with that environment's ecological balance, with particular attention being paid to protection from harmful effects of activities, *e.g.*, drilling, dredging, excavation, waste disposal, building and operating or maintaining installations, pipelines and other devices. These rules must also protect and conserve Area natural resources and prevent damage to flora and fauna of the marine environment. The Authority must take necessary measures, which may supplement existing treaties, to protect human life in connection with Area operations. LOS Convention, arts. 145-46. There is also an obligation to preserve objects of an archaeological and historical nature found in the Area, with particular regard paid to preferential rights of a State or country of origin, and which incorporates by reference other rules of law and agreements dealing with artifacts protection. *Id.*, art. 149. Area activities must be undertaken "with reasonable regard for other activities in the marine environment." Area installations, like those in the EEZ and on the continental shelf, must not be established "where interference may be caused to the use of recognized sea lanes essential to international navigation or in areas of intense fishing activity . . . Other activities in the marine environment shall be conducted with reasonable regard for activities in the Area." The LOS Convention has an other rules clause for the Area:

> The general conduct of States in relation to the Area shall be in accordance with the provisions of this Part [XI], the principles embodied in the [UN] Charter . . . and other rules of international law in the interests of maintaining peace and security and promoting international co-operation and mutual understanding.

As in the case of the high seas, the LOS Convention declares the Area shall only be used for peaceful purposes. *Compare id.*, art. 141 *with id.*, arts. 88, 240(a). The same interpretations should apply for these articles as under other parts of the LOS Convention and its 1958 antecedents. "Other rules" means the LOAC may be applied in certain contexts; the

peaceful purposes provision means no State may act, *e.g.*, commit aggression, in violation of the Charter. Area activities can include military operations, *e.g.*, naval maneuvers. States may act in self-defense in the Area. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Parts. V.B.1-V.B.2.

185. The treaties disclaim intention to affect parties' rights or claims to maritime jurisdiction "established in conformity with international law." Kuwait Regional Convention, n. II.63, arts. 2, 15, 1140 UNTS 156, 159; Red Sea Convention, n. 55, arts. 2, 15, 2 WALLACE 2284, 2287. The protocols allow application to ports, harbors, estuaries, bays and lagoons for a "marine emergency," defined broadly, and if a particular State so decides. Kuwait Protocol, n. II.63, arts. 1(2), 4, 1140 UNTS 201, 204. Red Sea Protocol, n. 55, arts. 1(2), 4, 2 WALLACE 2294, 2296, are similar. These implement LOS Convention, arts. 122-23; *see* n. 175 and accompanying text.

186. *Compare* Kuwait Regional Convention, n. II.63, art. 1(a), 1140 UNTS 156, *with* Red Sea Convention, n. 55, art. 1(2), 2 WALLACE 2283.

187. Kuwait Regional Convention, n. II.63, arts. 3(a), 4-7, 1140 UNTS 156-57; Red Sea Convention, n. 55, arts. 3(1), 4-8, 2 WALLACE 2284-85, which adds a pledge to prevent, abate and combat pollution "resulting . . . from other human activities."

188. *See generally* Kuwait Protocol, n. II.63, 1140 UNTS 201; Red Sea Protocol, n. 55, 2 WALLACE 2293.

189. *Compare* Kuwait Protocol, n. II.63, art. 1(2), 1140 UNTS 201, *with* Red Sea Protocol, n. 55, art . 1(2), 2 WALLACE 2294. (Italics in original.)

190. *See* nn. 160-65 and accompanying text.

191. The Marine Emergency Mutual Aid Centre, an administrative agency, also must be notified. Kuwait Protocol, n. II.63, arts. 3, 10, 1140 UNTS 202-03, 205; Red Sea Protocol, n. 55, arts. 3, 7(2), 2 WALLACE 2294-95, 2297.

192. Kuwait Protocol, n. II.63, art. 1(4), 1140 UNTS 202; Red Sea Protocol, n. 55, art. 1(4), 2 WALLACE 2294.

193. *See* nn. 160-72 and accompanying text.

194. *Cf.* UN Charter, arts. 51, 103; nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1.

195. *See* n. 185 and accompanying text.

196. *See* nn. II.264, 384, VI.185 and accompanying text.

197. *See* nn. II.368-72 and accompanying text.

198. Iran and Iraq were not parties to the 1958 or 1982 LOS Conventions. The customary other rules principle restated in these agreements did apply, however. *See, e.g.*, LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text; Part B.2.b.

199. Vienna Convention, arts. 61-62; *see also* nn. III.928-29, IV.26-27, VI.80-88 and accompanying text.

200. *See* nn. 185-89 and accompanying text.

201. *See* n. II.213 and accompanying text.

202. *See* n. II.214 and accompanying text.

203. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3); Okorodudu-Fubara, n. II.210, 197.

204. LOS Convention, arts. 232, 235; Kuwait Protocol, n. II.63, art. 1(2), 1140 UNTS 201; *see also* n.162 and accompanying text.

205. *See* nn. II.212 and accompanying text.

206. The UN Security Council deplored attacks on merchant shipping and violations of LOAC principles. If obeyed, these would have resulted in no more attacks on these vessels and therefore no more pollution of the Gulf from this cause. These resolutions covered a specific point, *i.e.*, freedom of navigation, and therefore should not be construed as applying special Charter law to the exclusion of conventional norms, to environmental situations. *See* nn. 34-37 and accompanying text.

207. *See* Part B.2.b.

208. *See* n. 184 and accompanying text.

209. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; nn. 194, 197 and accompanying text.

210. *See* nn. 4-8 and accompanying text.

211. *See* nn. 198-202 and accompanying text.

212. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1.

213. *See* Parts V.A.1-V.A.2, VI.B.2.b.

214. *See* Part B.2.a.

215. *E.g.*, the United States' active policy of objecting to LOS variances in practice by other States. *See generally* Chapter IV.

216. *See, e.g.*, LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.952-67, IV.10-25 and accompanying text; Part B.2.b.

217. *Compare* Part B.2.c.(I) *with* Part B.2.c(II).

218. *See* Part B.2.a.

219. *E.g.*, self-defense. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1.

220. *See* Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.*

221. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

222. Hague VIII arts. 1-6; *see also* Part V.G.2.

223. *See* n. V.686 and accompanying text.

224. LEVIE, MINE WARFARE, n. V.426, 137 predicts environmental protests if nuclear mines are detonated. The same can be said for conventional mines, particularly if pollutants escape from mined ships, or mines are laid in environmentally sensitive areas and locations are not published.

225. *See* Hague VIII, arts. 3-5; Part V.G.2.

226. *See* Part V.G.2.

227. Iran, formerly Persia, was an independent country in 1907 and signed but did not ratify Hague VIII. Iraq was part of Turkey, formerly the Ottoman Empire, in 1907. The Empire, of which Turkey is a successor State, signed but did not ratify Hague VIII. The United Kingdom did not accede to Hague VIII while serving as Iraq's mandatory Power. *See* Symposium, *Treaty Succession;* Walker, *Integration and Disintegration;* n. V.732 and accompanying text.

228. *Cf.* MELIA, n. II.6, 119-27.

229. *See* Part V.G.2.

230. *See* n. 224.

231. Hague IX, arts. 1-4, forbidding naval bombardment of undefended ports, towns, villages, dwellings or buildings. If automatic submarine contact mines are anchored off a harbor, the place cannot be considered a defended site. Military targets may be destroyed but only after warning, unless surprise or other "military reason" dictates immediate action. Shelling undefended places may begin after due notice if local authorities fail to comply with requisition requests proportionate to local resources. Undefended places may not be bombarded for failure to pay money contributions. *See* Part V.G.1.

232. *E.g.*, environmentally sensitive beaches or parks might be close to ports or be within towns to fall within Hague IX's scope.

233. Hague IX, art. 5 also provides for visible signs for these structures; Cultural Property Convention, arts. 16-17, 20, 36, or Roerich Pact, arts. 1-3 supersede art. 5 for some countries. *E.g.*, the United States is party to Hague IX and the Roerich Pact but not to the Convention. TIF 350, 442. The Pact does not have a supersession clause like the Convention; law of treaties later in time principles govern. Vienna Convention, art. 30; *see also* nn. IV.32, 60, VI.45 and accompanying text.

234. Hague IX, arts. 6-7. Protocol I, art. 57(2)(c) repeats the notice to civilian population principle as a precaution in attacks when the situation permits; it is considered a customary rule. NWP 1-14M Annotated ¶ 8.5.2 & n.126; NWP 9A Annotated ¶ 8.5.2 & n.106, refine the rule:

> . . . Where the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific warnings lest the bombarding force or the success of its mission be placed

> in jeopardy.... Warnings are relevant to the protection of the civilian population (so the civilians will have an opportunity to seek safety) and need not be given when they are unlikely to be affected by the attack.

NWP 1-14M Annotated ¶ 8.5 and NWP 9A Annotated ¶ 8.5 define bombardment as naval and air bombardment of enemy targets on land with conventional weapons. *See also* Part V.G.1.

235. *Compare* Hague IX, arts. 1-7 *with* Hague IV, Regulations, arts. 23(g), 25-28, superseding 1899 Hague II, Regulations, arts. 23(g), 25-28; their terms differ slightly. Second Protocol, art. 15(1)(e) declares theft or pillage of cultural property is a "serious violation" of the Protocol. *Compare* OXFORD NAVAL MANUAL, arts. 25-29, *with* 1880 Oxford Manual, arts. 32-34, 53; Brussels Conference of 1874, *Project of and International Declaration Concerning the Laws and Customs of War*, arts. 15-18 (1874), *in id.* 27, 29; Lieber Code, arts. 19, 34-36, 38. Military codes criminalize pillage, *e.g.*, Uniform Code of Military Justice, arts. 103, 109, 10 USC. §§ 903, 909, strengthening the customary norm. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 26. *See also* TOMAN 7, 10-11, 73, 91, 196 (Lieber Code, 1899 Hague II, Hague IV cultural protection aspects).

236. International Military Tribunal (Nuremberg), Judgment & Sentences (Oct. 1, 1946), *in* 41 AJIL 172, 248-49 (1949); *accord*, AFP 110-31 ¶ 5-2b; 2 OPPENHEIM § 68, 229; STONE 551; Diederich, n. 17, 141, 146-47; Edwards, n. 2, 110-13; LeGrand, n. 12, 26; Lijnzaad & Tanja, n. 2, 183-84; Plant, *Legal Aspects*, n. 17, 222-23; Sharp, n. 2, 10-42; *cf.* NWP 1-14M Annotated ¶ 8.1; NWP 9A Annotated ¶ 8.1; McNeill, *Protection*, n. 2, 539; Harlow & McGregor, n. 111, 318.

237. *See* Part V.G.1.

238. *See id.*

239. 1980 TIF 347.

240. *See* nn. 231-38 and accompanying text.

241. *See* Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.*

242. To that extent LOAC bombardment principles were integrated into Charter law. UN Charter, art. 2(4); *see also* Part B.1. They can be different, depending on circumstances. UN Charter, art. 103; nn. IV.57; Part B.1.

243. If an object is considered contraband or aiding the enemy war effort, its exemption is lost even if sent through the mail. Hague XI, arts. 1-2; *see also* nn. V.112, 257, 271 and accompanying text.

244. *See* Paris Declaration, arts. 1-3; London Declaration, arts. 27-29; Part V.D.3.

245. London Declaration, arts. 61-62; *see also* Paris Declaration, arts. 2-3; Part V.B.3.

246. Hague XI, arts. 3-4, stating customary rules; *see also* nn. V.113, 265, 274-76 and accompanying text.

247. *But see* Parts B.3.a(I)(D), B.3.a(I)(F) (Hague IV; OXFORD NAVAL MANUAL, art. 88).

248. Hague XI, arts. 3-4; SAN REMO MANUAL ¶¶ 47(h), 136(g); *see also* nn. 264, 266 and accompanying text.

249. *See* Hague IV, Regulations, art. 23(c); Hague IX, arts. 1-4; Second Convention, arts. 12, 18, 21-22, 24, 26-27, 29-30, 32-33, 38, 43, 47; Third Convention, arts. 70-77, 118; Fourth Convention, arts. 107-13; Cultural Property Convention, arts. 12, 14; Protocol I, arts. 8(b), 22-23, 41; *see also* nn. V.110, 113, 240, 258-69, 274-76 and accompanying text.

250. *See* Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.* Iran (formerly Persia), Iraq and the United States were not Paris Declaration parties. Turkey, a Coalition member, signed but did not ratify the Declaration and Hague XI. SCHINDLER & TOMAN 789, 823-24; 1980 TIF 348.

251. *See* nn. 4-8 and accompanying text.

252. *See* nn. 231-42 and accompanying text.

253. Hague IV, Regulations, arts. 22, 23(g), 46-47, 53, 55-56, superseding 1899 Hague II, Regulations, arts. 46-47, 53, 55-56; *see also* 1880 OXFORD MANUAL, arts. 51-55; Lijnzaad & Tanja, n. 2, 174-76; Evan J. Wallach, *The Use of Crude Oil by an Occupying Belligerent State as a Munition de Guerre*, 41 ICLQ 287 (1992); Edward R. Cummings, Note, *Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation*, 9 GEO. WASH. J. INT'L L. & ECON. 533 (1974). Hague IV standards have been customary law since the end of World War II. *See* n. 236 and accompanying text.

254. *See* nn. 231-42 and accompanying text.

255. Plant, *Introduction*, n. 2, 17 and Plant, *Legal Aspects*, n. 17, 222 suggested this for Protocol I, art. 1(2). *See* nn. 402, 450 and accompanying text. If so, this analysis applies to Hague IV, preamble; 1899 Hague II, preamble. Hague IX, preamble, does not have the Hague IV or 1899 Hague II language but recites:

> Whereas it is expedient that bombardments by naval forces should be subject to rules of general application which would safeguard the rights of the inhabitants and assure the preservation of the more important buildings, by applying as far as possible to this operation of war the principles of the Regulation of 1899 [*i.e.*, Hague II] respecting the laws and customs of land war . . .

This might or might not be a Martens clause, but Hague XI, preamble, incorporates prior law to the extent it is not inconsistent with Hague XI's norms:

> Considering . . . it is expedient, in giving up or, if necessary, in harmonizing for the common interest certain conflicting practices of long standing, to commence codifying in regulations of general application the guarantees due to peaceful commerce and legitimate business, as well as the conduct of hostilities by sea; that it is expedient to lay down in written mutual engagements the principles which have hitherto remained in the uncertain domain of controversy or have been left to the discretion of Governments;
>
> That, from henceforth, . . . certain . . . rules may be made, without affecting the common law now in force with regard to the matters which that law has left unsettled . . .

For trends analysis perhaps leading to custom before negotiation of these conventions, *see* Pietro Verri, *The Condition of Cultural Property in Armed Conflicts*, 1985 INT'L REV. RED CROSS 67.

256. OXFORD NAVAL MANUAL, art. 88.

257. Verri, *Commentary*, n. IV.71, 337.

258. *See* Part V.B.3.

259. An exception is Hague III, not relevant to this analysis and partly superseded by the Pact of Paris, n. III.160, and the UN Charter.

260. *E.g.*, Hague IV, Regulations, art. 53, superseding Hague II, Regulations, art. 53, declaring transportation systems, including steamers and other publicly or privately owned ships, are subject to seizure, except cases covered by naval law, *i.e.*, the LONW. 1880 OXFORD MANUAL, art. 51 is less precise:

> Means of transportation (railways, boats, etc.), as well as land telegraphs and landing-cables, can only be appropriated to the use of the occupant. Their destruction is forbidden, unless . . . demanded by military necessity. They are restored when peace is made in the condition in which they then are.

Whether "boats" refers to oceangoing vessels, and if so which, is not clear.

261. COLOMBOS §§ 95-121; 1 O'CONNELL, LAW OF THE SEA ch. 3; RESTATEMENT (THIRD) § 512 & r.n.1 (issue not resolved until Territorial Sea Convention ratified generally after 1958). There is a presumption against retroactively applying treaties. Vienna Convention, art. 28; RESTATEMENT (THIRD) § 322(1), cmt. a, r.n. 1.; *but see* Namibia, 1971 ICJ 16, 31. Today coastal State sovereignty includes the territorial sea and inland waters on the landward side of a baseline, usually the low water line, marking the beginning of the territorial sea. LOS Convention, arts. 2-16; Territorial Sea Convention, arts. 1-13. *See also* Part IV.B.4.

262. *Compare* Hague Air Rules, arts. 22-26 *with* Hague IV, Regulations, arts. 23(g), 25-26, (land warfare) *and* Hague IX, arts. 1-5 (naval warfare). Hague Declaration (XIV) Prohibiting Discharge of Projectiles & Explosives from Balloons, Oct. 18, 1907, 36 Stat. 2439; Hague Declaration (IV.1) to Prohibit for Five Years the Launching of Projectiles & Explosives from Balloons, & Other Methods of a Similar Nature, July 29, 1899, 32 *id.* 1839, also bear on the issue, but most do not consider them as stating custom. AFP 110-31 ¶ 5-2a; TOMAN 15, 178; Bierzanek, *Commentary*, n. V.197, 396-97; Verri, *Commentary*, n. IV.71, 133-35.

263. *Compare, e.g.*, AFP 110-31, n.254, ¶ 5-2(c) (*"they do not represent existing customary law as a total code"*) (italics in original) *with* NWP 1-14M Annotated ¶ 7.3.7 n.82 (Hague Air Rules represent custom); *see also* n. V.679.

264. *See, e.g.*, AFP 110-31 ¶¶ 5-3(b)(2), 5-17 n.22 (citing *inter alia* Hague Air Rules); ¶ 5-6, at 5-19 n.33 (Hague Air Rules, art. 21); NWP 1-14 Annotated ¶¶ 8.5.1.1 (Hague Air Rules, art. 24[4], declaring military objectives within a city, town village may be bombarded if required for the enemy's submission with minimum expenditure of time, life, physical resources; exception to the general rule that wanton or deliberate destruction of areas of concentrated civilian habitation is prohibited); 8.5.1.2 (Hague Air Rules, art. 22; bombardment only for terrorizing civilian population is forbidden); NWP 9A Annotated ¶¶ 8.5.1.1, 8.5.1.2 (same). *See generally* AFP 110-31 ch. 5; NWP 1-14M Annotated ¶¶ 8.5-8.5.2; NWP 9A Annotated ¶¶ 8.5-8.5.2 for air bombardment rules; *see also* Part V.G.1.

265. *See, e.g.*, Part V.D.3 (contraband).

266. Robertson, *Commentary, in* PROTECTION OF THE ENVIRONMENT 170; *see also* Part V.G.1.

267. *See* Part B.1.

268. Iran, Iraq and most if not all States involved in the Tanker War were either ratifying parties or were bound through treaty succession principles to the Geneval Gas Protocol. 1980 TIF 294-95. The Protocol and its no-first-use reservations are considered part of customary law. MCDOUGAL & FELICIANO 634; NWP 1-14M Annotated ¶ 10.3.2.1; NWP 9A Annotated ¶ 10.3.2.1; George Bunn, *Banning Poison Gas and Germ Warfare: Should the United States Agree?*, 1969 WIS. L. REV. 375, 384-85; John Norton Moore, *Ratification of the Geneva Protocol on Gas and Bacteriological Warfare: A Legal and Political Analysis*, 58 VA. L. REV. 419, 447-52 (1972); Hays Parks, *Classification of Chemical-Biological Warfare*, 13 U. TOLEDO L. REV. 1165, 1167 (1982); Elizabeth A. Smith, Note, *International Regulation of Chemical and Biological Weapons: "Yellow Rain" and Arms Control*, 1984 U. ILL. L. REV. 1011, 1048-56. Iran, Iraq and most States involved in the Tanker War were also bound by the Convention on Prohibition of Development, Production & Stockpiling of Bacteriological (Biological) & Toxin Weapons, Apr. 10, 1972, 26 UST 583, 1015 UNTS 163. 1980 TIF 268. *See* AFP 110-31 ¶ 6-4(b); NWP 1-14M Annotated ¶ 10.4; NWP 9A Annotated ¶ 10.4; Moore 447-52 (any use of biological weapons is a customary law violation). Mark D. Budensiek, *A New Chemical Weapons Convention: Can It Assure the End of Chemical Weapons Proliferation?*, 25 STAN. INT'L L.J. 647 (1990), 39 NAV. L. REV. 15 (1990), traces developments leading to the Convention on Prohibition of Development, Production, Stockpiling & Use of Chemical Weapons & on Their Destruction, Jan. 13, 1993, — UST —, 32 ILM 800 (1993), being ratified worldwide. Convention parties agree not to develop, produce, acquire, stockpile or retain these weapons; to transfer them to anyone; or to use or engage in military preparations to use them. States pledge to destroy these, production facilities and weapons abandoned on another party's territory. Helping combat chemical terrorism is a Convention goal. Implementing these conventions, like the Geneva Gas Protocol, will also protect the environment. *See generally* Panel, *Implementing the Chemical Weapons Convention: Progress and Challenges*, 1994 ASIL PROC. 12, 37-40 (1995). Legality of Threat or Use of Nuclear Weapons, 1996(1) ICJ 248 held the Protocol had been interpreted to apply to poison and asphyxiating gases; States had not treated it as referring to nuclear weapons. *But see id.*, 508-12 (Weeramantry, J., dissenting). For reservation principles, *see* Vienna Convention, arts. 19-23; n. III.621 and accompanying text; for treaty succession issues, *see* Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.*

269. *See* Diederich, n. 17, 146; L. Craig Johnstone, *Ecocide and the Geneva Protocol*, 49 FOREIGN AFFAIRS 711, 718 (1971); Okorodudu-Fubara, n. II.210, 158-59; Roberts, *Environmental Issues*, n. 2, 230. Wil D. Verwey, *Comment: Protection of the Environment in Times of Armed Conflict — Do We Need Additional Rules?, in* PROTECTION OF THE ENVIRONMENT 558, 563 did not consider this possibility.

270. Hence the territorial sea issue the 1958 Territorial Sea Convention settled does not arise with respect to the Protocol. *See* n. 261 and accompanying text; Part IV.B.4.

271. *See generally* Chapter II.

272. States may fly a distinctive flag over monuments and institutions to identify them. Roerich Pact, arts. 1-3; TIF 350. The Netherlands presented the Preliminary Draft International Convention for Protection of Historic Buildings & Works of Art in Time of War, Oct. 1938, TOMAN 403, developed through the International Museums Office, to governments in 1939; it was never accepted due to World War II. UNESCO developed the Cultural Property Convention, analyzed nn. 300-27 and accompanying text, after the war. TOMAN 19, 22; *Introductory Note*, SCHINDLER & TOMAN 741.

273. *See* n. 261 and accompanying text; Part IV.B.4.

274. *See* Parts IV.B.1-IV.B.2.

275. Roerich Pact, art. 1; TOMAN 386; *see also* nn. III.948, IV.30, VI.84 and accompanying text.

276. BROWNLIE, INTERNATIONAL LAW 5, 13-14; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3).

277. *See* nn. 231-42 and accompanying text.

278. The Genocide Convention was not invoked during Tanker War aspects of the 1980-88 conflict. The 1948 Genocide Convention addresses a different problem: intentional acts during peace or war designed to destroy a national, ethnic, racial or religious group. However, some of this international crime's components, *e.g.*, "Deliberately inflicting . . . conditions of life calculated to bring about [a group's] physical destruction," Convention on Prevention & Punishment of the Crime of Genocide, Dec. 9, 1948, arts. 1, 2(c), — UST —, 78 UNTS 277, 280 (Genocide Convention), might raise environmental issues. RESTATEMENT (THIRD) §§ 404 & r.n.1, 702 & cmt. c declare the Convention definition of genocide is a customary norm for a universal jurisdiction crime. The Convention is implemented for the United States by Genocide Implementation Act of 1988, 18 USC § 1091. *See also* Nuremberg Judgment, n.253, *in* 41 AJIL 172-75, 220-21; Justice Case (Case 3), Opinion & Judgment, 3 Tr. War Criminals Before

Nuremberg Milit. Tribunals under Control Council L. No. 10, 954, 955, 970-72, 974-75, 979, 983-84 (1951). Nearly all States including Iran, Iraq and other Tanker War participants were parties by ratifying it or through treaty succession principles, or were bound not to act to defeat its object and purpose. TIF 367; Vienna Convention, art. 18; Symposium, *Treaty Succession;* Walker, *Integration and Disintegration;* nn. IV.32, 60, VI.45 and accompanying text. Many countries have reserved to the Convention, including the United States. *See generally* SCHINDLER & TOMAN 239-49 (list as of 1987); 28 ILM 754 (US reservations). The result may be a treaty law patchwork because of the law of treaty reservations. *See* Vienna Convention, arts. 19-23; Reservations to Convention on Prevention & Punishment of Crime of Genocide, 1951 ICJ 19-30; n. III.621 and accompanying text. If naval warfare is conducted to deliberately destroy an environment that is a condition of life for a group covered by the Convention, there is potential for genocide as well as environmental deprivation claims. The same could be said of genocide through "Deliberate and public incitement to commit genocide." Genocide Convention, art. 3(c). Deliberate and public incitement to commit the crime may result in environmental destruction as well; one may recall destruction of synagogues before and during World War II. A landed naval or marine force could be held accountable for such behavior, by destruction of, *e.g.,* houses of worship of such a group. A genocide issue could also arise during psychological warfare, where naval personnel engage in broadcasting or leafleting that incites to violations. Most genocide issues involving use of the military to inflict damage by force will arise in the land warfare context, but if the prospect is for close inshore operations, sea services involvement is more likely. Naval aviation and land-based air forces stand on an equal footing in this regard as to targeting. *See* nn. 231-42 and accompanying text; Part V.G.1. An operation might or might not involve genocide claims. If, *e.g.,* enemy fishing communities or their environment are ordered destroyed with intent to destroy them as a group because of national, ethnic, racial or religious attributes, a genoide issue arises. If enemy coastal craft are destroyed because of suspected aid to the enemy through gun running, and not because of ethnic, *etc.,* composition of crews, an issue arises under Hague XI, art. 3, and not the Genocide Convention, *See also* nn. 243-51 and accompanying text. Either scenario might raise environmental issues. The Convention has no territorial limitation; issues related to the territorial sea, archipelagic waters, continental shelf and EEZ can arise. As with humanitarian law, no derogation from the Convention during armed conflict is permitted. *See* nn. III.948, IV.30, VI.84 and accompanying text. There is no evidence of practices amounting to genocide during the Tanker War; Iraq has been condemned for violations, *e.g.,* during the 1990-91 war. *See generally* S.C. Res. 674 (1990), 677 (1990), 686 (1991), 687 (1991), *in* WELLENS 536, 539, 540-41; DOD Report, n. II.8, 609, 623; John Norton Moore, *War Crimes and the Rule of Law in the Gulf Crisis,* 31 VJIL 403 (1991); William V. O'Brien, *The Nuremberg Precedent and the Gulf War, id.* 391 (1991). During the Gulf War the Coalition used psychological tactics, perhaps beamed from the sea as well as the land and air. DOD Report 536-38. These did not incite to genocide or otherwise violate the Convention; no one has suggested the Coalition committed, or incited to, genocide. Legality of Threat or Use of Nuclear Weapons, 1996(1) ICJ 240, after reciting Genocide Convention, art. 2 definitions, pointed out that the prohibition of genocide would be pertinent in a nuclear weapons situation only if the element of intent toward a group as such was present and declined to conclude on the issue absent specific circumstances.

279. Convention for Protection of World Cultural & Natural Heritage, Nov. 15, 1972, 27 UST 37, 1037 UNTS 151 (World Cultural & Natural Heritage Convention).

280. 1980 TIF 338-39, 342-43, 349.

281. Fourth Convention, art. 154, citing 1899 Hague II, Hague IV; *see also* 4 PICTET 613-21.

282. *See* Fourth Convention, arts. 4-6, 11, 35-37, 47-78; 4 PICTET 45-64, 99-113, 233-43, 272-369, does not elucidate the point.

283. *See* n. 261 and accompanying text; Part IV.B.4.

284. *See* Parts IV.B.1-IV.B.2.

285. *See* nn. III.948, IV.30, VI.84 and accompanying text.

286. Fourth Convention, arts. 14-15; 4 PICTET 119-33 focuses on these areas for purposes stated in the Convention and mentions Henry Dunant's hospital town proposals during the Franco-Prussian War and for refuges during the 1871 Paris Commune uprising. The ICRC administered neutralized zones in Madrid, Shanghai and Jerusalem before and after World War II. Argentina and the United Kingdom agreed on a zone in the Falkland Islands capital in 1982 and a Red Cross Box at sea, a concept not mentioned in the Second Convention, during the Falklands/Malvinas War. *See* Part V.F.4. GITTA SERENY, ALBERT SPEER: HIS BATTLE WITH TRUTH 487 (1995) reports Speer's attempt to have Heidelberg declared a hospital city late in World War II. These cities are known for cultural artifacts and buildings. If a hospital area or zone is established near cultural sites, a result is protection for cultural property and therefore the urban environment.

287. These lose protected status if used for acts harmful to the enemy, *e.g.,* antiaircraft weapons on the roof, sheltering troops, storing arms or ammunition, as observation posts or liaison centers. They may be attacked after

warning about their illegal use. Fourth Convention, arts. 18-19. *See also* AFP 110-31 ¶ 5-5; NWP 1-14M Annotated ¶ 8.5.1.4; NWP 9A Annotated ¶ 8.5.1.4; 4 PICTET 141-56; Part V.F.4.

288. First Convention, art. 23. These hospitals lose protected status if used for acts harmful to the enemy. *See* n. 287. The same is true for hospital ships in the territorial sea or inland waters. Second Convention, arts. 22-35; *see also* 1 PICTET 206-18; 2 *id.* 154-98; Part V.F.4.

289. Second Convention, arts. 38-40; *see also* 2 PICTET 212-25.

290. NWP 1-14M Annotated ¶ 8.5.1.5; NWP 9A Annotated ¶ 8.5.1.5.

291. Fourth Convention, arts. 53, 147; *see also* 4 PICTET 300-02 (art. 53 reinforces, broadens Hague IV, Regulations, arts. 46, 56; *id.*, Regulations, art. 23(g), more comprehensive in scope).

292. Lijnzaad & Tanja, n. 2, 178; Plant, *Legal Aspects*, n. 17, 223; Roberts, *Environmental Issues*, n. 2, 230-31; *see* nn. 231-42, 252-54 and accompanying text.

293. *See* nn. 231-42, 252-55 and accompanying text. The 1949 Conventions, through their Martens clauses continuing rules of humanity and the public conscience, incorporate and carry forward principles related to direct or indirect environmental protection. First Convention, art. 63; Second Convention, art. 62; Third Convention, art. 142; Fourth Convention, art. 158. Earlier treaties' Martens clauses, similarly carry forward earlier law. *See* 1 PICTET 413; 2 *id.* 282; 3 *id.* 648; 4 *id.* 625-26; Morris, n. 17, 780; n. 255 and accompanying text. Plant, *Introduction*, n. 2, 17; Plant, *Legal Aspects*, n. 17, 222, argue the Martens clause of Protocol I could be interpreted to incorporate environmental concerns as matters of humanity and the public conscience. *See* nn. 402, 450 and accompanying text. If this is so, the 1949 Convention clauses might apply too.

294. Michael BOTHE, *Remarks, in* Panel, *Criminal Responsibilities for Environmental Damage, in* PROTECTION OF THE ENVIRONMENT 499, 501; Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 AIR FORCE REVIEW 41, 57 (1994); Edwards, n. 2, 130; McNeill, *Protection*, n. 2, 540-541; Okorodudu-Fubara, n. II.210, 191; Roberts, *Environmental Issues*, n. 2, 250; Terry, n. 17, 63. Plant, *Legal Aspects*, n. 17, 224 says Fourth Convention, art. 53 did not apply to some discharges, *i.e.*, Iraqi-owned oil in the tankers and from the Mina al Bakr terminal. It did apply to discharge of Kuwaiti oil from the Sea Island Terminal.

295. Fourth Convention, art. 63; *see also* 4 PICTET 333-34.

296. NWP 1-14M Annotated ¶ 11.3 & n.16; NWP 9A Annotated, n.33, ¶ 11.3 & n.17; Matheson, *Remarks* 427.

297. *See* Part V.F.4.

298. *See* Part V.F.4; nn. VI.281-93 and accompanying text.

299. *See* Diederich, n. 17, 159; Part V.F.4; nn. VI.281-93 and accompanying text. Part of World War II lore may be that there was a tacit agreement between the United Kingdom and Germany that if Heidelberg and another German university would be spared from attack, Oxford and Cambridge would be. What has been proposed would follow this idea.

300. Immediate incentives were looting of art during the Nazi occupation, removal of important works from private and public collections, and intentional destruction of culturally significant movables and immovables, including cities. TOMAN 21-22; Prott, n. V.110, 582.

301. Cultural Property Convention, art. 36, citing Hague IV; Hague IX; 1899 Hague II; Roerich Pact. The United States is or has been party to the latter treaties and is a signatory but not a Convention party. Iran and Iraq ratified the Convention; many if not all other States involved in the Tanker War were parties through ratification or treaty succession. *See* SCHINDLER & TOMAN 769-75; TIF 350, 441-42; TOMAN 318-20; Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.* Although the United States is not a Convention party, NWP 1-14M Annotated ¶ 8.5.1.6 and NWP 9A Annotated ¶ 8.5.1.6 condemn the sort of destruction it denounces, unless property is used to further an enemy war effort. *Id.* publish orders from US higher commands that ordered preservation of cultural property during previous wars where the United States was a belligerent. The UN Educational, Scientific and Cultural Organization (UNESCO), a UN specialized agency like IMO, sponsored the Convention. TOMAN 21-24. The United States withdrew from UNESCO in 1984; Singapore and the United Kingdom followed in 1985. *See* 23 ILM 218 (1984); 24 *id.* 489 (1985). *See also* BIRNIE & BOYLE 59-60. TOMAN 322-23 explains why no Martens clause was included. The Second Protocol to the Cultural Property Convention also has no Martens clause. The Protocol, opened for signature in 1999, will come into force 3 months after 20 States ratify it. Second Protocol, art. 43. For Martens clause analysis, and possible application to environmental concerns, *see* nn. 255, 293, 402, 450 and accompanying text.

302. *Compare* Cultural Property Convention, art. 18 *with, e.g.*, Fourth Convention, art. 2; *see also* 4 PICTET 17-25; TOMAN 195-206; Theodor Meron, *Comment: Protection of the Environment During Non-International Conflicts, in* PROTECTION OF THE ENVIRONMENT 353, 354; Prott, n. V.110, 587-88. The Roerich Pact applies at all times; *see* n. 275 and

accompanying text. Second Protocol, arts. 2-4, states its supplementary status, declares its scope of operation and the relationship between *id.*, arts. 10-14, and other provisions of the Cultural Property Convention and the Second Protocol.

303. Cultural Property Convention, art. 1, states that cultural property, irrespective of origin or ownership, includes:

> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property described above;
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in ... (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in ... (a);
> (c) centres containing a large amount of cultural property as defined in ... (a) and (b), to be known as "centres containing monuments."

This definition covers cultural resources, *e.g.*, underwater sites of archaeological or historical importance, including historic shipwrecks and buildings, *etc.*, now under water. TOMAN 45-46; Prott, n. V.110, 582-83. Port Royal off Kingston, Jamaica, is a sunken town lost to earthquake. There are many sites in the Mediterranean Sea, *e.g.*, ancient Tyre off Lebanon. *Id.* 584-85. For comparative analysis between Convention art. 1 and Protocol II, art. 16, *see* Daniel Smith, *Protections for Victims of International Armed Conflicts: The Proposed Ratification of Protocol II by the United States*, 120 MIL. L. REV. 59, 72-75 (1988); *see also* Diederich, n. 17, 147. Second Protocol, arts. 1(e), 10-14, declare an "enhanced protection" regime for cultural property if the property is "cultural heritage of the greatest importance for humanity", is protected by adequate domestic measures recognizing its exceptional cultural and historic value that insure the highest level of protection, and is not used for military purposes or to shield military sites and a declaration has been made by the State having control over the property, confirming it will not be so used.

304. Cultural Property Convention, art. 2; *see also* TOMAN 57-58; Second Protocol, arts. 1(e), 10-14, establishing an enhanced protection regime; n. 303.

305. Parties pledge instructing their armed forces or publishing military regulations to insure Convention observance and respect for all peoples' culture and cultural property. Armed forces must establish a service or specialists to secure respect for cultural property and to cooperate with civil authorities responsible for safeguarding it. The property must be marked pursuant to the Convention. Cultural Property Convention, arts. 3, 7, 10, 16; *see also* Second Protocol, arts. 5-9; TOMAN 59-66, 91-96, 141-42, 177-84.

306. Armed custodians assigned to guard property are considered police responsible for public order and are not deemed part of a belligerent's armed forces because of their status as guards. Cultural Property Convention, arts. 8-9; *see also* Second Protocol, arts. 5-9; TOMAN 96-112, 138-40.

307. Cultural Property Convention, Regulations, art. 11; *see also* TOMAN 113-15. Diederich, n. 17, 159 suggests similar environmental sanctuaries.

308. Cultural Property Convention, arts. 12-14; Regulations, arts. 17-19; *see also* TOMAN 151-72.

309. *See generally* Part V.B. The Convention's implications for submarine warfare and reconnaisance "need discussion," according to Prott, n. V.110, 585; he offers no solutions.

310. Hague XI, art. 4; *see also* TOMAN 171; n. 248 and accompanying text.

311. The Cultural Property Convention also provides for dispute resolution, including arbitration. *Id.*, art. 8; Regulations, arts. 12-16; *see also* TOMAN 97-112, 116-37.

312. Protecting Powers are States not party to a conflict who safeguard interests of parties to the conflict. *See* n. V.439; TOMAN 94, 222-27.

313. Cultural Property Convention, art. 21; Regulations, arts. 1-10; *see also* TOMAN 222-49.

314. Cultural Property Convention, art. 4(1); *see also* Second Protocol, art. 6; TOMAN 68-69.

315. Cultural Property Convention, arts. 4(1)-4(2), 9; *see also* TOMAN 68-70, 72-79. This was included because of UK and US delegations' strong advocacy; neither country has ratified the Convention, however. TOMAN 75-77; Prott, n. V.110, 586. *See also* Second Protocol, art. 7.

316. Cultural Property Convention, arts. 4(3)-4(4); *see also* NWP 9A Annotated, Table ST6-1; TOMAN 70-71.

317. Cultural Property Convention, art. 4(5), referring to *id.*, art. 3; *see also* TOMAN 59-66, 71-72; nn. 305-13 and accompanying text.

318. A party whose government is considered its legitimate government by a resistance movement shall if possible draw its attention to the obligation to comply with cultural property conventions. Cultural Property Convention, art. 5; *see also* TOMAN 83-89.

319. Cultural Property Convention, art. 1; TOMAN 39-56 says coverage of sites of great natural beauty was rejected; they are covered by the Convention for Protection of World Cultural & Natural Heritage, Nov. 16, 1972, 27 UST 37, 1037 UNTS 151 (World Cultural & Natural Heritage Convention), analyzed nn. 339-48 and accompanying text. *See also* Harlow & McGregor, n. 111, 325-26, citing Bernard H. Oxman, *Environmental Warfare (Environmental Terrorism During Wartime and Rules of War)*, 22 ODIL 433 (1991). McNeill, *Protection*, n. 2, 543-44 notes discussions to protect nature preserves like demilitarized zones. The Second Protocol, arts. 1(e), 10-14 would add a special category of property subject to "enhanced protection;" *see* n. 303 and accompanying text. The Protocol also provides for criminal responsibility and jurisdiction of these offenses, including international judicial assistance and extradition. Second Protocol, arts. 15-21. *Id.*, art. 22 declares the Protocol will apply to armed conflicts not of an international nature within a party's territory but not to, *e.g.*, riots.

320. Roberts, *Environmental Issues*, n. 2, 231.

321. *Cf.* Prott, n. V.110, 583 (need to observe customary warfare rules, *e.g.*, proportionality). Cultural Property Convention, arts. 4(1)-4(2), 9, allow destroying cultural property if "military necessity imperatively requires" it; *see also* n. 315 and accompanying text.

322. *See* n. 261 and accompanying text; Part IV.B.4.

323. *See* Parts IV.B.1-2.

324. *See* nn. III.948, IV.30, VI.84 and accompanying text.

325. SCHINDLER & TOMAN 769-73, 780-82.

326. DOD Report, n. II.8, 605-06; John H. McNeill, *Remarks, in* Panel Discussion, *The Strategic Imperative*, PROTECTION OF THE ENVIRONMENT 63, 80; Roberts, *Environmental Issues*, n. 2, 240; *cf.* Harlow & McGregor, n. 111, 325 (1990-91 war sources; assumption is that same practice applied for Tanker War).

327. *See* Part V.F.4; nn. 297-99, 319 and accompanying text; *cf.* McNeill, *Protection*, n. 2, 543-44.

328. *See generally* TOMAN 25, 258-59; *see also* n. 301 and accompanying text.

329. Convention on Means of Prohibiting & Preventing Illicit Import, Export & Transfer of Ownership of Cultural Property, Nov. 14, 1970, — UST —, 823 UNTS 231 (Illicit Import, Export & Transfer of Ownership of Cultural Property Convention).

330. TOMAN 465-67. By 1998 90 States were parties. TIF 350.

331. TOMAN 25.

332. Illicit Import, Export & Transfer of Ownership of Cultural Property Convention, n. 329, arts. 2-3, — UST —, 823 UNTS 236; TOMAN 362.

333. *Compare* Cultural Property Convention, art. 1 *with* Illicit Import, Export & Transfer of Ownership of Cultural Property Convention, n. 329, art. 1, — UST —, 823 UNTS 234; *see also* TOMAN 359-60.

334. Cultural Property Convention, art. 8; *see also* n. 311 and accompanying text.

335. *Compare* Illicit Import, Export & Transfer of Ownership of Cultural Property Convention, n. 329, art. 11, — UST —, 823 UNTS 242 *with* Cultural Property Convention, art. 4(3); *see also* TOMAN 361.

336. TOMAN 361; *compare* Illicit Import, Export & Transfer of Ownership of Cultural Property Convention, n.329, art. 3, — UST —, 823 UNTS 236, *with id.*, art. 11, — UST —, 823 UNTS 242.

337. Illicit Import, Export & Transfer of Ownership of Cultural Property Convention, n. 329, art. 9, — UST —, 823 UNTS 242.

338. *Id.*, art. 10(a), — UST —, 823 UNTS 242.

339. *See* TIF 350; treaty succession principles may push the total of States party to the Convention higher. Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.*

340. TOMAN 369.

341. I.U.C.N./I.C.E.L., *Protection of Cultural and Natural Heritage Sites in Times of Armed Conflict*, 23 ENVT'L POL. & L. 259 (1993) (Convention, although concluded for times of peace, also applies during war); *see also* TOMAN 369; Verwey, n. 269, 563.

342. World Cultural & Natural Heritage Convention, n. 319, arts. 3-5, 27 UST 41, 1037 UNTS 154; TOMAN 369.

343. *Cf.* LOS Convention, art. 2; Territorial Sea Convention, art. 1; *see also* n. 261 and accompanying text; Part IV.B.4.

344. World Cultural & Natural Heritage Convention, n. 319, arts. 1-2, 27 UST 40-42, 1037 UNTS 153-55.

345. TOMAN 53-55; *see also* Part B.3.a(III)(B).

346. Verwey, n. 269, 563. The 1954 and 1982 Conventions lists can be and are different. The World Cultural & Natural Heritage Convention, n. 319, covers only fixed objects; the Cultural Property Convention protects immovable and movable property. TOMAN 54, 110, 117-18.

347. LeGrand, n. 2, 30.

348. *Compare* TOMAN 373-75 *with* Cultural Property Convention, art. 20.

349. *E.g.*, DOD Report, n. II.8, 605-07, does not cite World Cultural & Natural Heritage Convention, n. 319.

350. *Cf.* TOMAN 487-90.

351. TIF 468-69; treaty succession principles may push that total higher. Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.*

352. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3).

353. Daniel Barstow Magraw & Sergei Vinogradov, *Environmental Law, in* BEYOND CONFRONTATION, n. III.358, 193, 199.

354. Reservation & Understanding of Kuwait, Jan. 2, 1980, *in* SCHINDLER & TOMAN 174: "This Convention binds... Kuwait only towards States Parties thereto. Its obligatory character shall *ipso facto* terminate with respect to any hostile State which does not abide by the prohibition ... therein. ... " (emphasis in original). *See also* Vienna Convention, arts. 19-23; n. III.621, VI.268, 278 and accompanying text. Another interpretation is that it restates principles on the effect of fundamental change of circumstances, war and possibly impossibility of performance. *See* Vienna Convention, arts. 61-62; nn. III.928-29, IV.26-27, VI.80-81 and accompanying text.

355. Art. 1(2) bars any party from assisting, encouraging or inducing any State, group of States or international organization from engaging in environmental modification techniques the Convention condemns. ENMOD Convention, art. 1 (emphases added).

356. "[This Understanding is] not incorporated into the Convention but [is] part of the negotiating record and [was] included in the report... by the Conference of the Committee on Disarmament to the... General Assembly in September 1976." SCHINDLER & TOMAN 168 & n.1 (emphasis added), citing *Report of the Conference of the Committee on Disarmament,* 1 UN GAOR, 31st Sess., Supp. No. 27, 91-92, UN Doc. A/31/27 (1976) (*Report of the Conference*). The understanding interprets the Convention and is not a reservation excluding, limiting or modifying it. The understanding binds the United States. RESTATEMENT (THIRD) §§ 313 cmt. g, 314 cmt. d; *see also* Vienna Convention, arts. 19-23; nn. III.621, VI.268, 278 (multilateral treaty reservations).

357. ENMOD Convention, art. 2.

358. "[This Understanding is] not incorporated into the Convention but [is] part of the negotiating record and [was] included in the report transmitted by the Conference... to the... General Assembly.... " SCHINDLER & TOMAN 168 & n.1, citing *Report of the Conference,* n. 356, 91-92 (emphasis added). The understanding interprets the Convention and is not a reservation purporting to exclude, limit or modify it. The understanding binds the United States. *See* n. 356 and accompanying text; *see also* Vienna Convention, arts. 19-23; nn. III.621, VI.268, 278 and accompanying text (multilateral treaty reservations).

359. ENMOD Convention, art. 3(1). The Committee appended an understanding: "... [T]his Convention does not deal with... whether... a given use of environmental modification techniques is in accordance with generally recognized principles of international law." "[This understanding is] not incorporated into the Convention but [is] part of the negotiating record and [was] included in the report transmitted by the Conference ... to the ... Assembly .... " SCHINDLER & TOMAN 168 & n.1, citing *Report of the Conference,* n. 369, 91-92. The understanding interprets the Convention and is not a reservation purporting to exclude, limit or modify it. The understanding binds the United States. *See* nn. III.621, VI.356, 358 and accompanying text.

360. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1.

361. Vienna Convention, arts.190-23; *see also* nn. III.621, VI.268, 278 and accompanying text.

362. ENMOD Convention, art. 1(1); *see also* Okorodudu-Fubara, n. II.210, 182-83; nn. 354-56 and accompanying text. Terry, n. 17, 64 makes this point but does not inquire whether it might restate custom; *see* n. 365 and accompanying text.

363. TIF 364-65.

364. Vienna Convention, art. 18; SCHINDLER & TOMAN 170; Sharp, n. 2, 19; *see also* nn. IV.32, 60, IV.45 and accompanying text.

365. *E.g.*, SAN REMO MANUAL ¶ 44, cmt. 44.4 (ENMOD Convention standards "the threshold indicated"); *cf.* Arkin, n. 2, 121; Low & Hodgkinson, n. 2, 430; *cf.* Okorodudu-Fubara, n. II.210, 171-72, 179; Ivan Shearer, *The Debate to Assess the Need for New International Accords, in* PROTECTION OF THE ENVIRONMENT 546, 547; *contra*, Edwards, n. 2, 129. Legality of Threat or Use of Nuclear Weapons, 1996(1) ICJ 241-42, discussed ENMOD but appeared to take no position:

> . . . [T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.
>
> The Court does not consider that the treaties . . . [including ENMOD] could have intended to deprive a State of the exercise of its right of self-defense . . . because of its obligations to protect the environment . . . . State must take environmental considerations into account when assessing what is necessary and proportionate in [pursuing] legitimate military objectives. Respect for the environment is one . . . element . . . [in] assessing whether an action [conforms] . . . with necessity and proportionality.

*See also* UN Charter, arts. 51, 103; n. III.10 and accompanying text. Paul C. Szasz, reviewing the Convention, Protocol I and the World Charter for Nature, said that "[I]t can be safely concluded that the principle expressed in all these instruments—that nature is no longer fair game in mankind's conflicts—is well on its way to becoming an accepted principle . . ." Panel, *The Gulf War: Environment as a Weapon*, 1991 ASIL PROC. 215, 216-17. World Charter for Nature, G.A. Res. 37/7 (Annex), UN GAOR, 37th Sess., Supp. No. 51, at 17, UN Doc. A/37/51 ¶¶ 5, 20 (1982) (World Charter for Nature), *in* 22 ILM 455, 457, 459 (1983), declared that "Nature shall be secured against degradation caused by warfare or other hostile activities;" "Military activities damaging to nature shall be avoided."
Paul C. Szasz, *Comment: The Existing Legal Framework, Protecting the Environment During International Armed Conflict, in* PROTECTION OF THE ENVIRONMENT 278, 279, characterized "these statements, . . . merely declarations of leading representative international bodies, . . . at best constitute international 'soft law' [but] their adoption by the votes or with the concurrence of representatives of a majority of countries lend some weight to the suggestion that they represent, if not yet well-established customary law, at least . . . *lege ferenda*." *See also* G.A. Res. 35/8 (1980), discussed *in* Howard S. Levie, *Comment: Criminal Responsibilities for Environmental Damage, in* PROTECTION OF THE ENVIRONMENT, 491, 494-95.

366. ENMOD Convention, art. 2; *see also* Sharp, n. 2, 22.

367. *See* n. 358 and accompanying text.

368. ENMOD Convention, art. 1(1) (emphasis added).

369. *See* n. 356 and accompanying text.

370. Low & Hodgkinson, n. 2, 432; Leslie C. Green, *The Environment and the Law of Conventional Warfare*, 29 CYBIL 222, 226-27 (1991); Roberts, *Environmental Destruction*, n. 2, 544.

371. Low & Hodgkinson, n. 2, 432, citing Final Declaration of Second Review Conference of Parties to Convention on Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Sept. 14-18, 1992, art. 2, *in* U.N.I.D.R. Newsletter 60 (1993). Low & Hodgkinson say Convention preparatory works support this; they accept this view. *Id.* 432-33.

372. ENMOD Convention, art. 1(1).

373. *Id.*, art. 2.

374. *Cf., e.g.*, Space Treaty n. III.957, art. 1, 18 UST 2411, 610 UNTS 207; *see also* AFP 110-31 ¶ 2-3(a); BROWNLIE, INTERNATIONAL LAW 267-71; NWP 1-14M Annotated ¶ 1.9; NWP 9A Annotated ¶ 1.9.

375. *See* n. 357 and accompanying text.

376. LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* Part IV.B.1.

377. *See* n. 356 and accompanying text.

378. *See* nn. III.958, IV.16, VI.68 and accompanying text.

379. *See* n. 356 and accompanying text.

380. *See* Chapter IV for development of these LOS norms. Since the ENMOD Convention has no territorial boundaries, historical analysis of norms that may or may not apply to given treaties has no bearing. It is like the Geneva Gas Protocol and the Genocide Convention, which also apply worldwide. *See* nn. 270, 278 and accompanying text.

381. The World Meteorological Organization and UN Environmental Program Informal Meeting on Legal Aspects of Weather Modification *Draft Principles* (Apr. 1978), *in* Aviation & Space Law: Meteorology, 1978 Digest § 7, at 1204-05, declares States must take "all reasonable steps to ensure that weather modification activities under their jurisdiction or control do not cause adverse environmental effects . . . outside their national jurisdiction." *See also* Agreement Relating to Exchange of Information on Weather Modification Activities, Mar. 26, 1975, Can.-US, art. 7, 26 UST 540, 545.

382. *See* Parts IV.B.1-IV.B.3.

383. Vienna Convention, art. 18; *see also* nn. IV.32, 60, VI.45 and accompanying text.

384. *See* n. 365 and accompanying text.

385. *See* nn. 370-71 and accompanying text.

386. The record is not clear; presumably neutral ships diverted around the spill to avoid fouling engineering plants; Gulf fishing grounds were damaged, however. *See* n. 4-5 and accompanying text.

387. *See* nn. 4-5 and accompanying text.

388. *See* n. 356 and accompanying text.

389. Low & Hodgkinson, n. 2, 434; Okorodudu-Fubara, n. II.210, 179.

390. *See* nn. 367-68 and accompanying text.

391. *See* n. 6 and accompanying text.

392. *See* n. 8 and accompanying text.

393. *See* nn. II.65, 215, 221, 519, VI.9 and accompanying text.

394. ENMOD Convention, art. 1; *see also* nn. 355-56 and accompanying text.

395. ENMOD Convention, art. 2; *see also* nn. 357-58 and accompanying text.

396. *See generally* Walker, *State Practice* 158-70; Parts V.C-V.D.

397. *See* n. 6 and accompanying text.

398. ENMOD Convention, arts. 1-2; *see also* nn. 355-58 and accompanying text.

399. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1.

400. *See* ENMOD Convention, arts. 1-2; nn. 355-58 and accompanying text.

401. SCHINDLER & TOMAN 701-03 (1987 list). The United States has declared it will not ratify Protocol I; Protocol II has been sent to the US Senate for advice and consent. *See* n. III.622 and accompanying text.

402. *Cf.* DOD Report, n. II.8, 606-07. The Martens clause, Protocol I, art. 1(2) carried forward other humanitarian law, and perhaps environmental concerns as a matter of humanity and public conscience. Plant, *Legal Aspects*, n. 17, 222. *See also* n. 450 and accompanying text.

403. Protocol I, art. 49(3); BOTHE *et al.* 290; PILLOUD, COMMENTARY 605-06; Michael Bothe, *Commentary, in* LAW OF NAVAL WARFARE 760-62; Fenrick, *Military Objectives*, n. II.202, 23-24; Fenrick, *Legal Aspects*, n. II.501, 264-65; Low & Hodgkinson, n. 2, 441; van Hegelsom, n. III.623, 8-10 (noting, criticizing two commentators' opposing views); *see also* nn. 427-31 and accompanying text.

404. Protocol II, art. 1. Confusion in applying the Protocols has crept into secondary literature. *E.g.*, Edgerton, n. 2, 173 cites Protocol II, art. 14 instead of Protocol I, art. 54 in analyzing deliberate attempted destruction of Saudi Arabia's desalination plants during the 1990-91 war. Whatever one might think of Iraq's arguments for its invasion and trying to annex Kuwait as a long-lost province, rejected by the UN Security Council, *see* Walker, *Crisis Over*

*Kuwait* 34, its assault on Saudi Arabia was part of an international armed conflict, covered by Protocol I and not Protocol II.

405. The 1982 Falklands/Malvinas War belligerents agreed on a Red Cross Box on the high seas, analogous to demilitarized zones protected by Protocol I, art. 60 for transfer of sick and wounded; *see* Part V.F.4. The SAN REMO MANUAL analogizes Protocol I standards, particularly if they restate general customary norms, to the law of naval warfare.

406. Philippe Antoine, *International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict*, 32 INT'L REV. RED CROSS 517, 527 (1992).

407. Louise Doswald-Beck, *The Principle of Humanity in the Law of Sea Warfare: The Protection of Civilians and the Hors de Combat, in* Panel, *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part II)*, 1988 ASIL PROC. 599, 600-01 (1990).

408. *Cf.* Edgerton, n. 2, 173; Low & Hodgkinson, n. 2, 441.

409. Protocol I, art. 35(1), restating the principle of Hague IV, Regulations, art. 22; 1899 Hague II, Regulations, art. 22; G.A. Res. 2444, 23 UN GAOR Supp. No. 18, 50, UN Doc. A/7218, *in* SCHINDLER & TOMAN 263; *see also* AFP 110-31 ¶ 6-3(a); BOTHE *et al.* 193-95; Final Protocol, Aug. 27, 1974, art. 12, *in* SCHINDLER & TOMAN 25, 29 (never ratified); NWP 1-14M Annotated ¶ 8.1 n.2 (citing *inter alia* Lieber Code, art. 30); NWP 9A Annotated ¶ 8.1 n.1 (same); OXFORD NAVAL MANUAL, art. 14; 1880 OXFORD MANUAL, art. 4; PILLOUD, COMMENTARY 390; SAN REMO MANUAL ¶ 38 & cmts.; STONE 551; Fenrick, *Military Objectives*, n. II.201, 1; Lijnzaad & Tanja, n. 2, 180; Matheson, *Remarks* 424; Robertson, *Modern Technology*, n. V.173, 363, 370; William G. Schmidt, *The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions*, 24 AIR FORCE L. REV. 189, 213 (1984). Protocol I, art. 35(2) denounces weapons, projectiles or means of warfare intended, or may be expected, to cause superfluous injury or unnecessary suffering. This customary rule, applicable to naval warfare, is analyzed at 442-52 and accompanying text.

410. Protocol I, art. 35(2), a customary norm; *see also* nn. 442-52 and accompanying text.

411. Protocol I, art. 35(3) (emphasis added).

412. *See* nn. 354-56 and accompanying text.

413. Report of Committee III, Second Sess., *in* 2 HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 276 (1980); PILLOUD, COMMENTARY 416; Antoine, n. 406, 525; Low & Hodgkinson, n. 2, 429; Schmidt, *The Protection*, n. III.623, 215-16. Levie, *The 1977 Protocol I and the United States*, 38 ST. LOUIS U.L.J. 469, 478 (1993), describes the ENMOD Convention distinctions and says "it would be extremely difficult for a . . . party to the 1977 Protocol I to assert that the words so used had a different meaning in the Protocol . . . "

414. Low & Hodgkinson, n. 2, 429.

415. Antoine, n. 406, 526.

416. *Compare* ENMOD Convention, preamble *with* Protocol I, preamble; *see also* BOTHE *et al.* 33; PILLOUD, COMMENTARY 27-28.

417. BIRNIE & BOYLE 210; Green 123 ("new 'basic rule'"); JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 81 (1992); *cf.* SAN REMO MANUAL, ¶ 44 & cmt.; *cf.* Arkin, n. 2, 121; *cf.* Fleck, *Protection*, n. 17, 530; *cf.* Gasser, *The Debate*, n. 17, 523; Frits Kalshoven, *Prohibitions or Restrictions on the Use of Methods and Means of Warfare, in* DEKKER & POST 97, 100; Levie, *The 1977 Protocol I*, n. 413, 479 (United States has no valid reason to object to substance of art. 35[3]); Glen Plant, *Comment*, n. 2, 440, 441 (emerging norm); *cf.* Shearer, *The Debate*, n. 365, 547; Solf, *Protection*, n. III.623, 134 (1986); Terry, n. 17, 65 (replication of Hague IV standards); *contra*, Low & Hodgkinson, n. 2, 427; Matheson, *Remarks* 424 (US view is that art. 35(3) does not state a customary norm); McNeill, *Protection*, n. 2, 540-41 (treaty norms); *cf.* Bernard H. Oxman, *Comment: Developing the International Law of Armed Conflict, in* PROTECTION OF THE ENVIRONMENT 576, 577; L.R. Penna, *Customary International Law and Protocol I: An Analysis of Some Provisions, in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 200, 210 (Christophe Swinarski ed. 1984); *cf.* Roberts, *Environmental Issues*, n. 2, 235; Robertson, *Modern Technology*, n.V.173, 363; Schmidt, *The Protection*, n. III.623, 214-17; *cf.* Verwey, n. 269, 560-61. Low & Hodgkinson 427-28 seem to miss the point in saying that art. 35(3) "do[es] not apply to conventional warfare" and therefore would not apply to the Iraqi oil spills. Authorities *id.* cites do not speak of inapplicability but lack of significant limitations on belligerents, *i.e.*, that art. 35(3) would not be triggered by damage incidental or peripheral to conventional warfare. *See, e.g.*, BOTHE *et al.* 348; George H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VJIL 693, 711 (1986); Green, *The Environment*, n. 370, 228; Diederich, n. 17, 152; Report of Committee III, Second Sess. (CDDH/215/Rev. 1; XV, 263), *in* 2 LEVIE, PROTECTION, n. 413, 276-77 (Protocol I preparatory works), cited by Low & Hodgkinson 417-18, notes Art. 35(3) has been criticized as being insufficient, unworkable or unrealistic; Lijnzaad & Tanja, n. 2, 182; Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26

VJIL 109, 148 (1985); Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, *in* THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 63, 86-87 (Peter Rowe ed. 1993) (Art. 35(3)'s equivocal status.). The United States appears firm in opposing the art. 35(3) standard. A condition of its ratifying the Convention on Conventional Weapons and its Fragments and Mine Protocols was: "The United States considers that the fourth paragraph of the Preamble to the present Convention, which reproduces the subject of provisions of Article 35 ... [3] and Article 55 ... [1] of Additional Protocol 1, applies only to States which have accepted those provisions[.]" Levie, *Prohibitions*, n. III.627, 666. Legality of Threat or Use of Nuclear Weapons, 1996(1) ICJ 242, may have agreed that Protocol I, arts. 35(3) and 55 do not restate custom:

> ... [T]hese provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by ... reprisals.
> These are powerful constraints for all States having subscribed to these provisions.

One implication is that those countries that have not "subscribed" to these provisions by Protocol ratification or acceptance of them as custom are not bound.

418. Commentators divide on this point; *see* n. 365 and accompanying text.

419. *Compare* Protocol I, art. 35(3) *with* ENMOD Convention, art. 1(1).

420. *See* n. 417 and accompanying text.

421. *See* nn. 413-16 and accompanying text.

422. *See* nn. 403, 427-31 accompanying text.

423. *Compare* Protocol I, art. 35(3) *with id.*, art. 55. Most commentators lump the two provisions together in arguing whether they restate customary international law. *See* n. 417 and accompanying text. *See also* Harlow & McGregor, n. 111, 318 (Art. 55 does not restate custom); Verwey, n. 269, 561-63 (same).

424. Netherlands Declaration, June 26, 1977, *in* SCHINDLER & TOMAN 713, 714; UK Declaration, Dec. 12, 1977, *in id.* 717.

425. Declarations have the same legal effect as understandings, as distinguished from reservations, which introduce new terms for a treaty. *See* Vienna Convention, arts. 19-23; nn. III.621, VI.268, 278 and accompanying text.

426. *See* nn. 413-14 and accompanying text; *but see* Lijnzaad & Tanja, n. 2, 181. Second Protocol, art. 1(f) echoes the principles of the declarations. *See* n. 424 and accompanying text.

427. *See* van Hegelsom, n. III.623, 8-10, referring to two commentators.

428. *See* n. 403 and accompanying text.

429. Protocol I, art. 49, incorporating by reference *id.*, arts. 48-67 and Fourth Convention, arts. 13-26. "'[R]ules of international law applicable in armed conflict' means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict[.]" Protocol I, art. 2(b). This does not include, *e.g.*, UN General Assembly recommendations under UN Charter, arts. 10, 14, or the law of *jus ad bellum*, *e.g.* Charter law under *id.*, art. 51. BOTHE *et al.* 54-55; PILLOUD, COMMENTARY 60-61.

430. Under the LOS the territorial sea and inland waters are part of sovereign territory. *See* Part IV.B.4. The LONW and arms control law also make this distinction. *See generally* Seabed Arms Control Treaty, art. 4; Nyon Arrangement, art. 4; Nyon Supplementary Agreement; London Declaration, art. 37; OXFORD NAVAL MANUAL, arts. 1, 9, 21, 88; Robertson, New LOS 274-75; SAN REMO MANUAL ¶¶ 10(a), 14, 20-21.

431. *See* Parts. IV.B.1-IV.B.2.

432. MOORE, CRISIS, n. 417, 81 says Iraq violated Protocol I, arts. 35(3), 55, without differentiating between the 1990-91 sea and land campaigns; *see also* Low & Hodgkinson, n. 2, 430 (same).

433. *See* nn. 411, 423 and accompanying text.

434. *See* nn. 413-15 and accompanying text.

435. *See* nn. 4-6 and accompanying text.

436. *See* nn. 353-91 and accompanying text.

437. *See* Parts V.B-V.D; nn. VI.8, 411-34 and accompanying text.

438. *See* UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; n. 429 and accompanying text; Protocol I, preamble, art. 2(b); BOTHE *et al.* 32-33; PILLOUD, COMMENTARY 25-29, 60-61.

439. *See* nn. VI.5, 8, 411-34 and accompanying text.

440. UN Charter, arts. 51, 103; *see also* nn. 429, 438 and accompanying text.

441. Protocol I, art. 49(3); *see also* nn. 430-31 and accompanying text.

442. Hague IV, Regulations, art. 23(e); 1899 Hague II, Regulations, art. 23(e); AFP 110-31 ¶¶ 6-2, 6-3(b); BOTHE *et al.* 195; GREEN 131; Lieber Code, art. 16; NWP 1-14M Annotated ¶¶ 9.1-9.1.1; NWP 9A Annotated ¶¶ 9.1-9.1.1; OXFORD NAVAL MANUAL, art. 16(2); PILLOUD, COMMENTARY 409; SAN REMO MANUAL ¶ 42(a) & cmt. 42.2; STONE 558; US Department of Defense General Counsel letter, Sept. 22, 1972, *in* 67 AJIL 122 (1973); Fenrick, Comment, *New*, n. III.627, 233; Lijnzaad & Tanja, n. 2, 180; Matheson, *Remarks* 424; Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering*, 1994 INT'L REV. RED CROSS 98; Roach, *Certain*, n. III.627, 69-72; Robertson, *Modern Technology*, n. V.173, 363; Schmidt, *The Conventional*, n. III.627, 308-12; Schmidt, *The Protection*, n. III.623, 213-14.

443. *See* nn. 268-71 and accompanying text.

444. *Cf.* Hague IV, Regulations, art. 23(e); n. 442 and accompanying text.

445. *See* nn. 4-5 and accompanying text.

446. *Cf.* Protocol I, preamble, art. 1; *see also* BOTHE *et al.* 33, 37-45; PILLOUD, COMMENTARY 27-28, 34-40.

447. *See* n. 4 and accompanying text.

448. *See* n. 446 and accompanying text.

449. *See* n. 8 and accompanying text.

450. *See generally* Walker, *State Practice* 164-66 and sources cited. It has been argued that the language invoking "principles of humanity and the dictates of public conscience," in the Martens clause includes a requirement to avoid unjustifiable damage to the environment. Plant, *Introduction*, n. 2, 17; Plant, *Legal Aspects*, n. 17, 222, referring to Protocol I, art. 1(2). Be that as it may, this language supports culpability for States ordering attacks on innocent merchantmen. However, Art. 1(2) commentaries do not mention environmental degradation. *See* BOTHE *et al.* 44; PILLOUD, COMMENTARY 38-39.

451. UN Charter, arts. 51, 103; Protocol I, art. 2(b); *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; n. VI.429 and accompanying text.

452. *See* nn. 6-8 and accompanying text.

453. UN Charter, arts. 2(4), 103; Protocol I, art. 2(b); *see also* Part B.1.

454. Protocol I, art. 49; *see* nn. 403, 429 and accompanying text.

455. *See* n. 402 and accompanying text.

456. BOTHE *et al.* 282.

457. *Id.* 282; NWP 1-14M Annotated ¶¶ 8.1-8.1.2; NWP 9A Annotated ¶¶ 8.1-8.1.2; PILLOUD, COMMENTARY 598; SAN REMO MANUAL ¶ 39 & cmts.; Kalshoven, *Prohibitions*, n. 417, 100; Roberts, *Environmental Issues*, n. 2, 235; Robertson, *Modern Technology*, n. V.173, 363, 370; Schmidt, *The Protection*, n. III.623, 221-25; Solf, *Protection*, n. III.623, 129; *see also* G.A. Res. 2444, n. 409; *see also* Second Protocol, art. 1(f).

458. *See generally* NWP 1-14M Annotated ¶¶ 8.2-8.4.1; NWP 9A Annotated ¶¶ 8.2-8.4.1; SAN REMO MANUAL ¶¶ 47-52, 59-61, 67-69 & cmts.

459. BOTHE *et al.* 324-25; NWP 1-14M Annotated ¶¶ 8.1.1; NWP 9A Annotated ¶ 8.1.1; PILLOUD, COMMENTARY 668-69; US Department of Defense General Counsel letter, n. 442, 123-24; Burrus Carnahan, *Protecting Civilians Under the Draft Geneva Protocol: A Preliminary Inquiry*, 18 AIR FORCE L. REV. 32, 47-48 (No. 4, 1976).

460. BOTHE *et al.* 309-11, 359-67; NWP 1-14M Annotated ¶¶ 8.1.2.1; NWP 9A Annotated ¶ 8.1.2.1; Matheson, *Remarks* 426.

461. *See* nn. 4-6 and accompanying text.

462. *See* Part V.G.2-V.G.3.

463. UN Charter, arts. 2(4), 51, 103; Protocol I, art. 2(b); *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; n. VI.429 and accompanying text.

464. Protocol I, art. 50 defines "civilian" as anyone not belonging to categories in Third Convention, arts. 4(A)(1)-4(A)(3) or 4(A)(6), or Protocol I, art. 43, *i.e.*, members of armed forces, militias, volunteer corps, an organized resistance, inhabitants of unoccupied territory who spontaneously take up arms to resist invaders and not members of regular armed units if they carry arms openly and respect the laws and customs of war, and organized armed forces, *etc.* under command of a party whose government or authority is not recognized by an adverse party if these forces are under an internal disciplinary system enforcing compliance with the international law of armed conflict. If a party incorporates paramilitary or armed law enforcement agencies into its armed forces, it must notify other parties to a conflict. In case of doubt, a person is considered a civilian. Protocol I, art. 50. Argentina filed declarations for Protocol I, art. 43(1); Belgium filed them for art. 43(3). *See* Argentina Declaration, Oct. 6, 1986, *in* SCHINDLER & TOMAN 704-05; Belgium Declaration, n. III.626, 706. Thus wounded, ill or shipwrecked mariners at sea and civil air crews downed at sea remain subject to the Second Convention and become prisoners of war under the Third Convention, if they do not benefit by more favorable treatment under other rules. Second Convention, art. 13(5); Third Convention. *See also* BOTHE *et al.* 293-96; 2 PICTET 93-104; 3 *id.*, n. 320, at 44-65, 67-68; PILLOUD, COMMENTARY 506-18, 610-12.

465. Protocol I, art. 51; *see also* BOTHE *et al.* 299-318; PILLOUD, COMMENTARY 615-28.

466. Belgium Declaration, n. III.626, 707; Italy Declaration, n. III.626, 712; Netherlands Declaration, n. III.626, 714; UK Declaration, n. III.626, 717; for these declarations' impact, *see* n. III.621 and accompanying text.

467. Belgium Declaration, n. III.626, 707; Netherlands Declaration, n. III.626, 714; UK Declaration, n. III.626, 717. For these declarations' impact, *see* n. III.621 and accompanying text.

468. Protocol I, art. 52; *see also* BOTHE *et al.* 320-27; PILLOUD, COMMENTARY 630-38; Second Protocol, arts. 1(f), 5-9.

469. Belgium Declaration, n. III.626, 707; Italy Declaration, n. III.626, 712; Netherlands Declaration, n. III.626, 714; UK Declaration, n. III.626, 717. For these declarations' impact, *see* n. III.621 and accompanying text. Second Protocol, art. 1(f), is to the same effect.

470. Italy Declaration, n. III.626, 713; Netherlands Declaration, n. III.626, 714; UK Declaration, n. III.626, 717. For these declarations' impact, *see* n. III.621 and accompanying text.

471. Protocol I, art. 57(1); *see also* BOTHE *et al.* 359-62; PILLOUD, COMMENTARY 678-80.

472. Protocol I, art. 57(2)(a); *see also* BOTHE *et al.* 362-65; PILLOUD, COMMENTARY 680-85; Second Protocol, arts. 1(f), 5-9.

473. Article 57 cannot be construed to authorize attacks against civilians, the civilian population or civilian objects. Protocol I, arts. 57(2)(b)-57(5); *see also* BOTHE *et al.* 365-69; PILLOUD, COMMENTARY 686-89; Second Protocol, arts. 1(f), 5-9.

474. Austria Reservation, Aug. 13, 1982, *in* SCHINDLER & TOMAN 705; Switzerland Declaration, Dec. 12, 1977, *in id.* 716. For these reservations' impact, *see* Vienna Convention, arts. 19-23; nn. III.621, VI.268, 278 and accompanying text.

475. Belgium Declaration, n. III.626, 707; Italy Declaration, n. III.626, 712; Netherlands Declaration, n. III.626, 714; UK Declaration, n. III.626, 717. For these declarations' impact, *see n.* III.621 and accompanying text.

476. AFP 110-31, ch. 14; BOTHE *et al.* 299 & n. 3; NWP 1-14M Annotated ¶¶ 6.2.3.2 (protections also under Fourth Convention, art. 33), 11.2 n.4, 11.3; NWP 9A Annotated ¶¶ 6.2.3.2, 11.2 n.3, 11.3 (same); 4 PICTET 224-29; SAN REMO MANUAL ¶ 39; STONE 684-732; Mallison & Mallison, *Naval Targeting*, n. III.262, 260; Matheson, *Remarks* 423, 426; Robertson, *Modern Technology*, n. V.173, 363; Schmidt, *The Protection*, n. III.623, 225-32; Solf, *Protection*, n. III.623, 130-31.

477. 1 LEVIE, PROTECTION, n. 413, 217-18; NWP 1-14M Annotated¶¶ 11.2 (noting protections also under Fourth Convention, arts. 28, 33), 11.3; NWP 9A Annotated ¶¶ 11.2, 11.3 (same); Hans-Peter Gasser, *Prohibition of Terrorist Acts in International Humanitarian Law*, 1985 INT'L REV. RED CROSS 200; Hague Air Rules, art. 22; Matheson, *Remarks* 426; Robertson, *Modern Technology*, n. V.173, 363; Schmidt, *The Protection*, n. III.623, 227.

478. *See generally* BOTHE *et al.* 320-27; COLOMBOS §§ 510-11, 524-25, 528-29; NWP 1-14M Annotated ¶¶ 6.23 & n.36, 6.2.3.2 (protections for some civilians from reprisals under Fourth Convention, art. 33), 8.1.1 & n.9, 8.1.2 & n.12 (US position that Protocol I, art. 52[1] creates new law); NWP 9A Annotated ¶¶ 6.2.3 & n.33, 6.2.3.2, 8.1.1 & n.9, 8.1.2 & n.12 (same); 2 O'CONNELL, LAW OF THE SEA 1105-06; 4 PICTET 227-29; PILLOUD, COMMENTARY 630-38; TOMAN 384-85; Matheson, *Remarks* 426; *cf.* Roberts, *Environmental Issues*, n. 2, 235; Solf, *Protection*, n. III.623, 131. Russo, *Targeting*, n. III.624, 17 n. 36 rejects applying art. 52(2) to naval warfare.

479. *See generally* BOTHE *et al.* 309-11, 359-67; FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 99-100 (1987) (reviewing Protocol I declarations); MCDOUGAL & FELICIANO 525; NWP 1-14M Annotated ¶¶ 5.2 & n.7, 8.1.2.1;

NWP 9A Annotated ¶¶ 5.2 & n.6, 8.1.2.1; SAN REMO MANUAL ¶¶ 39-42 & cmts.; STONE 352-53; Fenrick, *The Rule*, n. III.623, 125 (questioning whether proportionality accepted as custom); Matheson, *Remarks* 426; *Results of the First Meeting of the Madrid Plan of Action Held in Bochum, F.R.G., November 1989*, 7 BSFHV 170-71 (1991); Schmidt, *The Protection*, n. III.623, 233-38; Solf, *Protection*, n. III.623, 131; van Hegelsom, n. III.623, 18-19.

480. *See* n. 8 and accompanying text.

481. *See* n. 8 and accompanying text.

482. *See* nn. 4-5 and accompanying text.

483. Iran's attacks on the UAE Abu al-Bakoush oil installations and Kuwaiti facilities, besides lacking in discrimination, proportionality and necessity, also violated UN Charter, art. 2(4). Charter law governed these situations. *See also* UN Charter, art. 103; Protocol I, art. 2(b); Part B.1; n. 429 and accompanying text.

484. UN Charter, arts. 51, 103; Protocol I, art. 2(b); *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; n. 429 and accompanying text.

485. *See* n. 8 and accompanying text.

486. *See* n. 8 and accompanying text.

487. *See* nn. 300-27 and accompanying text. Presumably Protocol I's statement of its being without prejudice to the Cultural Property Convention includes the 1999 Second Protocol, when it is in force 3 months after 20 States ratify it. The Second Protocol provides for relationships between it and the Convention but does not define relationships between it and, *e.g.*, Protocol I. *See* Second Protocol, arts. 2-4, 43. Interesting law of treaties analysis problems may ensue.

488. *See* nn. 272-76 and accompanying text.

489. Protocol I, art. 53; Protocol II, art. 16 repeats general Protocol I, arts. 53(a)-53(b) prohibitions against attacks on historic monuments, works of art or places of worship constituting the cultural or spiritual heritage of peoples, and prohibiting use of them to support the military effort, without prejudice to the Cultural Property Convention. There is no saving clause for other relevant international instruments as in Protocol I, art. 53, a curious omission, because even if there were no such treaties when the Protocols were negotiated, there may be in the future, and incorporation might avoid interpretation problems. *See generally* Vienna Convention, art. 30; nn. IV.455, VI.47 and accompanying text.

490. *See* nn. 403, 429-30 and accompanying text.

491. Netherlands Declaration, n. III.626, 714-15; UK Declaration, n. III.626, 717; NWP 1-14M Annotated ¶ 8.5.1.6; NWP 9A Annotated ¶ 8.5.1.6; 2 O'CONNELL, LAW OF THE SEA 1105; TOMAN 385-97; Solf, *Protection*, n. III.623, 133 ("it is not yet clear whether customary international law is as broad as article 53 seems to be"); *see also* n. III.621 and accompanying text.

492. Cultural Property Convention, art. 4(2); *see also* n. 315 and accompanying text.

493. TOMAN 389; *see also id.* 394-95.

494. *Compare* Protocol I, art. 52 *with id.*, art. 53; *see also* nn. 468-70, 478-79 and accompanying text.

495. The Cultural Property Convention provides for transoceanic carriage of cultural property. *See generally* nn. 300-27 and accompanying text. The 1999 Second Protocol, arts. 1(f), 5-9, also speaks to the military necessity issue.

496. Protocol II, art. 14 is similar in theme to Protocol I, art. 54.

497. *See* nn. 403, 429-30 and accompanying text.

498. *See* Part V.E.

499. *See* nn. 502-03 and accompanying text.

500. BOTHE *et al.* 336-42; PILLOUD, COMMENTARY 652-59 (arts. 54(1)-54(2) *de lege ferenda*). The United States agrees as to art. 54(1) but maintains art. 54(2) is *lex lata* but might in due course ripen into custom. NWP 1-14M Annotated ¶ 8.1.2 & n.15; NWP 9A Annotated ¶ 8.1.2 & n.15, citing *inter alia* US Department of Defense General Counsel letter, n. 442, 1300; Matheson, *Remarks* 426; Solf, *Protection*, n. III.623, 133 (art. 54 establishes substantially new principle not yet custom).

501. *See* nn. 4-6 and accompanying text.

502. *See* n. 6 and accompanying text.

503. UN Charter, arts. 2(4), 103; Protocol I, art. 2(b); *see also* Part B.1; n. 429 and accompanying text.

504. Protocol I, art. 56(1). Protocol II, art. 15 repeats Protocol I, art. 56(1)'s first sentence.

505. Belligerents must avoid locating military objectives in these installations' vicinity. Weapons used solely to defend them cannot be a basis of attack. Civilians around these installations keep civilian protections. Protocol I, arts. 56(2)-56(3), 56(5).

506. Protocol I, art. 56(4). None of these qualifications appear in Protocol II.

507. Belgium Declaration, n. III.626, 707; Italy Declaration, n. III.626, 712; Netherlands Declaration, n. III.626, 714; UK Declaration, n. III.626, 717. For the effect of these declarations, *see* n. 621 and accompanying text.

508. BOTHE *et al.* 353; Pilloud, Commentary 669.

509. BOTHE *et al.* 348-57; Green 149-50; NWP 1-14M Annotated ¶¶ 8.1.2 & n.14 (provision would create new law and is militarily unacceptable to the United States), 8.5.1.7 & n.124; NWP 9A Annotated ¶¶ 8.1.2 & n.14 8.5.1.7 & n.104 (same); PILLOUD, COMMENTARY 668-74; Matheson, *Remarks* 427; *but see* Solf, *Protection,* n. III.623, 134 (art. 56 "differs little from customary . . . law.")

510. AFP 110-31 ¶ 5-3(d); GREEN 149-50, 184; Bothe *et al.* 355-56; NWP 1-14M Annotated ¶¶ 8.5.1.7; NWP 9A Annotated ¶ 8.5.1.7; PILLOUD, COMMENTARY 672, citing *inter alia* Protocol I, arts. 51, 57-58; Solf, *Protection,* n. III.623, 134 (art. 56 differs little from customary necessity, proportionality norms).

511. *See* nn. 403, 429 and accompanying text.

512. *See* nn. 430-31 and accompanying text.

513. *See* nn. 456-79 and accompanying text.

514. *See* n. 459 and accompanying text; *see also* Kalshoven, *Prohibitions,* n. 417, 106-07.

515. *See* nn. 4-5 and accompanying attack.

516. UN Charter, arts. 2(4), 103; Protocol I, art. 2(b); *see also* Part B.1; n. 429 and accompanying text.

517. Neutralized and hospital zones are protected under the First and Fourth Conventions. *See* Part V.F.4; nn. 281-99 and accompanying text.

518. *See* Part V.F.4; nn. 281-99 and accompanying text; *cf.* TOMAN 393.

519. Protocol I, arts. 59-60, 62-63, 65; *see also* BOTHE *et al.* 375-78, 380-85, 387-92, 400-03, 405-06; 410-15; PILLOUD, COMMENTARY 697-98, 700-06, 708-16, 738-58, 770-78.

520. *See* nn. 295-96 and accompanying text.

521. *Compare* Protocol I, art. 59 *with* Hague IV, Regulations, art. 25; Hague IX, art. 1; *see also* 1899 Hague II, Regulations, art. 25; OXFORD NAVAL MANUAL, art. 27; Hague Air Rules, art. 24; Part V.G.1; nn. 231-42 and accompanying text.

522. *See* nn. 238-42, 252 and accompanying text.

523. BOTHE *et al.* 382.

524. NWP 1-14M Annotated ¶ 85.1.3; NWP 9A Annotated ¶ 8.5.1.3; Matheson, *Remarks* 427. This parallels customary rules for hospital and neutralized zones. *See* nn. 517, 520 and accompanying text.

525. NWP 1-14M Annotated ¶ 11.3; NWP 9A Annotated ¶ 11.3; Matheson, *Remarks* 427.

526. *See* n. 517 and accompanying text.

527. *See* Part V.F.4.

528. *See* nn. 297-99, 327 and accompanying text.

529. *See* nn. 468-69 and accompanying text.

530. UN Charter, art. 2(4), 103; Protocol I, art. 2(b).

531. *Id.*, arts. 51, 103; Protocol I, art. 2(b).

532. Edgerton, n. 2, at 173; K.M. Kelly, *Declaring War on the Environment: The Failure of International Environmental Treaties During the Persian Gulf War,* 7 AM. U.J. INT'L L. & POL. 921, 929 (1992).

533. UN Charter, arts. 2(4), 103.

534. *Id.*

535. *Id.*, arts. 51, 103.

536. Conventional Weapons Convention, preamble; Fragments Protocol; Mine Protocol; Incendiary Weapons Protocol. *See* TOMAN 24-30; Burrus M. Carnahan, *The Law of Land Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73 (1984); Fenrick, Comment, *New*, n. III.627; Levie, *Prohibitions*, n. III.627; Roach, *Certain*, n. III.627; Schmidt, *Conventional*, n. III.627. Conference of States Parties to Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects negotiated Protocol on Prohibitions or Restrictions on Use of Mines, Booby-Traps and other Devices (Protocol II) as Amended, May 3, 1996, — UST —, *in* 35 ILM 1209 (1996) (Amended Mine Protocol) and Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995, — UST —, *in* 35 ILM 1218 (1996) (Laser Protocol). For analysis of and comments on negotiations on Amended Mine Protocol and Laser Protocol, *see generally* Panel, *A Look at Current Action on the Conventional Weapons Convention of 1980*, 1996 ASIL PROC. 381.

537. SCHINDLER & TOMAN 191-92.

538. *See* Levie, *Prohibitions*, n. III.627, 666; Protocol I, art. 35(3). The US Declaration, Apr. 8, 1982, *in* SCHINDLER & TOMAN 196, says prohibitions and restrictions in the Convention and its Protocols were "new contractual rules" except provisions stating existing international law, and that these new rules would bind States only upon ratification or accession to the Convention and consent to be bound by the Protocols. The US Declaration also says in part:

> The United States . . . welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession. We believe that the Convention represents a positive step . . . in efforts to minimize injury or damage to the civilian population in time of armed conflict. Our signature . . . reflects the general willingness of the United States to adopt practical and reasonable provisions concerning . . . military operations, [to] . . . protect . . . noncombatants.
>
> At the same time, we want to emphasize that formal adherence by States to agreements restricting the use of weapons in armed conflict would be of little purpose if the parties were not firmly committed to taking every appropriate step to ensure compliance with those restrictions after their entry into force. It would be the firm intention of the United States and, we trust, all other parties to utilize the procedures and remedies provided by this Convention, and by the general laws of war, to see to it that all parties to the Convention meet their obligations under it. The United States strongly supported proposals by other countries during the [negotiating] Conference to include special procedures for dealing with compliance matters, and reserves the right to propose at a later date additional procedures and remedies, should this prove necessary, to deal with such problems.
>
> . . . [T]he United States . . . reserves the right, at . . . ratification, to exercise the option provided by article 4(3) of the Convention, [which provides, 1342 UNTS 164-65, that ratifying countries may opt not to consent to be bound by any Protocol, provided that the Depository, the UN Secretary-General pursuant to art. 10(1), *id.* at 167, is notified,] and to make statements of understanding and/or reservations, to the extent that it may deem . . . necessary to ensure that the Convention and its Protocols conform to humanitarian and military requirements. . . .

*See also* NWP 1-14M Annotated ¶9.7 n.44; NWP 9A Annotated ¶9.6 n.33; Vienna Convention, arts. 19-23, nn. III.621, VI.268, 278 and accompanying text (reservations principles). China Declaration, Dec. 13, 1981; Romania Declaration, Apr. 8, 1982, SCHINDLER & TOMAN 192, 195, may imply a view that the Convention and Protocols do not state customary norms.

539. By 1998 there were 70 Convention parties, most of which had ratified all Protocols. TIF 464.

540. Conventional Weapons Convention, art. 8; *see also* Roach, *Certain*, n. III.627, 38-44; Schmidt, *Conventional*, n. III.627, 312. The Conference produced Amended Mine Protocol and Laser Protocol, n. 536, now being ratified.

541. Conventional Weapons Convention, art. 1, noting applicability to situations in common article 2 of the 1949 Geneva Conventions, *i.e.*, First Convention, art. 2; Second Convention, art. 2; Third Convention, art. 2; Fourth Convention, art. 2, and situations in Protocol I, art. 1(4) (armed conflict involving peoples' fights for self-determination against colonial domination, alien occupation or racist regimes). *See also* Conventional Weapons Convention, art. 7; Roach, *Certain*, n. III.627, 18-30; Schmidt, *Conventional*, n. III.627, 298-304. Fenrick, Comment, *New*, n. III.627, 230, says the Convention does not apply to nuclear weapons or "weapons used exclusively against targets at sea or in the air . . ." It is not clear from the Convention or its Protocols how his interpretation was derived; art. 1 refers to all 1949 Geneva Conventions, and, as seen nn. 543-45, the Protocols to the Convention state limitations

in application, *e.g.*, for mine warfare; that aside, the Convention and Protocols seem to apply across the board. For common article 2 analysis, *see* 1 PICTET 27-37; 2 *id.* 26-31; 3 *id.* 19-27; 4 *id.* 17-25. For Protocol I, art. 1(4) analysis, *see* BOTHE *et al.* 45-46; PILLOUD, COMMENTARY 41-56.

542. Fragments Protocol is a single sentence: "It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays." It does not codify custom but develops basic rules. Roach, *Certain*, n. III.627, 69. When the Protocol was drafted, it was accepted unanimously because no negotiating State had such weapons or foresaw future use for them. Fenrick, Comment, *New*, n. III.627, 242; Levie, *Prohibitions*, n. III.627, 654. These weapons were not used during the Tanker War. Laser Protocol, n. 536, arts. 1, 3, 35 ILM 1218, prohibits laser weapons specifically designed to blind permanently unenhanced vision; the prohibition does not cover blinding as incidental or collateral effect of legitimate military use of laser systems.

543. Protecting civilians and UN, ICRC or other humanitarian missions or peacekeepers is its primary goal. Mine Protocol, arts. 1, 8; Amended Mine Protocol, n. 536, arts. 1(1), 12, — UST —, 35 ILM 1209, 1213-15. *See also* TOMAN 28-29; Carnahan, *The Law*, n. 536, 76-77; Fenrick, Comment, *New*, n. III.627, 244-46; Schmidt, *The Conventional*, n. III.627, 313.

544. *See* DOD Report, n. II.8, 213-21.

545. Mine Protocol, art. 2(1); Amended Mine Protocol, n. 536, art. 2(1), — UST —, 35 ILM 1209.

546. Carnahan, *The Law*, n. 536, 77-79; Fenrick, Comment, *New*, n. III.627, 244-45; Schmidt, *The Conventional*, n. III.627, 315; *see also* Part V.G.1; nn. 456-69 and accompanying text.

547. *Compare, e.g.,* Mine Protocol, arts. 2(4)-2(5), 3-4 (applying to mines, booby traps, "other devices"), *with* Protocol I, arts 51(2), 51(4)-51(6), 52. *See also* Levie, *Prohibitions*, n. III. 627, 656-57. Mines are defined as

> any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle, and "remotely delivered mine" means any mine so defined delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.

Mine Protocol, art. 2(1). Booby traps are defined as

> any device or material . . . designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.

*Id.*, art. 2(2). "Other devices" are defined as

> manually-emplaced munitions and devices designed to kill, injure or damage and . . . actuated by remote control or automatically after a lapse of time.

*Id.*, art. 2(3). Fenrick, Comment, *New*, n. III.627, 246, viewed the Mine Protocol as a "modest advance in the law;" *accord,* Schmidt, *The Conventional*, n. III.627, 338.

548. *Compare* Amended Mine Protocol, n. 536, arts. 3(8)-3(9), — UST —, 35 ILM 1210, *with* Mine Protocol, arts. 2(4)-2(5), 3-4; Protocol I, art. 52(3). The definitions list has been expanded; *see* Amended Mine Protocol, art. 2, — UST —, 35 ILM 1209-10.

549. Incendiary Weapons Protocol, art. 2, which does not restate customary law with respect to reprisals or military objectives within a concentration of civilians. Fenrick, Comment, *New*, n. III.627, 249; Schmidt, *The Conventional*, n. III.672, 342-44. Fourth Convention, art. 33 forbids using any weapons reprisals against enemy civilians in occupied territory. Schmidt 342. The Fourth Convention commentary does not speak specifically of incendiary reprisals, either. 4 PICTET 227-29.

550. NWP 1-14M Annotated ¶ 9.7 n.44; NWP 9A Annotated ¶ 9.6 n.33; *cf.* Harlow & McGregor, n. 111, 318; Schmidt, *The Conventional*, n. III.627, 341. Some oppose using incendiaries against combatants; there was support for this at the Incendiary Weapons Protocol negotiations. *See* Fenrick, Comment, *New*, n. III.627, 248.

551. Israel's attack on *U.S.S. Liberty* is a rare example. *See* JAMES ENNES, ASSAULT ON THE LIBERTY 67-68, 70, 81, 92, 152 (1980); Walter L. Jacobsen, *A Juridical Examination of the Israeli Attack on the* USS Liberty, 36 NAV. L. REV. 1 (1986). Since *Liberty* was a warship, the Incendiary Weapons Protocol did not apply; it deals with attacks on civilians. Neutrality, military objective, necessity and proportionality principles did, and *Liberty*, if not so disabled that it could not return fire, could have exercised the right of self-defense. Other US forces also could have responded. Moreover, the Protocol addresses LOAC situations, and *Liberty*'s case was covered by the law of self-defense. UN Charter, arts. 51, 103; Protocol I, art. 2(b); *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; n. 429

and accompanying text; Mallison & Mallison, *Naval Targeting*, n. III.262, 267. Israel agreed to pay for deaths and injuries on *Liberty* and damage to the ship without admitting liability. *See* 58 Bulletin 799 (1968); 59 *id.* 473 (1969); Agreement Concerning Claims Arising from Damage to United States Ship "Liberty," Dec. 17, 1980, Israel-US, 32 UST 4434, 1268 UNTS 33.

552. *Compare* Incendiary Weapons Protocol, arts. 1(2)-2(3) *with* Mine Protocol, arts. 2(4)-2(5), 3(2)-3(4), 4(2) *and* Protocol I, arts. 51(2), 51(4)-51(6), 52, 57(2). *See also* TOMAN 29; Fenrick, Comment, *New*, n. III.627, 249; Levie, *Prohibitions*, n. III.627, 664-65, criticizing arts. 2(2), 2(3); Schmidt, *The Conventional*, n. III.627, 341-421; Part V.G.1; nn. 464-83 and accompanying text. Harlow & McGregor, n. 111, 318 probably refer to the Incendiary Weapons Protocol's substantive provisions in saying it is not accepted as customary law.

553. Incendiary Weapons Protocol, art. 2(4). *Id.*, arts. 1(3)-1(4) define "military objective" and "objective" in the same language as Protocol I, art. 48. *See* nn. 456-63 and accompanying text.

554. Fenrick, Comment, *New*, n. III.627, 250; Schmidt, *The Conventional*, n. III.627, 345. Harlow & McGregor, n. 111, 318 say the forests provision does not represent customary law.

555. The low-water line is recognized as the mark from which the territorial sea is measured unless otherwise provided. LOS Convention, art. 5; Territorial Sea Convention, art. 3. Traditional warships (*e.g.*, destroyers, frigates) cannot navigate that close to shore, except areas like the Bay of Fundy where tidal differences are great, but hovercraft and small boats use only a few inches of water. Moreover, the Protocol protects forest cover from air, missile or shore bombardment by vessels well outside these waters.

556. *Compare* Incendiary Weapons Protocol, art. 2(4) *with* Protocol I, art. 56; *see also* nn. 505-16 and accompanying text.

557. *Compare* Incendiary Weapons Protocol, art. 2(4) *with* Protocol I, art. 35(3); ENMOD Convention, art 1(1). *See also* Protocol I, art. 55; nn. 411-37, 504-16 and accompanying text.

558. *See, e.g.*, n. 532 and accompanying text (Protocol I, art. 54).

559. SCHINDLER & TOMAN 191-92, reporting that 28 countries ratifying the Convention had ratified the three Protocols by 1987. The United States has ratified the Convention, and its Fragments and Mine Protocols but not the Incendiary Weapons Protocol, maybe the only State in this status. *See* TIF 464.

560. The Convention cannot derogate from other principles of international humanitarian law, *i.e.*, norms stated in custom. Conventional Weapons Convention, preamble, arts. 1-2, 7.

561. UN Charter, arts. 51, 103; Protocol I, art. 2(b); *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; n. 429 and accompanying text.

562. *See* n. 31 and accompanying text.

563. World Charter for Nature, n. 365, ¶¶ 5, 20 *in* 22 ILM 455, 457, 459 (1983), declaring that "Nature shall be secured against degradation caused by warfare or other hostile activities"; "Military activities damaging to nature shall be avoided," another "soft law" source. *See* n. 365.

564. The Summit closed June 14, 1992 and resulted in some nonbinding documents, *inter alia Agenda 21*, UN Doc. A/CONF.151/6/Rev. 1 (1992) (Agenda 21), *in* 31 ILM 876 (1992), an action plan for sustainable development to guide national policies for this and the next century. *See* Edith Brown Weiss, *Introductory Note, id.* 814-15 (1992). Agenda 21 repeated points in the Stockholm Declaration, n. 53. Agenda 21's Principle 24, 31 ILM 880, said: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary." Principle 26, *id.* 880, admonishes "States [to] resolve their environmental disputes peacefully and by appropriate means in accordance with the Charter . . . ." Two treaties were signed: Framework Convention on Climate Change, May 9, 1992, — UST —, *in id.* 849 (1992); Convention on Biological Diversity, June 5, 1992, — UST —, *in id.* 822 (1992). BIRNIE & BOYLE 545 say the Summit Declaration on Environment and Development "can best be seen in part as a codification of the subject," and as having gone "significantly beyond what could be achieved at Stockholm in 1972," where a similar conference produced, *inter alia*, the Stockholm Declaration. *See* nn. II.62, VI.53 and accompanying text.

565. Kuwait Regional Convention & Protocol, n. II.63; Red Sea Convention, n. VI.55; *see also* nn. VI.169-70, 185-206 and accompanying text.

566. Security Council resolutions bind UN Members if stated as a "decision" under UN Charter, arts. 25, 48, 103; the Council may also pass non-binding resolutions, and all General Assembly resolutions are non-binding. These resolutions may reinforce preexisting customary or treaty law, however. *See* n. IV.57 and accompanying text; *see also* Chapter III.

567. *See generally* Walker, *State Practice* 122-23, 125-26, 128, 133-37, 141-44, 153-54, 158-67, describing impact, or lack of it, of Council and Assembly actions for wars and confrontations at sea, 1945-90.

568. S.C. Res. 540 (1983); S.C. Res. 552 (1984), S.C. Res. 598 (1987), *in* WELLENS 451, 454, 473.

569. *See* nn. 4-5 and accompanying text.

570. S.C. Res. 660-62, 664-67, 669-70, 674, 677-78 (1990), 686-87 (1991) *in* WELLENS 527-42, referring *inter alia* to the Fourth Convention, Geneva Gas Protocol, and, in S.C. Res. 687 to Iraq's liability for environmental damage. Michael Bothe, *Remarks, in* PROTECTION OF THE ENVIRONMENT 17, 18, viewed Resolution 687 as dealing with aggression, *cf.* UN Charter, art. 2(4), and not the laws of war. *See also* SAN REMO MANUAL ¶¶ 116-19, 121-24, 135, 138-40, 146-49, 151-52.

571. S.C. Res. 678 (1990), incorporating by reference S.C. Res. 664-67, 670, 674 (1990), *in* WELLENS 530-31, 534, 540.

572. *Cf.* DOD Report, n. II.8, Appendix O.

573. S.C. Res. 687, *in* WELLENS 542.

574. *See* n. 570 and accompanying text.

575. *E.g.*, S.C. Res. 665, *in* WELLENS 530.

576. S.C. Res. 687, *in id.* 542.

577. *See* nn. 300-52 and accompanying text.

578. ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

579. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

580. Other Council actions, *e.g.*, calls for action or recommendations, do not bind Members unless construed as a decision under *id.* arts. 25, 48, 103. Nearly all General Assembly resolutions are non-binding, although they can strengthen norms stated in them. *See* n. IV.57 and accompanying text.

581. *See* n. III.10 and accompanying text.

582. *See* n. IV.57 and accompanying text.

583. *See* nn. 1-16 and accompanying text.

584. *See* n. 17 and accompanying text.

585. *Accord,* Fleck, *Comments,* n. 17, 532; Gasser, *The Debate,* n. 17, 524; Conrad Harper, *Opening Address, in* PROTECTION OF THE ENVIRONMENT 8, 13; LeGrand, n. 12, 30; McNeill, *Protection,* n. 2, 544; Moore, *Concluding Remarks, in* PROTECTION OF THE ENVIRONMENT 630-32; Morris, n. 17, 780; Roberts, *Environmental Issues,* n. 2, 258-59; Szasz, *Comment,* n. 365, 280; *contra,* Verwey, n. 269, 572. Shearer, *The Debate,* n. 365, 554-55, suggests a RESTATEMENT approach; DE GUTTRY & RONZITTI, n. II.210, 14, advocate "codification."

586. *See* n. IV.3.

587. *Cf.* Robertson, *Modern Technology,* n. V.173, 7.

588. Walker, *State Practice* 190-91.

589. *See* Symposium, *Treaty Succession;* Walker, *Integration and Disintegration.*

590. *See* Vienna Convention, arts. 19-23; nn. III.621, VI.268 and accompanying text.

591. UN Charter, art. 2(2); Vienna Convention, art. 26; nn. III.934, IV.31, VI.85 and accompanying text.

592. *Cf.* ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03; n. III.10 and accompanying text.

593. Exceptions may be treaties classified for security reasons. RESTATEMENT (THIRD) § 312 r.n.5; *see also id.* r.n.3, referring to UN Charter, art. 102, which requires treaty registration before an agreement can be cited before a UN organ.

594. *See generally* Walker, *State Practice* 190. ROACH & SMITH is a rare example of a government's position in one source. The last complete digest of US practice, WHITEMAN, appeared over 25 years ago. The annual digest of practice following WHITEMAN ends with 1979, with partial publication of the 1980-88 series since then.

595. SAN REMO MANUAL, *Introduction* to the Cmts. 62.

596. Robertson submitted this as a paper to the International Institute of Humanitarian Law Round Table considering the relationship between the LOS and the law of naval warfare; it was later published as a Newport Paper and in Moore & Turner; the last version is cited. *See* Robertson, New LOS 302-03 & n.1.

597. SAN REMO MANUAL ¶ 34.

598. LOS Convention, art. 87; High Seas Convention, art. 2; *see also* Part IV.B.1; n.110 and accompanying text.

599. Robertson, New LOS 302 & n.207.

600. *Compare id. with* SAN REMO MANUAL ¶¶ 12 (where neutrals have sovereign rights, jurisdiction, other rights under general international law, belligerents must have due regard for those neutrals' legitimate rights and duties when carrying out operations; no qualification as Robertson, New LOS 302 recommended), 34 (requiring belligerents' due regard for neutral coastal States' EEZ, continental shelf rights, duties, including those States' obligations toward the marine environment, and particularly due regard for artificial islands, *etc.*, established by neutrals; qualified by other rules of LOAC), 36 (due regard for neutrals' exploring, exploiting seabed, ocean floor resources beyond national jurisdiction; no qualification as Robertson 302 recommended), 88 (minelaying belligerents must pay due regard to legitimate high seas uses by *inter alia* providing safe alternate routes for neutral shipping; no qualification as Robertson 302 recommended), 106(c) (in declaring exclusion zones, belligerents must exercise due regard for neutrals' rights to legitimate ocean uses; no qualification as Robertson 302 recommended). *See also id.* ¶ 37 (belligerents must "take care" to avoid damaging cables, pipelines on the seabed that do not exclusively serve other belligerents; no qualification as Robertson 302 recommended). The IIHL group rejected "respect" for the environment and others' LOS rights; "respect" is often used in humanitarian law treaties; the MANUAL wished to preserve this distinction. SAN REMO MANUAL ¶ 44, cmts. 44.6-44.10; Fleck, *Comment*, n. 17, 530.

601. *See, e.g.*, SAN REMO MANUAL ¶ 3 & cmts., noting the MANUAL is primarily concerned with *jus in bello*, the LOAC, and not *jus ad bellum*, with which, *e.g.*, UN Charter, arts. 51, 103 is concerned.

602. SAN REMO MANUAL ¶¶ 34 & cmts., 34.2, 34.4; 35 & cmts. 35.2-35.4; 44 & cmts. 44.6-44.10.

603. *Id.* ¶ 11 (italics in original); this accords with the first alternative proposed by Diederich, n. 17, 156.

604. SAN REMO MANUAL ¶ 11, cmts. 11.1-11.7, citing *inter alia* LOS Convention, arts. 192, 194.

605. SAN REMO MANUAL ¶ 44; *accord*, Diederich, n. 17, 158; *compare* similar provisions in Protocol I, arts. 35(1), 35(2), 51(4), 51(5), 57.

606. SAN REMO MANUAL ¶¶ 47(a), 48-50.

607. *See* Geneva Gas Protocol; using chemical and biological weapons, subject to a no-first-use rule, also violates customary law. Depending on agents employed, chemical and biological weapons can degrade many aspects of the environment. *See* nn. 268-71 and accompanying text.

608. SAN REMO MANUAL ¶ 35, in *id.*, Part II, Regions of Operations.

609. *Id.* ¶ 11, cmt. 11.1; *see also id.* ¶ 44, cmt. 44.4.

610. *See id.* ¶ 11, cmt. 11.1; ¶ 44, cmt. 44.4, citing the LOS Convention; ENMOD Convention; Protocol I, arts. 35(3), 55.

611. SAN REMO MANUAL ¶ 10 preserves the distinction while recognizing the place of the continental shelf and the EEZ; *see also* Robertson, New LOS 274 (three divisions, internal waters, territorial waters [territorial sea], high seas).

612. For LOS and LOAC rights and obligations in these areas at stake in the Tanker War, *see generally* Chapters IV and V.

613. *See generally* LOS Convention, Part XI as modified by the Boat Agreement, declaring the Area, the deep seabed beyond the continental shelf, as part of the common heritage of humankind; *see also* n. IV.3 and accompanying text.

614. SAN REMO MANUAL ¶ 36. *See also id.* ¶ 12. *Id.* ¶ 12, cmt. 12.1 says:

> Although it was recognized that the most crucial areas where [the interface of belligerent operations and neutrals' rights] might occur would be in the [EEZ] or the continental shelf, a consensus [of IIHL participants] developed that the principle should be stated in general terms and for all areas, regardless of whether neutral rights were based on jurisdictional claims (for example, [EEZ], continental shelf) or universal rights flowing from the general law of the sea (for example, the high seas). Such rights also included those involving activities in the "Area" [as defined by LOS Convention, Part XI]. . . .[S]ome States had not

> formally claimed [EEZs] but may have established exclusive fishery zones or the like. [SAN REMO MANUAL] ¶ 12 reflects this consensus.

Thus the MANUAL does cover these areas, perhaps obliquely, as in the case of contiguous zones, presumably if they are "like" exclusive fishery zones. The relationship with the Area Authority is not clear. Presumably reference to the Convention, Part XI would include subsequent protocols such as the Boat Agreement, n. IV.3. However, the MANUAL intends that the due regard formula apply across the board for the relationship between the law of naval warfare and all ocean areas recognized by the law of the sea, whether in the LOS Convention, the 1958 LOS conventions or customary law. Therefore, in situations the MANUAL does not cover, those following it should accord due regard to environmental concerns wherever occurring on the ocean, unless there is specific law to the contrary.

615. SAN REMO MANUAL, *Introduction* to the Commentaries 64; *see also* Part V.G.1.

616. This kind of omission was a shortcoming of the OXFORD NAVAL MANUAL. Verri, *Commentary*, n. IV.71, 339-40.

617. SAN REMO MANUAL, *Introduction* to the Commentaries 67-68, referring to *id.* ¶¶ 3-9; *see also* n. 589 and accompanying text.

618. SAN REMO MANUAL, *Introduction* to the Commentaries 68, referring to *id.* ¶ 13(d) & cmts. 13.11-13.14; *see also* Walker, *Maritime Neutrality* 142-48.

619. SAN REMO MANUAL, *Introduction* to the Commentaries 68, referring to *id.* ¶¶ 38-111; *see also* Part V.G.1.

620. SAN REMO MANUAL, *Introduction* to the Commentaries 69, referring to *id.* ¶¶ 105-08; *see also* Part V.F.2.

621. SAN REMO MANUAL, *Introduction* to the Commentaries 69, referring to *id.* ¶¶ 14-37.

622. *Id.*, *Introduction* to the Commentaries 69, referring to, *e.g.*, ¶¶ 53-58, 62-66, 70-77, 112-13, 115-18, 125-34, 141-45, 153-68, 174-80. The MANUAL does not address air operations and land targets, except for general principles and rules of humanitarian law, *e.g.*, targeting. *See also* Part V.G.1.

623. ENMOD Convention, art. 1, cited *in* SAN REMO MANUAL ¶ 44, cmt. 44.4; *see also* nn. 353-400 and accompanying text.

624. UN Charter, art. 103; *see also* Part B.1; nn. IV.10, 57 and accompanying text.

625. *See* Part B.1.

626. International Committee of the Red Cross, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (1994) (ICRC Guidelines), *in* NWP 1-14M Annotated, Annex 8A-1.

627. *Id.* ¶¶ 8-20, *in* NWP 1-14M Annotated ¶, 8-21-33, citing these agreements related to international armed conflict; Hague IV, Regulations, arts. 1, 23(g); Hague VIII; ENMOD Convention, arts. 1-2; Fourth Convention, arts. 1, 53, 63(2), 144, 146-47; Cultural Property Convention; Protocol I, arts. 1(1), 35(3)-36, 51(4)-51(5), 52, 54-56, 61-67, 83, 86-87; Mine Protocol; Incendiary Weapons Protocol. Chapters V-VI *passim* have discussed all of these treaties and others, *e.g.*, Roerich Pact. Some treaties are not in force for some countries, *e.g.*, Protocol I for the United States, and some provisions the Guidelines cite are not recognized as customary law by some countries.

628. ICRC Guidelines, n. 626, ¶ 4, at 8-30.

629. *Id.* ¶ 5, at 8-30.

630. *Id.* ¶ 7, at 8-31, reflecting language in humanitarian law treaties' Martens clauses; *see also, e.g.*, First Convention, art. 63; Second Convention, art. 64; Third Convention, art. 142; Fourth Convention, art. 158; Protocol I, art. 1(2); nn. 255, 293, 402, 450 and accompanying text.

631. *See* nn. III.938-51, IV.29-30, VI.83-84 and accompanying text.

632. *E.g.*, LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.953-67, 10-25 and accompanying text; Part B.2.b.

633. LOS Convention, arts. 237, 311; *see also* Parts IV.A.2, VI.B.2.a.

634. ICRC Guidelines, n. 626, ¶ 1, at 8-30 refers to armed conflict, and all cited treaties deal with *jus in bello*, *i.e.*, the LOAC. Unlike SAN REMO MANUAL ¶¶ 3-9, which recognize the possibility of applying different rules for *jus ad bellum*, *see* n. 647 and accompanying text, the Guidelines are only concerned with protection of the environment and the LOAC.

635. *Compare* ICRC Guidelines, n. 626 *with* NWP 1-14M Annotated ¶ 8.1.3, citing *inter alia* UN General Assembly Resolutions A/47/37 (1992), A/49/50 (1994). NWP 9A Annotated has no comparable provision.

636. *See* NWP 1-14M Annotated ¶¶ 4.3.2-4.3.2.1; *compare* NWP 9A Annotated ¶¶ 4.3.2-4.3.2.1.

637. UN Charter, arts. 51, 103; Protocol I, art. 2(b); *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; n. 429 and accompanying text.

638. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

639. *Jus cogens* overrides treaties and custom, two primary sources of international law. *See* n. III.10 and accompanying text.

640. *See* nn. 231-42, 268-71 and accompanying text.

641. *See* nn. 340-47 and accompanying text.

642. Impossibility of performance, fundamental change of circumstances or armed conflict are among reasons for claiming suspension during war. Vienna Convention, arts. 61-62; *see also* nn. III.928-29, 938-51; IV.26-28, 29; VI.80-81 and accompanying text.

643. Waters landward of baselines establishing the territorial sea are subject to coastal State sovereignty; the LOS does not govern for internal waters pollution except ship pollution. *See generally* LOS Convention, arts. 2(1), 7(3), 8(2)-9, 10(4), 18(1), 25(2), 27(2), 27(5), 28(3), 35(a), 50, 111(1), 211(3), 218; Territorial Sea Convention, arts. 1, 5, 7(4), 8, 13, 14(2), 16(2), 19(2), 20(3); Part IV.B.4.

644. *See* Part B.2.a.

645. *See* n. IV.3 and accompanying text.

646. *See* Part B.2.c(II).

647. *See* nn. 596-600 and accompanying text.

648. *E.g.*, Kuwait Regional Convention and Protocol, n. II.63, a product of the UN Environmental Programme; *see also* Part B.2.c(III).

649. *See, e.g.*, Frank M. Snyder, *Introduction, in* SOUND MILITARY DECISION (1992); George K. Walker, *Sea Power and the Law of the Sea: The Need for a Contextual Approach*, 7 ODIL 299 (1979), 83 MIL. L. REV. 131 (1979), 30 NWC REV. 88 (No. 4, 1978).

650. *See, e.g.*, Part V.A.3.

651. RESTATEMENT (SECOND), CONFLICT OF LAWS (1971 & 1995 Supp.) (RESTATEMENT (SECOND), CONFLICTS).

652. Other categories of jurisdiction recognized by RESTATEMENT (THIRD) besides prescriptive jurisdiction (also known as legislative or regulatory jurisdiction or jurisdiction to prescribe), are jurisdiction to adjudicate (also known as judicial jurisdiction) and defined as a State's authority to subject particular persons or things to its judicial process, and jurisdiction to enforce (occasionally stated as executive jurisdiction), or a State's authority to use governmental resources to induce or compel compliance with that State's law. RESTATEMENT (THIRD) § 401 & *Introductory Note* to Part IV, 231. RESTATEMENT (SECOND), CONFLICTS, n. 657, § 6 is an analogous approach to the problem of prescriptive jurisdiction for conflict of laws, *i.e.*, private international law, among the 50 states of the United States. *Id.* chs. 3-4 offers a more elaborate analysis of judicial jurisdiction than does RESTATEMENT (THIRD) § 421.

653. RESTATEMENT (THIRD) § 402 enumerates these bases of jurisdiction to prescribe:

> Subject to [RESTATEMENT (THIRD)] § 403, a state has jurisdiction to prescribe law with respect to
>
> (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
> (b) the status of persons, or interests in things, present within its territory;
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
>
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
>
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

This recitation of bases of prescriptive jurisdiction is similar to that of RESTATEMENT (SECOND) §§ 7, 17-18, 40 and concerned with transnational assertions of the right to prescribe national standards of conduct outside a prescribing State's borders. These jurisdictional bases have also been labeled as territorial jurisdiction, events occurring within

the territory of the prescribing State; sometimes "floating territorial jurisdiction" with respect to jurisdiction over events aboard ships, aircraft and spacecraft registered by the prescribing State; objective territorial jurisdiction (the "effects" doctrine), concerned with acts outside the territory of the prescribing State that have impact within that State; jurisdiction based on nationals of a prescribing State; jurisdiction based on nationality of the victim (passive personality); the protective principle, *i.e.*, prescribing norms of conduct related to a prescribing State's vital interests. *See generally* RESTATEMENT (THIRD) §§ 402, cmts. a-h; 502(2) & cmt. d. The ensuing analysis is more concerned with the rule of reasonableness to which these bases are subject; *see* RESTATEMENT (THIRD) § 402. *Id.* § 403(1) declares these rules of reasonableness as limitations on jurisdiction to prescribe:

> ... Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.

*Id.* § 403(2) supplies examples of factors of reasonableness:

> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
> (e) the importance of the regulation to the international political, legal or economic system;
> (f) the extent to which the regulation is consistent with the traditions of the international system;
> (g) the extent to which another state may have an interest in regulating the activity; and
> (h) the likelihood of conflict with regulation by another state.

Analogous reasonableness factors are the heart of the proposed analysis to expand on the "due regard" rubric in the LOS Convention and the SAN REMO MANUAL. RESTATEMENT (THIRD) § 403(3) adds that when it would not be unreasonable for each of two States to exercise prescriptive jurisdiction, but the prescriptions are in conflict, "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, including those set out in Subsection (2); a state should defer to the other state if that state's interest is clearly greater." This principle of deference also has utility in the ensuing analysis.

654. *See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airways, 731 F.2d 909, 948-53 (D.C. Cir. 1984); Reinsurance Co. of America v. Administrata Asigurarilor de Stat, 902 F.2d 1275, 1283-84 (7th Cir. 1990) (Easterbrook, J., concurring); Robert H. Bork, *Introduction*, 18 STAN. J. INT'L L. 241, 244 (1982); Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1463-64 (1991); Eleanor J. Fox, *Extraterritoriality, Antitrust, and the New Restatement: Is Reasonableness the Answer?*, 19 N.Y.U.J. INT'L L. & POL. 565, 592-93 (1987); David I. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L.185, 208 (1984); James M. Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine*, 23 VJIL 395, 400 n.22 (1983); Steven A. Kadish, *Comity and the International Application of the Sherman Act: Encouraging Courts to Enter the Political Arena*, 4 NW. J. INT'L L. & BUS. 130, 156-66 (1982); Larry Kramer, *Extraterritorial Application of American Law After the* Insurance Antitrust Case: *A Reply to Professors Lowenfeld and Trimble*, 89 AJIL 750, 755 (1995); Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); Karl M. Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 L. & CONTEMP. PROBS. 47, 53-69 (No. 3, 1987); James A. Rahl, *International Application of American Antitrust Laws: Issues and Proposals*, 2 NW. J. INT'L L. & BUS. 336, 362-64 (1980); Phillip R. Trimble, *The Supreme Court and International Law: The Demise of* Restatement *Section 403*, 89 AJIL 53 (1995); Michael G. McKinnon, Comment, *Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of US Antitrust Law and Viable Solutions Beyond the* Timberlane/Restatement *Comity Approach*, 21 PEPP. L. REV. 1219, 1300-11 (1994); Note, *Beyond the Rhetoric of Comparative Interest Balancing: An Alternative Approach to Extraterritorial Discovery Conflicts*, 50 L. & CONTEMP. PROBS. 95, 101 (No. 3, 1987).

655. *E.g.*, Boudreau v. Baughman, 368 S.E.2d 849, 853-56 (N.C. 1988); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 2.14 (2d ed. 1992).

656. *See* RESTATEMENT (THIRD) § 403 r.n.6, citing *inter alia* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 614 (9th Cir. 1976), *opin. after remand*, 747 F.2d 1378 (9th Cir. 1984); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-99 (3d Cir. 1979). The RESTATEMENT (SECOND) had espoused a similar approach. *See id.* § 40 r.n.1, citing *inter alia* United States v. General Elec. Co., 115 F.Supp. 835, 878 (D.N.J. 1953). A difference between the RESTATEMENT (THIRD) § 403 and RESTATEMENT (SECOND) § 40 is that the former "is understood . . . not as a basis for requiring states to modify their enforcement of laws that they are authorized to prescribe [essentially the position of RESTATEMENT (SECOND) § 40], but as an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe." RESTATEMENT (THIRD) § 403 r.n.10. The ensuing analysis is closer to the RESTATEMENT (SECOND) and its intellectual debt to RESTATEMENT (SECOND), Conflicts, n. 651 than to the RESTATEMENT (THIRD), although the latter's more elaborate articulation of factors is more helpful.

The Supreme Court of the United States has never passed on the RESTATEMENT (THIRD) analysis. In re Insurance Antitrust Litig., 938 F.2d 919, 933-34 (9th Cir.1991) applied *Timberlane* factors, but the Supreme Court of the United States found no conflict between US antitrust law and UK law and therefore no need to pronounce whether a factorial test was appropriate for resolving conflicts of prescriptive jurisdiction. Hartford Fire Ins. Co. v. California, 509 US 764, 797-99 (1993); *compare* similar analysis in British Airways Bd. v. Laker Airways, Ltd., 1985 A.C. 58, 78-86, 95-96 (H.L.). For *Hartford Fire* analysis, *see, e.g.*, Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on* Hartford Fire Insurance Co. v. California, 34 VJIL 213 (1993); *Case Two: Extraterritorial Application of United States Law Against United States and Alien Defendants, in* Symposium, *Conference on Jurisdiction, Justice, and Choice of Law for the Twenty-First Century*, 29 NEW ENG. L. REV. 517, 577 (1995); Kramer, n. 654; Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the* Insurance Antitrust Case, 89 AJIL 42 (1995); Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 RCADI 9, 49-58 (1994); Trimble, n. 654; McKinnon, n. 654.

657. *E.g.*, Oil Shipping (Bunkering) B.V. v. Sonmez Denizcilik VE Ticaret A.S., 10 F.3d 1015, 1019-20 (3d Cir. 1993), citing RESTATEMENT (SECOND), Conflicts, n. 651; Lauritzen v. Larsen, 345 US 571 (1953). This is not surprising, because RESTATEMENT (SECOND), Conflicts drafters relied on *inter alia Lauritzen* and Romero v. International Term. Op. Co., 358 US 354 (1959) for choice of law principles for torts. RESTATEMENT (SECOND), CONFLICTS § 145 & cmts. b-d, r.n., referring to *id.* § 6. Neely v. Club Med Mgt. Serv., Inc., 63 F.3d 166, 186-98 (3d Cir. 1995) (*en banc*) applied RESTATEMENT (THIRD) factors in a Jones Act and general maritime law context, also citing *inter alia Lauritzen.* Federal courts, sitting in admiralty under 28 USC. § 1333(1), must apply federal choice of law rules. SCHOENBAUM § 18-11. The federal common law of conflict of laws governs unless supplanted by federal legislation or a treaty of the United States. The Second Hickenlooper Amendment, 22 USC § 2370(e)(2) is an example of the former, partly superseding Banco Nacional de Cuba v. Sabbatino, 376 US 398 (1964). Convention for Unification of Certain Rules Relating to Salvage of Vessels at Sea, Sept. 23, 1910, art. 15, 37 Stat. 1658, 1672 is an example of treaty-dictated choice of law principles. This illustrates the point of RESTATEMENT (SECOND), CONFLICTS § 6(1), that statutes, and by extension treaties establishing choice of law principles, displace common law factorial analysis in US conflicts analysis involving federal law. US Const., art. VI requires the courts of the states of the Union to apply federal conflicts principles, including treaties, when adjudicating federal law issues.

658. LEA BRILMAYER, CONFLICT OF LAWS § 2.2.3, 74-75 (2d ed. 1995); Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1169-79 (1987).

659. *E.g.*, British Nylon Spinners, Ltd. v. Imperial Chem. Indus., [1953] 1 Ch. 19, *final judgment*, [1955] 1 Ch. 37; Otto Kahn-Freund, *English Contracts and American Anti-Trust Law — The Nylon Patent Case*, 18 MOD. L. REV. 65 (1955); Meessen, n. 654.

660. This is particularly true in the European Union. Wood Pulp Case, Case 89/85, [1988] E.C.R. 5193; *see also* RESTATEMENT (THIRD) § 415, r.n.9. Nevertheless, these countries' and others' blocking or clawback statutes and others represent contrary policy in recognizing extraterritorial effect of US multiple damages awards, particularly in antitrust cases, and reach of US discovery requests abroad. *See generally British Airways*, n. 656 (Lord Diplock, J.); Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547; RESTATEMENT (THIRD) § 442, r.n.4; A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 75 AJIL 257 (1981).

661. *See* nn. 654-46 and accompanying text.

662. This is the approach required in the US military planning process, which has been in operation over a century. Undoubtedly other States use similar decisionmaking. Diederich, n. 17, 160, argues for environmental planning in the context of military operations planning. NWP 1-14M Annotated ¶¶ 8.1.3 directs this; *see also* n. 649 and accompanying text.

663. *See* n. 111 and accompanying text.

664. US Department of Justice & Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* 20-22 (Apr. 1995), *in* 34 ILM 1080, 1102-04 (1995).

665. *Id.* 10-11, 34 ILM 1092-93, citing *inter alia* NAFTA, n. III.949 and treaties with the European Union and other major US trading partners; *see also* nn. III. 949, IV.22, VI.76 and accompanying text.

666. Practice under multilateral and bilateral treaties with the same or similar terms can lead to custom. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3).

667. *See* nn. 654-55 and accompanying text.

668. LOS Convention, art. 91(1); High Seas Convention, art. 5(1), declaring in identical terms that there must be a genuine link between a flag State and a ship. *See also* Convention on Conditions for Registration of Ships, n. II.61; Part V.C.3. Since the LOS Convention's navigational articles and the High Seas Convention are generally thought to be declaratory of customary international law, this provision, implicating use of a factorial analysis not unlike that of Lauritzen v. Larsen, 345 US 571 (1953) and similar cases, argues for its use in other maritime contexts. *See* n. IV.3 and accompanying texts. On the other hand, it might be submitted that the holding of S.S. Lotus, 1927 P.C.I.J., Ser. A, No. 10, at 12-32 argues against it, *i.e.*, that the law of the flag is the only concern. *See* LOS Convention, art. 97; High Seas Convention, art. 11; *see also* Convention for Codification of Certain Rules Relating to Penal Matters in Matters of Collision or Other Incidents of Navigation, May 10, 1952, arts. 1-2, 439 UNTS 233, 235-37. *Lotus* and these treaties dealt with States' applying municipal law to conduct aboard ships flying other flags on the high seas in the absence of an international norm; what is at stake here is a technique of analysis, not extraterritorial reach of laws. LOAC customary rules, *e.g.*, the flag a neutral merchantman flies is *prima facie* indication of a ship's nationality, or that a ship flying an enemy flag is conclusive of its enemy character, are also of no consequence in this context. *See generally* Part V.D.1. As with the LOS and rules governing collisions at sea, these principles concern rights of visit, search, diversion and capture and destruction of merchant ships and do not reject a factorial approach. *See* Part V.B.

669. *See* RESTATEMENT (SECOND) CONFLICTS, n. 651 § 6(1), requiring a court, subject to constitutional restrictions, to follow its own state's statutory directive on choice of law; *see also* Robertson, New LOS 302-03. Uniform Commercial Code § 1-105 is a typical, and commonplace, example in the United States; all but one of the states have enacted it. Judge Weis' *Mannington Mills* opinion, 595 F.2d 1297-99, lists a relevant treaty as a factor to be considered, but it is not clear whether the treaty would govern over all factors if the treaty prescribed choice of law.

670. UN Charter, art. 103, declares that if there is conflict between Members' Charter obligations and obligations under other international agreements, Charter obligations prevail. This applies to Member obligations under Security Council decisions pursuant to *id.*, arts. 25, 48. Art. 103's rule is analogous to US Const., art. VI. The Constitution, US treaties and federal legislation prevail over laws of the states of the United States. The same is true in conflict of laws, or private international law; states' conflicts principles, whether in statute or case law, are subject to the Constitution. *See generally* Sun Oil Co. v. Wortman, 486 US 717 (1988); Phillips Petrol. Co. v. Shutts, 472 US 797 (1985); Allstate Ins. Co. v. Hague, 449 US 302 (1981). RESTATEMENT (SECOND), CONFLICTS, n. 651 § 6(1) recognizes the Constitution's primacy; this heirarchy is proposed by analogy for public international law issues, *i.e.*, first applying the Charter and *jus cogens*, and secondarily treaties or custom, with a factorial approach used only if none of these recite rules.

671. *See* n. III.10 and accompanying text.

672. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1.

673. Analysis proceeds under the simplest model, *i.e.*, two States in bilateral confrontation; if it is a multilateral situation, analysis might proceed by analogy to treaty reservation rules. *See* Vienna Convention, arts. 19-23; nn. III.621, VI.268 and accompanying text.

674. LOS Convention, arts. 21(1)(f), 21(2)-21(4); *see also* Part IV.B.4.

675. *Cf.* LOS Convention, art. 197; *see also* Part B.2.c(III).

676. ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10. Treaties might be subject to analysis under impossibility of performance or fundamental change of circumstances, *e.g.*, if there is a natural disaster affecting the environment. Vienna Convention, arts. 61-62; *see also* nn. III.928-29, IV.26-27, VI.80-81 and accompanying text.

677. UN Charter, art. 103; n. III.10 and accompanying text.

678. *See, e.g.*, LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* nn. III.932-67, IV.10-25 and accompanying text; Part B.2b. As in the LOS—law of the maritime environment contexts, treaty interpretation and application principles, *e.g.*, impossibility, fundamental change of circumstances and war, may affect analysis. Although war may suspend or end many agreements' operation, it cannot affect humanitarian law treaties. Vienna Convention, arts. 61-62; *see also* nn. III.928-29, 938-51; IV.26-27, 29-30; VI.80-81, 83-84 and accompanying text.

679. ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

680. ENMOD Convention; *see also* Part B.3.a(IV)(A).

681. The SAN REMO MANUAL and Robertson, New LOS 302 advocate this approach. *See* nn. 583-655 and accompanying text.

682. UN Charter, art. 103; nn. III.10 and accompanying text.

683. *See* n. 588 and accompanying text.

684. *See* n. III.874 and accompanying text.

685. This sort of quadrilateral confrontation might occur where two belligerents are engaged in armed conflict in waters that are part of the EEZ of a State not party to the conflict, through which pass other States' vessels exercising high seas navigational rights in the EEZ, or are engaged in fishing with coastal State authorization in that State's EEZ. In the former situation, passing vessels would exercise LOS due regard for coastal State EEZ operations but would be obliged to stay clear of the immediate area of belligerents' naval operations. The fishing boats, if coastal craft, would be immune from capture even if flagged under an opposing belligerent if pursuing usual occupations, but would be obliged to depart an immediate area of naval operations if a belligerent required it. Fishermen and passing vessels exercising navigational rights would observe due regard for each other while in their normal occupations. However, if a belligerent warship legitimately suspected that the fisherman or the navigating vessel were engaged in unneutral service, LONW principles would apply, and the belligerent would observe these as well as the LOS and the marine environment.

686. *See* nn. 678-82 and accompanying text.

687. Multilateral treaty reservation principles may be helpful. *See* Vienna Convention, arts. 19-23; nn. III.621, VI.268 and accompanying text.

688. UN Charter, art. 103; *see also* n. III.10 and accompanying text.

689. UN Charter, arts. 2(4), 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1.

690. UN Charter, arts. 25, 48, 103; *see also* n. IV.57 and accompanying text.

691. *See* n. III.10 and accompanying text.

692. *E.g.*, LOS Convention, art. 87(2); High Seas Convention, art. 2; *see also* n. IV.75 and accompanying text.

693. ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03; *see also* n. III.10 and accompanying text.

694. SAN REMO MANUAL 5.

695. *See* nn. 580-653 and accompanying text.

696. *Compare* RESTATEMENT (THIRD) § 403(2); *see also, e.g.*, RESTATEMENT (SECOND), CONFLICTS, n. 651, § 6(2); Romero v. International Termin. Op. Co., 358 US 354, 382-83 (1959); Lauritzen v. Larsen, 345 US 571 (1953); nn. 651-68 and accompanying text.

697. *Compare* anticipatory action permitted under, *e.g.*, LOS Convention, art. 221; 1969 Intervention Convention, and regional treaties, *e.g.*, Kuwait Regional Convention and Protocol, n. II.63 *with* the doctrine of anticipatory self-defense as part of an inherent right of individual and collective self-defense; *see* UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Parts B.1, B.2.c(III); n. 163 and accompanying text. A right of anticipatory self-defense to major environmental threats tends to confirm a right of anticipatory self-defense to threats to a State's right to territorial integrity and political independence, confirmed by art. 2(4), in that if affirmative action against a major environmental threat has received such widespread acceptance, anticipatory action is proper if a State protects much more than the environment, *i.e.*, political existence and freedom under art. 2(4), that Nicaragua Case, 1986 ICJ 100, held customary law approaching the character of *jus cogens*. *See also* n. III.10 and accompanying text.

698. UN Charter, arts. 51, 103; *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; and accompanying text.

699. Vienna Convention, arts. 19-23; *see also* nn. III.621, VI.268 and accompanying text.

700. *See* nn. III.617-27 and accompanyint text; Part V.A.2.

701. Protocol I, arts. 51, 52(2), 57(2), dealing with planning attacks during land warfare. States appended declarations to the Protocol, stating their interpretation that arts. 51-52 and 57(2) standards could only apply to information available to planners at the time of decision. *See* nn. III.620-26, V.42-43 and accompanying text.

702. Mine Protocol art. 3(4); Amended Mine Protocol, n. 536, art. 3(10), — UST —, *in* 35 ILM 1210; Incendiary Weapons Protocol, art. 2(3); Second Protocol, art. 1(f); *see also* nn. III.620-26, V.42-43 and accompanying text.

703. SAN REMO MANUAL ¶¶ 40 & cmts. 40.10-40.11, 46 & cmt. 46.3.

704. *See* nn. III.617-27 and accompanying text.

705. UN Charter, arts. 51, 103; Protocol I, art. 2(b); *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; n. 429 and accompanying text.

706. *See* nn. 695-704 and accompanying text.

707. UN Charter, arts. 51, 103; Protocol I, art. 2(b); *see also* nn. III.10, 47-630, 916-18, 968-84, IV.6-25 and accompanying text; Part B.1; n. 429 and accompanying text.

708. *See generally* Parts II.B-II.C.

709. This very scenario could have occurred in connection with maritime interdiction operations against the former Yugoslavia. *See* James R. Stark, *Welcoming Remarks, in* PROTECTION OF THE ENVIRONMENT 6-7; *see also* Arkin, n. 2, 120, for similar situations in the 1990-91 Gulf War that resulted in some spillage.

710. The Kuwait Regional Convention and Protocol, n. II.63, were invoked after Iraq's attack on Iran's offshore Nowruz oil facility. *See* nn. 185-206 and accompanying text.

711. *See generally* Part V.D.

712. *See generally* Part IV.C.2.

713. *See* nn. II.239-40 and accompanying text.

714. *See generally* Parts II.B-II.C.

715. *See* nn. II.250-59, 376-78 and accompanying text.

716. *See* nn. II.210-15 and accompanying text.

717. *See* nn. 185-206 and accompanying text.

718. Vienna Convention, arts. 61-62; *see also* nn. III.928-29, 938-51; IV.26-27, 29; VI.80-81, 83 and accompanying text.

719. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 28; RESTATEMENT (THIRD) § 102(3).

720. *Cf.* NWP 1-14M Annotated ¶¶ 8.5.1; *see also* ICRC Guidelines, n. 626, ¶¶ 4, 7 at 8-30 - 8-31.

721. *Cf.* NWP 1-14M Annotated ¶¶ 8.5.1.

722. *Cf.* J.H. Doyle, Jr., *Comments on James Service's Paper: Targeting Realities: Platforms, Weapons Systems and Capabilities, in* Grunawalt 242, 245.

723. Vienna Convention, arts. 61-62; *see also* nn. III.928-29, 938-51; IV.26-27, 29-30; VI.80-84.

724. *See* Chapter IV; Parts A-B.

725. *See generally* Chapter V; Part B.2.a.

726. *See* Parts B.3.a(IV)(A)-B.3.a(IV)(B), B.4.

727. *See* Part C.

728. *See, e.g.*, Special Issue: Iraqi Symposium, 15 SOU. ILL. U. L.J. 411 (1991); Symposium on International Law and the Rules of War: The Crisis Over Kuwait, 1991 DUKE J. COMP. & INT'L L. 1; Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AJIL 452 (1991).

729. *See, e.g.*, Mark Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AJIL 569 (1992).

730. *See, e.g.*, Lori F. Damrosch *et al.*, *Agora: The 1994 US Action in Haiti*, 89 *id.* 58 (1995).

731. *Cf.* COLIN L. POWELL, MY AMERICAN JOURNEY 528-29 (1995); Ralph Bergleiter, *Media and International Affairs in the Satellite Age, in* Panel, *The Impact of the Media on International Law and Relations*, 1995 ASIL PROC. 119.

732. Other values may be invoked as well. *See* Diederich, n. 17, 153-54.

733. *See* Symposium, *Treaty Succession*; Walker, *Integration and Disintegration.*

734. *See* nn. 583-94 and accompanying text.

735. *See generally* UN Charter, arts. 1(3), 55-56; Civil & Political Rights Covenant; Economic, Social and Cultural Rights Covenant, which together with Universal Declaration of Human Rights, G.A. Res. 217, UN Doc. A/810, at 71 (1948), are the core of this body of law. *Cf.* RESTATEMENT (THIRD), *Introductory Note* to Part VII. The United States is party to the Civil & Political Rights Covenant and to treaties protective of human rights, *e.g.*, the Genocide Convention. TIF 377-78, 382-83.

736. *E.g.*, European Convention for Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221; American Convention on Human Rights, Nov. 22, 1969, 1144 *id.* 123; African Charter on Human & Peoples' Rights, June 27, 1981, *in* 21 ILM 58 (1982) (Banjul Charter).

737. *See, e.g.*, A.A. Cancdo Trinidade, *The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change,* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS ch. 9 (Edith Brown Weiss ed. 1992); Richard Desgagne, *Integrating Environmental Values into the European Convention on Human Rights,* 89 AJIL 263 (1995); Cynthia Giagnocavo & Howard Goldstein, *Law Reform or World Re-form: The Problem of Environmental Rights,* 35 MCGILL L.J. 345 (1990); W. Paul Gormley, *The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansions of Human Rights Norms,* 3 GEORGETOWN INT'L ENVT'L L. REV. 85 (1990); Alexandre Kiss, *An Introductory Note on a Human Right to Environment,* ENVIRONMENTAL CHANGE ch. 1; Magraw & Vinogradov, n. 353, 210-12; R.S. Pathak, *The Human Rights System as a Conceptual Framework for Environmental Law, in* ENVIRONMENTAL CHANGE ch. 8; Dinah Shelton, *Human Rights, Environmental Rights and the Right to Environment,* 28 STAN. J. INT'L L. 103 (1991); William Andrew Shutkin, Note, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment,* 31 VJIL 479 (1991); Melissa Thorme, *Establishing Environment as a Human Right,* 19 DEN. J. INT'L L. & Pol. 301 (1991). A recent commentary on UN Charter, arts. 1(3), 55-56, does not list the environment as a human rights norm. The environment, *i.e.*, the UN Environment Programme, and areas peripheral to the environment, *e.g.*, permanent sovereignty over natural resources, food shortages, population, natural disasters, have been subjects of UN resolutions. SIMMA 55-56, 770-75.

738. National constitutions may grant protection of environmental rights. EDITH BROWN WEISS, FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY, app. B (1989) compiles these, which can be indicative of custom, which can also be derived from common patterns of national legislation, *e.g.*, NEPA. BROWNLIE, INTERNATIONAL LAW 5; 1 OPPENHEIM § 10, 26. The list for which a State is culpable for violating international human rights is short but includes "consistent patterns of gross violations of internationally recognized human rights." RESTATEMENT (THIRD) § 702.

739. *E.g.*, Convention Concerning Liability of Shipowner in Case of Sickness, Injury or Death of Seamen (ILO Convention No. 55), Oct. 24, 1936, 54 Stat. 1693, 40 UNTS 169, held by Warren v. United States, 340 US 523 (1951) as coinciding with US admiralty law maintenance, cure and wages standards. The United States has been a member of ILO, another UN specialized agency, for all but three years. TIF 394; Note, *U.S. Assaults ILO,* 65 AJIL 136 (1977). *See also* BIRNIE & BOYLE 56-57.

740. Defrenne v. SABENA, 1976 E. Comm. J. Rep. 455, 473-76; Symposium, *The Emerging European Constitution,* 1978 ASIL PROC. 166, 169 (Eric Stein remarks).

741. *See* nn. III.948, IV.30, VI.84 and accompanying text.

742. *E.g.*, Civil & Political Rights Covenant, art. 4, limiting applicability to circumstances stated in *id.*, arts. 6-7, 8(1)-8(2), 11, 15-16, 18; European Convention for Protection of Human Rights & Fundamental Freedoms, n. 736, art. 15, 213 UNTS 232-34, excluding application "during war or public emergency" except arts. 3, 4(1), 7, *id.* 227; *see also* SUBATRA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY 12-13, 22-29, 59, 121-25, 210-11(1989) (analyzing International Law Association Minimum Standards of Human Rights Norms in a State of Emergency [1984]); Joan Fitzpatrick, *Protection Against Abuse of the Concept of "Emergency," in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 203 (AM. SOC'Y INT'L L. STUD. IN TRANSNAT'L POL., Louis Henkin & John Lawrence Hargrove eds. 1994); Henkin, *International Human Rights as "Rights,"* 1 CARDOZO L. REV. 446-47 (1979). Legality of Threat or Use of Nuclear Weapons, 1996(1) ICJ 239-40, observed

> that the protection of the [Civil & Political Covenant] ... does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not .. such a provision. ... [T]he right not arbitrarily to be deprived of one's life applies also in hostilities. ... [W]hat is an arbitrary deprivation of life ... then falls to be determined by the applicable *lex specialis,* ... the [LOAC] ... [,] designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to ... the Covenant, can only be decided by ... the [LOAC] and not ... from the terms of the Covenant ....

This analysis would seem to apply if a right to a clean environment is considered a human right, an issue the case did not address in the majority opinion.

743. *E.g.*, Banjul Charter, n. 736. The Genocide Convention does not have a derogation clause; its background emphasizes that it, like the humanitarian law treaties, applies in all places and at all times. *See* nn. III.948, IV.30, VI.84, 278 and accompanying text.

744. *See* UN Charter, arts. 51, 103; Protocol I, art. 2(b); Vienna Convention, arts. 61-62; *see also* nn. III.10, 47-630, 916-18, 928-29, 938-51, 968-84, IV.6-27, 29-30 and accompanying text; Part B.1; nn. 80-84, 429 and accompanying text.

745. Some have already begun to advocate animal rights. *See* BIRNIE & BOYLE 422-24.

746. *See generally* Part B.3.a.(III)(B).

747. *See* nn. 16-18 and accompanying text.

# Chapter VII

# GENERAL CONCLUSIONS AND APPRAISAL: POLICY AND LAW

The Tanker War is important for many reasons. For the belligerents, Iran and Iraq, it represented the maritime aspects of total war. For neutral Persian Gulf States the war was a major if not a dominant factor. Other neutral countries, *e.g.*, the United States, at first treated the conflict as a policy matter, *e.g.*, by proclaiming the need to maintain freedom of the seas and free access through the Strait of Hormuz, although they may have had naval or other forces in the area on routine or special operations. By the war's end in 1988, however, many countries, including the United States, were involved in the conflict in direct military action, *e.g.*, convoying, accompanying or escorting neutral merchantmen, or indirectly through mine clearance and similar operations, as well as continuing statements of policies of freedom of the seas and the right of straits passage. States aligned with the belligerents, *e.g.*, some Gulf countries, Arab League members, and other nations, *e.g.*, much of Western Europe, the USSR and the United States, dependent on Gulf oil or concerned with law of the sea, self-defense and law of armed conflict issues, became increasingly involved politically and economically. In some instances involvement came through individual States' actions, and in other cases through collective statements or actions through intergovernmental organizations, *e.g.*, the Arab League, the European Economic Community, the formerly moribund Western European Union, or the Group of Seven. Gulf States formed the Gulf Cooperation Council initially for internal security; the GCC assumed an economic and national security posture as the war continued. The Cold War-gridlocked UN Security Council also became increasingly involved as the Tanker War continued, passing resolutions condemning belligerents' deprivations of high seas freedoms, violations of the LOAC, and continuation of the war in general. The war ended with Iran's accepting Council Resolution 598, establishment of UNIIMOG to supervise a ceasefire, and neutrals' individual and collective efforts to clear the Gulf of mines.

Although some commentators date the Tanker War from 1982 or perhaps 1984 when belligerents' interceptions of and attacks on merchant ships accelerated, the war at sea actually began with the initial land battles in 1980 near the Shatt al-Arab when 70+ merchantmen were bottled up in the Shatt. The belligerents' exclusion zone proclamations and attempts to route neutral traffic came soon thereafter. By 1988 seafaring countries had suffered major tonnage losses in their merchant fleets, particularly tankers, but a worldwide glut of available bulk petroleum

carriers partly offset these losses. The number of ships lost, or declared constructive total losses, was relatively low because of merchant ships' growth in size since World War II. Nevertheless, more merchant mariners lost their lives during 1980-88 than at any time since that War; again, the number was low because of smaller-sized merchant crews on most ships. Iraqi attacks on Iran's Nowruz facilities produced a major oil spill in the Gulf; spills probably also resulted from belligerents' attacks on other enemy facilities and neutral countries' shoreside petroleum production or pumping facilities. Undoubtedly oil slicks resulted from belligerents' attacks on merchantmen or after neutral navies responded in self-defense to belligerents' maritime attacks.

Chapter II discusses these developments in more detail. And while Chapter III analyzes the Tanker War in the context of self-defense and other aspects of the *jus ad bellum* under the UN Charter, and Chapters IV (LOS issues), V (LOAC issues) and VI (law of the maritime environment) analyze LOS and *jus in bello* (*i.e.*, LOAC) problems during the war, a summary of important legal aspects of the Tanker War and projections for the future are useful here.

## Part A. Self-Defense, Charter Law and Neutrality Issues[1]

After the Nicaragua Case and its applying customary law alongside the Charter, which is a treaty (albeit the most important of the post-World War II agreements because of its Article 103 trumping provision for other treaties and the possibility that parts of it may now have *jus cogens*[2] status), a principal issue arising from the war is the definition and scope of the right of self-defense. First, it is arguable, following the Case, that a parallel customary law of self-defense travels alongside Charter-based principles deriving from Article 51. Second, this customary right of self-defense may be different in content and scope from Charter-based norms and therefore subject to the balancing of sources of law usually employed in determining norms to be applied in a situation.[3] Third, if the right of self-defense is a *jus cogens* norm, as some claim, it has priority over all other rules (custom, treaties, general principles, *etc.*) except other *jus cogens* norms, *e.g.*, the law under the Charter, Article 2(4). (If self-defense is a *jus cogens* norm, it must be balanced with other *jus cogens* norms, *e.g.*, those under Article 2(4).)

The Tanker War did not resolve these issues. Indeed, belligerents' claims and counterclaims of aggression at the beginning of the war left neutrals in a legal quandary, if one subscribes to a view, characterized as nonbelligerency during 1939-41 when the United States was officially neutral, that under the Charter States may aid victims of aggression. Unlike the 1990-91 Coalition buildup against Iraq where Iraqi aggression was blatant, the 1980-88 war's record is far from clear. However, practice since 1945 seems to point to a right of countries to aid victims of aggression, the position of the International Law Association's Budapest Articles interpretation of the Pact of Paris (1928), still in force for the United States and

many countries when treaty succession principles are considered. The Pact condemns the use of war as an instrument of national policy, subject to the inherent right of self-defense.[4] The Falklands/Malvinas War is an example of aggression and neutrals' response to aid a target of aggression, the United Kingdom.

The Tanker War supplies several examples of informal collective self-defense, which continues to exist during the Charter era as a valid response, provided adequate notice of actions is given. Unlike the 1990-91 conflict, where the United States had self-defense agreements with Kuwait and perhaps other Gulf countries and the possibility of multilateral NATO involvement if Iraq had moved against Turkey to the north, there was no formal treaty arrangement proclaiming a right of collective self-defense like the soon to be defunct Warsaw Pact, the NATO treaties, or bilateral agreements the United States and many nations have negotiated since World War II. To be sure, the GCC pledged collective action in many respects, but it does not have a formal statement of collective self-defense. Nevertheless, it may be argued that the GCC engaged in informal collective self-defense actions among its members during the Tanker War.

Neutrals' cooperating to clear the Gulf of mines, and the Red Sea in the case of the 1984 Libyan mining, are other examples of informal collective self-defense. Insofar as the record indicates, there were no formal treaties proclaiming self-defense arrangements among Gulf and other States for this and similar purposes. Nevertheless, when these countries worked together to clear the seas of mines, they were in effect acting collectively to defend coastal States' shores, and countries' merchant shipping plying these waters, from the potential for mine attack.

The same might be said for cooperation to protect neutral shipping from belligerents' air and warship attacks. The US declaration that it would extend protection to foreign-flag neutral merchant ships not carrying goods destined for a belligerent, upon that neutral's request, was a third example of informal collective self-defense. The United States had a right to defend US-flag merchant ships under longstanding rules of international law; this included its right to defend Kuwaiti tankers reflagged under US law and the LOS. However, in those situations only US flagged vessels were involved; issues of collective self-defense, formal through treaty or informal through other arrangements, did not arise. When the United States published its policy of defending foreign-flag ships upon request, it legitimately acted under a right of informal self-defense as long as the policy was published, was clear, and did not otherwise violate Charter principles, *e.g.*, aiding an aggressor.

Belligerents' attacks on neutral territories, including oil production or pumping facilities, were violations of Article 2(4), and could have triggered a right of individual or collective self-defense. The same could be said about belligerents' attacks on neutral flag shipping where there were no LOAC violations (*e.g.*, fleeing legitimate belligerent attempts to exercise visit and search).

The United States claimed rights of self-defense in its responses to attacks on its warships and US-flag merchant ships. In most cases these responses were reactive in nature, *i.e.,* coming after a belligerent's attack. In some cases a response came while a belligerent was attacking or threatening attack; this invoked anticipatory self-defense issues. Commentators agree that self-defense responses, whether reactive or anticipatory, must be necessary and proportional under the circumstances. Commentators disagree on whether a right of anticipatory self-defense, which appends a requirement of no other alternative besides the response, exists in the Charter era. Given the nature of modern weaponry and its delivery systems, it would seem that a right of anticipatory self-defense, whether delivered individually by a State or collectively by countries acting in formal concert (*i.e.,* pursuant to treaty) or informally, is admissible during the Charter era. To repeat: This right of anticipatory self-defense is subject to limitations, *e.g.,* necessity, proportionality, admitting of no other alternative, and prior consultation (perhaps agreed in advance) for collective response. Responding States are bound by what their leadership knows, or would be reasonably expected to know, at the time of decision.[5] Necessity and proportionality principles for self-defense responses may be, but are not necessarily, the same as those to be observed during LOAC situations. For example, during war belligerents may attack any legitimate military target (*e.g.,* an enemy warship far from a war operations area), while self-defense proportionality may dictate a different rule (*e.g.,* a warship far from an area of attack invoking a self-defense response may or may not be a proper target under self-defense proportionality principles). Although under the majority view the right of reprisal through use of force in peacetime is no longer an option in the Charter era, countries may respond through nonforce reprisals (proportional acts that are unlawful, *e.g.,* trade sanctions in violation of trade treaties, seeking to compel an offender to observe the law) or retorsions (unfriendly acts, *e.g.,* naval forces operating on the high seas off a State's coasts). There is nothing in the US actions during the Tanker War to indicate that it violated principles of necessity and proportionality, or that there were viable alternative actions the United States could have taken in anticipatory self-defense situations, during the Tanker War, based on what the United States or its military commanders knew at the time of response. This is why, *e.g.,* the Airbus response was legitimate; based on what the *Vincennes* commanding officer knew at the time, he thought an attack was coming from an Iranian fighter. The response was necessary, proportional and admitting of no other alternative, thereby meeting the *Caroline Case* criteria, from what the commander then knew. It was a tragic mistake for which the United States paid compensation while not admitting liability.

In terms of UN Security Council lawmaking, *i.e.,* Council decisions binding as law on UN Members through Charter Articles 25 and 48, there were none that affected the war at sea. However, the Council's increasing interest in and resolutions

on the war was apparent. The Council passed Resolutions 540 and 552, confirming as a matter of supportive "soft law," rights of freedom of navigation and access to neutral ports. Resolution 598 (1987), the basis for the 1988 ceasefire, was the first Council resolution specifically referring to a breach of the peace and Articles 39-40 of Chapter VII of the Charter.

The Tanker War also illustrates the relationship between rules of engagement and the law of self-defense. US ROE, then and now, instruct commanders that regardless of options listed in the rules, the first duty is defense of the command or unit. This is coincident with the law of self-defense in the Charter era. ROE may give options that may be more restrictive than what international law might permit in a given situation.

## Part B. The Law of the Sea and the Tanker War

The Tanker War illustrated two fundamental principles applicable to armed conflict and the LOS: (1) the primacy of self-defense over norms in the LOS conventions;[6] (2) the LOS, whether stated in treaties or customary law, is subject to other rules of international law, *i.e.*, the LOAC, in situations involving armed conflict at sea.[7]

As to specific LOS issues, Security Council Resolutions 540 and 552 and neutrals' protests and actions confirmed customary high seas freedoms and entry into neutral ports. The right of neutrals, including neutral warships, to unimpeded straits passage, *i.e.*, through the Strait of Hormuz, was also confirmed.

The straits passage controversy is but one more argument for ratifying the 1982 LOS Convention by major maritime powers, *e.g.*, the United States. Others on the periphery of the war include strengthening customary warship immunity rules, for which there is a gap in the 1958 LOS conventions; standards for warship innocent passage in the territorial sea; maritime environmental standards; and rules delimiting ocean areas like the EEZ, continental shelf, contiguous zone and territorial sea.[8]

Although more of an issue of admiralty and maritime law and only indirectly an LOS issue, the war demonstrated the relationship of national decisionmaking, and perhaps decisions at international levels, with private interests, *e.g.*, seafarers and their unions and the complicated web of parties (vessel owners, charterers, subcharterers, cargo interests, marine insurance) engaged in ocean trade, whether in war or peace. Arms suppliers might operate contrary to national policies, or perhaps with overt or covert governmental assistance.

## Part C. The Tanker War and the Law of Armed Conflict

The Tanker War raised many issues relevant to modern warfare at sea. While Parts V.A-V.J analyze these in more detail, this Part offers summaries of important points.

### *1. Basic Principles: Necessity and Proportionality; ROE; the Spatial Dimension.*[9]

The general factual record is not clear as to whether the belligerents generally observed LOAC principles of necessity, proportionality and distinction in attacks during the Tanker War, based on information they had or should have had when deciding on attacks. However, it is reasonably certain that these principles were not observed in specific situations, *e.g.*, mine warfare, discussed below and in Parts V.B-V.I.

The war is an example of the difference between necessity, proportionality, *etc.*, principles that must be observed under the LOAC and principles employing the same names, *e.g.*, necessity and proportionality, that must be observed in self-defense responses. What is necessary and proportional in a self-defense response, and what is necessary and proportional under the LOAC, may be entirely different. The United States observed these principles in its self-defense responses where its warships and military aircraft were under attack, or were reasonably believed to be under attack, and in its responses to attacks on merchant shipping. Whether these responses would have met LOAC standards, or whether a different and greater or lesser response would have been in order if the United States had been at war with Iran or Iraq, would have required different analysis. For example, the United States responded proportionally in self-defense in shooting to destroy Iranian naval vessels and platforms attacking it. The United States would not have been required to wait for an Iranian attack, or threat of attack under anticipatory self-defense principles, if the United States had been at war with that country.

The war also demonstrates differences in ocean spatial dimensions under the LOAC and the LOS. The LOAC recognizes only two divisions of ocean areas: the high seas and territorial waters, today equated to the territorial sea. The LOAC also differentiates between belligerents' territorial seas and territorial seas of neutrals, while the LOS has no similar differentiation. A belligerent may wage war, subject to other LOAC principles (*e.g.*, rights of neutrals, principles of humanity, *etc.*) on the high seas, in its territorial waters, in its allies' territorial waters and in enemy territorial waters. It may not wage war in neutral territorial waters. To do so violates the LOAC. It is also a violation of Article 2(4) of the Charter, if directed against the neutral coastal State, and would therefore be subject to that State's right to exercise individual and collective self-defense. It would also be a violation of LOS innocent passage rules. Thus belligerents' attacks on neutrals' coastal

installations during the Tanker War was an LOAC violation, an LOS violation to the extent that belligerents did not exercise innocent passage rules or overflew neutral territorial waters without coastal State permission, and a violation of the Charter.

The LOAC and Charter law are not the same in this context, either. For example, a belligerent may attack an enemy ship, *e.g.*, a submarine, lurking in neutral territorial seas where that neutral either cannot or will not cause the submarine to leave under the LOAC, under principles of necessity. A neutral could not attack that submarine unless threatened by it under principles of self-defense, and the standards for either attack might be the same or different. No such incidents occurred during the Tanker War, however, but this again illustrates the point of the difference between self-defense principles and LOAC principles. Nor are the LOS and the LOAC necessarily the same under the circumstances. For example, neutral warships are subject to the LOS innocent passage regime for territorial sea passage, while belligerents' warships are subject, under special LOAC rules applicable to them through the LOS other rules principle, to the LOAC during war. If a belligerent's warship within neutral territorial waters and subject to the LOAC for such passage threatens or attacks a coastal State, that coastal State has inherent rights of individual or collective self-defense besides rights it might have under the LOAC governing belligerent warship passage. Conversely, the warship retains its rights of individual and collective self-defense. The same is true for neutral warships legitimately exercising LOS rights of innocent passage. If a warship transiting under innocent passage rules attacks or threatens a coastal State, that State may respond in self-defense in addition to whatever claims it might have under the LOS. Conversely, the warship retains its rights of individual and collective self-defense.

As noted above, LOS divisions of the sea (*e.g.*, high seas fishing areas, EEZs, continental shelf waters, contiguous zones, or the Area) are high seas areas for LOAC purposes. Robertson advanced a view, which the *San Remo Manual* accepts, that belligerents must observe due regard for neutrals' rights in these areas, including neutrals' high seas rights of, *e.g.*, freedom of navigation and overflight, pipeline and cable laying, *etc.*, so long as there is no positive LOAC rule governing a situation. LOS high seas freedoms definitions of ocean areas, *e.g.*, of the EEZ, may be used in LOAC situations as rules for belligerent operations, but the two need not coincide. Where they do, there may be confusion as the sometimes muddled claims of the 1982 Falklands/Malvinas War demonstrate. Thus it was proper for Iran and Iraq to declare maritime exclusion zones, analyzed under the name of war zones in this volume, whose boundaries sometimes coincided with LOS lines, as in the case of Iranian territorial sea claims, and sometimes stretched over the high seas far beyond belligerents' EEZ claims. Whether use of these zones was lawful during the war is a different story, however.[10]

The war also raised issues of neutrals' straits passage rights during war. As Part IV.B.6 demonstrates, the LOS recognizes many varieties of international straits, depending on special treaty regimes in a few cases and geographic or LOS considerations, *e.g.*, whether a strait connects two high seas areas or otherwise, in other situations. The Strait of Hormuz, one of the Earth's great sea transportation arteries, or choke points in geopolitical terms, may have been a high seas passage strait when the war began in 1980 and a three-mile territorial sea limit, although waning as a customary norm, was in force for many countries including the United States. As such, Iran had no right to close the strait, any more than it had a right to close high seas areas for other than limited times incident to belligerent naval operations.[11] By the war's end, however, it was reasonably clear that coastal States could validly claim 12-mile territorial seas, the result being that except for perhaps a narrow sliver of high seas, unusable for navigation of all shipping but dhows, the Strait was governed by the 1982 LOS Convention transit passage regime as a matter of customary law. States' continued protests over perceived Iranian threats to close the Strait, and the majority view of commentators since 1980, combine to declare that no belligerent may close international straits like Hormuz to neutral shipping.

*2. Visit and Search; Capture, Destruction or Diversion.*[12]

Iran conducted visit and search operations involving neutral merchant ships it suspected of carrying goods to Iraq to sustain its war-fighting or war-sustaining effort. Iran was within its rights to conduct these operations, but attacking neutral merchantmen incident to otherwise lawful visit and search was inadmissible unless the merchant ships were attempting to evade visit and search. Iran could employ military aircraft for these operations, but these aircraft could not attack neutral merchantmen involved in visit and search operations unless these vessels were attempting to escape. Both belligerents legitimately flew aircraft over the Gulf for general surveillance as a high seas freedom, but these aircraft could not indiscriminately attack neutral merchantmen. The Tanker War strengthened the principle that belligerents may use military aircraft, including helicopters, in addition to warships for visit and search operations.

The United States and other neutrals were within their rights to convoy, escort or accompany neutral merchant ships that did not carry goods sustaining belligerents' war efforts. A neutral could convoy, escort or accompany a merchantman flying that neutral's flag, and that neutral could convoy, escort or accompany merchant vessels with other neutrals' registry if the two States agreed on this procedure. Belligerents' attacks on these formations could be met by self-defense responses. Neutrals could clear mines belligerents laid indiscriminately on the high seas, particularly those laid in shipping lanes, also under self-defense principles.

*3. Belligerents' Seaborne Commerce; Belligerents' Convoys.*[13]

Apparently the belligerents did not attack platforms the LOAC exempts as targets unless they contribute to the enemy war effort, *e.g.*, hospital ships or civil airliners. On the other hand, Iran and Iraq did not always discriminate between merchant ships carrying war-fighting or war-sustaining cargo for the enemy under enemy flags and innocent merchantmen with other cargoes. While it was lawful for Iraq to attack merchantmen, regardless of flag, under Iranian military convoy, it was not lawful for Iran or Iraq to attack independently-steaming merchantmen bound for neutral ports and not carrying goods for the enemy war effort. It was also not lawful for Iran to attack neutral flag merchant ships accompanied, escorted or convoyed by neutral warships.

As noted in Part C.1, it is also questionable whether Iranian and Iraqi attacks were necessary and proportional when visit, search and diversion were options, and whether under the circumstances belligerents observed humanitarian law standards in caring for merchant ship survivors after attacks, particularly in the case of Iranian surface ship actions.

Neutral-flag warships could respond in self-defense to belligerents' attacks on merchant ships flying their flag, and to attacks on other neutrals' merchant ships if the flag State requested protection. Although these responses were governed by the law of self-defense and not the LOAC, LOAC and LOS principles for succoring survivors applied in these situations, even though necessity and proportionality principles might have been different from LOAC standards for responses to these attacks. The same principles applied to what were perceived to be belligerents' attacks, or threats of attack, on neutral warships. There is no evidence that neutrals' responses were other than necessary and proportional, or admitting of no other alternative in the case of anticipatory self-defense, or that neutrals did not apply humanitarian standards after responding.

*4. Neutral Flag Merchantmen: Enemy Character; Reflagging; Contraband.*[14]

Neutral flag merchantmen that Iran convoyed down its coasts acquired enemy character by being convoyed. War-fighting or war-sustaining goods aboard neutral flag merchant ships preceding to or from belligerents' ports and under belligerent direction or control would also have resulted in characterization as flying an enemy flag and therefore being subject to belligerents' attack and destruction besides liability to visit, search, diversion and condemnation as prize. On the other hand, goods destined to or from neutral ports, invoiced under other than a belligerent's title, did not give a neutral flag merchant ship enemy character. These vessels were not subject to attack on this account.

During the war neutral States' merchantmen were reflagged under US or other registry. Besides qualifying as neutral flag merchant ships under the LOS, under the LOAC these vessels were considered as flying a neutral flag. Unless, *e.g.*, they

carried war-fighting or war-sustaining goods destined to or from a belligerent port while under belligerent direction or attempted to evade legitimate visit and search, they were not subject to attack on this account.

The law of contraband did not impact the war; it could have applied only to inbound cargoes destined for a belligerent. Therefore, this law did not apply to outbound shipments, nor did it apply to pipeline shipments to neutrals, even though there may have been later transshipment to neutral flag ships for sealift. The law of contraband could not have applied until 1988, when Iran published a list; contraband lists must be published before the law of contraband may be applied. That list comported generally with modern principles, allowing diversion and prize court condemnation of ships carrying war-fighting or war-sustaining cargoes destined to or from an enemy, instead of high seas seizure and later condemnation before a prize court, or current concepts of contraband, which tend to ignore publication of lists of absolute or conditional contraband and which only list goods not considered contraband, *i.e.,* free goods, or humanitarian cargoes. Although systems like navicerts or clearcerts have been used during the Charter era, *e.g.,* during the 1962 Cuban Missile Crisis, there is no evidence of employment of this option during the war.

*5. The Law of Blockade and the Tanker War.*[15]

There is no formal record of either belligerent's declaring a blockade, although commentators loosely mentioned blockade in their accounts, as similar sources would during the 1990-91 Gulf War. Even if these commentators reflected government sources, neither belligerent observed well-established rules for blockades, which must be noticed, be definite in area, and state a time when a blockade begins and a grace period for neutral ships to leave a blockaded area. It is doubtful whether Iraq could have maintained an effective blockade, since it had no appreciable naval assets to conduct one; paper blockades have been unlawful since the 1856 Paris Declaration. Although Iraq might have declared a blockade to be enforced by aircraft, provided those aircraft could have functioned as surface ships do in blockade, *e.g.,* communicating with merchant ships, diverting them as appropriate, or boarding them for visit and search, Iraq did not declare such a blockade. Iran's attempts to inhibit Kuwait or Saudi Arabia-bound merchant traffic by mining, warships or aircraft attacks could not have been characterized as a blockade; the LOAC does not permit blockades of neutral coasts. Thus the UN Security Council was fully justified in condemning this action in Resolution 552, in addition to the Resolution's explicit invocation of LOS principles of freedom of the seas and freedom to enter neutral ports.

Iraq refused to allow passage of trapped merchant ships out of the Shatt al-Arab at the beginning of the war. If it had done so, this would have been permissible as a

matter of international law by analogy to cartel ships passing through blockade, if a legitimate blockade of nearby high seas areas had been declared.

*6. Zones: Excluding Shipping, Aircraft from Area of Belligerents' Naval Operations; High Seas Defense Zones; War Zones; Air Defense Identification Zones; Ocean Zones Created for Humanitarian Law Purposes.*[16]

Although customary law, recently confirmed in publications like the *San Remo Manual* and *NWP 1-14M*, allows belligerents to exclude neutral shipping and aircraft from an immediate area of belligerent naval operations, there is no record of this during the Tanker War.

The United States published warnings of risk of self-defense responses if shipping or aircraft came within stated ranges of US forces operating in international waters. Although proclaiming these self-defense zones (SDZs) was admissible, there is no obligation to publish them. They are like warnings, usually published in NOTAMs and NOTMARs, that States may legitimately publish for peacetime naval maneuvers, which Iran published during the Tanker War for this purpose. States may use the seas beyond territorial waters for naval maneuvers if they have due regard for others' high seas/EEZ uses, *i.e.*, freedoms of navigation and overflight. States conducting peacetime high seas naval maneuvers may not exclude other shipping and aircraft from the areas of these maneuvers as they can for belligerent naval operations during war. If there is a belligerent naval operation during war that includes what would usually be considered peacetime naval operations, *e.g.*, high seas refueling in the course of war measures against an enemy, the right of exclusion applies to the ocean area(s) affected insofar as the areas and times for the operations coincide. States also have a right of self-defense at sea, for which an SDZ warning is notice. Exercise of self-defense does not require an SDZ notice as a prerequisite. A State's ROE or other national rules, perhaps stated in operation orders or plans, may require it, but this would be a national policy or national law requirement and not a rule of international law.

The belligerents published war zone notices. Although these zones were not "paper" zones, were reasonable in geographic scope and gave notice of times of application, they could not be used to justify free-fire on all shipping in these areas. If not a paper zone, (*i.e.*, a zone that a State proclaims when that State has insufficient military assets to enforce the zone) and if noticed with stated times of application and if reasonable in geographic scope under the circumstances, a war zone may be proclaimed under the LOAC. LOAC principles, *e.g.*, rules for visit and search, apply within the zone. States proclaiming a zone must have due regard for neutrals' LOS rights, *e.g.*, of freedom of navigation and overflight, and must have due regard for the maritime environment, within the zone. Neutrals' rights to respond in individual and collective self-defense also apply within a zone. Belligerents also have self-defense rights against neutral States within a zone.

Saudi Arabia proclaimed an ADIZ over the Gulf during the war; it was within its rights under international law to do so. Actions against intruding aircraft were governed by the law of self-defense, *i.e.*, responses had to be necessary and proportional, and in the case of anticipatory self-defense, admitting of no other alternative, under the circumstances of each situation, based on what the responsible commander, which might have been a single aviator in the case of solo flights to investigate an intruder, knew or should have known at the time.

*7. Weapons and Weapons Use; Mine Warfare.*[17]

There were two principal issues connected with weapons and weapons use during the Tanker War; shore bombardment from the sea and mine warfare at sea. Although Iraq used poison gas against its opponent in the land war during 1980-88, there is no record of its use in the sea war. Intermediate range ballistic missiles were employed during the War of the Cities, but these were land-launched and hit land-based targets, an issue outside the scope of this volume.

There were attacks delivered from over the sea against land-oriented targets, *e.g.*, belligerents' strikes against oil platforms in enemy territorial seas and other offshore zones and shore facilities. Shore-based aircraft, perhaps flying over the Gulf, and perhaps belligerents' naval assets, delivered these attacks. The record is not clear as to the lawfulness of these operations in terms of compliance with rules for naval bombardment from the sea or air. Whether notice if appropriate was given; whether Hague IX and Hague Air Rules standards, articulating general necessity and proportionality standards; whether civilian objects or historical, artistic, scientific or hospital sites were involved; whether belligerents attacked areas where the civil population was concentrated; whether attacks were designed to and did terrorize the civil population; or whether attacks followed general LOAC principles of necessity and proportionality; is not clear from the available evidence. If the nature of attacks on Gulf shipping or the War of the Cities and other land-based aspects of the war are indicators, there is a high likelihood that some or all of these principles were at issue, and that there were LOAC violations. It is quite likely, *e.g.*, that general principles of necessity and proportionality were violated, an example being the result of attacks on Iran's Nowruz facility in 1983, resulting in a large oil spill into the Gulf. We do not know with certainty, from the available record, whether and when LOAC violations occurred. These principles for shore bombardment, whether from aircraft or warships, applied to the Tanker War, however. Possible charges of LOAC violations are not proven in most cases.

The record of mine warfare during the war is better documented. In unleashing what was in some cases unrestricted mine warfare, *e.g.*, employing mines that did not deactivate after becoming unmoored or laying mines in neutral shipping lanes and perhaps neutrals' territorial waters, the belligerents violated general LOAC principles of discrimination, necessity and proportionality. Failure to publish

minefield locations or to give alternative routes around a minefield were also LOAC violations, as was Iran's laying mines off neutral coasts solely to intercept shipping. Iran's mining the Strait of Hormuz in an attempt to deny international straits passage to neutral vessels also violated the LOAC.[18]

During the war neutral navies engaged in mine countermeasures. International law permitted sweeping of unlawfully laid mines in international waters, and in neutrals' territorial seas with approval of the neutral coastal State. The law of self-defense also authorized these actions.[19]

*8. Other Humanitarian Law Issues.*[20]

Parts V.A-V.G and VII.C.1-VII.C.7 have analyzed LOAC questions that arose, or may have arisen, during the Tanker War. There were also humanitarian law issues related to merchant ship crews trapped in the Shatt al-Arab in 1980, rescuing those in peril on the sea, and neutral repatriations of belligerent armed forces members.

If crew stranded in the Shatt al-Arab were aboard vessels that had not acquired enemy character, they were protected persons under the Fourth Convention and were entitled to be returned home promptly. If aboard vessels that had acquired enemy character, they had prisoner of war status. However, these PW mariners were entitled to repatriation at cessation of hostilities in 1988, and not 10 years later, when many PW's were repatriated. If seriously ill or wounded, they should have been repatriated long before 1998. If internees under the Fourth Convention, they should have been returned at the end of hostilities.

US forces rescued surviving crew of the minelayer *Iran Ajr* after the US self-defense response. These crew members and remains of dead crew were turned over to Omani Red Crescent officials, who repatriated them to Iran. The United States also picked up Iranian Revolutionary Guards boat crew members after they went overboard during another US self-defense response. Two died aboard US Navy ships; the remains and the survivors were turned over to Omani Red Crescent officials, who sent them to Iran. After the US self-defense response against the Rostum oil platforms, Iranian tugs were allowed to pick up survivors. As a technical matter, the law of self-defense covered these situations, but the United States acted properly, following LOAC principles in rescuing survivors, or allowing them to be rescued. To the extent that other mariners were in peril after other self-defense responses, *e.g.*, the US response to Iranian warship attacks, the same principles applied.

These situations might be contrasted with a US rescue of an Iraqi pilot whose plane was shot down by an Iranian air-to-air missile; the basic rule of assisting those in peril on the sea, common to the LOS and the LOAC, applied. (The United States turned the pilot over to Saudi Arabian Red Crescent officials, who repatriated him to Iraq.) The same principles applied in other rescues of merchant

mariners in peril after belligerents' attacks on merchant ships; there is no positive record of this, but LOS and LOAC principles applied to these situations as well.

Although under humanitarian law the neutral Red Crescent officials of Oman and Saudi Arabia should have detained the Iranian crews and the Iraqi pilot until the end of hostilities, the opposing belligerents did not protest any of these actions. Therefore, it can be argued that the opposing belligerent acquiesced in their premature repatriation.

*9. Deception During Armed Conflict at Sea: Ruses and Perfidy.*[21]

There are no reported ruses of war, lawful or unlawful, adopted by belligerents during the war. There are no reports of perfidious conduct. Other neutrals' actions may have been deceptive in nature, but they could not be considered ruses, since neutrals employed them. These included warships' painting pendent numbers black instead of white on black in the case of US warships to minimize reflective surfaces attractive to missiles. As long as a warship displays its pendent number, the LOAC is indifferent to its coloration. The same is true of nonreflective paint for general hull coating or hull configuration to make the vessel relatively invisible to missile radar, or emission control to minimize electronic radiations that might attract missiles or invite attack.

Although there were situations where ships might have flown flags other than those of their registry States (the proposal to use the UN or ICRC ensign to extract merchantmen trapped in the Shatt early in the war, and the proposal late in the war for a UN flotilla), these possibilities did not come to fruition. False flags issues therefore did not arise.

No perfidy issues arose when merchantmen began tailing neutral naval convoys or simulating convoys during the night. This might have put the neutrals at greater risk. However, since they were neutral flagged, and perfidy applies to belligerents' conduct, no perfidy issue arose. Similarly, neutral merchant vessels that were painted grey like warships did not raise a problem of perfidy.

## Part D. The Tanker War and the Law of the Maritime Environment[22]

The Tanker War's impact on the Gulf maritime environment is less than clear. The only recorded major environmental disaster occurred when Iraq attacked Iran's Nowruz offshore oil installations in 1983. Even if it could be argued that the Kuwait Regional Convention and Protocol did not apply between the parties because of law of treaties principles like suspension or termination during war, the law of treaties says that the Convention and Protocol continued to govern relations between belligerents and neutrals unless suspended or ended under theories of impossibility of performance or fundamental change of circumstances.[23] However, there were necessarily petroleum spills from vessels' bunkers or tankers split open or sunk by belligerents' attacks or during neutrals' self-defense responses. Thus,

although Chapter VI is largely theoretical when applied to the Tanker War, as media coverage of Iraq's outrageous and unlawful behavior during the 1990-91 Gulf War demonstrated, environmental issues are likely to arise and become major considerations in future conflicts.

The law of the environment as expressed in regional agreements, *e.g.*, the Kuwait Convention and Protocol, is subject to important qualifications. First, these treaties, like all international agreements, are subject to the Charter and its principles, *e.g.*, the right of self-defense.[24] Second, regional agreements cannot be inconsistent with general LOS Convention standards.[25] Third, like general LOS principles affecting navigation, *etc.*, they are subject, through the LOS Conventions' restatement of the other rules principle, to the LOAC in certain situations.[26] Fourth, any treaty-based norms must be balanced against other sources, *e.g.*, custom.[27] Fifth, any attempt to declare the right to a clean, healthful environment as a human right is subject to the human rights conventions' derogation clauses and to general law of treaties provisions dealing with LOAC situations, *e.g.*, impossibility of performance, fundamental change of circumstances, and the impact of armed conflict on treaty obligations.[28]

Although there is little positive law governing environmental protection during war, many LOAC norms offer incidental but important protection to the environment if observed. These include rules, many of which are also customary norms, stated in, *e.g.*, the 1907 Hague Conventions, the Hague Air Rules, the Geneva Gas Protocol, the 1949 Geneva Conventions, cultural property treaties like the 1954 Hague Cultural Property Convention, ENMOD, Protocol I to the 1949 Geneva Conventions, and the Conventional Weapons Convention and its protocols. Although these treaties are often site, object or warfare method specific, many (*e.g.*, Hague IX, Protocol I, Conventional Weapons Convention) restate customary rules applying to all warfare, *e.g.*, military objective, necessity, proportionality and limiting actors' liability to what they knew or should have known when they directed an attack. There seems to be no need for international agreements to govern environmental protections during naval warfare.

Modern military manuals analyzing the place of the LOS and environmental considerations during war at sea say due regard should be paid to neutrals' LOS rights and obligations and to the environment without specifying whether there should be one or two due regard applications, *i.e.*, one governing LOS obligations and another for the environment, or a single due regard analysis taking into account LOS and environmental policies and law. In some cases there is no clear statement of the place of positive rules of law, *e.g.*, in treaties governing the LOAC, in connection with environmental protection. As Robertson persuasively argues, the first step is to apply positive rules; if there are none, a due regard principle should govern for environmental considerations. Chapter VI advocates a single due regard principle, taking into account LOS issues and environmental principles. A

single due regard principle, not necessarily the same one as in LOAC situations, should also apply in self-defense situations where LOS and/or environmental considerations are at issue. Chapter VI also offers a factorial analysis for defining due regard.

## Part E. Projections for the Future

With the USSR's demise and the breakup of other countries, *e.g.*, Czechoslovakia and Yugoslavia incident to the end of the Cold War, many trends portend for the future of armed conflict situations at sea and the law governing them. As Chapters II-VI demonstrate and McDougal and his associates have theorized, the law governing these situations is interactive with many factors, including values at stake; participants with different and perhaps multiple perceptions that range from the individual to the intergovernmental organization; situations that include time, geography, the degree of organization, and relative crisis level; what assets can be brought to bear on a situation; coercive or persuasive strategies that include military force, diplomacy, ideology, or financial strength; short-range outcomes and long-range effects to be achieved, after which goals should be clarified, past trends described, conditions affecting those trends evaluated, future trends predicted, and policy alternatives at that point reviewed.[29] This multifactor analysis should be no stranger to national or international planners or defense analysts, who have used variants for years.[30] Part E.1 discusses some geopolitical and other trends emerging during the Tanker War; Part E.2 follows with trends in the law related to them.

### *1. Geopolitical and Other Trends Emerging During the Tanker War.*

The separatist disintegration of the USSR into Russia and the USSR's component republics, and a possibility of further spinoffs from Russia, today a federation of semiautonomous areas, and dismemberment of Yugoslavia and Czechoslovakia, have been echoed in other countries. These include, *e.g.*, Canada (the Quebec separatist movement, establishment of a separate Inuit province), China (Tibet), India and Pakistan (the festering Kashmir dispute), Indonesia (East Timor and other parts of that archipelago), Iraq and Turkey (Kurds), Italy (tensions between northern and southern Italian cultures), Mexico (native Americans in southern Mexico), Spain (Basque areas), the United Kingdom (separate legislatures in Scotland and Wales) and all across Africa, where colonial boundaries often divide territories in which native populations of sometimes very different ethnic origins live on different sides of lines.[31] If the end of the Cold War ended fears of Soviet dominance and a perceived need for association with the United States while remaining a cohesive State or nonalignment but with a cohesive facade for possible unified opposition to the USSR in the case of Yugoslavia and maybe other countries, and if Soviet dominance, now removed, has been a catalyst for expressing pent-up desires

for separation (the case of the USSR itself, Yugoslavia and Czechoslovakia), the result in some areas has been clustering around other ideologies, *e.g.*, tribalism,[32] messianic and sometimes fanatic or fundamental religion (a factor in the 1980-88 Iran-Iraq war[33]), or political separatism, which continues to bedevil Russia today, even after the breakup of the Soviet Union.

On the other hand, Europe, including countries beset with internal separatist movements (*e.g.*, Italy, Spain, the United Kingdom) has been moving through the European Union toward greater economic and political integration that may prevent international wars that have ravaged it during the Twentieth Century.[34] In the Western Hemisphere the United States, emerging in political, economic and military strength as the only superpower, has joined its neighbors in the North American Free Trade Agreement, a northern hemisphere free trade zone with a promise of developing even stronger economies for its members and a potential for expansion to Central and South America. The Arab League remains a potential force for cohesive action, as does the GCC,[35] formed during the Tanker War.

Today the United Nations has over 180 Members, virtually all countries on Earth except Switzerland. If it is too early today to determine whether the United Nations, acting through Security Council decisions[36] to maintain international peace and security, the Cold War era (1947-91), with the risk of a Permanent Council Member veto,[37] was certainly no measure of the UN's potential. However, Council resolutions promoting freedom of navigation were a positive indicator of the UN's potential for the future.[38]

The result of these developments may lie in an even more pluralistic world society, in which even the smallest and relatively weakest countries may choose to go their own way rather than being coerced or guided by the more powerful. Add to that the possibility of ethnic or religious fanaticism, and the possibility of national decisions not guided by political, economic or legal considerations emerges. And although certain areas of the Earth are relatively stable and prosperous due to economic integration (the EU, NAFTA), or are relatively prosperous, *e.g.*, the United States, budget expenditures for defense, and therefore naval forces, are down worldwide.

With the Soviet threat gone, a rationale for maintaining large and expensive armed forces is not as strong for many countries, including the United States. This comes when the potential for use of armed forces is more multipolar than at any time since 1945. Many similar situations involving use of forces occurred during the Cold War as before it,[39] but the principal thrust of national policies has changed dramatically since 1991.[40] One indicator of this has been the US Navy's "From the Sea" emphasis on littoral warfare as distinguished from a blue water high seas confrontation with the Soviet Union.[41] One result is that navies may be called upon to do more with less. The newer and economically weaker States may decide to employ cheaper weapons, as distinguished from the relatively

sophisticated (and expensive) weaponry that nations like the United States have. The United States and other major naval powers will be called on to counter these threats as well as more sophisticated weaponry, including adversaries' use of the Internet.[42]

The beginnings of this were apparent during the Tanker War.

Although the mechanisms for formal collective enforcement of the peace were available from 1980 through 1988, ending the war was as much a result of the belligerents' mutual exhaustion as any outside pressure. The European Economic Community, now the EU, and the Group of Seven passed resolutions, but these were of no effect; there was no legal authority behind them. The GCC was politically and militarily weak, sometimes divided on which side to support during the war. The Arab League was similarly divided, at least until the end of the war. Although NATO and WEU countries cooperated with each other and other nations, including GCC countries, Gulf naval operations were geographically "out of area" for both organizations. In the main the result was individual State action, or informal cooperation, for or against belligerents, with some countries (*e.g.*, the United States, the USSR) seemingly tilting either way, depending on circumstances. The United Nations, with its potential for Security Council action that might have ended the war sooner, did little until 1987, when Resolution 598, passed under Chapter VII of the Charter, called upon the belligerents to end the war but did not decide[43] on action. Given the end of the Warsaw Pact, and the possibility of flareups around the world where established alliances, *e.g.*, NATO or the Rio Pact, do not apply, might this be the trend for future crises?

Iranian Islamic fundamentalism was a factor in starting the war in 1980; it may well have been a factor in prolonging it until that country was totally exhausted in terms of its economy, national morale and military forces. Planning for suicidal attacks on Gulf shipping apparently was part of Iran's strategy late in the war, and this factor was echoed in at least neutral responses. The amended US SDZ announcements for a *cordon sanitaire* around US forces was one manifestation, and clearly the reason for the Airbus tragedy lay in US fears of a *kamikazi*-style aerial crash on a US warship analogous to the Beiruit truck bombing of the Marine barracks in Lebanon. The media carry almost daily accounts of ethnic or religious-based violence; unquestionably this sort of advocacy may influence national decisionmaking involving future naval wars.

Although the USSR, many European powers and the United States ordered naval forces to the Gulf or augmented forces already there, it became apparent that no single naval power, not even the United States, had the kind of forces to meet all contingencies. US lack of mine countermeasures ships and forces and dependence on Western European navies is one example; acceptance of US offers for defense of other countries' merchantmen is another. Even at the Cold War's height and as the USSR and its navy and merchant marine began declining, there were not enough

naval forces available to go around. The same was true for the contemporaneous Falklands/Malvinas War (1982), when neither belligerent could bring overwhelming naval force to bear. This might be compared with the Korean War (1950-53) or the Cuban Missile Crisis (1962), where there were plenty of naval assets to prosecute policy.

It is virtually impossible to negotiate a treaty to regulate specific weaponry in an age of rapid technological development. At the same time, for those countries with less robust economies or defense budgets, there is the option of cheaper, often indiscriminate weapons, *e.g.* sea mines whose technology may date back 100 years. For countries, *e.g.*, the United States, with economic potential and industrial bases for relatively sophisticated and expensive systems, there is the dilemma of having to meet sophisticated threats while maintaining the capability for countering more traditional but equally deadly weapons. The close-in rapid fire gun as a final defense against missile or suicide aircraft attacks on warships is an example of a response to a threat as old as World War II's *kamikazis*, where the proximity fuse and the 3-inch rapid-fire gun responded to these attacks. Lack of adequate mine countermeasures forces during the Tanker War is an example of the inability of a relatively sophisticated navy to meet and overcome a traditional, one might say archaic, weapon threat. One further problem for the future might be marrying traditional technology with inexpensive but sophisticated components, *e.g.*, using the Internet to trigger traditional devices at great distance and little cost to a country, either in manufacturing the device or means of communicating it. Fortunately for neutrals involved in the Tanker War, this variant did not occur.

Another factor that became apparent in the Tanker War was the interest of parties other than States or international organizations. These included arms suppliers, seafarers of many nations, their unions, ship owners and others involved in ocean carriage (charterers, subcharterers, cargo interests, marine insurers), that might involve still more countries' interests in a conflict. This was really a repetition of behind the scenes situations in earlier conflicts. For example, the US World War II Lend-Lease program of supplying arms began before Pearl Harbor. The pattern of parties involved in oceanic cargo transport is nearly the same as it has been for years, the major changes being the advent of larger and more automated merchantmen, smaller crews, and a greater use of open registry (flag of convenience) shipping. This trend will continue in the future and may become even more complicated with the growth of large transnational companies.

*2. Developments in the Law: Trends for the Future.*

Invoking the inherent right of self-defense, particularly unit and individual countries' claims for a right of anticipatory self-defense, is more likely in the pluralistic world of the next millenium. This is so for several reasons. First, the multilateral and bilateral self-defense alliances developed during the Cold War had a

goal of containing the potential opponent(s), *i.e.*, the USSR and the Soviet bloc by NATO, ANZUS, and bilateral treaties like those between Japan and the United States and Korea and the United States, or their complimentary opposites, the Warsaw Pact and a web of bilaterals between the USSR and its satellites, the latter now all defunct. Second, navies the world over are downsizing, in part due to the Cold War's end and in part because of the spiraling cost of modern naval vessels. The era of large fleet exercises as contemplated during the Cold War[44] may be over. Naval vessels that remain to patrol the world oceans, and merchant ships as well for that matter, remain expensive assets. They are also quite vulnerable to attacks, particularly by missiles that kill with the first strike. This new technology suggests that countries are more likely to act preemptively, at displays of hostile intent rather than hostile acts, to protect these scarce and increasingly valuable naval assets. An increased concern for human life, including the lives of military personnel threatened by these kinds of attacks, is also a major factor. As long as principles of proportionality, necessity and the availability of no other alternative are observed, based on information known or what should have been known at the time, countries may successfully invoke anticipatory self-defense to justify responses in these situations.

As long as new permanent Security Council Member veto issues do not arise, increased Council lawmaking through its decisions may be the order of the day in future conflicts, perhaps started with assertions of the right of individual or collective self-defense. Whether this will be true is less than clear. An active General Assembly, where there is no veto but also no authority to enact positive rules of law in these situations, may contribute to lawmaking through supporting resolutions asserting principles of law. The same may be true in other international organizations, *e.g.*, IMO, a UN specialized agency, and the ICRC, a nongovernmental organization.

Law of the sea issues will continue to arise. A major contributing factor to this may be US failure to ratify the 1982 LOS Convention. Although the Convention's navigational articles largely restate customary norms today, as the United States delared nearly 20 years ago, custom can change through practice accepted as law. However, if the LOS Convention becomes a worldwide treaty-based norm as the 1949 Geneva Conventions have for humanitarian law during war, the number of sources for applying the Convention's terms as law has doubled.[46] And while ratification is not an absolute assurance that the law will not change, since a contrary custom can develop to outweigh treaty-based norms, the risk of change through evolving custom may be halved, particularly since many nations stress the importance of treaties. For issues related to potential naval warfare situations, *e.g.*, warship innocent passage and straits passage, the difference could be critical. This is particularly true where there is an interface between LOAC standards and LOS

principles that are relatively hazy because of the nature of custom in a world of over 180 countries, most of them with seafaring capability.

If future wars at sea involve ever more sophisticated naval assets opposing sophisticated military assets, the result necessarily will be resort to traditional general LOAC principles, *e.g.*, target discrimination, military objective, necessity and proportionality. For these kinds of conflicts, present treaty law or other attempts to specify particular weapons use under particular circumstances will almost always be outrun by human inventiveness. The same can be said about wars involving less sophisticated weapons, whether opposed by technologically advanced systems or more traditional devices. Some warfare methods, particularly those that are by nature indiscriminate, *e.g.*, poison gas or bacteriological weapons, are, will be, and should be, outlawed. Beyond this, however, the law of naval warfare will remain as it has been for centuries, largely a corpus of custom and general principles.

The maritime environment will continue to be an important factor in naval warfare considerations. Although there was one reported environmental catastrophe during the Tanker War, the 1983 Nowruz spill, it was the 1990-91 war that resulted in massive destruction of the environment at sea, in the air and on the land. Given greater public awareness through the media and today the Internet, the environment may become a major force in national and international decision-making. Here too widespread ratification of the LOS Convention will help; its comprehensive terms for protection should promote due regard for the maritime environment, in connection with due regard for neutrals' LOS Convention rights, by belligerents. Moreover, many LOAC treaties, most of which restate customary norms, offer protection for the environment if States observe these standards.

*3. Final Thoughts.*

Future conflicts at sea, like the Tanker War and in reality all wars, are likely to be multidimensional in terms of participants, levels of participants, organization of participants, interests of participants (economic or otherwise), relative sophistication of participants (*e.g.*, in weapons available to them), perspectives of participants (perhaps based on ethnic or religious persuasions instead of nationalism or ideologies like communism), and factors participants must consider (*e.g.*, Charter law, neutrality or shades of it, the general LOS, LOAC principles, the maritime environment). Despite a growing number of international organizations and new countries which may attempt to harness the worst or best intentions of humanity, the beginning of the next millenium may be more pluralistic, more integrated and at the same time more disintegrated than at any recent time before.

## NOTES

1. For further analysis of the issues, *see generally* Chapter III.

2. *See* n. III.10 and accompanying text.

3. *See, e.g.,* ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03.

4. Pact of Paris, n. III.160.

5. Other limitations may include examination of LOAC principles, *e.g.,* prohibitions on attacking some targets under the LOAC (*e.g.,* hospital ships), or collective self-defense arrangements' terms (*e.g.,* treaty provisions).

6. UN Charter, arts. 51, 103.

7. *See, e.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2.

8. For a recent analysis, advocating US ratification of the LOS Convention as part of a comprehensive international oceans policy, *see generally* GEORGE V. GALDORSI & KEVIN R. VIENNA, BEYOND THE LAW OF THE SEA: NEW DIRECTIONS FOR U.S. OCEANS POLICY (1997), discussing other key features of the Convention not at issue in the Tanker War, *e.g.,* archipelagic waters, the Area, islands, marine scientific research and dispute resolution through peaceful means.

9. For further analysis, *see* Parts V.A.5, VII.A.

10. *See* Parts V.F.2, V.F.5, VII.C.6.

11. For analysis of belligerents' temporary closure of high seas areas for naval operations during war, *see* Parts V.F.1.a, V.F.5, VII.C.6.

12. For further analysis, *see* Part V.B.2.

13. For further analysis, *see* Part V.C.5.

14. For further analysis, *see* Part V.D.4.

15. For further analysis, *see* Part V.E.3.

16. For further analysis, *see* Part V.F.5.

17. For further analysis, *see* Part V.G.1, V.G.3.

18. *See also* Parts IV, V.A.5, VII.A, VII.C.1.

19. *See also* Parts III-IV, VII.A, V.D.1.

20. For further analysis, *see* Part V.H.

21. For further analysis, *see* Part V.I.2.

22. *See* Chapter VI for further analysis.

23. Vienna Convention, arts. 61-62.

24. UN Charter, arts. 51, 103.

25. LOS Convention, art. 237.

26. *E.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* Part B.

27. *See, e.g.,* ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03.

28. *E.g.,* Civil & Political Rights Covenant, art. 4; Vienna Convention, arts. 61-62.

29. *See generally* Moore, *Prolegomenon,* n. III.1, 662-72; McDougal *et al., Theories,* n. III.2, 189-206; McDougal *et al., The World,* n. III.1; Suzuki, n. III.1, 23-27; Walker, *Sea Power,* n. III.1, 310-14, analyzing the analytical method of, *e.g.,* MCDOUGAL & BURKE 1-52; MCDOUGAL & FELICIANO 1-59; MCDOUGAL, LASSWELL & CHEN chs. 1-4; MCDOUGAL *et al.,* LAW AND PUBLIC ORDER, n. III.1, ch. 1.

30. *See, e.g.,* THEODORE W. BAUER, REQUIREMENTS FOR NATIONAL DEFENSE 47-111 (1975); KEN BOOTH, NAVIES AND FOREIGN POLICY 136 (1977); KLAUS KNORR & OSKAR MORGENSTERN, POLITICAL CONJECTURE IN MILITARY PLANNING (1968); E.S. Quade, *Introduction* to ANALYSIS FOR MILITARY DECISIONS (Quade ed. 1964); Demitri B. Shimkin, *The Social Sciences and National Defense: Trends, Potential and Uses,* 30 NWC REV. 41 (No. 1, 1977); Snyder, n. VI.649; John E. Starron, Jr., *Approaches to Decisionmaking, in* MANAGEMENT: CONCEPTS AND PRACTICE 88-108 (Fred R. Brown ed., 4th

ed. 1977); Larry N. Tibbetts, *A Practitioner's Guide to Systems Analysis*, 28 NWC REV. 21 (No. 3, 1976); Walker, Sea Power, n. III.1, 307-08; N. Clark Williams, *Decision Analysis: Toward Better Naval Management Decisions*, 27 NWC REV. 39 (No. 1, 1974). Alfred Thayer Mahan's influential INFLUENCE OF SEA POWER UPON HISTORY (1890) employed similar broad-based analytical techniques. Thomas B. Buell, *Admiral Edward C. Kalbfus and the Naval Planner's "Holy Scripture": Sound Military Decision*, 25 *id.* 31 (No. 5, 1973); Charles W. Cullen, *From the Kriegsacadamie to the Naval War College: The Military Planning Process*, 21 *id.* 6 (No. 1, 1970) and Snyder trace evolution of the military planning process from last century's German General Staff through World War II naval planning to current work at the Naval War College. For a current example of command and control warfare, *see, e.g.*, US Chairman of the Joints Chiefs of Staff, Joint Doctrine for Command and Control Warfare (C2W) ch. 5 & Appendix A (Joint Pub. 3-13.1, Feb. 7, 1996).

31. For the story of some of these developments through late 1992, *see generally* Walker, *Integration and Disintegration* 4-13.

32. *See, e.g.*, Walter Goldstein, *Europe After Maastricht*, 71 FOREIGN AFFAIRS 117, 123 (No. 5, 1992); Robert S. Wood, *Europe: Transfigured or Transfixed?*, 45 NWC REV. 20, 22-23 (No. 4, 1992).

33. *See, e.g.*, nn. II.13, 505, 514 and accompanying text.

34. *See generally* Walker, *Integration and Disintegration* 12-25.

35. *See* nn. II.543-545 and accompanying text.

36. *See* UN Charter, arts. 25, 48, 103.

37. *See id.*, art. 27(3).

38. *See* n. II.537 and accompanying text.

39. *See, e.g.*, CABLE (tracing employment of naval forces in "gunboat diplomacy" missions, 1919-94), James D. Watkins, *The Maritime Strategy, in The Maritime Strategy*, 112 PROCEEDINGS 8 (Supp. Jan. 1986) (more than 60 uses of limited naval force between 1970 and 1979, at height of Cold War).

40. *Compare, e.g.*, President of the United States, A National Security Strategy for the United States (Oct. 1998) (noting expanded alliances like NATO; NATO's Partnership for Peace and its partnerships with Russia, Ukraine; free trade through the World Trade Organization, n. III.949, and moves toward free trade areas in the Americas; arms control; multinational coalitions to combat terrorism, corruption, crime, drug trafficking; binding commitments to protect the environment and safeguard human rights in contexts of smaller scale contingencies and major theater warfare, perhaps involving weapons of mass destruction); Chairman of the Joint Chiefs of Staff, National Military Strategy of the United States of America: Shape, Respond, Prepare Now: A Military Strategy for a New Era (1997) (same) *with* President of the United States, National Security Strategy of the United States (Mar. 1990) (US policy as USSR was in a state of collapse) *and, e.g.*, NORMAN FRIEDMAN, THE US MARITIME STRATEGY (1988) (naval strategy based on blue-water, deep ocean confrontation with the USSR); Watkins, n. 39 (same).

41. *Compare, e.g.*, Friedman, n. 40; Watkins, n. 39; *with* US Department of the Navy, 1999 Posture Statement: America's 21st Century Force chs. 1-2 (1999) (Posture Statement); Sean O'Keefe *et al.*, ... From the Sea: Preparing the Naval Service for the 21st Century (Sept. 1992); John H. Dalton *et al.*, Forward ... from the Sea (1994), analyzed *in* Edward Rhodes, *"... From the Sea" and Back Again: Naval Power in National Strategy in the Second American Century, in* STRATEGIC TRANSFORMATION AND NAVAL POWER IN THE 21ST CENTURY 307, 322-30 (Pelham G. Boyer & Robert S. Wood eds. 1998).

42. Posture Statement, n. 41, 42, 51, 55; *cf.* Arthur K. Cebrowski, *President's Notes*, 52 NWC REV. 4 (No. 3, 1999). In 1999 the Naval War College convened an information warfare symposium; a forthcoming *International Law Studies* volume will publish the symposium papers. *See* STRATEGIC TRANSFORMATION, n. 41, for excellent essays on trends in national strategy and naval power for the next century.

43. *Cf.* UN Charter, arts. 25, 48, 103.

44. For an exegesis of this in the Cold War context at the end of the Tanker War, *see generally* FRIEDMAN, n. 40.

45. *See* ICJ Statute, art. 38(1)(b); RESTATEMENT (THIRD) § 102.

46. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03.

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