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### The Current State of The Law of Naval Warfare: A Fresh Look at the *San Remo Manual*

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#### *Introduction*

**T**he 1994 *San Remo Manual*<sup>1</sup> has met widespread approval as a contemporary restatement of the principles and rules of international law applicable to armed conflicts at sea. In view of the fact that many of its provisions are but a compromise between the differing views within the group of international lawyers and naval experts who drafted it, some of its provisions may be far from perfection. Still, this has not prevented a considerable number of States from adopting most of the San Remo rules in their respective manuals or instructions for their naval armed forces.<sup>2</sup> Against that background it is somewhat surprising that there are an increasing number of both operators and lawyers criticizing parts of the *San Remo Manual* as outdated and as an unreasonable obstacle to the success of their operational or strategic goals. They, *inter alia*, refer to the provisions on measures short of attack and on methods and means of naval warfare, especially on blockade and operational zones. In their view, those provisions meet neither the necessities of modern operations, e.g., maritime interception operations (MIO) nor non-military enforcement measures decided upon by the UN Security Council, nor do they offer operable solutions to the naval commander.<sup>3</sup>

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## *A Fresh Look at the San Remo Manual*

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Of course, the *San Remo Manual* does not prioritize military or operational necessity. Rather it imposes legal restrictions on naval commanders that may prove inconvenient in view of the means available and in view of the task of the respective mission. The said criticism, however, goes beyond such general complaints about legal rules. It is based upon the belief that whenever it comes to other States' shipping, interference would be permissible only if it is in accordance with the law of naval warfare, i.e., with the provisions of the *San Remo Manual*. If so, it would be difficult, indeed, to maintain that certain missions, e.g., MIO, conducted within the framework of the Global War on Terror are legal. It would be similarly difficult to explain the legality of measures enforcing an embargo if they had to be judged in the light of the law of blockade alone.

However, the said criticism is based upon an erroneous understanding of the law of naval warfare, of its scope of applicability and, thus, of the *San Remo Manual*. Maritime interception operations aimed at combating transnational terrorism<sup>4</sup> or the proliferation of weapons of mass destruction<sup>5</sup> and related components do have a legal basis that is independent from the law of naval warfare. The same holds true with regard to enforcing an embargo—either with or without the authorization of the UN Security Council.<sup>6</sup> Therefore, neither the law of naval warfare nor the *San Remo Manual* as its most recent restatement pose an insurmountable obstacle to such operations. The *San Remo Manual*'s provisions apply exclusively to situations of international armed conflicts.<sup>7</sup> MIO and other maritime operations have to be based upon that body of law only if they occur in the course of an armed conflict between two or more States.

However, the said criticism does not seem to be absolutely unjustified insofar as the *San Remo Manual* may indeed no longer properly reflect contemporary State practice or meet the realities of modern maritime and naval operations. Moreover, some of its provisions seem to be quite ambiguous and, thus, may be misinterpreted. This lack of legal clarity could ultimately render obsolete the great progress achieved by the *San Remo Manual*.

Therefore, it is time to take a fresh look at the *San Remo Manual*. The task this author has been entrusted with is to identify those provisions that ought to be reconsidered or modified<sup>8</sup> and to evaluate the persuasiveness of some of the critical arguments that have been put forward.

### *Definitions*

At first glance, the list of definitions in paragraph 13 of the *Manual* seems to be comprehensive and reflective of customary law. The latter is certainly true in

principle.<sup>9</sup> Still, this does not necessarily mean that all the definitions continue to reflect contemporary State practice.

### **Civilian Mariners and Private Contractors on Board Warships**

There is a tendency in contemporary State practice to crew warships with civilians or at least to make use of civilian contractors who work on board warships.<sup>10</sup> In many cases, the contribution of civilian contractors is essential for the operation of the ship or of its weapons systems. Hence, the question arises whether the presence of civilian mariners or civilian contractors affects the legal status of the ship concerned. The ability to exercise belligerent rights remains reserved for warships.<sup>11</sup> Warships are authorized to engage in offensive military activities, including visit and search, blockade, interdiction and convoy escort operations. Auxiliary vessels are expressly prohibited from exercising belligerent rights.<sup>12</sup> There are convincing arguments according to which civilians on board warships should perform neither crew functions nor other functions related to the operation of the ship and its weapons or electronic systems. Such activities should indeed remain reserved for the armed forces personnel who have traditionally performed them.

It should be noted, however, that the definition of warships in paragraph 13 (g) and in customary international law does not necessarily rule out the use of civilian mariners and of civilian contractors. According to that definition the warships must be manned by “a crew that is under regular armed forces discipline.” In contrast, the 1907 Hague Convention VII Relating to the Conversion of Merchant Ships into Warships,<sup>13</sup> in Article 4, provides that “the crew” of a converted merchant ship “must be subject to military discipline.” While the use of the definite article in Hague Convention VII rules out the (further) use of civilian mariners, the indefinite article in the definition of warships justifies the conclusion that not necessarily all crew members must be under regular armed forces discipline. Leaving aside the ensuing question of the permissible proportion of civilian mariners (or private contractors) in comparison to sailors and officers proper, it, thus, becomes clear that the manning of warships with civilian mariners does not affect the legal status of the ship as long as the other criteria are met and as long as a certain portion of the crew remains under regular armed forces discipline. Of course, these findings are without prejudice to the legal status of civilian mariners and of civilian contractors. If captured they could, with good reasons, be considered unlawful combatants and prosecuted for direct participation in hostilities. The latter problem could be solved by conferring a special legal status on civilian mariners and private contractors. Still, it would certainly contribute to legal clarity if paragraph 13 (g) were supplemented by an explanatory statement with regard to the presence of civilians on board warships.

### **Unmanned Vehicles**

Paragraph 13 lacks a definition of unmanned—aerial or underwater—vehicles.<sup>14</sup> This issue is raised here because their legal status may well be of importance with regard to the rights and duties of neutral States. An unmanned vehicle is either an integral part of a warship's weapons systems or otherwise controlled from a military platform. If that military platform is a warship or a military aircraft, the unmanned aerial vehicle (UAV), unmanned combat air vehicle (UCAV), or unmanned underwater vehicle (UUV), according to the position taken here, necessarily shares the legal status of that platform and it, thus, enjoys sovereign immunity as long as it is operated in high seas areas or in international airspace. Accordingly, neutral States would under no circumstances be allowed to interfere with them.

### *Regions of Operations*

The provisions of the *San Remo Manual* on the Regions of Operations are evidently influenced by the 1982 UN Convention on the Law of the Sea.<sup>15</sup> The adaptation of the rules on the regions of operations to the contemporary law of the sea is by all means a realistic, and the only operable, approach to reconcile the interests of belligerent and neutral States. Of course, this delicate compromise is continuously challenged by excessive maritime claims.<sup>16</sup> Creeping jurisdiction may unsettle that compromise and may, ultimately, render obsolete that part of the *San Remo Manual*. Therefore, States should take all necessary measures to preserve the achievements of both the Law of the Sea Convention and of the *San Remo Manual*.<sup>17</sup> Still, the provisions of the *San Remo Manual* on the regions of operations are far from perfect.

Those provisions reflect the approach underlying the Law of the Sea Convention not only with regard to the determination of “neutral waters,”<sup>18</sup> but also with regard to the obligations of belligerents at sea to pay due regard to the legitimate rights of coastal States, when operating within their EEZ, and of third States, when operating in high seas areas.<sup>19</sup> The author is aware that during the drafting process of the *San Remo Manual* there was a controversy about the exact meaning of the due regard principle and that its inclusion in the manual was a compromise decision.<sup>20</sup> Nevertheless, there should be a little further guidance as to its exact meaning. Unless specified, the due regard principle will only be paid lip service or, even worse, it will be abused by coastal States in order to camouflage acts of unneutral service.

The same holds true with regard to paragraph 15 of the *Manual* which states that “within and over neutral waters . . . hostile actions by belligerent forces are forbidden.” Paragraph 16 contains a non-exhaustive list of activities that are covered by

the term “hostile actions.” This enumeration predominantly refers to traditional naval operations during armed conflict. Of course, the term “hostile action,” as well as one of the activities listed—“use as a base of operations”—would be broad enough to also cover other activities, e.g., the use of means for electronic warfare (EW), target acquisition, or reconnaissance purposes. Such an interpretation would, it is maintained here, certainly be in accordance with customary international law. However, the examples following that term could cast doubt on whether such activities would also be covered by the prohibition of using neutral waters and neutral airspace as a base of operations. One way of avoiding such cases of doubt would be the deletion of all examples. In order to contribute to legal clarity, however, it seems preferable to add to the examples listed a formulation similar to that of Article 47 of the 1923 Hague Rules<sup>21</sup> which provides:

A neutral state is bound to take such steps as the means at its disposal permit to prevent within its jurisdiction aerial observations of the movements, operations or defenses of one belligerent, with the intention of informing the other belligerent.

This provision applies equally to a belligerent military aircraft on board a vessel of war.

Such a clarification also seems appropriate with regard to combat rescue operations in neutral territory. Such rescue operations are not specially protected under the law of armed conflict. Rather, they are to be considered military operations that would also fall into the category of “hostile action.”

### *The Aerial Element—Underestimated*

Modern naval operations are no longer conducted in a purely maritime environment. Naval battles proper, as traditionally envisioned, belong more or less to the past. Today naval forces operate jointly with other forces, especially with air forces.<sup>22</sup> As an integral part of these joint operations, naval forces can no longer be considered bound by only one set of rules specifically and exclusively designed for them. Moreover, even if naval operations were confined to the maritime environment, they would always imply the use of aircraft and of missiles because these assets are among the most effective weapons against enemy naval forces.

Of course, the *San Remo Manual* does not follow the limited approach of the treaties of 1907<sup>23</sup> or of 1936.<sup>24</sup> Its provisions are not limited to naval platforms, but also relate to military aircraft, civil aircraft, and to missiles.<sup>25</sup> Thus, the *Manual* has broadened—or at least clarified—the scope of the term “law of naval warfare” to cover not only ship-to-ship, but also ship-to-air and air-to-ship operations,

including the use of missiles; as well as “prize measures,” and the protection of vessels, aircraft, objects and persons at sea, on land, and in the air.

While the *San Remo Manual* addresses many of the issues arising from the interaction of naval and air warfare, its provisions sometimes give reason to assume that naval warfare still has been regarded in isolation. At least one cannot entirely escape the impression that the aerial element of maritime operations, as well as the possible impact of aircraft on naval operations, has been dealt with only marginally.

With paragraph 45 stating that “surface ships, submarines and aircraft are bound by the same principles and rules,” the *San Remo Manual* starts from the premise that when it comes to methods and means of naval warfare there is no need to distinguish between the vehicles or platforms employed. Since the basic principles of the law of armed conflict apply to all methods and means of warfare, this approach seems to be logical and cogent. Still, the question remains whether this approach will lead to operable and viable provisions for the conduct of modern maritime operations. For example, the *Manual’s* rules on mine warfare and on blockade do not seem to meet that test. The same holds true with regard to those rules dealing with enemy and neutral aircraft.

### **Aerial Threats**

Aircraft have always posed, and continue to pose, a considerable threat—a threat not limited only to naval platforms. Accordingly, particularly the conditions that render civil aircraft legitimate military objectives need to be reconsidered. An aircraft approaching naval surface forces can inflict damage to a warship by the use of comparatively inexpensive and non-sophisticated means. Moreover, it may gain and transmit information that is vital to the success of the military operation in question. The drafters of the 1923 Hague Rules<sup>26</sup> understood this and, accordingly, agreed upon Articles 33, 34, and 35<sup>27</sup> that would have enabled belligerents to deal with those threats adequately.

Spaight, who is hesitant to accept the 1923 Hague Rules relating to the treatment of civil aircraft as suitable for adoption,<sup>28</sup> doubts whether Article 34 would prove operable in practice for the following reasons:<sup>29</sup>

Item (1) of the Article contemplates a contingency which is improbable; enemy non-military aircraft are hardly likely to venture into the jaws of the enemy’s jurisdiction. The term ‘operations’ in item (3) of the same Article is unduly restricted. If a belligerent warship saw an enemy private aircraft suddenly approaching at high speed, surely it would be entitled to repel the aircraft by gunfire even if no operations were in progress in the locality? The reference to the ‘immediate vicinity’ of a ‘jurisdiction’—a new test in international law—may lead to difficulties in interpretation; it will not be an easy test for the officers concerned to apply in practice.

The framing of both Articles in a positive, instead of the usual prohibitory, sense leads to lack of precision. The quite unchallengeable right of a belligerent to fire upon a non-military aircraft which disobeys his signal or order to stand off or change its course does not seem to be safeguarded, at any rate in the open sea when ‘operations’ are not in progress.

Spaight therefore suggests replacing Articles 30, 33, and 34 with the following formulation:<sup>30</sup>

A non-military aircraft may not be fired upon in flight, unless

- (1) It disobeys a belligerent’s signals or orders; or
- (2) It enters an area notified by him as one of military activity in which aircraft circulate at their peril and are liable to be fired upon without warning.

Spaight’s criticism is not necessarily valid today. On the one hand, it is not improbable that civil aircraft continue to fly within the jurisdiction of the respective enemy. On the other hand, the term “immediate vicinity of operations” has obviously gained some support and, moreover, has to be distinguished from self-defense situations obviously (also) envisaged by Spaight. While we will return to these concepts, it needs to be emphasized here that Spaight, despite his criticism, agrees that aircraft—enemy or neutral—pose a considerable risk and that the belligerents are entitled to counter that risk if necessary by the use of armed force.

Unlike Spaight and the 1923 Hague Rules,<sup>31</sup> the *San Remo Manual* obviously underestimates that threat and imposes upon belligerents obligations of abstention that will hardly meet the test of reality. Accordingly, therefore paragraph 63 (f) is too restricted. Pursuant to that provision, an enemy civil aircraft is a legitimate military objective if it, *inter alia*, is “armed with air-to-air or air-to-surface weapons.” This excludes, as emphasized in the explanations, “light individual weapons for defence of the crew, and equipment that deflects an attacking weapon or warns of an attack.”<sup>32</sup> But it remains an open question of what weapons can be qualified as coming within the categories of paragraph 63 (f). Moreover, this formulation leaves out of consideration the possibility that the aircraft itself is used as a weapon. The way modern warships are constructed would not enable them to sustain a hit by an aircraft. In this context, one should not think of “Kamikaze” aircraft used as a pattern of an unsuccessful military tactic or strategy. What needs to be considered are scenarios similar to that of the *USS Cole* incident.<sup>33</sup>

### **Mine Warfare**

One consequence of equating warships and aircraft is that the latter would also be obliged to “record the locations where they have laid mines.”<sup>34</sup> States possessing advanced military equipment may be in a position to comply with that obligation, e.g., by equipping air delivered mines with a system that would transmit their location without the enemy belligerent profiting from the signals. The majority of States will, however, hardly be in a position to acquire such systems. As the practice of World War II demonstrated, the recording of minefields laid by aircraft is a most difficult undertaking<sup>35</sup> and an obligation to do so does not seem to reflect customary international law.<sup>36</sup> Closely related is the problem—at least for a considerable number of States—of how to provide “safe alternative routes for shipping of neutral States”<sup>37</sup> in case the mining is executed by military aircraft. The minelaying belligerent will, in many cases, only be in a position to identify the mine area as such but not routes through the minefield that would be sufficiently safe. No considerable difficulties arise with regard to the obligation laid down in paragraph 85 of the *San Remo Manual*.<sup>38</sup> For example, the United States, when mining Haiphong harbor, made it possible for merchant vessels lying there to leave the harbor by daylight. The mines delivered by aircraft were activated three days after their delivery.<sup>39</sup>

### **Blockade**

It is true that in the past blockades were a method of economic warfare at sea; however, today a blockade will regularly be an integral part of a genuinely military operation. Therefore, the lack of a definition of the concept of blockade in the *San Remo Manual* could give rise to some unnecessary misunderstandings.<sup>40</sup> Such a definition could read as follows: “Blockade is a method of naval warfare by which a belligerent prevents vessels and/or aircraft of all nations from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation.”

The purpose of establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory. It should be emphasized that a blockade is the only method of naval warfare by which belligerents may interfere with enemy exports.

But even if exclusively directed against the enemy’s economy, there will always be a strategic element because the enemy’s capabilities of resistance will necessarily be weakened.<sup>41</sup> Regardless of the distinction between economic and strategic blockades there is today general agreement that a blockade need not be enforced exclusively against seagoing vessels but that it may also be enforced against aircraft.<sup>42</sup> Moreover, and in view of the importance of aerial reconnaissance, a



blockade may be maintained and enforced “by a combination of legitimate methods and means of warfare,”<sup>43</sup> including military aircraft.<sup>44</sup>

The *San Remo Manual*'s provisions on blockade, however, lack any express reference to aircraft. Of course, an interpretation of paragraphs 96<sup>45</sup> and 97<sup>46</sup> justifies the conclusion that a blockade may also be enforced and maintained by military aircraft. In most cases, these aircraft will operate from a warship that serves as their base.<sup>47</sup> It is also possible, however, that the aircraft entrusted with the enforcement of a blockade are deployed on airfields on land. Still, while there seems to be general agreement on the lawfulness of the enforcement of a blockade by military aircraft, two questions remain unanswered. (1) Is the presence of a warship or its operational control of the military aircraft necessary for a blockade to be lawful or may a blockade be enforced by aircraft (and mines) alone? (2) What criteria have to be met in order for the blockade to be effective if it is maintained and enforced by aircraft?

In most cases, the aircraft entrusted with the enforcement of a blockade need not be dependent upon a warship, i.e., they are not necessarily under the operational control of a warship. However, the answer to the first question becomes a little complicated if one takes into consideration the following scenario: A merchant vessel or a neutral warship may be damaged or in another distress situation. Therefore, it will have to access the blockaded coast or port but the blockade is maintained by mines and aircraft only. How will the blockading power be able to comply with its obligation to allow ships in distress entry into the blockaded coastline if no warship is in the near vicinity?<sup>48</sup> Accordingly, there is at least one argument against the legality of a blockade that is enforced and maintained without a surface warship present in, or in the vicinity of, the blockaded area.

As regards the second question, one may be inclined to point to the well-established rule according to which the “question whether a blockade is effective is a question of fact.”<sup>49</sup> While it is clear that “effectiveness” can no longer be judged in the light of the state of technology of the 19th century<sup>50</sup> and, while the view is widely held that effectiveness continues to be a constitutive element of a legal blockade,<sup>51</sup> it must be recognized that there are no criteria that would make possible an abstract determination of the effectiveness of all blockades. In this context, Castrén postulates:

Aircraft in the blockaded area may leave the area when there are other aircraft on patrol duty so that the blockade remains in force the whole time. The activities of aircraft even in connexion with a naval blockade are effective only to the extent that they do in fact dominate the air.<sup>52</sup>

It is maintained here that this position is correct. In any event, aircraft will be used for the enforcement of a blockade only if the respective belligerent has gained air superiority. Otherwise, the use of aircraft would be too dangerous.

A further aspect regarding blockade, as dealt with in the *San Remo Manual*, is whether this method of naval warfare is necessarily restricted to vessels or whether it may also be enforced vis-à-vis aircraft. Again, the provisions of the *San Remo Manual* are silent on this issue. The “explanations” reveal that the legal and naval experts, in the context of the effectiveness of a blockade, considered that question only indirectly.<sup>53</sup> While it may be correct that a (purely) naval blockade may not be considered to have lost its effectiveness for the sole reason that a considerable small number of aircraft continue to land within the blockaded area, this is but one aspect. Although traditionally blockades have been viewed as a method of naval warfare proper, there is no reason why it may not be extended (or even restricted) to aircraft.<sup>54</sup> In this context, the argument that “transport by air only constitutes a very small percentage of bulk traffic”<sup>55</sup> is not absolutely convincing. The blockaded belligerent State, either alone or together with its allies, may have a considerable air fleet at its disposal. As the example of the “blockade of Berlin” shows—although the cargoes only served humanitarian purposes—a considerable percentage of bulk traffic can be transported by air over a considerable period of time.

#### *Methods and Means of Naval Warfare*

Despite the lack of a definition and despite the disregard of the aerial elements, the provisions of the *San Remo Manual* on blockade certainly reflect customary international law.<sup>56</sup> Whether this also holds true with regard to the provisions on zones<sup>57</sup> is far from settled. Of course, it seems that, in principle, zones have become a recognized method of naval warfare<sup>58</sup>—and it is quite probable that the *Manual* has contributed to that development. Still, as already stated elsewhere,<sup>59</sup> the *San Remo Manual*’s provisions on zones remain rather obscure, particularly with regard to the purpose such zones may serve. This, however, is not the only criticism of the *Manual*’s provisions on methods and means of naval warfare.

#### **Precautions in Attack**

The *Manual*’s rules on precautions in attack are directly taken from the 1977 Additional Protocol I.<sup>60</sup> In principle, this does not necessarily pose problems—even though Additional Protocol I is far from being recognized by all States of the world. It would be futile to reopen the famous dispute between Meyrowitz<sup>61</sup> and Rauch<sup>62</sup> on whether and to what extent the provisions of Additional Protocol I apply to naval warfare at all. It is maintained here that, according to Article 49(3) of the

Protocol I, a special body of rules applies to ship-to-ship, ship-to-air, and to air-to-ship attacks as long as such attacks do not affect civilians or civilian objects on land. That is also clear from a reading of Article 49(4).<sup>63</sup> Accordingly, Articles 58 and 59 of Additional Protocol I are inapplicable to naval warfare as treaty law. Whether and to what extent they are customary in character is not quite settled.<sup>64</sup> Moreover, it is far from clear whether paragraph 46 of the *San Remo Manual* offers operable solutions for the conduct of hostilities at sea. The use of the concept of “feasibility” certainly mitigates some of the difficulties. Still, if naval operations are conducted in sea areas with dense maritime traffic, like in the Persian Gulf, it could become nearly impossible to determine “whether or not objects which are not military objectives are present in an area of attack.”<sup>65</sup> The *USS Vincennes* incident may be indicative of the difficulties involved.<sup>66</sup> Legal rules that are merely paid lip service will certainly not pass the test of practice.

#### **Naval Bombardment**

Attacks against targets on land (naval bombardment) are not dealt with explicitly in the *San Remo Manual*. This is partly due to the fact that the participants regarded this subject as already covered by the respective provisions of Additional Protocol I.<sup>67</sup> It should be kept in mind, however, that not all States are bound by the Protocol. Then the question arises whether the provisions of the 1907 Hague Convention IX<sup>68</sup> constitute customary international law.

Even if that question is answered in the affirmative,<sup>69</sup> it remains unsettled how to deal with aircraft launched from warships attacking targets on land. According to Article XLI of the 1923 Hague Rules “aircraft on board vessels of war, including aircraft-carriers, shall be regarded as part of such vessels.” This could imply that the rules applicable to warships engaged in naval bombardment also apply to aircraft launched from them. Then, however, such aircraft would be allowed to attack military objectives in non-defended localities.<sup>70</sup> While Additional Protocol I, Article 59, paragraph 1, prohibits attacks on such localities “by any means whatsoever,” i.e., including aircraft, such attacks would not be prohibited under Articles 1 and 2 of Hague Convention IX. Castrén takes the position that Hague Convention IX “must probably be understood to concern warships only, and not aircraft even when collaborating with them.”<sup>71</sup> If, however, Article XLI of the 1923 Hague Rules is a correct statement of customary law, warships and military aircraft launched from warships would be bound by the same rules.

Apart from the wording of these provisions, a further argument in favor of the view that land attacks by aircraft operating from warships should be governed by Additional Protocol I is the ability of modern aircraft to discriminate and to conduct surgical strikes by means of high-precision ammunition.

Still, it must be remembered that for a locality to be entitled to protection against attacks, Article 59(2) of Additional Protocol I, and the probably corresponding rule of customary law, provides that four conditions must be met:

- (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.

Accordingly, even if fixed military installations or establishments remain in the respective port or town this would not justify an attack “by any means whatsoever” if no hostile use is made of them. Then, regardless of the binding force of Additional Protocol I, an attack would probably be contrary to the law of armed conflict because the object in question would not make an effective contribution to military action and its neutralization would not offer a definite military advantage. Be that as it may, a clarification of the rules applicable to naval bombardment, including the use of aircraft and missiles launched from warships, should be taken into consideration.

#### **Deception (and Surrender)**

The *San Remo Manual*'s rules on deception are too vague and, thus, do not provide the necessary guidance for naval commanders. On the one hand, it is rather difficult to distinguish “active simulation”<sup>72</sup> from “passive simulation.” The capabilities of modern technologies could open a vast grey area and, consequently, could render the provision obsolete. On the other hand, there should be a definition of legitimate ruses amended by a non-exhaustive list of permitted ruses that should be drafted with a view to modern technologies. The traditional examples given for permissible ruses of naval—especially *Count Luckner* and the Cruiser *Emden*—have a romantic charm but they certainly are too remote from the realities of modern naval operations.<sup>73</sup>

In a highly electronic environment and with over-the-horizon or beyond-visual-range capabilities, the hoisting of the true flag prior to an attack no longer seems to make much sense. However, ruses remain an important pattern of modern naval warfare. Therefore, there is a growing need for specific rules enabling

naval commanders to distinguish between permissible ruses and prohibited acts of perfidy. While perfidy has been clarified in the *San Remo Manual*, ruses are not adequately addressed. It needs to be emphasized in this context that it is not always sufficient to draw the necessary conclusions from the prohibition of perfidy. For example, actively feigning the status of a protected vessel is prohibited by paragraph 110 of the *Manual* and the corresponding customary law.<sup>74</sup> This rule, however, is without prejudice to a decision to feign neutral status by the use of civilian radars or other electronic equipment. According to the position taken here, the use of civilian navigational radars (thus taking advantage of the respective emissions) is to be considered a permissible ruse of naval warfare if the radar is switched off immediately prior to the launching of an attack. It may well be, however, that this position is not shared by all. It should be recalled that, in 1983, the World Administrative Conference for the Mobile Services adopted Resolution No. 18<sup>75</sup> on the identification of vessels and aircraft of States not participating in an international armed conflict, recommending the use of adequate transponders and that:

The frequencies specified in No. 3021 of the Radio Regulations may be used by ships and aircraft of States not parties to an armed conflict for self-identification and establishing communications. The transmission will consist of the urgency or safety signals, as appropriate, described in Article 40 followed by the addition of the single group 'NNN' in radiotelegraphy and by the addition of the single word 'NEUTRAL' pronounced as in French 'neutral' in radiotelephony. As soon as practicable, communications shall be transferred to an appropriate working frequency. . . .

It would, of course, be a considerable progress if the protection of neutral vessels were enhanced. However, that proposal is not suited for achieving that aim. As Fenrick has rightly pointed out, the resolution:

appears to have been issued by a forum unfamiliar with law of armed conflict issues and without consultation with national officials responsible for such matters. Ships and aircraft using such procedures may assume they are entitled to protection when in fact they are not. The fact that a ship or aircraft is registered in a state not party to the conflict does not, in and of itself, mean that it is not a legitimate military objective.<sup>76</sup>

Therefore, it would certainly add to legal clarity and legal certainty if the rules on permissible ruses were amended by a non-exhaustive list of examples.

A problem closely related, but not limited, to ruses and perfidy is the surrender of warships and military aircraft. The provision of the *San Remo Manual* referring to the surrender of warships<sup>77</sup> certainly reflects customary international law.<sup>78</sup> Still, in a modern battlefield environment, visual identification is rather the exception than the rule. Therefore, an effort should be undertaken to specify the different

possibilities of how warships and military aircraft can surrender at all. The more so since the *San Remo Manual* lacks a provision on enemy aircraft exempt from attack which have surrendered. It may, indeed, be difficult to verify whether a military aircraft has surrendered.<sup>79</sup> If, however, surrender has been offered *bona fide*, an attack on it would be contrary to basic rules of the law of armed conflict.

### *Maritime Neutrality*

Probably, the law of neutrality is one of the most disputed aspects of public international law. The diversity of views on the subject makes it almost impossible to establish the continuing validity of that body of law, its scope of applicability, and its content. The drafters of the *San Remo Manual* have been heavily criticized for having adopted a rather traditional approach to the law of maritime neutrality.<sup>80</sup> It is maintained here, however, that this criticism is unfounded.

#### **Obsolete by Desuetude or Irrelevant under the *Jus ad Bellum*?**

Although the said uncertainties persist, there is general agreement that there is a need to protect States not taking part in an international armed conflict, as well as their nationals, the vessels flying their flags and the aircraft bearing their markings.<sup>81</sup> Moreover, there is similar agreement on the need for there to be obligations on neutral States, their nationals and their merchant shipping and civil aviation with a view to effectively prevent the escalation of an ongoing international armed conflict.<sup>82</sup> However, there is no consensus on how these objectives ought to be pursued.

According to a widely held view, the traditional law of neutrality is incompatible with the *jus ad bellum*.<sup>83</sup> The proponents of that view claim that the traditional rules have been extensively modified by the UN Charter. Therefore, they maintain, States not parties to an ongoing international armed conflict are entitled to take a position of “benevolent” neutrality if one party to the conflict has violated the *jus ad bellum*.<sup>84</sup> Indeed, under the right of collective self-defense, States are entitled to participate in an international armed conflict on the side of the victim of aggression. If they may assist the victim militarily then, *a fortiori*, they must be entitled to discriminate against the aggressor and to assist the victim State by any means short of war. In theory, this is certainly correct. However, the concept of benevolent neutrality is operable only if the Security Council has authoritatively determined the aggressor. This is expressly recognized in paragraphs 7 and 8 of the *San Remo Manual*.<sup>85</sup> If, however, the Security Council is unable or unwilling to act under Chapter VII, the benevolent neutral’s right will compete with the right of the aggrieved belligerent to take appropriate counter measures in order to induce the neutral State

to comply with the traditional rules. The better view is, therefore, to apply the laws of neutrality to such situations because only by so doing can the object and purpose agreed upon—protection of neutrals and prevention of an escalation of the armed conflict—be achieved.

Moreover, the concept of benevolent neutrality has no foundation in State practice. The proponents of that view ignore the fact that, since 1945, third States assisting one belligerent to the disadvantage of the other never referred to the right of collective self-defense.<sup>86</sup> Rather, they either advanced contractual obligations, or they claimed that their assistance did not cover military (“lethal”) items,<sup>87</sup> or they simply acted clandestinely.<sup>88</sup> Hence, State practice since 1945 is not apt “for proving that a new legal status of non-belligerency has emerged as a concept of law. It would be all too easy to avoid duties of neutrality by just declaring a different status.”<sup>89</sup> The fact that in many instances “non-belligerents” endeavored to conceal their assistance indicates, if not proves, that they had not based their conduct on a corresponding *opinio juris*.

Hence, State practice, as well as military manuals<sup>90</sup> and the International Law Association’s Helsinki Principles,<sup>91</sup> support the view that the traditional rules of the law of maritime neutrality as codified in the 1907 Hague Convention XIII<sup>92</sup> have neither become obsolete nor have they been extensively modified. Therefore, the provisions of the *San Remo Manual* continue to reflect customary international law.

### **Continuing Value of the Laws of Maritime Neutrality**

The main reason why most States continue to pledge allegiance to the laws of maritime neutrality is the intrinsic value of its principles and rules. On the one hand, this body of law serves the interests of neutral States by protecting them, their nationals, their merchant shipping and their aviation against the harmful effects of ongoing hostilities.<sup>93</sup> On the other hand, it guarantees that legitimate belligerent interests are not jeopardized by neutral States, their nationals, their merchant shipping and aviation unduly interfering in the warfighting and war-sustaining effort.<sup>94</sup>

It should be remembered, however, that the applicability of that law in its entirety is not triggered automatically as soon as an international armed conflict is in existence. This only holds true with regard to those rules of the law of maritime neutrality that are essential for safeguarding its object and purpose (*essentialia neutralitatis*). There is widespread agreement that the following rules of the law of maritime neutrality become applicable to every armed conflict at sea, irrespective of a declaration of war or of a declaration of neutrality: protection of neutral waters,<sup>95</sup> the obligation of neutral States to terminate violations of their neutral status,<sup>96</sup> and the prohibition of unneutral service.<sup>97</sup>

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It needs to be emphasized that, despite allegations to the contrary,<sup>98</sup> the 24-hour rule<sup>99</sup> also belongs to those *essentialia neutralitatis*. If a neutral State does not, on a non-discriminatory basis, prohibit access to its territorial sea and its internal waters by belligerent warships,<sup>100</sup> a passage or sojourn exceeding 24 hours (unless unavoidable on account of damage or stress of weather) would amount to the use of neutral waters as a sanctuary. If the neutral State does not terminate that violation of its neutral status, the aggrieved belligerent will be entitled to take appropriate countermeasures.<sup>101</sup> The ensuing potentialities for escalation are obvious. The fact that the international armed conflict takes place in areas remote from the neutral waters in question is irrelevant. While the aggrieved belligerent may not be in a position to enforce the neutral State's obligations by directly interfering with its warships or military aircraft, it would certainly be entitled to take other measures in response to that violation of international law. Even if the aggrieved belligerent does not react at all, this does mean that there has not been a violation unless the aggrieved belligerent's conduct amounts to acquiescence.

Of course, the 24-hour rule implies some inconveniences for belligerent warships and auxiliaries, especially if their visit in a neutral port is unrelated to the ongoing international armed conflict. However, the object and purpose of the 24-hour rule is not limited to the protection of the belligerents, it also contributes to the protection of neutral States. If neutral States wish to remain under the protection of the law of maritime neutrality they are under an obligation to apply and to enforce the 24-hour rule. It should not be forgotten that the rule may prove a most valuable tool in pursuing belligerent goals as the case of the *Graf Spee* clearly demonstrates.<sup>102</sup>

### *Measures Short of War*

A final criticism of the *San Remo Manual* relates to its section on "measures short of attack," i.e., prize law. The United Kingdom in particular has long taken the view that this part of the law of naval warfare and neutrality at sea has been considerably modified by the *jus ad bellum*. This approach must be rejected. The provisions of the *San Remo Manual* on prize measures certainly reflect customary international law. There are, however, two aspects that should be reconsidered.

#### **Prize Law—Modified by the Jus ad Bellum?**

The *San Remo Manual*—as well as the military manuals of some navies—starts from the premise that the *jus ad bellum* and the *ius in bello* are two distinct parts of international law.<sup>103</sup> In view of the basic principle of the equal application of the *ius in bello*,<sup>104</sup> the *San Remo Manual* does not distinguish between the aggressor and



the victim of aggression, unless the UN Security Council has acted under Chapter VII of the Charter of the United Nations.<sup>105</sup> Accordingly, it allows all parties to an international armed conflict at sea to make use of the full spectrum of methods and means of naval warfare, including measures short of attack.<sup>106</sup>

According to the UK Manual, however, “the conduct of armed conflict at sea is subject to the limitations imposed by the UN Charter on all use of force.” Therefore, in “a conflict of limited scope . . . a belligerent state is constrained, to a greater extent than the rules set out in the present chapter might suggest, in the action that it may lawfully take against the shipping or aircraft of states not involved in the conflict.”<sup>107</sup>

This position is far from new. The UK government has maintained it since the 1980s—and has been heavily criticized for it. According to the position taken here, this criticism is well-founded. The British position would, if adopted by other States, lead to a most unfortunate lack of legal clarity and it would enable some malevolent States to arbitrarily deny the legality of measures taken by a belligerent against the shipping and aviation of States not parties to an ongoing international armed conflict.

This position is not shared by the UK’s allies who are unwilling to limit the spectrum of methods and means provided by the law of naval warfare.<sup>108</sup> Obviously, those allies maintain that it will be up to them to decide whether and to what extent they will interfere with neutral shipping and aviation when engaged in an international armed conflict. And indeed the question arises as to who other than the belligerent State is competent to decide what is “necessary and proportionate to the achievement of the goal for which force may be used.”

Of course, in case of an authoritative decision by the UN Security Council based upon Chapter VII of the UN Charter, a belligerent may be prevented from making use of the full spectrum provided by the law of naval warfare. However, if there is no such decision by the Security Council, it is generally recognized that the belligerent States alone are entitled to decide whether they will interfere with neutral shipping and aviation. The affected neutral States will be limited to a legal evaluation of the concrete measures taken, i.e., they may judge their legality in the light of the law of naval warfare and the law of maritime neutrality.<sup>109</sup> The right to judge, in a legally binding manner, the legality of the initial decision to resort to actions such as visit and search has been conferred upon the UN Security Council. Therefore, statements by neutral States on the legality of measures short of attack based upon rules other than those of the *ius in bello* (including the law of maritime neutrality) are to be considered merely political in character.

Another concern with the UK position is that it may lead to an arbitrary application of the law of naval warfare. In this respect, the British conduct during the

Falklands War (1982) and during the Iran-Iraq War (1980-1988) may serve as an example.<sup>110</sup>

As is well known, during the Falklands War the British government, on April 28, 1982, announced a Total Exclusion Zone (TEZ).<sup>111</sup> According to the wording of that proclamation the UK was prepared to attack every ship encountered within the limits of the TEZ. In the light of the jurisprudence of the Nuremberg Tribunal and of customary international law the legality of the TEZ, or of attacks performed therein, would have been more than doubtful.<sup>112</sup> It may well be that the proclamation was intended to deter rather than to serve as a legal basis for attacks on neutral shipping. It may well be that it was, after all, nothing but a—permissible—ruse of war. Taken at face value, however, and in view of the fact that the British government tried to justify the TEZ by referring to the right of self-defense, the British conduct during the Falklands War could also justify the following conclusion: if the British Government considers it necessary for its self-defense, it may decide to go beyond what is provided for by the law of naval warfare by establishing and enforcing a “free-fire zone.”

During the Iran-Iraq War, the British Government chose the same approach. That time, however, it did not lead to a widening but rather to a restriction of the spectrum of measures provided by the law of naval warfare. After Iranian forces had stopped the British merchant vessel *Barber Perseus*, the Foreign Office, on January 28, 1986, declared:

[U]nder Article 51 of the United Nations Charter a State such as Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self-defence, to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. . . .<sup>113</sup>

Thus, the British Government claimed the right to judge the legality of belligerent measures not in the light of the law of naval warfare alone, but also in the light of Article 51 of the UN Charter.

In other words, if party to an international armed conflict, the British Government, by referring to its inherent right of self-defense, considers itself entitled to enlarge the spectrum of methods and means under the law of naval warfare. If not party to an international armed conflict, the British government denies that very right to the belligerents but claims to be entitled to judge and declare what is necessary and proportionate for the belligerents’ self-defense.

Hence, the British position will not lead to operable and practicable solutions. Of course, in theory it is always possible to identify a breach of the *jus ad bellum*. However, it must be emphasized that the prohibition of the use of force is an

integral part of the UN system of collective security.<sup>114</sup> If the Security Council is not in a position to authoritatively determine the limits of the right of self-defense in a given case, it remains with the parties to the conflict to determine and decide which measures are necessary. The only operable legal yardstick providing practical solutions will then be the *jus in bello*. Moreover, the British position is irreconcilable with the principle of the equal application of the *ius in bello*. The continuing validity of that principle is confirmed by State practice since 1945 and by the Preamble to the 1977 Additional Protocol I. Accordingly, there is an overwhelming international consensus that the *jus in bello* does not discriminate between the alleged aggressor and the alleged victim of aggression. Moreover, that position may prove counterproductive for British interests in case the United Kingdom is party to an international armed conflict at sea. The use of prize measures by the Royal Navy, as provided for in the UK Manual,<sup>115</sup> could be qualified as illegal by other States that may refer to this very statement.

#### **Prize Measures and the Necessity of Prize Courts**

In view of the fact that, under customary international law, belligerents, by resorting to prize measures, are entitled to interfere with enemy and neutral merchant shipping and aviation,<sup>116</sup> it is indispensable to provide for the establishment of prize courts. There is no evidence in State practice or in legal writings that the traditional maxim “*Toute prise doit être jugée*” has become obsolete by desuetude.<sup>117</sup> Rather, pre- and post-World War II practice and scholarly statements give ample proof that the maxim remains in force.<sup>118</sup>

#### **Aspects to Be Reconsidered**

It has been shown in the foregoing that the provisions of the *San Remo Manual* on prize measures indeed restate the customary rules and principles on the subject matter. Still, the question remains whether those rules sufficiently take into account practical requirements.

On the one hand, there seems to be an unjustified discrimination between warships and military aircraft. As regards the rules applicable to military aircraft conducting visit and search operations, the *San Remo Manual* unnecessarily denies military aircraft the same rights as warships. While paragraphs 139 and 151 allow, “as an exceptional measure,” the destruction of enemy and of neutral merchant vessels, there is no such exception for enemy or neutral civil aircraft. It should be kept in mind that, according to Articles 57 to 59 of the 1923 Hague Rules,<sup>119</sup> the destruction of such aircraft would be permissible if certain conditions are met beforehand.<sup>120</sup>

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Moreover, the *San Remo Manual*, in paragraph 128, obliges belligerents “to adhere to safe procedures for intercepting civil aircraft as issued by the competent international organization,” i.e., to the International Civil Aviation Organization’s (ICAO) Manual concerning Interception of Civil Aircraft.<sup>121</sup> While it is true that “the ICAO manual contains detailed procedures for interception,”<sup>122</sup> those provisions are designed for interception operations in times of peace. It is, therefore, far from settled whether and to what extent the detailed procedures laid down in the ICAO manual are operable in times of armed conflict.

On the other hand, a further alternative to visit and search should be considered. Modern armed forces possess multi-sensors enabling them to identify certain cargoes, like chemicals or explosives.<sup>123</sup> Therefore, as an alternative to visit and search conducted in the traditional way, a belligerent may very well be satisfied with verifying the innocent character of cargo on board neutral merchant vessels and civil aircraft by merely “scanning” the vessels or aircraft with such sensors. Of course, whether the use of sensors is practicable and sufficient will depend upon the circumstances of each case.

### *Conclusion*

The 1994 *San Remo Manual* has contributed in an invaluable manner to a clarification of the law applicable to naval warfare and maritime neutrality. The vast majority of its provisions are a contemporary restatement of customary international law. Since those provisions almost perfectly balance the interests of belligerents and of neutrals alike everything feasible should be undertaken to safeguard its tremendous achievement in restating a body of law that had not been comprehensively addressed since the adoption of the *Oxford Manual*<sup>124</sup> in 1913.

We do, however, live in a time of rapid technological development that certainly has a deep impact upon military doctrine and on the conduct of hostilities. Disregarding that development and the way modern armed conflicts are fought would marginalize the *San Remo Manual* and could even make it obsolete. While thanks to Yoram Dinstein considerable efforts are being undertaken to fill the *Manual*’s gaps with regard to the aerial issues involved, the other issues addressed here should be thoroughly scrutinized and ultimately solved. The best way of adapting the *San Remo Manual* to the said developments would be to reconvene, under the auspices of the International Institute of International Humanitarian Law and of the International Committee of the Red Cross, a group of experts with a view to adopt an informal declaration that would not substitute for but merely amend or clarify parts of the *San Remo Manual*.

**Notes**

1. INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (1994), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/966627225C719EDCC1256B6600598E01> [hereinafter SAN REMO MANUAL]. An accompanying explanation is written in the form of a commentary and indicates the sources used by the drafters for each of the provisions of the Manual, and the discussion which led to their adoption. See EXPLANATION: SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter EXPLANATION].
2. US Navy: The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-2.1./COMDTPUB P5800.1 (1997) [hereinafter NWP 1-14]; Royal Navy: UK Ministry of Defence, The Manual of the Law of Armed Conflict, chap. 13 (2004) [hereinafter UK Manual]; German Navy: Commander's Handbook (Kommandanten-Handbuch) (2002) [hereinafter GN Manual].
3. See, *inter alia*, the papers presented by Steven Haines and by Jane Dalton in 36 ISRAEL YEARBOOK ON HUMAN RIGHTS (forthcoming 2006).
4. See Wolff Heintschel von Heinegg, *Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality*, 34 ISRAEL YEARBOOK ON HUMAN RIGHTS 151 (2004).
5. See Wolff Heintschel von Heinegg, *The Proliferation Security Initiative – Security vs. Freedom of Navigation?*, 35 ISRAEL YEARBOOK ON HUMAN RIGHTS 181 (2005).
6. In that case, the legal basis is the Security Council's decision based on Chapter VII of the Charter. While some navies, in their rules of engagement, also refer to rules and principles of the law of naval warfare, this is due to the fact that there exists no specific rules on the conduct of enforcement measures authorized by the Security Council. Therefore, they rely on the law of naval warfare as a general guidance only. This practice does not give evidence of an *opinio juris* that the respective States consider the law of naval warfare to be applicable in a formal sense.
7. See SAN REMO MANUAL, *supra* note 1, para. 1. Note, however, that this provision does not correctly reflect customary international law as rightly pointed out by Steven Haines, *supra* note 3.
8. The issues of arming hospital ships and of the use of secure communications on board hospital ships is dealt with in the article by Jane Dalton, *supra* note 3, and by Heintschel von Heinegg, *supra* note 4.
9. For corresponding definitions, see UK Manual, *supra* note 2, para. 13.5; NWP 1-14M, *supra* note 2, paras. 2.1.1, 2.1.3, 2.2.1; GN Manual, *supra* note 2, paras. 83 *et seq.*
10. For a long time, the Royal Navy has used civilian personnel to provide ship's services including food service, cleaning, and laundry. The US Navy also experimented with the concept of augmenting warship crews with civilian mariners supplied by the Military Sealift Command (MSC). Three years ago, MSC identified fleet command and control ships as platforms that can be transferred to MSC and staffed with civilian mariners. The *USS Coronado* had been chosen as the "pilot program" for this initiative. In addition, there is very often a considerable number of private contractors on board warships who maintain and/or operate electronic and weapons systems.
11. NWP 1-14M, *supra* note 2, paras. 2.1 and 7.6.1; UK Manual, *supra* note 2, paras. 13.5 and 13.91; GN Manual, *supra* note 2, paras. 200 *et seq.* and 280. See also Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts – Manual*, paras. 1002 and 1015 (1992) (hereafter German Manual).
12. See, *e.g.*, German Manual, *supra* note 11, para. 1016.

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13. Convention (VII) Relating to the Conversion of Merchants Ships into Warships, Oct. 18, 1907, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 97 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
14. While there is a growing use of unmanned aerial vehicles (UAVs) for reconnaissance and for combat operations (UCAVs), there are but a few scholarly works on the legal questions involved in their use. Unmanned submarine or underwater vehicles (UUVs) that are used for purposes other than counter mine operations have not been dealt with at all by legal writers because most of the information on such vehicles is still classified.
15. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, *reprinted in* 21 INTERNATIONAL LEGAL MATERIALS 1261, *available at* [www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindex.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindex.htm).
16. For an overview, see J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996). A regular update is provided in the Maritime Claims Reference Manual, <http://www.dtic.mil/whs/directives/corres/html/20051m.htm> (last visited Jan. 15, 2006).
17. For example, the US Freedom of Navigation Program, established in 1979, continues as an active tenet of national policy. Probably the biggest success of the program, from the perspective of public international law, was the Joint Statement by the United States of America and the Union of Soviet Socialist Republics on the Uniform Interpretation of Rules of International Law Governing Innocent Passage (Sept 23., 1989) (the Jackson Hole Agreement), *reprinted in* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 161 (A.R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies) which followed the so called "bumping incident" in the Black Sea.
18. SAN REMO MANUAL, *supra* note 1, para. 14.
19. *Id.*, paras. 34 and 35.
20. See EXPLANATIONS, *supra* note 1, para. 12.2, at 84.
21. The 1923 Hague Rules of Aerial Warfare, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 13, at 141, were never adopted in legally binding form and are generally referred to as the "1923 Hague Draft Rules of Aerial Warfare."
22. Naval air components contribute to and enhance (sea) power projection. Before and during armed conflict their tasks include the establishment and maintenance of air superiority and the conduct of a variety of air interdiction operations. This, however, only in a very generic way describes the missions assigned to naval aircraft, fixed or rotary wing, in the course of an armed conflict. For regularly updated fact sheets on US Navy weaponry, see <http://www.chinfo.navy.mil> (last visited Jan. 18, 2006).
23. Hague Conventions of October 18, 1907: No. VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities; No. VII Relating to the Conversion of Merchant Ships into War-Ships; No. VIII Relative to the Laying of Automatic Submarine Contact Mines; No. IX Concerning Bombardment by Naval Forces in Time of War; No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War; No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War; all *reprinted in* THE LAWS OF ARMED CONFLICT (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) at 1059, 1065, 1071, 1079, 1087, and 1407, respectively.
24. Procés-verbal relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930, Nov. 6, 1936, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 13, at 171. For a short analysis, see Edwin I. Nwogugu, *Submarine Warfare – Commentary*, in THE LAW OF NAVAL WARFARE 353 (Natalino Ronzitti ed., 1988).

25. SAN REMO MANUAL, *supra* note 1, paras. 13, 18, 23–30, 45, 53–58, 62–66, 70–78, 106, 108–109, 112, 115–117, 125–134, 141–145, 161, 163, 165–166, 174–183.
26. *Supra* note 21.
27. Article 33: “Belligerent non-military aircraft, whether public or private, flying within the jurisdiction of their own state, are liable to be fired upon unless they make the nearest available landing on the approach of enemy military aircraft.” Article 34: “Belligerent non-military aircraft, whether public or private, are liable to be fired upon, if they fly (1) within the jurisdiction of the enemy, or (2) in the immediate vicinity thereof and outside the jurisdiction of their own state or (3) in the immediate vicinity of the military operations of the enemy by land or sea.” Article 35: “Neutral aircraft flying within the jurisdiction of a belligerent, and warned of the approach of military aircraft of the opposing belligerent, must make the nearest available landing. Failure to do so exposes them to the risk of being fired upon.”
28. JAMES M. SPAIGHT, AIR POWER AND WAR RIGHTS 409 *et seq.* (3d ed. 1947), concludes: “For the present, little seems to be gained by an attempt to analyze them. They were, and are, rather long shots or dips into a distant future.”
29. *Id.* at 402.
30. *Id.*
31. For a discussion of these provisions, see also II OPPENHEIM’S INTERNATIONAL LAW 530 (Hersch Lauterpacht ed., 7th ed. 1963).
32. EXPLANATIONS, *supra* note 1, para. 63.6, at 153.
33. For the details of the *Cole* incident, see the DoD USS Cole Commission Report (Jan. 9, 2001), available at <http://www.defenselink.mil/pubs/cole20010109.html> (last visited Jan. 17, 2006). See also CRS Report for Congress, Terrorist Attack on USS Cole: Background and Issues for Congress (Jan. 30, 2001), available at <http://news.findlaw.com/cnn/docs/crs/coleterrattck13001.pdf> (last visited Jan. 17, 2006).
34. SAN REMO MANUAL, *supra* note 1, para. 84.
35. See, *inter alia*, REINHARD OSTERTAG, DEUTSCHE MINENSUCHER: 80 JAHRE SEEMINENABWEHR 128 (1986).
36. SPAIGHT, *supra* note 28, at 494 *et seq.*
37. SAN REMO MANUAL, *supra* note 1, para. 88.
38. “Mining operations in the internal waters, territorial sea or archipelagic waters of a belligerent State should provide, when the mining is first executed, for free exit of shipping of neutral States.”
39. See Howard S. Levie, Mine Warfare at Sea 117 *et seq.*, 147 (1992).
40. Therefore, this author is in disagreement with Steven Haines article (*supra* note 3) insofar as he maintains that blockade is to be considered a pattern of *guerre de course*.
41. For the differences between economic and strategic blockades, see OPPENHEIM’S, *supra* note 31, at 769 *et seq.*
42. See, *inter alia*, NWP 1-14, *supra* note 2, para. 7.7.1; OPPENHEIM’S, *supra* note 31, at 781; ERIC CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 301 (1954). See also ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 283 n.1 (1957): “The extension of blockades to include the air space over the high seas remains a development for the future. It is next to impossible to declare with any degree of assurance what procedures may govern blockade by air. Certainly, there are grave difficulties in assuming that the practices of naval blockade can be applied readily, by analogy, to aerial blockade.” Note, however, that Tucker does not doubt the legality of a blockade if applied and enforced against air traffic.
43. SAN REMO MANUAL, *supra* note 1, para. 97.
44. OPPENHEIM’S, *supra* note 31, at 780 f.; CASTRÉN, *supra* note 42, at 300 *et seq.*

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45. “The force maintaining the blockade may be stationed at a distance determined by military requirements.” The term “force” is broad enough to also cover military aircraft.
46. *Supra*, text accompanying note 42.
47. See CASTRÉN, *supra* note 42, at 409 *et seq.*
48. See also EXPLANATIONS, *supra* note 1, para. 97.1, at 178.
49. SAN REMO MANUAL, *supra* note 1, para. 95.
50. Frits Kalshoven, *Commentary on the 1909 London Declaration*, in THE LAW OF NAVAL WARFARE, *supra* note 24, at 274 maintains: “[D]evelopments in the techniques of naval and aerial warfare have turned the establishment and maintenance of a naval blockade in the traditional sense into a virtual impossibility. It would seem, therefore, that the rules in the Declaration on blockade in time of war are now mainly of historical interest.” This position is certainly not shared by those States having published manuals for their respective navies or by other authors. See JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 508 (1954): “The realities of the present century require the British long distance blockade to be viewed as a long term transformation of the traditional law of blockade, rather than as mere reprisals, or mere breach of the traditional law.” See also OPPENHEIM’S, *supra* note 31, at 796 *et seq.*
51. See NWP 1-14 M, *supra* note 2, para. 7.7.2.3; UK Manual, *supra* note 2, para. 13.67; GN Manual, *supra* note 2, para. 293 *et seq.*
52. CASTRÉN, *supra* note 42, at 409.
53. EXPLANATIONS, *supra* note 1, para. 95.2, at 177: “The Round Table considered whether the fact that aircraft could still land within the territory of the blockaded belligerent would affect the effectiveness of a sea blockade. This was found not to be the case, as, on the one hand, transport of cargo by air only constitutes a very small percentage of bulk traffic and, on the other hand, the fact that transport over land could take place without affecting this criterion.”
54. See *supra* text accompanying notes 42 *et seq.*
55. EXPLANATIONS, *supra* note 1, para. 95.2, at 177.
56. Those rules were codified in the Paris Declaration Respecting Maritime Law, Mar. 13, 1856, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 13, at 48. Moreover, they have been incorporated into military manuals. See NWP 1-14M, *supra* note 2, para. 7.7; UK Manual, *supra* note 2, para. 13.65 *et seq.*; GN Manual, *supra* note 2, para. 291 *et seq.* Moreover, they have been recognized by the International Law Association in paragraph 5.2.10 of the Helsinki Principles on the Law of Maritime Neutrality. See International Law Association Committee on Maritime Neutrality, Final Report: Helsinki Principles on Maritime Neutrality, in International Law Association, Report of the Sixty-Eighth Conference 496 (1998), reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 23, at 1425, 1430 (less Commentaries) [hereinafter Helsinki Principles]. While it is true that in post-WW II State practice blockades have only played a minor role, it is untenable to maintain that the law of blockade has been rendered obsolete by desuetude.
57. SAN REMO MANUAL, *supra* note 1, paras. 105 *et seq.*
58. UK Manual, *supra* note 2, para. 13.77 *et seq.*; NWP 1-14M, *supra* note 2, para. 7.9; GN Manual, *supra* note 2, para. 302 *et seq.*
59. See Heintschel von Heinegg, *supra* note 4.
60. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 13, at 422.
61. Henri Meyrowitz, *Le protocole additionnel I aux conventions de Genève de 1949 et le droit de la guerre maritime*, 89 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 245, 254 *et seq.* (1985): “Cette différence, répétons-le, est fondamentale et absolue. Fondamentale, en ce qu’elle découle



de l'essence respective du droit de la guerre terrestre et du droit de la guerre maritime, cette différence découlant elle-même de la différence entre les données de la guerre sur terre et celles de la guerre maritime. *Absolue*, parce qu'elle interdit de transposer les règles de l'une à l'autre."

62. Rauch maintains that the provisions of Part IV, Section I, Additional Protocol I apply to all measures of naval warfare directed against merchant vessels. ELMAR 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* 57 *et seq.* (1984); *see also* Elmar Rauch, *Le droit contemporain de la guerre maritime*, 89 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 958 (1985).

63. *See, inter alia*, Michael Bothe, *Commentary on the 1977 Geneva Protocol I*, in *THE LAW OF NAVAL WARFARE*, *supra* note 23, at 761; Sally V. Mallison & W. Thomas Mallison, *Naval Targeting: Lawful Objects of Attack*, in *THE LAW OF NAVAL OPERATIONS* 259 *et seq.* (Horace B. Robertson, Jr. ed., 1991) (Vol. 64, US Naval War College International Law Studies).

64. GN Manual, *supra* note 2, para. 321, and UK Manual, *supra* note 2, para. 13.32, both repeat the wording of paragraph 46 of the *San Remo Manual*. However, in NWP 1-14M, *supra* note 2, there is no express reference to precautions in attack.

65. SAN REMO MANUAL, *supra* note 1, para. 46 (a).

66. For the details, see David Evans, *Vincennes – A Case Study*, 119 U.S. NAVAL INSTITUTE PROCEEDINGS 49 (Aug. 1993); Norman Friedman, *The Vincennes Incident*, 115 U.S. NAVAL INSTITUTE PROCEEDINGS 74 (May 1989).

67. While this view is shared by most writers, O'Connell seems to take the position that naval bombardment is governed by both Hague Convention IX and Additional Protocol I. *See* II DANIEL P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 1130 *et seq.*, 1139, (Ivan A. Shearer ed., 1984).

68. *Supra* note 23.

69. *See, inter alia*, EBERHARD SPETZLER, *LUFTKRIEG UND MENSCHLICHKEIT [AIR WARFARE AND HUMANITY]* 127 *et seq.* (1956).

70. Obviously, this is the position taken by SPAIGHT, *supra* note 28, at 221 *et seq.* For an early criticism, see MORTON W. ROYSE, *AERIAL BOMBARDMENT* 162 *et seq.* (1928).

71. CASTRÉN, *supra* note 42, at 402.

72. SAN REMO MANUAL, *supra* note 1, para. 110.

73. *See* Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, 40 NAVAL WAR COLLEGE REVIEW 52 (1989). *See also* TUCKER, *supra* note 42, at 139, who, in 1957, still believed that flying a false flag was of most practical importance.

74. UK Manual, *supra* note 2, para. 13.83; NWP 1-14M, *supra* note 2, para. 12.1; GN Manual, *supra* note 2, para. 406 *et seq.*

75. *Reprinted in* 238 INTERNATIONAL REVIEW OF THE RED CROSS 58 *et seq.* (Jan.–Feb. 1984).

76. William J. Fenrick, *Introductory Report: Military Objectives in the Law of Naval Warfare*, in *THE MILITARY OBJECTIVE AND THE PRINCIPLE OF DISTINCTION IN NAVAL WARFARE* 40 (Wolff Heintschel von Heinegg ed., 1991).

77. SAN REMO MANUAL, *supra* note 1, para. 47 (i).

78. UK Manual, *supra* note 2, para. 13.33; GN Manual, *supra* note 2, para. 324 *et seq.*; NWP 1-14M, *supra* note 2, para. 8.2.1.

79. In NWP 1-14M, *supra* note 2, para. 8.2.1, it is emphasized: "Disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly,

surrender in air combat is not generally offered. However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected.”

80. E.g., by Steven Haines, *supra* note 3.

81. CASTRÉN, *supra* note 42, at 500 *et seq.*; TUCKER, *supra* note 42, at 206 *et seq.*; OPPENHEIM’S, *supra* note 31, at 675 *et seq.*; Yoram Dinstein, *Neutrality in Sea Warfare*, in III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 558 *et seq.* (Rudolf Bernhardt ed., 1997).

82. *Supra* note 81. See also STEFAN OETER, NEUTRALITÄT UND WAFFENHANDEL 129 *et seq.* (1992); Dietrich Schindler, *Aspects contemporains de la neutralité*, 121 RECEUIL DE COURS 263 (1967); Michael Bothe, *Neutrality at Sea*, in THE GULF WAR 1980–1988, at 205 *et seq.* (Ige F. Dekker & Harry H.G. Post eds., 1992).

83. Schindler, *supra* note 82, at 261 *et seq.*; Krzysztof Skubiszewski, *Use of Force by States. Collective Security: Law of War and Neutrality*, in MANUAL OF PUBLIC INTERNATIONAL LAW 840 *et seq.* (Max Sorensen ed., 1968); Philip C. Jessup, *Should International Law Recognize an Intermediate Status Between War and Peace?*, 48 AMERICAN JOURNAL OF INTERNATIONAL LAW 98 *et seq.* (1954); Quincy Wright, *Rights and Duties Under International Law*, 34 AMERICAN JOURNAL OF INTERNATIONAL LAW 238 *et seq.* (1940); Frederick R. Coudert, *Non-Belligerency in International Law*, 29 VIRGINIA LAW REVIEW 143 (1942); Andrea Gioia, *Neutrality and Non-Belligerency*, in INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT 51 *et seq.* (Harry H.G. Post ed., 1994); Ove Bring, *Comments*, in THE GULF WAR 1980–1988, *supra* note 82, at 244.

84. *Supra* note 83; see also OPPENHEIM’S, *supra* note 31, at 651.

85. Paragraph 7: “Notwithstanding any rule in this document or elsewhere on the law of neutrality, where the Security Council, acting in accordance with its powers under Chapter VII of the Charter of the United Nations, has identified one or more parties to an armed conflict as responsible for resorting to force in violation of international law, neutral States: (a) are bound not to lend assistance other than humanitarian assistance to that State; and (b) may lend assistance to any State which has been the victim of a breach of the peace or an act of aggression by that State.” Paragraph 8: “Where, in the course of an international armed conflict, the Security Council has taken preventive or enforcement action involving the application of economic measures under Chapter VII of the Charter, Member States of the United Nations may not rely upon the law of neutrality to justify conduct which would be incompatible with their obligations under the Charter or under decisions of the Security Council.”

86. See OETER, *supra* note 82, at 136.

87. For example, the British Government, during the Iran-Iraq War (1980–1988), stated that it would not deliver “lethal equipment” to Iraq, but added that it would nevertheless “attempt to fulfill existing contracts and obligations.” See 56 BRITISH YEARBOOK OF INTERNATIONAL LAW 534 (1985).

88. It suffices here to mention the Iran-Contras affair. See Alan T. Leonhard, *Introduction*, in NEUTRALITY – CHANGING CONCEPTS AND PRACTICES 4 (Alan T. Leonhard ed., 1988).

89. Bothe, *supra* note 82, at 207.

90. NWP 1-14M, *supra* note 2, chap. 7; GN Manual, *supra* note 2, chap. 3; UK Manual, *supra* note 2, para. 13.9 (note that para. 13.9 has been supplemented by para. 13.9 A to E).

91. *Supra* note 56.

92. *Supra* note 23.

93. See the references, *supra* note 81 *et seq.*

94. *Id.*

95. Hague Convention XIII, *supra* note 23, arts. 1, 2, and 5; UK Manual, *supra* note 2, para. 13.8 *et seq.*; NWP 1-14M, *supra* note 2, paras. 7.3.2, 7.3.4; GN Manual, *supra* note 2, para. 236, 243;

SAN REMO MANUAL, *supra* note 1, paras. 15–17; Helsinki Principles, *supra* note 56, paras. 1.4, 2.1.

96. Hague Convention XIII, *supra* note 23, art. 8; UK Manual, *supra* note 2, para. 13.9E; NWP 1-14M, *supra* note 2, paras. 7.3 and 7.3.4.1; GN Manual, *supra* note 2, para. 232; SAN REMO MANUAL, *supra* note 1, para. 22.

97. The term “unneutral service” refers to a conduct of neutral merchant vessels which is in support of the enemy belligerent, e.g. the carriage of contraband. See Dinstein, *supra* note 81, at 564 *et seq.* With regard to the prohibition of unneutral service, see Declaration Concerning the Laws of War arts. 45, 46, Feb. 26, 1909, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 23, at 1113; NWP 1-14M, *supra* note 2, para. 7.4; UK Manual, *supra* note 2, para. 13.84 *et seq.*; GN Manual, *supra* note 2, para. 258 *et seq.*; SAN REMO MANUAL, *supra* note 1, paras. 112 *et seq.*; Helsinki Principles, *supra* note 56, paras. 5.2.1 *et seq.*

98. See UK Manual, *supra* note 2, para. 13.4: “[T]he United Kingdom takes the view that the old rule which prohibited belligerent warships from remaining in neutral ports for more than 24 hours except in unusual circumstances, is no longer applicable in view of modern state practice.”

99. The 24-hour rule is expressly recognized in Hague Convention XIII, *supra* note 23, art. 12; NWP 1-14M, *supra* note 2, para. 7.3.2.1; GN Manual, *supra* note 2, para. 236 *et seq.*; SAN REMO MANUAL, *supra* note 1, para. 21; Helsinki Principles, *supra* note 56, para. 2.2. See also Dinstein, *supra* note 81, at 559 *et seq.*; Paul Parfond, *Le statut juridique des navires de guerre belligérants dans les ports neutres*, REVUE MARITIME 867 (1952).

100. Hague Convention XIII, *supra* note 23, art. 9; NWP 1-14M, *supra* note 2, paras. 7.3.2 and 7.3.4; UK Manual, *supra* note 2, para. 113.9B; GN Manual, *supra* note 2, para. 245. See also Tucker, *supra* note 42, at 240; OPPENHEIM’S, *supra* note 31, at 727 *et seq.*; CASTRÉN, *supra* note 42, at 519 *et seq.*

101. See the references *supra* note 96.

102. For an in-depth analysis of the *Graf Spee* incident, see DANIEL P. O’CONNELL, THE INFLUENCE OF LAW ON SEA POWER 27 *et seq.* (1975).

103. See SAN REMO MANUAL, *supra* note 1, paras. 3 *et seq.* See also NWP 1-14M, *supra* note 2, para. 5.1; GN Manual, *supra* note 2, para. 218.

104. For a detailed analysis of this principle, see HENRI MEYROWITZ, LE PRINCIPE DE L’ÉGALITÉ DES BELLIGÉRANTS DEVANT LA DROIT DE LA GUERRE (1970). See also YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 4 (2004).

105. SAN REMO MANUAL, *supra* note 1, paras. 6 *et seq.*

106. The same approach underlies NWP 1-14M, *supra* note 2, and the GN Manual, *supra* note 2.

107. UK Manual, *supra* note 2, para. 13.3.

108. *Supra* note 106.

109. Evidence can be found in the practice of States during the Iran-Iraq War. The attacks on neutral merchant vessels were condemned by the UN Security Council (SC Res. 552, June 1, 1984) and by the member States of the European Community. See Bulletin of the European Communities, Commission, No. 9, at 7 (1980); European Political Cooperation Documentation Bulletin, Vol. 3, No. 2, at 93 (1987) and Vol. 4, No. 1, at 173 *et seq.* (1988).

110. For a detailed analysis of that practice, see William J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW 91 (1986). See also Ronald P. Barston & Patricia Birnie, *The Falkland Islands/Islands Malvinas Conflict – A Question of Zones*, 7 MARINE POLICY 14 (1983); A. Vaughan Lowe, *Commentary*, in THE IRAN-IRAQ WAR (1980–1988) AND THE LAW OF NAVAL WARFARE 241 *et seq.* (Andrea de Guttry & Natalino Ronzitti eds., 1993).

111. “[T]he exclusion zone will apply not only to Argentine warships and naval auxiliaries but also to any other ship, whether naval or merchant vessel, which is operating in support of the illegal occupation of the Falkland Islands by Argentine forces. The zone will also apply to any

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aircraft, whether military or civil, which is operating in support of the Argentine occupation. Any ship and any aircraft, whether military or civil, which is found within the zone without authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by British forces.” *TIMES* (London), Apr. 29, 1982, *reprinted in* 53 *THE BRITISH YEARBOOK OF INTERNATIONAL LAW* 542 (1982).

112. However, Fenrick, *supra* note 110, at 112 *et seq.*, maintains that the British TEZ was legal in view of the fact that it was established in a remote sea area and that neutral ships were not attacked.

113. Statement by the Minister of State, Foreign and Commonwealth Office, Jan. 28, 1986, House of Commons Debates, Vol. 90, col. 426, *reprinted in* 57 *THE BRITISH YEARBOOK OF INTERNATIONAL LAW* 583 (1986).

114. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 80 *et seq.* (3d ed. 2001).

115. UK Manual, *supra* note 2, para. 13.84 *et seq.*

116. NWP 1-14M, *supra* note 2, para. 7.4; GN Manual, *supra* note 2, para. 258 *et seq.*; Helsinki Principles, *supra* note 56, paras. 5.2.1 *et seq.* See also Wolff Heintschel von Heinegg, *Visit, Search, Diversion and Capture in Naval Warfare: Part I, The Traditional Law*, 29 *CANADIAN YEARBOOK OF INTERNATIONAL LAW* 283 *et seq.* (1991); *Part II, Developments since 1945*, 30 *Canadian Yearbook of International Law* 89 *et seq.* (1992).

117. Paul Reuter, *ETUDE DE LA RÈGLE: 'TOUTE PRISE DOIT ÊTRE JUGÉE'* (1933).

118. See the references *supra* note 116. See also Dinstein, *supra* note 81, at 566.

119. *Supra* note 21.

120. As already mentioned, these conditions are similar to those laid down in the San Remo Manual on the destruction of “prizes.” Note that SPAIGHT, *supra* note 28, at 394 *et seq.* and 409 *et seq.*, doubts whether the 1923 Hague Rules would be operable.

121. See also Convention on International Civil Aviation, Annex 2, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

122. EXPLANATIONS, *supra* note 1, para. 128.1.

123. For a most recent description of the capabilities of such sensors, see JANE’S DEFENCE WEEKLY, Apr. 14, 2004, at 23 *et seq.*

124. INSTITUTE OF INTERNATIONAL LAW, *THE LAWS OF NAVAL WAR GOVERNING THE RELATIONS BETWEEN BELLIGERENTS* (1913), *reprinted in* *THE LAWS OF ARMED CONFLICT*, *supra* note 23, at 1123.