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 warfare5 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, and perhaps *jus cogens*-based norms. Council “decision” compliance is mandatory for UN Members, but other international organizations’ resolutions can restate or help crystallize rules of international law, 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, fundamental change of circumstances, desuetude, or material breach. Some LONW treaties have “escape clauses,” e.g., “do their utmost” and the like, and these treaties’ *force majeure* and distress clauses may or may not amount to a restated form of impossibility or fundamental change, but the possibility remains for these kinds of claims. Armed conflict does not vitiate treaties governing humanitarian law, e.g., the 1949 Geneva Conventions, 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, 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, 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. However, the law of armed conflict also requires application of necessity and proportionality; it has its own standards for these principles, now firmly embedded in custom. Necessity is, of course, not the same as military necessity or *kriegsraison*, a defense rejected by the Nuremberg trials. *NWPs 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, 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 I-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, 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.

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, 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 . . . .

"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.

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. 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. 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. 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. 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.¹⁶

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,²⁷ or more recently, drug interdiction agreements. In the latter cases permission to board may be obtained by telecommunications as the agreement provides.²⁸ Agreements also exist for suppressing terrorist acts against maritime navigation and offshore oil platforms.²⁹

In either case, traditional LOS approach and visit or interdiction operations, a warship retains its right of self-defense.³⁰ The LOAC applies through the LOS conventions’ other rules clauses, or applying treaty suspension or wartime termination principles, in war situations.³¹

I. 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.³² 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.³³ 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.³⁴ 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.³⁵ Fourth, warships conducting visit and search retain a right of self-defense.³⁶

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, but the previous formula takes into account Hague XIII's more general language in a context of modern LOS principles. 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, i.e., the deep seabed the LOS Convention reserves as humankind's common heritage. 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. 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. 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, 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, 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. 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.

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. 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. If a littoral State cannot close
a strait under the law of the sea for temporary security protection as it may for terri-
torial sea innocent passage, 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.

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.
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.
Although once a debatable issue, today the diversion option (¶ 5) instead of visit and search on the spot is accepted practice.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{107} If the vessel is found to carry contraband or warfighting/war-sustaining cargo, she may be declared a prize of war.\textsuperscript{108} The right to visit and search continues during an armistice, unless the armistice's or other ceasefire's terms provide otherwise.\textsuperscript{109}

A right of belligerent visit and search extends to other vessels beyond typical merchant ships, e.g., ships carrying cultural property,\textsuperscript{110} hospital ships,\textsuperscript{111} perhaps mail ships,\textsuperscript{112} and other vessels exempt from capture, etc., e.g., coastal trading and fishing vessels,\textsuperscript{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,\textsuperscript{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. 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.

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.

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.

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.

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, yet another example of the operation of the LOS conventions' other rules clauses. (Different rules apply if a belligerent transfers flags from its merchantmen to neutral flags, 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, but the LONW rule of prima facie attribution of neutrality covers the transfer to attribute prima facie neutral flag status to the reflagged vessel. (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.) 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.\(^\text{126}\)

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.\(^\text{127}\)

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.\(^\text{128}\) 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,\(^\text{129}\) 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.\(^\text{130}\) 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.\(^\text{131}\) These States’ warships and military aircraft also could conduct surveillance as a self-defense measure.\(^\text{132}\) 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.\textsuperscript{133} Whatever the result under Charter law analysis,\textsuperscript{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, \textit{e.g.,} Kuwait, where cargoes did not directly contribute to a belligerent's war effort, \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{137} (The UN ensign has been used on several prior occasions.)\textsuperscript{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.\textsuperscript{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,\textsuperscript{140} could request protection, preferably through a Security Council decision,\textsuperscript{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.\textsuperscript{142} If the merchantmen had flown a UN or ICRC flag under these circumstances, presumably the same principles would have applied for convoying, \textit{i.e.,} a warship with a different ensign\textsuperscript{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.\textsuperscript{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. Merchant ships painted grey to simulate warships, feigning convoys, or which snuggled close to convoyed, escorted or accompanied ships without request for protection, were not entitled to self-defense protection on those accounts, whatever might be said of these measures as ruses.

To the extent that belligerents used mines to deter, threaten or attack convoyed, escorted or accompanied merchantmen, 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, 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.

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, convoys 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 convoys 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, 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. Capture of a warship, naval auxiliary or military aircraft immediately vests title in a captor. Crews of captured, attacked or destroyed aircraft or military vessels become prisoners of war when captured. 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." Although enemy merchantmen sailing outside neutral territorial seas or inland waters may be subject to visit and search, they may be captured without visit and search if positive determination of enemy status may be made by other means. (Hague VI principles, regulating conduct toward belligerents' merchant ships in enemy ports at war's outbreak, are considered not to reflect customary law. 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. Today they too may be captured.) Enemy merchant ships and crew must be made prisoners of war. 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.

Enemy merchant ships may be attacked and destroyed without prior warning or an attempt to capture them if they are a legitimate military objective 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 \textit{NWP 9A}, published at the end of the Tanker War, with an addition from the \textit{San Remo Manual} and modifications suggested, for reasons stated below.\(^{165}\)

The \textit{NWP 9A} and \textit{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 \textit{NWP 9A} and the \textit{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, \textit{e.g.}, pistols or rifles for defense against pirates, but that armament of a kind to enable the ship to conduct warfare is forbidden.\(^{167}\) \textit{NWP 9A} and the \textit{Manual} sensibly drop the distinction between defensive and offensive weapons. \textit{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 \textit{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.\(^{169}\) \textit{NWP 9A} recites that an enemy merchant ship is subject to attack and destruction “If armed.”\(^{170}\) The \textit{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, \textit{e.g.}, against pirates, and purely deflective systems such as “chaff.”…”\(^{171}\) Both definitions must be read with their explanatory comments to determine, for \textit{NWP 9A}, the limitation on offensive armament; for the \textit{Manual}, what is meant by “damage to a warship,” \textit{i.e.}, it does not include using a bow to ram. Being armed, under the \textit{Manual} definition, may not mean the capability to damage another merchant vessel, however. The \textit{Manual} does not say.\(^{172}\) If \textit{NWP 9A} might seem too broad on its face, the \textit{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 \textit{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, \textit{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.\(^\text{175}\) 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,\(^\text{176}\) 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.\(^\text{177}\) 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[.]."\(^\text{178}\) 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\(^\text{179}\) but does not cover situations where merchantmen engage in belligerent acts. The 1856 Paris Declaration condemns privateering\(^\text{180}\) 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.\(^\text{181}\) Here the conventions’ other rules clauses\(^\text{182}\) 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\(^\text{183}\) 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 NWPs, 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.\textsuperscript{195} The Protocol does not mention air attacks,\textsuperscript{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.\textsuperscript{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,\textsuperscript{198} and since 1949 the Second Geneva Convention and Protocol I,\textsuperscript{199} restate a customary rule\textsuperscript{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, \textit{e.g.}, liners, had been a highly charged issue during the Great War,\textsuperscript{201} and it was an emotional and legal issue in World War II, particularly during the early years.\textsuperscript{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,\textsuperscript{203} losses of merchant mariners after attacks was considerable.\textsuperscript{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.\textsuperscript{205}

The Nuremberg trials of German Admirals Karl Doenitz and Erich Raeder did not resolve the issue. The admirals, \textit{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.\textsuperscript{206}

Post-World War II commentator opinion has also divided. Some say the London Protocol is of no effect today\textsuperscript{207} or not relevant in modern warfare,\textsuperscript{208} some say it has been cast in ambiguous light or is unrealistic,\textsuperscript{209} others say it remains in effect,\textsuperscript{210} and still others say it applies only to Categories (1) and (2), \textit{i.e.}, where a merchant ship persistently refuses to stop upon due summons or actively resists visit and search, the Protocol's exact language,\textsuperscript{211} or does not apply to attacks from the air.\textsuperscript{212}

Military manuals show similar ambiguity. For example, the 1900 US Naval War Code said that prizes could be destroyed under certain conditions, \textit{e.g.}, unseaworthiness,\textsuperscript{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 gravis military emergency which would not justify [the capturing warship] in releasing the vessel or sending it in for adjudication. 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 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.

NWIP 10-2, published and revised by the US Navy as a naval warfare publication between September 1955 and October 1974, and declared not to be "a legislative enactment binding upon courts and tribunals applying the rules of war," 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, represented the thinking of the US Navy when it was the largest naval power on Earth. The NWIP 10-2 text continues recitation of Protocol principles of safety of passengers, crew and papers as applicable to prize destruction. 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. The final version of NWIP 10-2 (1974) follows the 1955 edition.

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 came to a
different conclusion from Professor Tucker, a Stockton Professor of International Law at the College (and later a consultant there),\textsuperscript{224} author of \textit{The Law of War and Neutrality at Sea}, which precedes the 1955 version of \textit{NWIP 10-2} in the same book.\textsuperscript{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.\textsuperscript{226} This is negated by earlier language in the note\textsuperscript{227} and lack of amendments in six later manual supplements over nearly 20 years.\textsuperscript{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.\textsuperscript{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 \textit{NWIP 10-2} supplement was published.\textsuperscript{230} The reason for the difference is thus not clear.

The 1976 US Air Force manual quoted \textit{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."\textsuperscript{231} Ambiguities of the first round of post-World War II military manuals thus match the differences (and difficulties) among commentators. \textit{NWP 9A} and \textit{NWP I-14M} represent improvement. Besides adopting \textit{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:

\begin{quote}
. . . [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.
\end{quote}

The \textit{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.\textsuperscript{232} The \textit{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
The Tanker War

[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 *NWPs* 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 merchantman is subject to categories permitting destruction and exemptions, e.g., for hospital ships. In effect, the Manual sees the Protocol principles as indicia of proportionality for particular situations in naval war.

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.

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.

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.

4. Principles of necessity and proportionality apply to all attacks.

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. 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. 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, 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, 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. 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. 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. 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 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;  
2. Small craft used for coastal rescue operations and other medical transports;  
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;  
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;  
5. Ships transporting cultural property under special protection;  
6. Passenger vessels when engaged only in carrying civilian passengers;  
7. Ships on religious, scientific or philanthropic missions;  
8. Small coastal fishing vessels or small boats in local coastal trade;  
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*;  
10. Ships or vessels of any size (e.g., boats) or aircraft that have surrendered;  
11. Life rafts and lifeboats or  
12. Vessels a belligerent gives a unilateral safe-conduct or license, perhaps by proclamation.

There is no customary exemption for ships driven ashore by *force majeure*. Mail ships are not exempt; there seems to be no custom to exempt them, although the issue is not free of doubt. 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. Enemy merchant vessels in a 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.

By the opposite token, if a ship otherwise exempt from attack is used for war effort, or if it is otherwise used in activity that removes it from exempt status, that ship may be subject to capture or attack, depending on circumstances. 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.

Certain kinds of enemy civil aircraft are also exempt from attack:  
1. Medical aircraft;  
2. Aircraft granted safe conduct by belligerents or  
3. Civil airliners.
As with exempt enemy merchant vessels and exempt ships, enemy aircraft otherwise exempt can lose this status under certain conditions,\textsuperscript{281} they are subject to self-defense considerations\textsuperscript{282} and UN Security Council decisions.\textsuperscript{283} Rules of engagement or operation plans or orders can further limit capture or destruction of aircraft not otherwise exempt.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{287} The exception is if the convoy, escorted ship or accompanied ship is entitled to protected status, \textit{i.e.}, coastal fishing vessels engaged in their trade and not contributing to the enemy war effort.\textsuperscript{288} An enemy warship or military aircraft, unless exempted, \textit{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.\textsuperscript{289} Goods with a neutral destination coming from a belligerent's port cannot be contraband.\textsuperscript{290} This is not to say, however, that these goods may not be classified as aiding the enemy war effort, \textit{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, \textit{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\textsuperscript{291} during the Tanker War? Iran conducted visit and search operations on numerous merchant ships during the war,\textsuperscript{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, 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. 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 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, 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, 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) there was little to no opportunity for humanitarian law survivor assistance. Perhaps the belligerents notified other vessels of the survivors; 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. 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. 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. Iranian-flag merchantmen were subject to Iraqi attack while being convoyed; Iran could defend these ships under the LOAC, like any other Iraqi target. As will be seen, neutral flag merchantmen participating in these convoys were also subject to attack. 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. In either case, however, the humanitarian law or LOS rules for survivors, etc., applied.

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, the merchantmen steamed independently, or were convoyed, escorted or accompanied. Neutral warships and merchantmen they convoyed, escorted or accompanied had obligations to see to the missing, shipwrecked, sick, wounded or dead after each engagement. 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. Duties of ships involved in the engagement devolved from the LOAC as applied under the law of self-defense through the LOS conventions' "other rules" clauses, the customary law of the sea, and Article 103 of the Charter, other ships in the area but not involved in the engagement only had LOS obligations.

Similarly, neutrals could respond to what were perceived to be air, mine or surface ship attacks on their military aircraft or warships in self-defense, but in these cases neutrals also had obligations to see to the missing, shipwrecked, sick, wounded or dead after each engagement. 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 through the LOS conventions' other rules clauses, the customary law of the sea, and Article 103 of the Charter. Merchantmen in the area but not involved in the engagement were obligated to attempt rescue pursuant to the LOS.

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).\textsuperscript{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,\textsuperscript{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.\textsuperscript{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,\textsuperscript{323} apart from petroleum Iraq pumped through pipelines to Turkey, Syria, Kuwait and Saudi Arabia,\textsuperscript{324} Iran through pipelines to its southern Gulf ports,\textsuperscript{325} and perhaps through pipelines to the USSR.\textsuperscript{326} Iran conducted visit and search operations aboard neutral flag merchantmen, looking for cargoes destined to benefit the Iraqi war effort;\textsuperscript{327} both belligerents attacked and damaged or destroyed some of these ships, sometimes by surface ship or aircraft attacks, but also by mining.\textsuperscript{328} Iran published a contraband list late in the war.\textsuperscript{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,\textsuperscript{330} or visit and search pursuant to the law of armed conflict,\textsuperscript{331} but it is otherwise exempt from capture or attack and destruction, and doubly so if it is an exempt vessel or aircraft.\textsuperscript{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.\textsuperscript{333}
An opposing belligerent may treat ships or aircraft acquiring enemy character as if they are enemy vessels or aircraft.\textsuperscript{334} Neutral ships and civil aircraft are \textit{prima facie} neutral in character if flying a neutral flag or bearing neutral markings.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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, \textit{e.g.}, by communicating belligerent warship movements on the high seas.\textsuperscript{340}

A neutral platform may be liable to capture if it engages in more than one of these, \textit{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, \textit{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.\textsuperscript{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, which often varied according to circumstances of the war. Practice during the World Wars distorted differences between absolute and conditional contraband; nevertheless, in some recent conflicts belligerents have published contraband lists.

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. 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. Countries could also publish items for which they had waived status as contraband. World War I belligerents soon rejected this list as all-inclusive.

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.

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. Absolute contraband lists began to swell, and there were constant disputes over conditional contraband. The free goods lists shrank. 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. 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, 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.

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.

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).

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 transshipment, 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 transac-
tions were anything but arms-length and that title passed on neutral territory, e.g., in Kuwait.)

Neutrals protested Iran's legitimate right to visit and search neutral flag mer-
chant ships. 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. No Iranian attacks appear to have occurred on this basis.

Reflagging Kuwait-owned tankers to the US ensign, and others to other neu-
trals' 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.

The law of contraband had little impact on the Tanker War. First, since its prin-
ciples can only apply to cargo inbound to a belligerent, the law of contraband
was not involved with shipments of oil outbound by the belligerents themselves.
The contiguous voyage rule 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 belong-
ing 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 trans-
port, either directly or through a neutral intermediary, was an enemy of Iran.
This generalized statement was consonant with recent statements, either of situa-
tions where an opposing belligerent could attack a merchantman that had ac-
quired enemy character because it carried war-fighting or war-sustaining cargo
while under enemy direction or control, or of the definition of contraband it-
self. The Prize Law also appeared to recognize the foregoing principles, i.e.,
contraband rules applied only to inbound traffic, and the continuous voyage
rule. To be sure, perhaps from caution, the United States and other countries
declared their convoy, escort and accompanying operations did not involve con-
traband-carrying neutral merchantmen or goods contributing to belligerents' war
efforts, but there is no indication that these statements applied to more than in-
bound traffic, e.g., tankers in ballast headed for Kuwait. There is nothing in these
statements by neutrals to indicate there had been prior contraband proclama-
tions by Iran or Iraq. They were merely statements of conformity with international law,
which permits neutral warship convoy of neutral merchantmen not carrying con-
traband.

Moreover, if it is accepted that publication of contraband lists is a requirement of
international law, 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. Similarly, there were no UN Security Council decisions affecting these LONW issues. 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.

**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. 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. The Council authorized interdiction of petroleum bound for Rhodesia in 1965, but not a blockade, 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. It may be argued, however, that Article 42 indirectly supported the UN forces' North Korea blockade, pursuant to Council decisions to aid South Korea. Since Council decisions may supersede at least treaty law, the traditional law may not apply in blockade operations when Council decisions authorize or direct action.

2. **Blockade Under the Law of Naval Warfare**

   The traditional law of blockade, recited mostly in custom or commentators' views, may be stated fairly simply. Unlike issues related to contraband, which is concerned with traffic inbound to a belligerent, 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 re-instituted. 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,\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{435} In only that narrow context may the prohibition survive. The \textit{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.  

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. 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. Under the continuous voyage rule, 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. Necessity, i.e., distress, may excuse a merchantman's actions that would otherwise be breach of blockade.  

Besides being subject to UN Charter decisions, blockades are also subject to general LOAC necessity and proportionality rules.  

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. 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. 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.  

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. Any blockade Iraq declared would not have been effective; Iraq had no naval assets, e.g., on-station surface warships, to enforce it. Paper blockades have been invalid since the 1856 Paris Declaration. 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 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. Iraq may have also justifiably refused on grounds of temporarily suspending territorial sea innocent passage, if the LOS applied, 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), if such was the case. 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. To the extent that Iranian naval maneuvers occurred in Saudi territorial waters as a naval demonstration, 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. There is no record of a belligerent's mounting a quarantine operation.

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). 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. Assuming a proper blockade of Iraq's coast then existed, which is unlikely, 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.

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. 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. Neither belligerent declared a blockade, as the LONW requires. However, to the extent that mines belligerents laid hampered access to neutrals' ports and might somehow be considered related to blockade, Council Resolution 552 (1984) condemning lack of access 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. Iran also conducted visit and search operations throughout much of the Gulf. 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.

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. 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). The US and other navies conducted naval operations, including mine clearance; formation steaming and other air and surface evolutions; escorting, accompanying or convoying neutral flag merchantmen
that did not carry contraband; and defense of these ships and their naval forces. Saudi Arabia announced a safety corridor throughout its and other Gulf States' territorial seas.

This Part analyzes these issues in the LOAC context and the law of naval warfare in particular; Chapter III discussed self-defense issues, 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.

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. 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. 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. 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 regard499 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 discrimina-
tion 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 territo-
rial sea airspace and may totally exclude foreign aircraft. Transit or innocent pas-
sage through straits cannot be suspended, unless a treaty governing straits passage
says so.\textsuperscript{502} States cannot establish permanent security or military zones, purport-
ing to regulate activities of other countries' warships and military aircraft, seaward
from their coasts.\textsuperscript{503} However, States may conduct high seas military oper-
ations.\textsuperscript{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.\textsuperscript{505} These LOS rules are subject to the inherent
right of self-defense,\textsuperscript{506} which gives States authority to declare a high seas defense
zone (SDZ), also known as a "cordon sanitaire,"\textsuperscript{507} on a temporary basis during na-
val 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 re-
sponse, 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 suspen-
sion areas,\textsuperscript{508} blockade areas,\textsuperscript{509} war zones,\textsuperscript{510} some but not all areas from which a
belligerent would exclude shipping and aircraft while conducting naval opera-
tions during armed conflict,\textsuperscript{511} or permanent security zones tied to a country's
coastline and extending beyond the territorial sea, the latter of which violate inter-
national law.\textsuperscript{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)\textsuperscript{513} or blockade areas (start times must be published, and when a
blockade ends must also be published).\textsuperscript{514} However, on a time line an SDZ-cover-
ered 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 Is-
lands during the 1982 war.\textsuperscript{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. 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; 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.

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. A right to establish an SDZ is limited to areas beyond the territorial sea and straits passage for the declaring State. 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, and the rule that straits passage cannot be impeded, 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.

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.\textsuperscript{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.\textsuperscript{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 \textit{jus cogens} status?\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{533} Similarly, the country A convoy commander must communicate the nature of the convoy.\textsuperscript{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.\textsuperscript{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 \textit{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.\footnote{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, \textit{e.g.}, directions to ships and aircraft to stay outside the immediate area of naval operations during armed conflict,\footnote{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.\footnote{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, \textit{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, \textit{e.g.}, announcing movement of some forces but not discussing covert operations, \textit{e.g.}, those with submarines. Nor must an SDZ announcement publish a list, inclusive or otherwise, of options a force may employ.\footnote{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{552} These areas were not tied to a coast, like North Korea’s security zone,\textsuperscript{553} but were moving zones within which patrol vessels might operate. The concept of a “cordon sanitaire,” \textit{i.e.}, an area around a peacetime naval force analyzed in Parts F.1.b-F.1.c, also developed at this time.\textsuperscript{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.\textsuperscript{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.\textsuperscript{556} Two days after the TEZ proclamation, the UK submarine \textit{Conqueror} sank the Argentine cruiser \textit{General Belgrano} with heavy loss of life 30 miles outside the TEZ; \textit{Belgrano}, \textit{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.\textsuperscript{557} The UK also boarded and sank \textit{Narwal}, an oceangoing Argentine trawler with communications equipment and an Argentine communications officer aboard that had been shadowing the UK formation.\textsuperscript{558} Justified on the basis of the threat language in the TEZ proclamation,\textsuperscript{559} the \textit{Narwal} capture was also lawful under the LOAC.\textsuperscript{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. 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. 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 was also proper; it had precedent under the Nyon Agreement and other declarations, 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. 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. 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.

The Argentine war zone declaration covering the entire South Atlantic 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.\(^\text{577}\) Neutral ships and aircraft did not lose protections just because they passed through a war zone.\(^\text{578}\) 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.\(^\text{579}\) 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,\(^\text{580}\) 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.\(^\text{581}\) 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,\(^\text{582}\) 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.\(^\text{583}\)

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.\(^\text{584}\) The two concepts are mutually exclusive.\(^\text{585}\) 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.\(^\text{586}\) 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. 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. 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, 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.

A central purpose of these zones has been to avoid committing large forces to a task of cutting off enemies’ seaborne and air commerce, 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 regard601 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." 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. A neutral's complying with a belligerent's orders in the zone cannot be construed as an act harmful to an opposing belligerent. 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.

UN Security Council decisions can override these principles, to the extent a Council resolution is in point. These considerations apart, and despite some commentators' and countries' objections, 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.

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. Since this aspect of the territorial sea is also subject to the LOAC through LOS other rules provisions, 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.

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. 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.) An ADIZ cannot be a sovereignty claim over high seas airspace; freedom of navigation and overflight are high seas freedoms. An ADIZ does not stand in the way of high seas freedoms. An ADIZ is a reference area for initiating identification procedures for aircraft on a course that will penetrate an ADIZ State's national airspace. 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 SDZs624 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 re-patriated. 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.  

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. 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. 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, 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.

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. Although there appear to be no published SDZs as such for the war’s neutral convoy, escort or accompanying operations, permitted under international law, 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.

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. The convoys were subject to Iraqi attack. 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. 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. Nor could publishing an SDZ justify belligerents’ mine or other attacks on neutrals.

Iran and Iraq published war zones. 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, 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, any more than North Korea could establish its security zone, purporting to limit high seas freedoms.

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. 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. UN Security Council resolutions condemning indiscriminate Tanker War attacks on neutral shipping support this view.

Saudi Arabia established an ADIZ during the war. Establishing the zone was consistent with international law; it was noticed. 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. 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. 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. There is no evidence that these aircraft entered under distress conditions, 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. 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. 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.

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, no equivalent of a Red Cross Box was established during the conflict.
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, 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.

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 mine-layer Iran Ajr, and returned surviving crew to Iran. After hostilities ended neutral navies organized to sweep thousands of mines in the upper Gulf.

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, 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. 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. The Hague Air Rules have similar provisions for attacks from the air but omit requirements for a summons.

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. Besides historical and artistic monuments, medical facilities are off limits for attack unless used for military purposes.

The record of belligerents’ bombarding opponents’ shore facilities as incidents of the Tanker War is sparse. 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.\textsuperscript{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,\textsuperscript{683} and custom developed from it\textsuperscript{684} and elsewhere since introduction of sea mines, once known as torpedoes, over two centuries ago.\textsuperscript{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,\textsuperscript{686} belligerents laid only bottom-moored contact mines during the Tanker War, although some of these may have broken loose from their moorings.\textsuperscript{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.\textsuperscript{688} Belligerents may not lay mines in neutral waters, \textit{i.e.}, neutrals' territorial seas.\textsuperscript{689} Anchored mines, \textit{i.e.}, moored or tethered mines, must become harmless when they break their moorings or control over them is lost.\textsuperscript{690} Unanchored mines, \textit{i.e.}, those not fixed to or imbedded in the bottom, must become harmless after a mine layer loses control of them, \textit{e.g.}, after a vessel drops them over the side or an aircraft deploys them.\textsuperscript{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.\textsuperscript{692}

Minefield locations must be carefully recorded to ensure accurate notification (and therefore appropriate action by other States, \textit{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.\textsuperscript{693} Neutral States do not commit an unneutral act if they clear mines laid in violation of international law\textsuperscript{694} unless to do so would violate other international law principles.\textsuperscript{695}

Mines may be used to channel neutral shipping but not to deny straits or archipelagic sea lanes passage.\textsuperscript{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.\textsuperscript{697} States cannot mine areas of indefinite extent in international waters, \textit{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.\textsuperscript{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.\textsuperscript{717} Minefield locations were not published.\textsuperscript{718} Belligerents laid mines in neutral waters, a Charter violation and a violation of the LOAC.\textsuperscript{719} Mines, particularly those Iran laid, failed to become harmless after breaking moorings.\textsuperscript{720} Whether the belligerents recorded minefields carefully is unknown. What is clear is that an international post-war 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.\textsuperscript{721} Iran’s mines in the Strait of Hormuz also violated a principle of mine warfare, that international straits passage must not be impeded.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{728} Another self-defense claim related to the US destruction of \textit{Iran Ajr},\textsuperscript{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.\textsuperscript{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),\textsuperscript{731} their mine warfare programs take the prize for wholesale violations of international law. And although neither State is party to Hague VIII,\textsuperscript{732} the rules of that treaty are grounded in custom, whose norms both belligerents violated.

\textbf{Part H. Other Humanitarian Law Issues}

Chapter III and Parts A-G have discussed Tanker War humanitarian law issues in other contexts, \textit{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,\textsuperscript{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;\textsuperscript{734} blockade and exemptions from blockade because a vessel is carrying cargo for a humanitarian purpose;\textsuperscript{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;\textsuperscript{736} bombardment and mine warfare.\textsuperscript{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.

\textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{740}

Crew entitled to prisoner of war status were entitled to treatment as prisoners of war,\textsuperscript{741} including repatriation before the end of hostilities for those seriously ill or wounded.\textsuperscript{742} In any event these crews should have been repatriated “without delay after the cessation of hostilities.”\textsuperscript{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,\textsuperscript{744} the Detaining Power\textsuperscript{745} (Iran or Iraq) may have been guilty of a
grave breach of humanitarian law. The same can be said for the seriously ill or wounded who were not returned in accordance with the Third Convention.

Fourth Convention-covered crew also had considerable protections even if internees. Unless interned, these crews were entitled to leave unless their departure was contrary to Detaining Power interests. Internees should have been released from internment as soon as conditions for internment no longer existed, and then as protected persons they were entitled to rapid repatriation. 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. 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, 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. 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.

Undoubtedly there were survivors in the high seas after belligerents' numerous attacks on shipping by mines, aircraft or surface combatants. 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. 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. 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, 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. Alternatively, it could be argued that these rescues were incidental to the right of self-defense, 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, the LOAC could not have governed these rescues. 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, 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. 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 as-
sumed that the United States turned these persons over to Red Crescent represen-
tatives 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 ap-
ply of its own force, but only in the context of necessary and proportionate self-de-
fense.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 be-
fore the end of hostilities was not unlawful; there were no treaty rules to govern re-
patriation, 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 re-
sponse, 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 con-
text, it was not proper to repatriate the rescued crew prior to termination of
hostilities without opposing belligerent consent. However, since there was no pro-
test 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 misrepresenta-
tion, 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 ad-
versary's confidence that the actor is entitled to protection or must accord protec-
tion 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 en-
emy vessel into action. The warship must fly its national ensign immediately be-
fore 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; decaying 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. 

And as in the case of prohibitions on warships and naval auxiliaries, the list is not exhaustive; e.g., aircraft cannot display any false markings.

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.

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. Any such agreement is subject to Security Council decisions, which could supersede it. 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, 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, 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. 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.

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. 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. 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. 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. 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. As in the case of the UN or ICRC flag proposals for merchantmen, 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. Some merchant ships appeared in the Gulf painted grey, like warships. 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. It could be defended like any other merchantmen by neutral warships. 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, 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, 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, or perhaps neutrals' self-defense responses if the neutral warship thought the grey-painted vessel was a warship approaching with hostile intent, however.

Part J. General Conclusions and Appraisal; Projections for the Future

Cessation of hostilities in 1988 did not end the war. 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. 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. Tardy prisoner of war exchanges a decade after the cease-fire may indicate that matters are not settled yet. There is litigation in the International Court of Justice over the US platforms attack, for example; private claims may be in lawsuits or the espousal process 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.

1. Basic Principles: Necessity and Proportionality; ROE; the Spatial Dimension

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. 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. 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 efforts that were escorted by neutral flag warships. Neutral flag warships could legitimately respond in self-defense.

3. Belligerents’ Seaborne Commerce; Belligerents’ Convoys830

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. 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

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 direction 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

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. 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

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 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

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, 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.

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 IranAJr crewmen to
another Red Crescent Society, the United States acted in accordance with humani-
tarian 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 re-
 mains 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 opera-
tions concepts.

Neutral warships and military aircraft probably began to adopt protective mea-
sures 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 ac-
quision radars. Neutral shipping tagged along with neutral convoys; some ships
were painted grey like warships, probably to simulate them and thereby deter bel-
ligerent 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, be-
gan 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, 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. 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. 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. 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. 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. 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 De Saussure, 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, xviii. 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 bombing 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 § 503(b); NWIP 1-14M Annotated ¶ 8.2.2.1; NWIP 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 Guiry, 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. Possibility 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. NWIP 9A Annotated ¶ 5.2 nn.5; NWIP 1-14M Annotated ¶ 5.2 nn.5; 2 Oppenheim ¶ 69; Stone 351-53.

24. NWP 9A Annotated ¶ 5.2, citing inter alia Protocol I, arts. 51(5)(b), 57(2)(a)(ii); McDougall & Felciano 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 NWIP 1-14M Annotated ¶ 5.2, employing identical language; Hague IV, Regulation 23(b); Protocol I, art. 37(1); AFP 110-31 ¶ 5-3c; Bothel 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(4) & 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 fait 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.488, 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 STS-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. H. Hughes, MILITARY CONCEPTS AND PHILOSOPHY 113 (1965); see also WAYNE HUGHES, FLEET TACTICS 140-45, 290-97 (1986).


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. See nn. II.488-90 and accompanying text.


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. ¶ 6 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(a).

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.


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 A-5-1, 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. TIP 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); Helsinki 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.


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, ¶¶ 3.11.1.5, 4.3.2.2.2, 5.5; NWP 9A Annotated ¶¶ 3.1, 3.3.6.3, 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 ENGAGEMENT, 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

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 nn. 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.


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)(d), 19(2)(d); 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, 7.3.4.2, 7.3.7; 2 OFFENHEIM ¶ 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.


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 ILGM 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 Preserving 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.


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, 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.


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.


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.; NWP 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 performed 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 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 similar zones, which implicate wider high seas areas than the immediate area of naval operations for visit and search.

5.2.6; NWP 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 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 areas 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. III.308-09, 337, 349 and accompanying text.

101. 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; McDougall & Feliciano 509-13; W.N. Medlicott, The Economic Blockade 70-85 (1952); NWP 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.

102. See generally NWP 1-14M Annotated ¶ 7.6, 7.8; NWP 9A Annotated ¶ 7.6, 7.8; 2 Oppenheim §§ 412a-21b; 1 von Heinegg 301-04.

103. San Remo Manual ¶ 121 & cmts. 121.1. The merchantman may consent to diversion. Id. ¶ 119 & cmts. 119.1-119.2, citing inter alia Colombo §§ 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.

106. See generally NWP 1-14M Annotated ¶ 7.6.1, 8.2.2.8.2.3, 8.3.1, 8.4; NWP 9A Annotated ¶ 7.6.1, 8.2.2.8.2.3, 8.3.1, 8.4; San Remo Manual ¶ 47, 136-37, 139-40, 146, 151.

107. See Parts C.4 and D.3.


109. Cultural Property Convention, art. 14(2), to which the United States is not a party; see also Colombo §§ 662-63; Tomato 151-72; San Remo Manual ¶ 47(d), 136(d), 137, & cmts. 47.30, 136.1, 137.1; Stone 586; Dowdall-Beck, Vessels, n. II.468, 253; 1 von Heinegg 312; Lyndel V. Prott, Commentary, in Law of Naval Warfare 582, 595; n. V.262 and accompanying text.

110. Second Convention, arts. 22, 24-25, 29-33, 47; Protocol I, art. 22; Both & al. 142-45; Colombo §§ 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 154-63, 164-69, 177-89, 252-56; Pilloed, Commentary 254-60; San Remo Manual ¶ 13(e), 47(a), 48(b), 136(a) & cmts. 13.16, 17.1-17.8, 18.10, 136.1; Stone 587; Tucker 97, 117-34; Dowdall-Beck, Vessels, n. II.468, 214-29; P. Eberlein, Identification of Hospital Ships and Ships Protected by the Geneva Conventions of 12 August 1949, 1982 INT'L REV.
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 [s]e [p]rovisions ... do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port ... [I]nvio lability 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 O'Connell, Law of the Sea 1122-24 (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 in 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 Mail, 1 Minn. L. Rev. 293 (1917); A.P. Higgins, Treatment of Mail in Time of War, 9 BYBIL 31 (1928); Shearer, 183-85; Verri, Commentary, in Law of the Sea 111-35. 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 §§ 655-59; 1 Lewis, Code 186; Mallison 15-16, 126-28; NWIP 1-14M Annotated ¶ 8.2.3, 8.3.2, 8.4.1; NWIP 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 ¶ 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 Gunnawalt 225, 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; NWIP 1-14M Annotated ¶ 7.6; NWIP 9A Annotated ¶ 7.6; 2 Oppenheim § 416; Oxford Naval Manual, art. 32; Stone 591-92; 11 Whitteman 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; NWIP 1-14M Annotated ¶ 7.6; NWIP 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, Antici patory, 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; 176, nn. IV.811-19, 826 and accompanying text. UK practice was once to the contrary. 2 Oppenheim § 456. 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. NWIP 1-14M Annotated ¶¶ 7.4, 7.5; NWIP 9A Annotated ¶¶ 7.4, 7.5 (LNW 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; NWIP 1-14M Annotated ¶ 7.5; NWIP 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); NWIP 1-14M Annotated ¶¶ 7.4-7.4.1.1; NWIP 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.


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.


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 n. 120-25 and accompanying text.

140. Reparations for Injuries Suffered in Service of the United Nations, 1949 ICJ 174; BROWNLEE, 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 accompanying text.
146. See nn. II.365, 412 and accompanying text.
147. See Part I.
148. See, e.g., n. II.420 and accompanying text.
149. See n. 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; NWIP 1-14M Annotated ¶ 8.2.1; NWIP 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 NWIP 1-14M Annotated ¶ 8.1.1; NWIP 9A Annotated ¶ 8.1.1; SAN REMO MANUAL ¶ 39; see also AIP 110-32 ¶ 6-3c; BOTHERS 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; NWIP 1-14M Annotated ¶ 8.2.1; NWIP 9A Annotated ¶ 8.2.1, reflecting Oakes vs. United States, 74 US (32 How.) 778 (1863); but see COLOMBOS § 930 and A. Pearce Higgins, Ships of War as Prize, 6 BYBIL 101 (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; BOTHERS et al., 171-75; COLOMBOS § 510; NWIP 10-2 ¶ 511b; NWIP 1-14M Annotated ¶ 8.2.1; NWIP 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; NWIP 1-14M Annotated ¶ 8.2.2.1; NWIP 9A Annotated ¶ 8.2.2.1; SAN REMO MANUAL ¶ 135; TUCKER 103-04.


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. NWIP 1-14M Annotated ¶ 8.2.2.1 & NWIP 9A Annotated ¶ 8.2.2.1 ("may be made prisoners of war").

162. COLOMBOS §§ 909-10; NWIP 10-2 ¶ 502b(2); NWIP 1-14M Annotated ¶ 8.2.2.1; NWIP 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); NWIP 1-14M Annotated ¶ 8.2.2.2; NWIP 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 NWIP 9A Annotated ¶ 8.2.2.2 and NWIP 1-14M Annotated ¶ 8.2.2.2 (identical with NWIP 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); NWIP 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. NWIP 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; Levee, 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 NWIP 9A Annotated ¶ 8.2.2.2 n.49; NWIP 1-14M Annotated ¶ 8.2.2.2 n.54 with San Remo Manual, cmt. 60.14; NWIP 10-2 ¶ 503b(3) used the formula, "offensive . . . use . . . against an enemy."

169. NWIP 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 NWIP 1-14M Annotated ¶ 8.2.2.2.

171. San Remo Manual ¶ 60(f).

172. Compare NWIP 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.


174. In this regard NWP 9A Annotated ¶ 8.2.2.2; NWIP 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 decay dispensers, and chaff, would be allowed. Cf. NWIP 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 NWIP 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 NWIP 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 & Leitza, 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, cmnt. 60.10; n. 45 and accompanying text.


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:

... Among 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; Ngwagugu, 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 Bierzanezk, 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; NWIP 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), 37 (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 in quoque defense); L.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.


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, 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. NWIP 1-14M Annotated, Preface, at 1, and NWIP 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 NWIP 1-14M Annotated or NWIP 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 faculty, 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.


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.


231. **AFP** 110-31 ¶ 4-4c.

232. Compare NWIP 1-14M Annotated ¶ 8.2.2.2; NWIP 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 NWIP 1-14M Annotated ¶¶ 8.3, 8.3.1; NWIP 9A Annotated ¶¶ 8.3, 8.3.1, with NWIP 1-14M Annotated ¶ 8.2.2.2; NWIP 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 NWIP 1-14M Annotated ¶ 8.4 with id. ¶ 8.2.2.2, 8.3, 8.3.1; NWIP 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).


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., NWIP 9A Annotated ¶ 8.2.2.2, at 8-11 - 8.12; NWIP 1-14M Annotated, ¶ 8.2.2.2, at 8-11 - 8.12 with NWIP 9A Annotated ¶ 8.4; NWIP 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.


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.


248. London Protocol, Rule 2; Second Convention, arts. 12-21; Protocol I, art. 33; see also nn. IV.816, V.195 and accompanying text.


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. C.f. 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; Pîlloûd, 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 Heineg 313.

260. See generally Third Convention, art. 118 (requiring returning prisoners of war at end of hostilities); Colombos § 660-61; Mallisson 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)(ii) & cmts. 47.18-47.23, 136.1; Stone 586; Tucker 97-98; Doswald-Beck, Vessels, n. II.468, 239-41; 1 von Heineg 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. 483-73; 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 Heineg 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; Mallisson 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(g) & 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 Picter 94-92, 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. NWP 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. NWP 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), 24-34; 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 Picter 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(b) & cmt. 53.2; 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 & cmt. 54.1-57.5.

282. UN Charter, arts. 51, 103; see also 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; see also nn. 260 and accompanying text; see also Hague Air Rules, arts. 33-34; 2 Oppenheim § 214f.

283. UN Charter, arts. 25, 48, 103; see also n. IV.57 and accompanying text.

284. 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. Colombo § 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.


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.


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 n. II.155-55 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.


328. See, e.g., nn. II.179 (mines), 233 (mines), 250 (mines), 260, 354 (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.I.

332. See Parts C.1-C.4.

333. NWIP 10-2 ¶ 501; NWIP 1-14M Annotated ¶ 7.5; NWIP 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 LOC 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. NWIP 1-14M Annotated ¶ 7.5; NWIP 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; NWIP 1-14M Annotated ¶ 7.5.1; NWIP 9A Annotated ¶ 7.5.1; SAN REMO MANUAL ¶ 67-68; TUCKER 319-21; see also nn. 156-256 and accompanying text.

337. NWIP 1-14M Annotated ¶ 7.5.2; NWIP 9A Annotated ¶ 7.5.2.

338. See Parts C.1-C.4

339. NWIP 1-14M Annotated ¶ 7.10; NWIP 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. NWIP 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; NWIP 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; NWIP 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 II (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 II 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 ¶ 55, 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; NWIP 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; NWIP 1-14M Annotated ¶ 7.4.1; NWIP 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; NWIP 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; NWIP 9A Annotated ¶ 7.4.1.

361. NWIP 10-2 ¶ 631b; NWP 1-14M Annotated ¶ 7.4.1; NWIP 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.
7.4.1; 2 O’Connell, Law

Medlicott, n. 192, 94-101; O’Connell, AS-I, n. III.628. United States, are not

SAN contraband lists must be published; otherwise goods not on lists may not be captured, and this would include free
goods.

MANUAL 11108; 4

requirement came close to being, if it was not already, a customary norm.

and what was not contraband throughout a war. If other

continue to require publication of contraband lists, recent practice indicates that the requirement may be satisfied by a

listing of exempt
goods. “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.”)

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 (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 Botte 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; Pildan, Commentary 816-29; Tucker 263. The United States is not a Protocol I party but recognizes art. 70 principles as custom. Matheson, Remarks 426.

379. Helsinki Principle 3.3 & cmt.; NWP 1-14M Annotated ¶ 7.9; SAN REMO MANUAL ¶ 106(c); 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.
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 Colombo §§ 766-70; Helsinki Principle 5.2.4, cmt.; NWIP 10-2 ¶ 631c (partially accepting London Declaration rules); NWIP 1-14M Annotated ¶ 7.4.1.1 n.99; NWIP 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. Colombo §§ 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.


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 NWIP 1-14M Annotated ¶ 7.4.1 n.96. See also nn. II.422-23 and accompanying text.

405. NWIP 1-14M Annotated ¶ 7.5.1, 8.2.2.2; NWIP 9A Annotated ¶ 7.5.1, 8.2.2.2; compare San Remo Manual ¶ 60(g); see also Paris 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; Summa 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, 52f; nn. 416-21.


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, 52f (same); NWP 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 VIII, arts. 1, 5; Colombos § 489; also 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 civilian 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 PRCs 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; NWP 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 ¶ 7.7.1.1; 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, 333; 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; NWP 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. 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); NWP 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. III.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); 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, NAVAL 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; NWIP 1-14M Annotated ¶ 7.7.2.3; NWIP 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; OFFICE NAVAL MANUAL, art. 92; see also Leve, 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 Leve, 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; NWIP 1-14M Annotated ¶ 7.7.2.3; NWIP 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.; NWIP 1-14M Annotated ¶ 7.7.5; 2 O'CONNELL Annotated ¶ 7.7.5; compare 2 OPPENHEIM 380. 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 (27-28); NWIP 1-14M Annotated ¶ 7.7.5; 2 OPPENHEIM, 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. 429, 293; 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; Swayze, n. III.322, 137-38; LOWE, THE COMMANDER'S HANDBOOK, n. III.318, 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.

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 non-suspendable straits passage.

434. 2 O'CONNELL, LAW OF THE SEA 1156.


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; NWIP 1-14M Annotated ¶¶ 7.4.1.2, 7.7.2.4, 7.7.3; NWIP 9A Annotated ¶¶ 7.4.1.2, 7.7.2.4, 7.7.3; 2 O'CONNELL, LAW OF THE SEA 1151; 2 OPPENHEIM ¶¶ 379; 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; 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; NWIP 1-14M Annotated ¶ 7.4.1.2; NWIP 9A Annotated ¶ 7.4.1.2; SAN
RESO MANUAI § 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 PICTER 212-15; 3 id. 351-74, 664-68; 4 id. 178-84, 219-23, 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 І, arts. 2(с), 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 PICTER 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. Levine, 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. HOOPERS 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; NWIP 1-14M Annotated ¶ 7.7.2.5; NWIP 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); NWIP 1-14M 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(0), 159(0); TUCKER 292-93. 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; NWIP 1-14M Annotated ¶ 7.7.4; NWIP 9A Annotated ¶ 7.7.4; 2 OPPENHEIM §§ 383-84; TUCKER 292-93.

443. See nn. 388-389 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; NWIP 1-14M Annotated ¶ 7.7.4; NWIP 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 NWIP 1-14M Annotated ¶ 7.7.4 n. 140; NWIP 9A Annotated ¶ 7.7.4 n.138, as obsolete in light of State practice; Kalshoven, Commentary, n. 115-116, 261-274, 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); Navel 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. L27-33 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. 11.365 and accompanying text.

461. UN Charter, arts. 2(4), 103; LOS Convention, art. 19; Territorial Sea Convention, art. 14(4); Hague XII, 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. 11.153-56 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. II.179, 233, 250, 334, 354, 357, 359, 368, 420 and accompanying text; see also Part G.2 for mine warfare analysis.


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.


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.1.c. 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.


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, 969-84, 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.; NWP 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. Ranzotti, 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); 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); 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); 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.950, IV.28 and accompanying text (desuetude).

496. See nn. 486-87 and accompanying text.

497. Hague Radio Rules, art. 6; NWP 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.


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, n. 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. 30; Territorial Sea Convention, art. 23 (treaty 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. Mackesney 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 Orpenhima § 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; Kalhoven, 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 Halfers, n. 115, 49.


550. 2 von Heinegg 98; Walker, State Practice 144; see also Goldie, Maritime War Zones, n. II.519, 190.


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.


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;


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.
To this extent a war zone differs from blockade. A blockading force may bar entry or exit of all ships and aircraft; also Jacobson, n.166, 234 suggests a treaty to establish negotiated rules balancing needs of protecting belligerent forces in Principle 6.2 & cmts.; NWP 5.2.9 & cmts.; NWP 5.2.10 & cmts.

Annotated 'II 7.9. Annotated 'II 7.9.

Fenrick, The Exclusion Zone, n. II.109, 124-25; accord, Vaughan Lowe, The Impact of the Laws 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.

Helsinki Principle 3.3 & cmts.; 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.

Tucker 301.

Helsinki Principle 3.3 & cmts.; 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.

NWP 1-14M Annotated ¶ 7.9.

See Part E.2.

See nn. 555-56 and accompanying text.

LOS Convention, art. 57; see also nn. IV.147-57 and accompanying text.

Gf. Helsinki Principle 3.3 & cmts.; 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.

See nn. IV.309, 357-58 and accompanying text.

See n. IV.75 and accompanying text. For LOAC due regard analysis, see nn. 58, 62 and accompanying text.

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.

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.

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 & cmts.; 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 & cmts.; 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. COLOMBO § 561; Helsinki Principles 3.3, 5.2.9 & cmts.; NWP I-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, 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 Opfennweg § 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. Levine, 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 n. 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 Opfennweg § 220; AFP 110-31 ¶¶ 2-2a, 2-6d; NWP 1-14M Annotated ¶¶ 2.5.1, 4.4; NWP 9A Annotated ¶¶ 2.5.1, 4.4; Parts IV.3B.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 ¶¶ 2-2a, 2-6d; 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(4), 26-27, 29, 31; Botha et al. 95-96, 101, 153-56, 159-61, 165-67; 1 PICTET 285-96; 2 PICTET 215-25; 4 PICTET 173-77; Pillard, 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; NWP 10-2 ¶ 422b; NWP 1-14M Annotated ¶ 12.5.2.3; NWP 9A Annotated ¶ 12.5.2.3;
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. 12(2), 3-9 (same); AFP 110-31 ¶ 2-1g; BOTHE et al. ¶ 59-96, 101, 150-67, 578-90; NWP 1-14M Annotated ¶s 4.4, 8.2.1; 8.2.3, 8-13, 8-15, 8-16, 8-18, 8.4.1; NWP 9A Annotated ¶s 4.4, 8.2.1; 8.2.3, 8.2.5, 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 ¶s 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 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 nn. 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 ¶s 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. ¶s 456-66; NWP 1-14M Annotated ¶s 7.10.2, 8.2.2.1; NWP 9A Annotated ¶s 7.9.2, 8.2.2.1; 3 PICTET 45-73; 4 id. 257-59; PILLOUD, COMMENTARY 863-90; SAN REMO MANUAL ¶s 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 ¶s 12-2B, 14-3; NWP 1-14M Annotated ¶ 8.5.1.5; NWP 9A Annotated ¶ 8.5.1.5; 2 OPPENHEIM ¶ 1245b; 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. Levine, Civilian Sanctuaries: An Impractical Proposal, 11 ISRAEL Y.B.
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-STOYANOFF JUNOP, 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 in 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 I.b.-F.I.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, 537-50 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.


657. *See* n. 600 and accompanying text.


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.


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. Melis, n. II.6, 116-27, describes mine countermeasures operations from a U.S. 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 bombing of 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 protecting cultural property; *Toman*; nn. V.110, 262, VI.272-77, 300-52 and accompanying text.


679. *Colombos* §§ 580-87 (inferring customary acceptance despite breaches of Hague IX rules); NWP 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.
The Tanker War

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); AFF 110-31 (general discussion, Hague Air Rules, arts. 22, 24-26 do not represent custom as total code); Böhme 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(c) (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; TIP 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; Böhme 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. Böhme 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. COlomous §§ 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 water column above these waters, 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; 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, NWP 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) §§ 102-08; n. III.10 and accompanying text; cf. NWP 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, MINES WARFARE, n. 424, 57-133; MELIA, n. 11.6.5, 41-66, 114, 136; NWP 1-14M Annotated ¶ 9.2.3, 9-23; NWP 9A Annotated ¶ 9.2.3, 9-23.1; 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, MINES 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, MINES WARFARE, n. 426, 173 & n. 146, quoting Charles C. Petersen, Soviet Military Objectives in the Arctic Theater, NWMC 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, 147-49; NWP 10-2 ¶ 611 (limited to automatic submarine contact mines, but see id. n. 3); LEVIE, MINES 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 through analogy for defensive mining. See nn. 705-06 and accompanying text.

689. Hague VIII, arts. 1-2; LEVIE, MINES 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, MINES WARFARE, n. 424, 101-02 (control by acoustic, electrical signal); NWP 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, MINES WARFARE, n. 424, 27-31; NWP 10-2 ¶ 611 (limited to automatic 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.1-2.

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, MINES WARFARE, n. 424; NWP 1-14M Annotated; NWP 9A Annotated; SAN REMO MANUAL make no distinction among mining platforms.

693. Hague VIII, art. 5; see also BOTHET et al. 172-75; LEVIE, MINES 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; PILLAUD, COMMENTARY 350-63; SAN REMO MANUAL ¶¶ 84, 90-91 & cmts. (citing inter alia Third Convention, art. 118; Protocol I, art. 39); 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, MINES 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, MINES 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); cf. SAN REMO MANUAL ¶ 87; Tucker 303; Fujita, n. IV.624, 70; cf. OXFORD NAVAL MANUAL, art. 22; see also LEVIE 144-47, 153-55 (Haiphong harbor mine blockade); Swayne, 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; OPPENHEIM ¶ 182a (commenting on contrary German World War I practice, Allied reprisals); cf. SAN REMO MANUAL ¶ 80 & cmt. 80.1; Tucker 303; but see LEVIE, MINES WARFARE, n. 426, 34-42; LEVIE, MINES 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 sovereignty); 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, MINES 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, MINES 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, 855; A.G.Y. Thorpe, Mine Warfare at Sea—Some Legal Aspects of the Future, 18 ODIL 255, 267 (1987); but see LEVIE, MINES 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.


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 supersedes 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; Le vie, *The Nature*, n. 109, 903-06; nn. 109, 688 and accompanying text. Le vie, *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* L e v i e, *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* Le vie, *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* n. 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.


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.
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), at 167; STONE 704-05.

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.

Third Convention, arts. 109-10; see also 3 PICTET 508-20; STONE 660-62; n. 746 and accompanying text.

Third Convention, art. 118; see also 3 PICTET 541-53; STONE 662-65.

See nn. II.489-90 and accompanying text.

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.

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.

Se en nn. 739, 741 and accompanying text.

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.

Fourth Convention, arts. 35-36; see also 4 PICTET 234-42; GREEN 196-201; STONE 688-90; n. 745 and accompanying text.

Fourth Convention, art. 132; see also NWP 1-14M Annotated ¶ 11.8; NWP 9A Annotated ¶ 11.8; 4 PICTET 510-14.

See nn. 742-47 and accompanying text.

Fourth Convention, arts. 133-34; 4 PICTET 514-17.

Protocol I, art. 85(4)(b); see also nn. 745-46, 749 and accompanying text.

See nn. II.358, 368-72 and accompanying text.

See nn. II.431-33 and accompanying text; see also Levine, The Status, 31 VJIL, n. II.410, 611-12.

See nn. II.179 (mines), 233 (mines) 250 (mines), 260, 354 (mines), 356 (mines), 357 (mines), 359 (mines), 362, 368 (mines), 373, 393-94, 412, 420 (mines), 421, 446, 469, 519 and accompanying text.

See n. 755 and accompanying text.

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.

See nn. 755, 757 and accompanying text.

LOS Convention, art. 98; High Seas Convention, art. 12; see also n. IV.816, V.758 and accompanying text.

UN Charter, arts. 51, 103; see also nn. III.10, 117-30, 916-18, 968-84, IV.6-25 and accompanying text.

Second Convention, art. 12; Protocol I, art. 33; see also nn. IV.816, V.198-200, 758 and accompanying text.

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 n. III.952-67, IV.10-25 and accompanying text.

See n. III.10 and accompanying text.
765. Hague V, art. 12; 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 PICET 107-12, 2 HAGUE 673; SCHINDLER, COMMENTARY, n. 52, 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; AIP 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 § 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. AIP 110-31 8-4-8-5; Hague Air Rules, arts. 3, 7; NWP 1-14M Annotated 12.3.1-12.3.2, 2.5.1-12.5.2; NWP 9A Annotated 12.3.1-12.3.2, 2.5.1-12.5.2; 2 OPPENHEIM § 211; SAN REMO MANUAL nn. 109-11.

772. Hague IV, Regulations, art. 24; Hague VII, art. 2; Protocol I, art. 37(2); AIP 110-31 8-4-8-4b; BORTHET 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); PILLOU, COMMENTARY 430-32, 439-44; SAN REMO MANUAL 110, cmt. 110.1; Hall, False Colors, n. 771, 57-59; see also Part IV.CA; 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. AIP 110-31 8-5.

774. Hall, False Colors, n. 771, 56-57; see AIP 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(3), 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 BORTHET et al., 202-03, 206-07; NWP 1-14M 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); PILLOU, 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. Of 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; Böthe 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, 280-92; 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; Tomac 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 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.


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.


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.