Chapter IV

State Practice Following
World War II, 1945-1990

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The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
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I. Introduction

At least ten armed conflicts at sea since World War II have involved targeting issues concerning enemy merchant shipping and neutral vessels that have acquired enemy character: the Korean conflict of 1950-53 and naval actions connected with the civil war in China, 1949-58; the Arab-Israeli conflicts of 1948-57, 1967, 1973 and 1982; the India-Pakistan wars of 1965 and 1971; the Vietnam War, with principal U.S. forces involvement between 1962 and 1973; the Falklands/Malvinas War of 1982; and, most importantly, the Iran-Iraq Tanker War of 1980-88. There was no global war similar to the experiences of World Wars I and II; in all cases the arenas of attack were relatively localized. However, to some participants the conflict was total, e.g., the Tanker War as to the belligerents, Iran and Iraq; to neutral bystanders, involved to a greater or lesser degree (e.g. the United States in the Tanker War), the conflict was only a regional, second or third level affair.

Although these conflicts overlapped each other in point of beginning and duration, they may be analyzed conveniently in the sequence listed above. This chapter will also attempt to interweave other major sources of state practice - e.g., treaties, in some cases like UNCLOS, not yet in force - that may have impact on this area, albeit tangentially, in the future. It might be noted that other sources of state practice or custom, the theme of this chapter, may be found in

[Diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g., manuals of military law, executive decisions and practices, orders to naval forces, etc., comments by governments on drafts produced by the International Law Commission; state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, and resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and such depends on the circumstances.]

Most modern military manuals, e.g., NWP 9A, contain a “disclaimer clause,” which says that although the publications cannot be considered as binding on courts, “their contents may possess evidentiary value in matters relating to U.S. custom and practice.” And besides customary and treaty sources, there may be general principles of law, authoritative treaties, other research of competent scholars, court decisions, or perhaps resolutions of international organizations,
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that may impact the law-defining process. Some of these sources, e.g., actions of international organizations, may appear for the first time in the time frame of this analysis, 1945-90, while others have been sources, perhaps subsidiary to custom, treaties and general principles, for a long time.

The general format of this chapter is analysis, on a general time line when the conflict occurred, grouping adversaries where successive conflicts have occurred, e.g., Korea, 1950-53, and naval activity connected with the Chinese civil war, followed by the 1948-1957, 1967, 1973, and 1982 Arab-Israeli conflicts, etc. Within each conflict, or set of conflicts, state practice will be analyzed first. This will be followed by other primary sources developed during the time frame, e.g., treaties binding on the parties, and then by other developments in international law - e.g., treaties that would apply to future wars at sea, treaties not related to armed conflict but whose principles may be arguably applicable in the future, and the research results of major commentators. While this has made for a longer chapter, it is hoped (and submitted) that the comprehensive approach may be more useful than examination of state practice in isolation from other sources.

This chapter is limited to its topic. Full analysis of issues involving the results of attacks on truly neutral merchant shipping, which are strictly prohibited; attacks on enemy warships or naval auxiliaries, which are permitted; attacks on warships of neutrals, which are prohibited; and attacks on certain protected vessels, e.g., hospital ships, which are prohibited; are not always given full analysis. For example, specific humanitarian law rules that flow from such attacks may be discussed only tangentially, e.g., the particular rules for notification of casualties. The same is true for claims concerning accidental attacks in peacetime, or sea-air warfare, such as the Airbus incident during the Tanker War. The chapter confines itself to high seas situations.

II. State Practice and Other Sources of International Law Since World War II

The postwar era began with ratification of the U.N. Charter, whose articles 51 and 52 recognize the inherent right of individual and collective self-defense, and the right to establish regional arrangements or agencies to deal with matters relating to the maintenance of international peace and security as appropriate for regional action. Article 2(4) of the Charter declares that all U.N. members shall refrain from the threat, or use, of force against the territorial integrity or political independence of any state. Article 2(3) states the correlative principle that U.N. members must settle international disputes by peaceful means so that "international peace and security, and justice, are not endangered." There is, of course, an inherent tension between the principles of Articles 2(3) and 2(4) and Articles 51 and 52, in that the use of force in self-defense, perhaps through an Article 52 agency, will almost invariably involve the territorial integrity or political
The independence of a state to which the defensive response is directed. Settlement by peaceful means is the polar opposite to the threat or use of force permitted under the principles of self-defense. However, Article 2(3)'s peaceful means provision is qualified by the paramountcy of international peace and security, and the order of listing of Purposes of the United Nations, as well as the content of subsequent Charter provisions, supports the view that the maintenance of peace and security is "the primary purpose of the Organization and takes priority over other purposes." Since the "inherent right of self-defense" is preserved under article 51 in the absence of action by the Security Council, and is a correlative of actions the Council might take, the right of self-defense is part of the corrective mechanisms (albeit through self-help) the Charter contemplates.

Besides the preservation of the right of self-defense, the Charter also provides, in Chapter VI, for pacific settlement of disputes, including investigations, recommendations and decisions by the Security Council of disputes "likely" to endanger the maintenance of international peace and security. The Charter also gives the Security Council, in Chapter VII, authority to act to deal with threats to the peace, breaches of the peace, or acts of aggression. Nonforce actions that the Council may direct include "complete or partial interruption of economic relations and of ... sea, air and other means of communications" under Article 41. Article 42 gives the Council the option of deciding on force, including "demonstration, blockade, and other operations by air, sea, or land forces of Members. ..." (Chapter VII also includes Article 51, with its statement of the inherent right of individual and collective self-defense.) Although the principal institution for implementing Council action, the Military Staff Committee, withered during the Cold War, U.N. Members remain liable to obey the Council's "decisions," which have been issued only rarely because of that Cold War. Thus one of the primary foci for enforcement of states' rights under international law for 1945-90 has been self-help, through claims of self-defense, anticipatory self-defense, nonforce reprisal and retorsion.

Self-defense has two elements, necessity and proportionality, and for U.S. practice includes the right of anticipatory self-defense, perhaps on a global scale, involving use of armed force where there is a clear necessity that is "instant, overwhelming, and leaving no reasonable choice of peaceful means." The basic self-defense principles, tersely articulated in the Charter in 1945 and developed through state practice since then, might come into play at the beginning of any armed conflict where enemy merchant ships are at sea or are being convoyed by enemy warships, or situations might develop during armed conflict involving neutral vessels. Two views have developed as to the scope of self-defense after ratification of the Charter. The U.S. position has been that a parallel customary right of self-defense exists alongside Article 51, while others have argued that the Charter comprehends the scope of the right, i.e., that the right to self-defense occurs only when there is an armed attack. And, as will be seen, the peacetime
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Law of the sea declares that merchant ships have the nationality of the state whose flag they fly, so long as there is a "genuine and effective link" between the flag state and the vessel. Thus a violation of Charter Article 2(4) might be claimed if there is an unwarranted attack on a neutral merchant ship as much as if a battleship bombarded a neutral coast or an army invaded neutral territory. Self-defense, whether anticipatory or in response to an attack, can be asserted in several contexts, e.g., unit self-defense, where a particular ship, aircraft or group of units (e.g., a carrier battlegroup) responds to use, or threat of use, of force; national self-defense, where other forces, citizens or territory are involved.

Those who would deny validity to the U.S. position would also say that there is therefore no right of anticipatory self-defense, although Professor Dinstein has taken an interesting middle view in suggesting a right of "interceptive" self-defense, i.e., that an attack "occurs" when one party "embarks upon an irreversible course of action, thereby crossing the Rubicon." This is close to the U.S. position of anticipatory self-defense, which in the U.S. view is permitted when "there is a clear necessity that is instant, overwhelming and leaving no reasonable choice of peaceful means," as stated above.

Beyond the case of self-defense for a single state, the Charter, Article 51, affirms the right of collective self-defense. The result has been formation of bilateral and multilateral treaties, which, when duly published, communicate the existence of a critical defense zone (CDZ), perhaps of half a continent. For the now-defunct USSR, this had been Eastern Europe. The Western Europe counterpart has been NATO, with its carefully-delineated boundaries that do not include all the national territories of its partners as applicable for a required collective response. The existence of a formal treaty arrangement may not be necessary to signal a CDZ, but it frequently is, as in the case of NATO.

There is a similar division of authority on the use of armed force reprisals after 1945 in situations not involving armed conflict. Reprisals are proportional responses, illegal as a matter of international law, to a prior act illegal under international law by another nation. Most authorities say that reprisals involving use of force cannot be asserted as a matter of self-defense; a few have taken a contrary position. NWP 9A appears to take no position on the issue, but its analysis of wartime reprisals and the severe limitations that international law and U.S. policy would place on such reprisals would tend to the view that U.S. policy opposes forcible reprisals in peacetime. Reprisals of a non-force nature, e.g., economic sanctions directed at a nation violating international law, are valid in the Charter era. Retorsions -- unfriendly but legal responses to other nations' actions, e.g., conscious refusal of a warship to respond to a dipped ensign of another nation's merchantmen -- also remain valid responses.

The problem has been compounded by the recognition that there has been no bright-line division between peace and war, and that therefore a static set
of rules, some to be applied during wartime and others applicable during peace, is not a useful concept for many situations.

For the particular issue of this book - attacks on merchant ships - there is another set of issues, springing from the nature of commercial ventures at sea for most of this century. Flags of convenience, now euphemized as open registry, have called into question the nationality of the merchantman, whose connection with the flag state may be nominal. The ship may be crewed by nationals of several states, while its officers may have allegiance to another nation. The vessel may be owned by a corporation whose stockholders are not nationals of the flag state. The insurance coverage may be spread among still other states' nationals. The cargo may be consigned to one person, or it may be beneficially owned by many, and the same may be said of cargo insurers. The ship may be chartered to another national, and there may be subcharterers as well, each with their own insurance coverage. Today nonbulk cargo is frequently lifted by sealed containers, perhaps loaded and sealed by the consigner, for which the bill of lading may recite that the container is "said to contain" certain items, with a resulting problem for a visiting officer searching for contraband. Even though the USSR, with its system of state ownership is collapsing, many nations operate commercial shipping companies, for which the defense of sovereign immunity may or may not be available, depending on the cargo. Although the rule of the 1909 London Declaration that warships may rely on the flag the merchantman flies for visit and search purposes, the existence of other interests, and behind them the states whose nationals are interested, cannot be dismissed as a factor in the problem. Given the "intermediate" status of most armed conflict situations today - somewhere on the continuum between peace and total war - the problem is likely to be more difficult, and claims more frequent, than in a World War II-style scenario.

These preliminary remarks are generally directed at the beginning of hostilities in the Charter era, i.e., after 1945, but they might also apply if a neutral merchant vessel is perceived to be on unneutral service or if a neutral power becomes involved in the conflict after initial commencement of hostilities.

From the problems of jus ad bell o to problems of jus in bello in recent armed conflict situations we now turn.


Immediately after the invasion of the Republic of Korea (ROK) in late June 1950, the U.N. Security Council authorized the United States to respond to the attack and called upon all nations to assist in that effort. The Soviet Union was not present when the Council vote was taken and hence did not veto these resolutions.

As part of this response, the United States, on July 4, 1950, informed the U.N. Secretary-General "that, in support of the resolution approved by the
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Security Council relative to the attack upon the Republic of Korea [ROK] involving forces from North Korea, . . . a naval blockade of the entire Korean coast" had been ordered by the President of the United States. Notice of the blockade had been broadcast on July 4; its 39° 35'N and 41° 51'N limits "were established to keep all sea forces well clear of both Russian and Chinese territory," thus allowing access to territory of nonbelligerents. Both the USSR and the People's Republic of China (PRC) protested the blockade and refused to acknowledge its existence or legality although both observed it. All warships except North Korean vessels were allowed to enter North Korean ports; all other ships were barred. Although blockading forces were meager at first, the blockade was soon set and became effective along 500 miles of the Korean peninsula. After initial attempts to break the blockade, there was no active surface or submarine and little air opposition. Mines laid by North Korea with Soviet assistance were employed, however.

The blockade of Korea had several important ramifications for international law. First, it was part of the first major peacekeeping operation authorized by the Security Council under the Charter. Second, the Council authorization for U.S. leadership in the defense of Korea began the practice of the "agency principle," used in subsequent operations directed by the Council - e.g., Rhodesia - or recommended by the General Assembly. Third, practice under the blockade conformed to previously-established principles of the law of blockade and thereby reinforced them. U.N. naval forces also evacuated diplomatic personnel and U.S. civilians aboard U.S. warships after the initial North Korean attack in 1950; some dependents were evacuated by commercial shipping. Substantial numbers of Koreans who wanted to leave North Korean-occupied South Korea or North Korea were also evacuated by these ships when U.N. land forces later rolled north or were pushed south. The evacuations were well-advertised in the media, although there were no formal agreements between U.N. forces and North Korea, as customary law would dictate. Adversaries to these operations did not attack the evacuation ships, but if they had, there would have been possible violations of the rules against attacking cartel vessels or ships performing humanitarian missions. The use of media announcements in lieu of agreements was an extension of the traditional rule requiring prior agreements between belligerents. As such, the U.N. procedure was the beginning of incipient custom as to the procedure.

Local convoy operations began soon after hostilities; no trans-Pacific convoying was employed. Vessels escorted included at least 40 Japanese-owned freighters under the control of Shipping Control Administration, Japan (SCAJAP); U.S. Army transports and cargo ships, and Military Sea Transportation Service (MSTS) vessels under command of the Chief of Naval Operations of the U.S. Navy. SCAJAP was part of the U.S. administrative structure for the
occupation of Japan. MSTS vessels included commissioned naval vessels (designated U.S.S. like warships but primarily cargo carriers in nature), U.S. civil service-manned ships (designated U.S.N.S.), and a tanker fleet under time charter to MSTS from private companies. As in the case of ships involved with evacuations, there were no attacks on the convoys, which shuttled warfighting and war-sustaining personnel and goods from Japan and elsewhere to the Korean peninsula. Attacks on these convoys, whether the ships were under SCAJAP, U.S. Army, or MSTS control, would have been justified as military convoys for the warfighting/war-sustaining effort. Since some of the same merchantmen may have been employed for law-protected voyages (e.g., cartels or evacuations), and at other times in carriage of warfighting or war-sustaining efforts, the dilemma of the 1907 Hague Convention (VII) on conversion of merchant ships to warships is apparent and illustrates the Convention’s possible supersession in practice. (The United States is not a party to Hague VII.)

U.N. forces took the position that since fish was an important source of food for North Korea, including its armed forces, destruction of all fishing boats, inshore and offshore, was strategically necessary. Commander Fenrick has stated that the anti-fishing campaign appears to have been an extension beyond previous practice. It must, however, be conceded that... contraband lists in World War II specified food as conditional contraband... Although all the naval weapons were used, neither nuclear weapons nor submarines in the commerce destruction role were used during the conflict.

Although a naval blockade of the PRC was considered after the Chinese intervention in the Korean peninsula land campaign, those plan “folders stayed on the shelf.” Throughout the conflict, “In the northern Sea of Japan the... Soviet Far Eastern Fleet maneuvered, undisturbed and undisturbing.” Later in the war, on September 27, 1952, U.N. Commander (and U.S. General) Mark W. Clark proclaimed a Sea Defense Zone (SDZ), “for... preventing attacks on the Korean Coast; securing the [U.N.] Command sea lanes of communications and preventing the introduction of contraband or entry of enemy agents into [the] Republic of Korea. Paralleling the "Peace Line" proclaimed by ROK President Syngman Rhee earlier in 1952 to claim continental shelf and exclusive fishing rights for South Korea, the Clark Line was rescinded August 25, 1953 as part of the armistice negotiations. Although Professor O'Connell has asserted that the SDZ “was operationally successful because in the circumstances the law could be overlooked,” his position, taken in 1975, was not correct in 1952 when the Clark Line was proclaimed, or today. As analyzed in the contexts of the 1982 Falklands/Malvinas war and the 1980-88 Tanker War, Part II.F and II.G, such war zones are legal so long as they are limited in time and geographic scope proportional to the conflict. As sources for those conflicts illustrate, such
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zones have a history of state practice going back to at least the Russo-Japanese War of 1904–05.68 And to the extent that the Clark Line area coincided with the Security Council decisions authorizing defense of Korea, the SDZ was legal for that reason as well.69 The geographic coincidence of the Rhee Line, which ran up to 200 miles off the ROK coasts and was primarily aimed at excluding fishermen from Japan, then emerging from postwar occupation,70 illustrates a problem common to the postwar world of relatively limited naval warfare and the seaward extensions of claims of national sovereignty, such as the exclusive economic zone (EEZ), or the continental shelf.71 While it might be perfectly valid for a state to reasonably regulate fishing and other economic activity 50 miles off its coast, as North Korea has purported to do recently, that nation’s geographically coincident 50-mile defense exclusion zone clearly is not proportional, in duration or area, relative to whatever threat(s) North Korea might perceive,72 and thus is illegal under international law.

The Korean conflict also saw the genesis of another source of law for naval warfare. When the USSR returned to the Security Council and its vetoes throttled further Council action on the war, the General Assembly passed the “Uniting for Peace” Resolution (UFP) with the backing of the United States.73 UFP in effect construed the Assembly’s largely non-binding authority under the U.N. Charter74 to include recommendations to U.N. Members for further prosecution of the war. UFP was the legal vehicle for later Assembly-approved peacekeeping operations, most of which did not involve U.S. forces, and few of which involved naval units.75 The UFP process has been employed in situations outside the arena of armed conflict, often to the chagrin of the United States. In theory at least, UFP remains as a possible source of claims to the control of naval warfare. Two important products of the UFP process include the 1970 General Assembly Resolution 2625, declaring principles of friendly relations and cooperation among states, and the 1974 Resolution 3314, defining aggression, both adopted by consensus.76

(1) The Civil War in China

During the same time, the U.S. Seventh Fleet had begun the Taiwan Straits Patrol to prevent the PRC from invading Taiwan or the Republic of China from invading the mainland as a corollary to the Korean conflict,77 rejecting USSR claims that this was an act of aggression and a blockade of Taiwan.78 In 1953 the United States changed the Patrol to a defensive shield for Taiwan because of PRC entry into the Korean War.79 Although no formal mutual defense treaty with Taiwan was ratified until 1954,80 the United States had retained its posture as a World War II ally of Nationalist China before then.81 Thus U.S. naval forces could legitimately protect Taiwan’s territorial integrity under a self-defense theory as long as Taiwan acquiesced in this form of limiting an ally’s freedom of movement.
In 1949, the United Kingdom and the United States had protested the Republic of China's declared blockade of the China coast. Several U.S. and U.K. merchantmen were seized. The practice as to the United States stopped with advent of the Korean War and President Truman's statement directed toward the Taiwan government. Seizures of Soviet bloc vessels by Taiwan government ships occurred in 1953-54, for which the United States disclaimed responsibility, and U.K. ships also were molested up through 1953, for which Great Britain protested and declared that U.K. warships had been instructed "to afford protection to British ships on their lawful occasions on the high seas." From 1950 through 1953, there were 90 incidents of Nationalist Chinese interference with international shipping destined for PRC ports. Two thirds of these incidents involved U.K.-flag vessels. These ships were detained in Taiwanese ports and their cargoes confiscated. Nevertheless, James Cable has rated the Nationalists' operation "not very successful" from the standpoint of gunboat diplomacy. At the same time, PRC warships were successfully employing gunboat diplomacy against Japanese fishing vessels; 158 were seized between 1950 and 1954 "before Japanese fishermen agreed to respect Chinese prohibited zones." South Korea employed the same practice from 1953 through 1955. The 1958 PRC attack on the Quemoy and Matsu Islands close to the China mainland but held by the Taiwan government, prompted a U.S. response of 60 warships. "Smaller ships began escorting Nationalist convoys to the offshore islands. The PRC response was the issuance of a declaration extending China's territorial waters from 3 to 12 nautical miles, which applied to the coastal islands . . . and all other islands claimed as Chinese territory." The United States, as a matter of policy, did not send its convoying warships into Quemoy/Matsu territorial waters, but it did not thus imply recognition of PRC claims to territorial seas around the islands. During the 1950s PRC PT boats developed the tactic of concealing themselves in PRC fishing fleets and darting out of this cover to attack Nationalist ships. Both the U.S. tactic of convoying and the PRC use of fishing fleets to camouflage speedboats were later employed in the Tanker War.

The United States could convoy Nationalist vessels to the offshore islands, and the convoys, if they carried goods that did not contribute to the Nationalist warfighting/war-sustaining effort, enjoyed legal immunity from attack. Even if vessels did carry goods to support the Nationalists' efforts to respond to a civil war, the United States could legitimately convoy them. Until 1979, the United States recognized Taiwan as the legitimate government of all China and had a self-defense arrangement with Nationalist China dating from World War II. Thus the United States, as a matter of self-defense, could have defended its escorting ships and any convoys vessels from attack.

Small coastal fishing boats engaged in their trade are exempt from capture or attack. However, if the boats aided and abetted the speedboats by concealing
them or otherwise assisting in their belligerent acts, the fishing craft lost their immunity.\textsuperscript{94} This issue was apparently never tested insofar as U.S. naval vessels were concerned, but several Nationalist vessels were hit, and there was response in kind.

(2) \textit{Other Trends}

Writing just after the close of the Korean War, Professor Tucker confirmed the traditional rule that small coastal fishing and trade vessels, so long as they did not participate in the war effort, were exempt from capture and destruction,\textsuperscript{95} as did \textit{NWIP 10-2},\textsuperscript{96} the predecessor to \textit{NWP 9A}. They followed the view of Oppenheim's current treatise, published in 1952.\textsuperscript{97} All authorities agreed that coastal steamers or relatively large, deep-draft vessels were not within the exception.

Professors Oppenheim and Tucker, tracing the shift from the mid-eighteenth century, when the rule was that private enemy merchant ships might be captured, through the early twentieth century debate over capture, to the rule following World War II and the early Fifties, concluded that such vessels could not be captured, attacked and destroyed, with these exceptions:

(1) A ship refused to stop when summoned to do so;

(2) A ship actively resisted visit and search;

(3) A ship sailed under convoy of military ships and/or aircraft;

(4) A ship was armed with offensive weapons, and such have been used, were intended for use, against an enemy;

(5) A ship was incorporated into or assisted the enemy's armed forces intelligence system; or

(6) A ship acted as a naval or military auxiliary to enemy armed forces.

The merchantman's passengers, crew and papers were to be placed in safety if circumstances permitted, and the attacking ship was required to look for survivors and to protect them and the dead against ill treatment if the ship were sunk. If a merchantman desired to surrender, the attacking vessel could not refuse quarter.\textsuperscript{98} \textit{NWIP 10-2} approved exclusion zones, stating that "[w]ithin the immediate vicinity of his forces, a belligerent commanding officer may exercise control over the communications of any neutral vessel . . . whose presence might otherwise endanger the safety of his operations," and that "a belligerent may establish special restrictions . . . upon the activities of neutral vessels . . . and may prohibit altogether such vessels . . . from entering the area. Neutral vessels . . . [failing] to comply . . . expose themselves to the risk of being fired upon."\textsuperscript{99}
Professor Tucker, in whose Naval War College analysis appears the first edition of *NWIP 10-2*,¹⁰⁰ says that war zones directed against enemy merchantmen not integrated into the war effort, or presumably otherwise not exempted (as being unarmed), would not justify a shoot-on-sight policy.¹⁰¹ Tucker agreed with *NWIP 10-2* that practice allowed controlling neutral vessel movements, and that merchantmen carrying contraband were subject to seizure.¹⁰² Oppenheim stated that war zone declarations warning neutrals of entry only at their peril were illegal. However, “[a]s between the belligerents only, provided that the zone is enforced by the use of means . . . which comply with the laws of maritime warfare, . . . there can be no doubt of the lawfulness of the practice.”¹⁰³

Although negotiated during the Korean War, the four Geneva Conventions of 1949 did not come into effect for the United States until 1952. They are now generally effective worldwide.¹⁰⁴ The Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (GWSEA) is, in a sense, a misnomer, for its provisions apply, *inter alia*, to persons wounded, sick or shipwrecked who are “[m]embers of crews, including masters, pilots and apprentices, of the merchant marine . . . of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.”¹⁰⁵ An inference could be made that the negotiators would not have included all merchant seamen, including those aboard enemy merchant vessels, if they did not feel that all such ships were subject to attack under some circumstances, which had become the norm during World War II.¹⁰⁶ GWSEA also exempts small coastal rescue craft from attack.¹⁰⁷

The last phrase of article 13(5) of GWSEA - “who do not benefit by more favorable treatment under any other provisions of international law” - invites attention to the growing body of human rights norms, typically encased in treaty format, but perhaps applicable today as general practice of states.¹⁰⁸ The first of these was the Genocide Convention,¹⁰⁹ and there has been a veritable torrent of them since, some regional and some worldwide in application. To be sure, many human rights conventions contain “escape clauses” that render them largely inoperative during times of national emergency,¹¹⁰ e.g., armed conflict, but a future international tribunal might declare them articulative of a general customary standard, as the World Court did in the *Nicaragua Case*,¹¹¹ perhaps ignoring the escape clause limitation. In general, future wars at sea may be largely free of these constraints, owing to the targeting of ships, not people, but it would seem that a national command authority ordering a war of genocidal extermination at sea, or an individual commander that directs execution of a rescued crew with genocidal intent, would be as guilty of violating human rights norms as of violating the law of armed conflict. Existence of this body of human rights law at least creates the expectation that claims of such violations will be made in future armed conflicts at sea.¹¹²
The 1954 Hague Cultural Property Convention\textsuperscript{113} may also impact armed conflict at sea. The United States is not party to this convention, although about 80 nations are. Although the primary purpose of the Convention was protection of sites and immovable and moveable property on land as a response to the Nazis' looting of Europe during World War II,\textsuperscript{114} there are implications for naval warfare. If a belligerent that is party to the Convention decides to transport cultural property, that state must apply to the Commissioner General for Cultural Property appointed under the Convention, who consults with the Protecting Powers for each belligerent on measures for specifically protected transport and who appoints inspectors to determine that only cultural property is being shipped in accordance with approved measures. Parties to the Convention pledge to "refrain from any act of hostilities, directed against transport under special protection." The ship must display a special emblem, a pentagonal blue and white shield.\textsuperscript{115} In "urgent cases," particularly at the start of armed conflict, a belligerent may "As far as possible notify . . . Parties," but the pentagonal shield may not be displayed unless other belligerents expressly grant immunity. Other belligerents must "take, so far as possible, the necessary precautions to avoid acts of hostility directed against [the transporting ship if it displays] the distinctive emblem."\textsuperscript{116} If either method is employed, the property and the carrying ship are immune from seizure, placing in prize, or capture.\textsuperscript{117} In effect, unless there is advance consent for emergency transfer, there would be a high risk of attack, even if there is a shield displayed or other notice given. The dilemma for the naval commander would be a decision whether the transporting vessel was employing a perfidious ruse or whether it was in fact carrying only cultural property. In any event, the Convention guarantees the right of visit and search of ships operating under both kinds of transport.\textsuperscript{118} The Convention also generally excepts from its operation cases of "imperative" "military necessity" for such time as that necessity continues.\textsuperscript{119} Immunity may also be withdrawn by a belligerent if its opponent violates the requirement that the cultural property not be employed for military purposes,\textsuperscript{120} e.g., transporting valuable cultural property to pledge it for purchase of war material. If a Commissioner has been appointed, he or she must be notified of either kind of withdrawal from immunity.\textsuperscript{121}

As in the case of the human rights conventions, nonratifying nations may find, after the fact, that the Convention articulates customary law norms,\textsuperscript{122} particularly if the state is party to a similar regional agreement such as the Roerich Pact,\textsuperscript{123} which covers the same ground for certain Western Hemisphere nations, including the United States. At the least, there can be expectations of claims of violations of international law from Convention parties. The Convention applies among parties bound by it, even though a co-belligerent is not bound by it. A co-belligerent may declare its acceptance of the Convention for the conflict,
and all are then bound so long as the nonparty co-belligerent adheres to the Convention’s terms.  


On May 15, 1948, toward the opening of the first conflict, Egypt instituted shipping inspections at Alexandria, Port Said and Suez, the latter two being entry ports for the Suez Canal. A May 18 proclamation provided that “munitions or merchandise of any kind destined directly or indirectly to the institutions or persons residing in Palestine” might be confiscated in accordance with international law. (Israel had been proclaimed a state that day.)  

On May 29 the U.N. Security Council called upon all governments to refrain from introducing fighting personnel, or importing or exporting war material into or to the area during a ceasefire. A June 3 notice applied the May 18 proclamation to Israeli exports. On July 8 Egypt established a prize court. Egypt further decreed search and seizure procedures, and published a contraband list, “including arms and armaments, chemicals, fuels, armed forces automobiles, and bullion,” on February 6, 1950. On November 28, 1953, the list was expanded to include foodstuffs and “other commodities likely to strengthen the war potential” of Israel. The decree applied to vessels in Egyptian territorial waters or the Canal.  

On November 14, 1948 Egypt detained the U.S.-flag S.S. Flying Trader on grounds that it was transporting war materials. Trader’s cargo included 4000 bags of rice, an ingot of tin and 38 “trucks.” The rice was released; the fate of the tin is unknown. The Egyptian prize court later said the “trucks” were “in fact guns, etc. [. i.e.] . . . armored cars each capable of carrying a dozen soldiers.” Trader had received the vehicles in Bombay; they were part of a consignment of 50 originally sent on Trader’s sister ship, S.S. Flying Arrow, from the United States to Tel Aviv. Twelve vehicles were offloaded at Tel Aviv before the war began, but more could not be discharged because of attacks in this port. Arrow then proceeded to Bombay, India, where the 38 vehicles were transshipped to Trader, which sailed for New York via Genoa, Italy, a port allegedly “a principal base for contraband traffic destined for” Israel. Genoa was on the Egyptian blacklist of ports. Trader was stopped at Port Said. Two bills of lading for the vehicles were offered to the court, the original “to order” and a copy naming an individual. The vehicles were condemned as lawful prize. Perhaps equally important was the prize court’s ruling that the seizure was legal despite conclusion of a General Armistice Agreement between Egypt and Israel before the seizure. Although this aspect of the holding has been criticized, the Trader case is illustrative of the potential for legal approval of claims to commit “warlike” acts while there is a technical “peace.”  

The United States protested Egypt’s oil tanker regulations requiring a ship to certify it was heading for a neutral port and to obtain an Egyptian certificate that the cargo was for local consumption in a neutral port in late 1950. The Egyptian
regulations also provided that if a tanker did not comply, it would be denied facilities. The protest “stated that these regulations would work undue hardship on normal shipping operations” and reserved the right to protest on legal grounds. Egypt responded by blacklisting vessels whose manifests showed they had carried to Israel “any material considered contraband by . . . Egypt.”

The United Kingdom, on the other hand, had “compromised the position” of straits passage (through the Straits of Tiran) to the Israeli port of Eilat by agreeing to contraband search at Adabiya or Suez, a “concession to belligerency . . . to prevent hostilities from spilling over on to the high seas, but the British agreement carried with it the implication of a recognition that Egypt had belligerent rights, and it claimed no reservation as to rights of passage through the straits.” Although Egypt claimed the United States and Denmark had also acquiesced in such searches, the record is less than clear but would indicate that the United States protested some, if not all, of the Egyptian procedures, and that probably Denmark did too. Indeed, after an Egyptian corvette stopped, plundered and damaged a U.K. merchantman on July 1, 1951 in the Gulf of Aqaba as part of the attempted blockade of Israel, and British protests and Security Council discussion were unavailing, a British destroyer flotilla was sent to the Red Sea “to prevent further incidents of this kind.” On July 26, Egypt and Britain reached agreement on future procedures for U.K. ships. From late 1951 to March 1952 British warships - usually two cruisers - were employed to keep the Canal open when Egyptian labor was withdrawn and clearance was denied U.K. vessels. The cruisers provided a protected labor force to keep the Canal open until Egypt resumed operations.

After the Egyptian-Israeli Mixed Armistice Commission reported its belief that it did not have the right to ask Egypt to stop interfering with goods passage through the Canal, the U.N. Security Council passed a resolution on September 1, 1951, finding that Egypt’s interference with neutral shipping’s passage was “an abuse of the right of visit, search and seizure” that could not be justified on the basis of self-defense and was a violation of freedom of the seas. The Council called upon Egypt to end the restrictions. The resolution went unsupported, and the result was more seizures and protests. A second Council resolution was vetoed by the USSR in 1954. Professor O’Connell has inquired whether the 1951 resolution applied to the Gulf of Aqaba. After Egypt nationalized the Canal, Israel’s 1956 attack on Egypt, a ceasefire and establishment of the U.N. Emergency Force, the Canal was reopened under management of the Suez Canal Users’ Association with right of passage guaranteed. From February - April 1957, U.S. destroyers had patrolled the Straits of Tiran to successfully prevent Egyptian interference with U.S. merchantmen bound for Israel. Other U.S. naval vessels evacuated U.S. citizens and “friendly nationals,” on a space-available basis, from Haifa and Alexandria.
Dr. von Heinegg has summarized the decisions of the Egyptian prize courts from 1949 through the Fifties:

... [T]he Egyptian prize court in its jurisdiction very often referred to the decisions of prize courts of the two World Wars. Whereas in a number of cases neutral cargo was released, the principle that a neutral flag covers enemy cargo was acknowledged only if the neutral did not cooperate with the enemy. Enemy destination was assumed in conformity with, e.g., British prize jurisdiction of the two World Wars, black lists playing an important role. All goods labelled " Produce of Israel" were considered to be of enemy character. The notion of contraband was interpreted extensively comprising, e.g., tea, coffee, onions, [and] spices.

The judgments of the Egyptian prize court bore a strong resemblance to the prize jurisdiction of the two World Wars. It is, however, remarkable that all ships and goods affected had been captured in Egyptian ports. Partly the goods had been unloaded before the outbreak of hostilities in 1948. In the... Inge Toft the court expressly indicated that Egypt did not exercise its rights on the high seas but restricted itself to territorial waters and ports. Even though the Security Council in September 1951 [had] characterized the Egyptian practice as an "abuse of the exercise of the right of visit, search and seize Egypt more or less regularly maintained it until the conclusion of the peace treaty of 1979."

In 1949 an armistice to the first round of fighting had been declared, and it was in response to this that the Security Council in Resolution 95 had declared that Egypt had indulged in "an abuse of the right of visit, search and capture;" Egypt considered the armistice ended due to Israeli "aggressions," including a high seas attack on Karim, an Arab vessel. The important point is that the precedent of seizing ships during an armistice was deemed legal by Egypt, although denounced by the Security Council, when there was an alleged breach of the armistice. The Council had made no "decision" requiring U.N. Members to assist in ending the seizures, as it had during the Korean conflict. The second point is that Inge Toft does not indicate that Egypt felt compelled, as a matter of international law, to limit its seizures to its territorial waters:

... The United Arab Republic does not exercise her rights of belligerency on the high seas, but limits herself to exercising them within the confines of her territory, ports and territorial waters. Article 10 of the [Constantinople] Convention of October 29, 1888 [governing use of the Suez Canal], gives Egypt the right to take all necessary measures for the maintenance of public order in time of peace and for her defence in time of war. It is natural that the requirements of such protection are left entirely to the United Arab Republic, just as are the requirements of legitimate self-defence. The policy of the economic boycott of Israel has been part of the public order of the United Arab Republic since 1948. To renounce this policy would be to compromise this public order in all the Arab and Islamic States.
The case should not be read as lending support to the questionable view that belligerent naval operations, which may include seizure of merchantmen, can be conducted only near the belligerents’ coasts. Although Israel attempted to characterize the seizures as a blockade, and therefore violative of the 1888 Constantinople Convention’s prohibition of such in the Canal, the Egyptian actions were not, technically, that form of interdiction. During the Security Council debate on the seizure, Egypt asserted in 1951 that they had been relatively few in number and were essential if the nation were to “survive.” This seems to be a vague reformulation of a claim of the right of anticipatory self-defense – i.e. seizure of war material before it could be used against Egypt – qualified by the principles of necessity and proportionality that Egypt had asserted in earlier Security Council debates. In any event, the Council condemned such actions in its September 1, 1951 resolution.

In the 1967 Six Day War, Egyptian submarines sank two innocent Greek freighters in the Mediterranean Sea, one off Alexandria and the other further west in the Mediterranean. A sidebar aspect of this war was a U.K. statement that it would join with other nations to assure right of passage through the Straits of Tiran. A British carrier group and the U.S. Sixth Fleet were concentrated in the Eastern Mediterranean, but “[t]his threat of purposeful force . . . was not pursued and . . . did more harm than good to British and American interests.” The U.S.S. Liberty, which was monitoring Israeli transmissions during the Egyptian phase of the war, was damaged in an attack by Israeli PT boats, for which compensation was paid to the United States by Israel for loss of life and injuries among the crew and for damage to Liberty, without admission of fault. Liberty was configured like a merchant cargo ship but flew the U.S. ensign, was painted haze grey like all U.S. warships in the Mediterranean Sea, and had traditional pendant numbers on the bow and stern. Israel had declared a very imprecise exclusion zone, warning all ships to keep away from “the coasts of Israel during darkness.” As to what coasts were meant (e.g., conquered territory also?) was less than clear. There was also an informal, private warning to the United States. As Commander Jacobsen has analyzed it, the public exclusion zone as a matter of law failed because of vagueness; in any event, the attack occurred in daylight (2 p.m.). The second, privately-warned zone was not legitimate either because it was not publicly announced in such a manner that Liberty would have been aware of the risk. Although Liberty was a warship, if she had been a merchantman, the same result would have obtained as to the legality of the attack so long as the ship was not engaged in work that assisted a belligerent, e.g., gathering intelligence. The attack on the Liberty might be contrasted with the sinking of the Israeli destroyer Eilat, a warship of one of the belligerents, during a resumption of hostilities in October 1967. During the next month, the U.N. Security Council adopted Resolution 242 which “Affirm[ed] further . . . the necessity for guaranteeing freedom of navigation through
international waterways in the area, which undoubtedly meant the Suez Canal but may have included the Gulf of Aqaba.

During the 1973 Yom Kippur War, international shipping was warned about entering the region of conflict, which first comprised Egyptian and Israeli territorial waters, but later further parts of the sea plus Egyptian, Libyan and Syrian ports. In October 1973 the Syrian navy captured and diverted a Greek liner, Romantica, but released her the next day after the Italian ambassador intervened. No further such incidents occurred, perhaps because of international protests, although Egypt regularly stopped, visited and searched neutral merchantmen. Third states’ reactions varied: African nations unilaterally suspended or terminated diplomatic relations with Israel; Arab nations boycotted oil exports to Israel and the United States; Great Britain embargoed arms, largely affecting Israel; except for Portugal, other West European nations refused to allow use of their territories for supply or assistance to any belligerent, thereby cutting down the black-list potential of the 1948-57 war. Arab navies adopted the tactic of taking shelter beside merchant ships in their harbors after firing missiles at Israeli warships. Egypt declared a blockade in the Red Sea and attacked but missed an Israeli-bound tanker. In the Gulf of Suez, Egypt acted to blockade the Abu Rudiers-Eilat route used by Israeli-chartered tankers carrying oil from the Israeli-occupied Sinar fields to Eilat. In response to Egypt’s blockade of the Straits of Bab el Mandeb, Israel counter-blockaded the area. The rationale of Egypt in the Bab el Mandeb operation was obscure:

blockade was maintained in the Straits of Bab el Mandeb. Whether this was conducted by units of the Egyptian navy or not was apparently deliberately obscured, perhaps because the Egyptian government had not made up its mind whether the appropriate concept was that of distant blockade of Israel as an enemy with whom Egypt was at war; or the exercise of belligerent rights in the territorial seas of an allied State engaged in a collective self-defence operation; or the right of a coastal State (in this case Southern Yemen) to close its territorial seas to enemy-destined traffic, even though the territorial seas lie within straits. Egypt’s only official announcement on the subject referred to the ‘legitimate right of the Republic of South Yemen’, which also by decree unilaterally asserted sovereignty over the seaway. South Yemen, with only two ex-Russian submarine chasers, two minesweepers and a total naval complement of 200 men, was in no position to prevent the passage of ships in the face of any resistance, and it seems that units of the Egyptian navy did, in fact, fire warning shells, visit and search foreign ships and warn off those bound for Israel.

When the destroyer U.S.S. Charles Francis Adams intercepted the radio message of the S.S. La Salle, a U.S.-flag merchantman, that she was being fired on in the Straits, Adams’ sailing was delayed by French authorities until such time as La Salle had turned back to Massawa, Ethiopia. A U.S. Seventh Fleet task force entered the Indian Ocean from the Pacific, and was believed to have orders to
protect American neutral traffic in the Straits. This ended the blockade, at least insofar as U.S.-flag shipping was concerned. The naval war had no decisive influence on the final outcome of the conflict. The 1979 Egypt-Israel peace treaty, ending the 1973 war, provided that Israeli ships, and cargoes coming to or from Israel, enjoyed free passage rights through the Suez Canal and its approaches on the basis of the Constantinople Convention, which had internationalized the Canal. Israeli nationals, vessels and cargoes, as well as persons, vessels and cargoes going to or from Israel, would be given non-discriminatory treatment in use of the Canal. Egypt and Israel declared the Straits of Tiran and the Gulf of Aqaba “open to all nations for unimpeded and non-suspendable freedom of navigation and overflight.” They also agreed to respect the other’s right to these rights in the Straits and the Gulf. A protocol recognized the rights of vessels of the parties to innocent passage through the other’s territorial waters “in accordance with the rules of international law.”

During the 1982 campaign in Lebanon, Israel imposed a naval blockade on the Lebanese coast to prevent weapons from reaching the Palestine Liberation Organization, then based in Lebanon. Any ships or boats running guns to the PLO were subject to interdiction, capture and condemnation or destruction under the traditional rules of blockade. Weapons have always been considered absolute contraband.

(1) Trends in the Arab-Israeli Conflicts

The 1948, 1973 and 1982 conflicts saw the declaration of traditional close-in blockades, with the typical problems of visit, search and capture. The eventual result of the 1979 Egypt-Israel peace treaty was recognition of Israel’s right to use the Suez Canal, internationalized by the 1888 Constantinople Convention, a further limitation on the opportunity to visit, search and capture merchantmen.

Various high seas attacks by Egypt on neutral freighters were clearly illegal under international law, as was the Israeli attack on the Liberty, a U.S. Navy warship marked as such. The high seas attacks by Egypt on neutral merchantmen was an ominous portent of things to come in the Tanker War.

(2) Other Trends

During these conflicts the four 1958 law of the sea treaties were negotiated and have come into force. All save the 1958 Fisheries and Conservation Convention have been accepted as restatements of customary law.

The 1958 High Seas Convention in particular has provisions that relate to this study. It declares that the high seas are “open to all nations, [and] no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under [the Convention] and by the other rules of international law,” e.g., the law of armed conflict. Thus as between belligerents, the convention would be modified by the law of naval warfare. However, non-belligerents can claim rights under the Convention, except insofar as the
law of war affects them, e.g., exclusion zones. The Convention does state the rights of freedom of navigation and freedom of fishing, but these and others "recognized by the general principles of international law," must be exercised by states "with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." The Territorial Sea Convention provided for a contiguous zone as part of the high seas to allow littoral states to police such an area for, e.g., smugglers, but the negotiators did not include any provisions for shoreside security zones.

All states have the right to sail ships under their flag, to fix conditions for granting nationality to ships, for registering ships, and for flying the flag. However, "there must exist a genuine link between the State and the ship," e.g., effective jurisdiction and control of the flag state in administrative, technical and social matters over ships flying its flag. The latter provision responded to the flag of convenience phenomenon. Warships and vessels owned or operated by a state and "used only on non-commercial service" have complete immunity except for the flag state. States must prevent oil pollution or the release of radioactive waste from ships. The 1958 Fisheries and Conservation Convention reaffirms the above-stated right to fish on the high seas, but adds that states must adopt or cooperate in adopting conservation measures for the seas' living resources. The influential Restatement (Second), Foreign Relations Law of the United States adopted the genuine link theory in 1964; it did not address directly the sovereignty and navigation issues. Professor Wolfrum has interpreted the 1960 decision of the International Court of Justice concerning the membership of the Inter-Governmental Maritime Consultative Organization (IMCO, now IMO, the International Maritime Organization) to imply that only registration, and not the "genuine link" postscript to Article 5 of the High Seas Convention, governed for nationality of vessels. He concludes that "the right of each State to establish its own conditions for the grant of its flag is not limited by international law. Consequently, no State may challenge or refuse to recognize the registration of ships by another State. Moreover, no State has the right to look behind a ship's flag." Prominent treatise writers of the time generally approved the traditional rules applicable to enemy merchant ships. Professor McDougal and Florentino Feliciano in 1961 summarized the exceptions for protected vessels such as hospital ships and small coastal fishing boats, but that "in the practice of both sides in [World War II], merchantmen were in fact regarded as regular combatants and subjected to sinking at sight." Although one later commentator has said McDougal and Feliciano equate the law of war zones with the law of blockade - as applied to neutrals - it is reasonably clear that McDougal and Feliciano would approve war zone treatment for enemy merchant ships, the object of this study. Therefore, the legitimacy of attack on enemy merchantmen - subject to the usual protection and exclusions - would apply to war zone
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situations too. McDougal and Feliciano also preserve the distinction between neutrals carrying contraband, which in their view would be subject to capture and condemnation of the goods. There was apparently no analysis of the problem of war-sustaining cargo aboard neutral vessels.

C. John Colombos came to the same conclusions in 1967, noting 11 exceptions, among them protected vessels such as hospital ships, or small coastal fishing or trading boats when not used for military operations, stating that enemy character must be determined by the flag flown. Destruction of the enemy merchant ship required that all on board be placed in safety and that the ship's papers be removed and preserved. Since it was difficult under modern warfare conditions to accomplish this, "destruction must be treated as an exceptional measure." Colombos acknowledged, however, that NWIP 10-2 and World War II practice by France, Great Britain, Italy and the United States permitted destruction in case of military necessity when the merchantman could not be captured and sent or escorted in for adjudication. Capture was seen as the normal modality for neutrals carrying contraband; there is no clear statement concerning attack and destruction of a contraband carrier, but if the merchantman was integrated into the war effort, World War II practice and NWIP 10-2 would permit destruction. The capturing officer had the duty of taking all possible measures to provide for the safety of passengers, crew and ship's papers. Colombos also seemed to approve a measure of control over the high seas by belligerents for their own protection, provided they could control the area.

In 1968, Professor Mallison traced the history of the law of naval warfare on capture or destruction of enemy merchant vessels and approved the NWIP 10-2 list, but added:

The provisions of this article are accurate as far as they go but are inadequate in covering this one particular situation. During the past general wars enemy cargo ships were attacked without warning even if they did not participate otherwise in the enemy war effort. They were attacked without warning because they were cargo vessels carrying cargoes of military importance. There is, unfortunately, no reason to believe that such cargo ships which comply rigorously with the requirements of Article 503(b)(3) will be immune from attack without warning in future general wars. This article, however, could provide specific grounds for claims and counterclaims based upon charges of illegality. If this occurs, the next steps could involve the invocation of reprisals and counter-reprisals so that a future general war could be conducted, thereafter, without regard to this article of the Law of Naval Warfare.

Professor Mallison also recognized the traditional list of vessels immune from capture or attack - e.g., hospital ships and coastal fishing or trading boats. Although primarily concerned with attacks on neutrals in war zones, he declared that attacks on enemy merchantmen in declared war zones was and would be legal, subject to the usual exceptions, e.g., hospital ships, etc. The rule on neutral
ships integrated into the enemy war effort was that they should be treated like enemy merchant ships.196

Writing in 1962, Professor McDougal and his associates noted that the law of naval warfare, conditioned by the norms of the U.N. Charter, was an exception to the general principles of freedom of navigation of the seas.197 They severely criticized the genuine link theory of the 1958 High Seas Convention.198

C. Other Merchant Ship Interdictions and Diversions, 1956–66

From 1956 through 1966, other incidents involving merchant ship interdiction occurred without conflict erupting on the high seas, although there was sometimes parallel fighting on land.

(1) The Civil War in Algeria

During the civil war in Algeria, the French navy sought to visit and search ships that were suspected of running war materials to the rebels in Algeria. France declared a 20 to 50 kilometer (11-28 mile) customs zone off Algeria for small craft.199 High seas interceptions occurred off Algeria but also 45 miles off Casablanca, in the Atlantic Ocean, and in the English Channel, far from the high seas adjacent to Algeria. In 1956, 4775 vessels were visited; 1330 were searched; 192 were re-routed, i.e., diverted; and 1 was arrested. Diversion was ordered if weather made boarding impossible, if the cargo’s nature was such that a thorough at-sea search could not be conducted, or if cargo was arms, ammunition and explosives. Ships flying flags of a dozen nations were involved, and the flag states protested vigorously. France justified her actions on self-defense grounds.200 Although a large-scale operation, the French interdiction program did not seriously affect freedom of navigation, since those few ships whose cargoes were seized were clearly engaged in smuggling arms to Algeria.201 Compensation was paid for some vessels wrongfully detained.202 Although some arms were imported directly from the seas off the Algerian coast, others were brought in overland through Morocco, Tunisia or Libya. In some instances arms were sent to a third state, e.g., Egypt or Libya, and then transported through another country, e.g., Tunisia, and across the Algerian border. In some cases, states friendly to the rebels were buying vessels, vesting nominal ownership in third-country nationals, for the traffic. In other cases, bogus shipping documents were used. Some arms were smuggled in by fishermen.203

(2) The Iceland-United Kingdom Cod War

In 1958-59 British warships escorted and protected British trawlers fishing in waters claimed as territorial sea by Iceland. Great Britain eventually withdrew from the “Cod War,” and the issue was resolved by diplomacy.204

(3) The Cuban Quarantine

In 1962 the United States, acting in concert with other Western Hemisphere states under the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), imposed a maritime quarantine against Soviet introduction of missiles, components
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and delivery systems, into Cuba. The action was claimed to be proper under Article 52 of the U.N. Charter, which allows interim security arrangements such as the Rio Treaty. The quarantine was undoubtedly legal under Article 52 of the Charter. The U.S. presidential proclamation establishing the quarantine, besides citing the Rio Treaty-based resolution, also relied on a U.S. Congressional resolution that recognized the threat. The U.S. proclamation was specific as to the type of cargoes to be halted, e.g., missiles, bombs, bomber aircraft, warheads, and support equipment, “and any other classes of material hereafter designated by the Secretary of Defense [to] effectuate” the proclamation. The proclamation exempted other cargoes, e.g., foodstuffs and petroleum, and declared neutral rights would be respected. No blockade was declared, and the proclamation limited use of force to situations where directions under the quarantine were disobeyed if reasonable efforts had been made to communicate directions to an interdicted vessel, “or in case of self-defense.” (The Rio Treaty authorized “partial or complete interruption of economic relations or of . . . sea . . . communications; and use of armed force[.]” among other measures, thus paralleling the language of Articles 41 and 42 of the Charter.) Some commentators have seen the quarantine as a self-defense measure, pure and simple. 205 Self-defense as a proper rationale for the quarantine after the Nicaragua Case has been questioned, although the possible limited precedential value of that case should be noted. 206 Moreover, to the extent that action was taken under Article 52 of the Charter, as noted by the United States and others, the Nicaragua Case, which dealt with the parallel customary right of self-defense alongside Article 51, the case carries even less weight. Moreover, no one would question the right of individual and collective self-defense, e.g., under customary law or Article 51 of the Charter, if a warship maintaining the quarantine had been attacked by, e.g., a Soviet warship, while enforcing the quarantine or in other circumstances, e.g., in the Pacific Ocean.

(4) The Rhodesian Interdiction Operation

In 1965-66, as part of the transition of governance from Southern Rhodesia to independent Zimbabwe, the U.N. Security Council passed a series of resolutions denouncing the white Rhodesian government as illegal, and calling upon all states to refrain from assisting the white minority regime and to institute an oil embargo, and upon the United Kingdom in particular to enforce such an embargo. 207 H.M.S. Berwick, on patrol off Beira, a Mozambican port employed for offloading oil bound for Rhodesia, stopped and visited S.S. Joanna, an inbound Greek tanker, which refused to divert from Beira. Because the operative Council resolution spoke only in terms of embargo and not blockade or similar measures, Berwick had to let Joanna enter Beira. A later resolution specifically authorized such action, and the next blockade-runner, Manuela, was diverted after boarding. Oil companies and tanker owners began to supply lists of innocent tankers manifested for Beira, and except for one French tanker
not on the list but in fact innocent, the system worked well. "[O]utsiders as possible blockade-runners . . . did not reappear." When France protested H.M.S. *Minerva*'s signalling "Stop or I will fire," and then shooting one round across *Artois*’ bow, the U.K. response was that *Minerva* was acting in accordance with Council Resolution 221. The Council also passed a series of decisions under Chapter VII of the Charter beginning in 1966 "which imposed" economic and other sanctions on Rhodesia; those were not terminated until 1979 when Zimbabwe majority rule was assured.

(5) **The Trends**

The seaward aspects of the Algerian civil war developed the concept of diversion of merchantmen to other ports, away from their destinations in rebel-held parts of Algeria, rather than the traditional visit, search and capture procedure. The customs zone idea was not new and roughly paralleled the exclusion zones under World War II and earlier practice. The high seas interdictions far from Algeria, justified by France on self-defense grounds, came close to the line of an international law violation, if they did not cross over into illegality. Under today’s standards of proportionality, and in view of contemporary protests, such actions were probably illegal, given the localized nature of the conflict.

The U.K. Cod War convoying continued the trend of legitimating peacetime convoying of a nation’s own vessels to protect them against assaults by others, a theme that had been restated during the civil war in China and later during the Tanker War of 1980-88.

The 1962 Cuban Crisis started another trend for maritime naval operations, use of a quarantine under Article 52 of the Charter, rather than employment of the more traditional declaration of blockade, which carries with it a connotation of war. In reality, the Cuban quarantine continued the practice of the Algerian civil war of a proportional exclusion zone, but in an international confrontation situation as distinguished from the internal conflict circumstances of civil war.

The Rhodesian transition was the second example of use of the agency principle to effect control of merchant ship traffic by the U.N. Security Council, the first being Korea. Employment of diversion instead of traditional visit, search and capture followed the Algerian civil war model, but this time in the context of a U.N.-approved action.

**D. India-Pakistan: 1965, 1971**

During the first of these wars, Pakistan seized 50 Indian cargoes on neutral ships and adjudicated them before a prize court. The cargoes consisted mainly of tea, with some manifests of coal and general cargo; the High Court of Dacca held that because the tea was "produce of Indian soil," grown by Indian companies, it was lawful prize. Pakistan had previously published lists of
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absolute and conditional contraband; India responded with a list of absolute contraband. India asserted that because a formal state of war did not exist, Pakistan could not constitute a prize court. Pakistan responded that the maritime measures were a lawful exercise of the right of self-defense under the U.N. Charter.\(^\text{216}\) India’s ultimate response to the initial Pakistani seizure was impoundment of three Pakistani ships in Indian waters and ordering offloading contraband before proceeding to Pakistan as “reprisals.” When Pakistan continued to offload cargoes in neutral bottoms bound for India, India informed foreign shipping companies that no India-bound cargoes should be shipped in Pakistani-flag vessels and that neutral-flag vessels bound for either nation should stop first at an Indian port, despite a cease-fire in effect. If the cargo was not contraband, it would not be seized. Thirty-eight vessels complied; 16 did not. After the end of contraband control by both belligerents, they first agreed to permit U.S. aid vessels to land their cargoes. Eventually both states heeded the International Federation of Insurance’s request for release of neutral vessels.\(^\text{217}\) Late in 1966, the U.N. General Assembly belatedly called upon the belligerents to observe the rules of warfare.\(^\text{218}\) Under the traditional view of Charter law, the resolution was nonbinding, although it was some evidence of the international community’s views.\(^\text{219}\)

In the 1971 war, India successfully isolated East Pakistan (later Bangladesh) by “contraband control and blockade.” After dark, neutral vessels were not allowed to approach the Pakistani coast closer than 75 miles. Besides ensuring safety of Indian vessels at sea through naval control and protection of shipping, the Indian Navy sought to capture or destroy Pakistani merchant vessels. More than 115 neutral ships were inspected, and India diverted neutral ships to Calcutta if they carried cargo of military significance, after India discovered that vessels’ markings and names of many ships had been changed. Three Pakistani merchantmen were captured.\(^\text{220}\) A Liberian-registered ship and a Spanish vessel were also sunk; Professor O’Connell has asserted that “[t]he naval operations conducted by India against . . . Karachi and on the Bay of Bengal took no account of international law, which was . . . deliberately put to one side by the Indian naval staff.” In these operations, two merchantmen were destroyed by surface-to-surface missiles from Indian patrol boats while the ships were at anchor in the Karachi roadstead, \textit{i.e.}, in territorial waters. The neutral in-bound \textit{Venus Challenger} was hit and sunk by a missile 26.5 miles off Karachi and was lost with all hands; a Pakistani destroyer 20 miles off Karachi also went down to a Styx missile attack that night; the cause was probably “[c]apricious behavior of the missiles and malfunction or inadequate operation of the guidance systems.”\(^\text{221}\) \textit{Venus Challenger’s} destruction on the high seas was a classic case of indiscriminate use of weapons. Significantly, a week later, but apparently before the Pakistanis discovered her wreck, the Bengal Chamber of Commerce published its 40-mile dusk-to-dawn warning.\(^\text{222}\) Professor O’Connell was correct with respect to the
Venus Challenger; the Pakistani destroyer was fair game, however. On the other hand, the economic warfare aspects of the conflicts—visit, search, seizure, diversion, capture contraband and prize procedures—proceeded along traditional lines\(^223\) and thereby reinforced the traditional norms. The war was over in two weeks,\(^224\) thus ending the potential for a more significant trend in state practice on the issues.

**E. Vietnam: 1962-73\(^225\)**

During the Vietnam conflict, North Vietnam employed small coastal fishing vessels as logistic craft to support its military operations\(^226\) in violation of the obligation to use these vessels, normally exempt from capture or destruction, for fishing only.\(^227\) The patrol areas developed for Operation Market Time, originally part of a 12-mile defensive sea area, eventually extended to over 30 miles off the South Vietnamese coast.\(^228\) The U.S. Joint Chiefs of Staff considered a blockade of North Vietnam in 1965 but took Commander-in-Chief, Pacific’s advice against such because it would indicate the United States was performing a belligerent act.\(^229\) At the same time that the United States and South Vietnam (RVN) were intercepting southbound North Vietnamese supply boats, South Vietnamese were operating a Junk Force that was not part of its navy, also to prevent the very kinds of craft attempting to filter from the north. They performed other military tasks as well.\(^230\) In 1965 the Junk Force was integrated into the RVN Navy.\(^231\) The patrols did not interfere with local fishing and trading boats, even though Vietnam was not party to Hague Convention XI.\(^232\)

The United States used Military Sealift Command ships, U.S.-flag charters, and occasionally foreign-flag vessels to deliver war materials. Several of these ships were attacked, and two were sunk, due to attacks by the Viet Cong while the ships were in South Vietnamese internal waters, *i.e.*, during river transit. There seems to have been no discrimination between vessels carrying war material and civilian-oriented cargoes, *e.g.*, cement.\(^233\) The United States did give antisubmarine protection to valuable cargoes, *e.g.*, troop carriers.\(^234\) As it had done during the Korean War, the U.S. Navy evacuated refugees—over 300,000 of them, mostly civilians—from North to South Vietnam, and 721 French wounded, including prisoners of war, were taken aboard the hospital ship *U.S.S. Haven*, bound for Morocco and France.\(^235\) Soviet-flag vessels carrying war supplies to North Vietnam initially were not interdicted.\(^236\) In 1972 a mine quarantine program in North Vietnamese territorial waters sought to seal off North Vietnamese ports;\(^237\) its antecedent had been an attempted quarantine by South Vietnam of Communist seaborne supplies coming to the Viet Cong through the Gulf of Siam and the Mekong Delta.\(^238\) A RVN destroyer did succeed in sinking a North Vietnamese trawler, believed to be carrying ammunition, in 1972, however.\(^239\)
(1) **Analysis of Trends**

Although the small-boat interdiction\(^{240}\) and the mine campaign have been justified\(^{241}\), there is no evidence of North Vietnam's justification of its antiship interdiction campaign. If an interdicting ship's wake overturned a junk, a \textit{GWSEA} issue of the duty to stop and pick up survivors would have arisen, according to Professor O'Connell.\(^{242}\) The civilian evacuations followed the same pattern as those of the Korean conflict, with at least media announcement of the process, and were justified under international law as a \textit{de facto} cartel operation.\(^{243}\) The hospital ship was also protected from attack,\(^{244}\) even though the United States was not in an international armed conflict at the time.

(2) **Other Incidents of the Era**

Two incidents involving naval force and merchant-type vessels occurred after the United States withdrew from Vietnam.

On January 20-21, 1974, the P.R.C loaded 11 "warships" with 660 amphibious assault troops and took the disputed Paracel Islands in the South China Sea, fending off South Vietnamese naval gunfire with a superior naval force. Press reports indicated that the first P.R.C convoy, which was driven off by Vietnam, had been "fishermen" who had raised a P.R.C flag.\(^{245}\)

The second was the \textit{Mayaguez} incident, May 12-15, 1975. Cambodian naval forces fired on and seized S.S. \textit{Mayaguez}, a U.S.-flag unarmed merchantman in the Gulf of Thailand, 7-8 miles off an island claimed by Cambodia and Thailand but 60 miles off the coast of the mainland. Cambodia claimed \textit{Mayaguez} was on a spy mission in her territorial waters. The United States asserted that the vessel was on a regular run between Hong Kong and Thailand and in the usual shipping lanes. The United States issued a \textit{Notice to Mariners}, warning of the danger and intimating other incidents. U.S. Marine and Navy units cooperated to rescue the 40-member U.S.-national crew and the ship from Koh Tang Island, 15 miles off Cambodia. After receiving small arms fire from Cambodian patrol boats and attempting to block \textit{Mayaguez}' movement toward the mainland, U.S. carrier-based aircraft had fired on and sunk three boats and damaged others. Because of the "profoundly negative" attitude of Communist states toward the ICJ, no possibility was seen for Cambodia's submission to the World Court, and that avenue of redress was not followed.\(^{246}\)

The convoy of "fishermen" aboard fishing craft was, of course, yet another example of misuse of a protected class of commercial ships. When these vessels were employed for the attack on the Paracels, they lost their protected status and could be treated like any warship.\(^{247}\) South Vietnam was legally justified in its attack. Moreover, one might question whether the vessels in question were local coastal craft, as contemplated by Hague Convention XI, since the Paracels are over 100 miles off the Asian mainland.

The Cambodian seizure of \textit{Mayaguez} also violated international law. The Cambodians had full opportunity to search for espionage evidence after they
boarded, and no report of such has been found. It is true that ships may use transit passage to the high seas in sea lanes that are in territorial waters, but the passage must be innocent in nature. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state, and such nations may take steps to prevent passage which is not innocent, which may include temporary suspension if such is essential for the protection of the coastal state’s security. In other respects, coastal states cannot hamper innocent passage. There was no showing of any danger to the security of Cambodia, nor was this a temporary suspension; it was an outright seizure. If the Cambodian action occurred outside territorial waters, in the contiguous zone as part of the high seas, there was no justification for stopping *Mayaguez.*

It was appropriate, as a matter of international law, for the United States to respond proportionally to defend *Mayaguez* and to recover the crew and the ship. The incident illustrates the interplay of peacetime principles of maritime operations, today articulated in UNCLOS in addition to other treaties and customary law, and the law of armed conflict, i.e., the principles of self-defense.

(3) Other Trends

Treaty regimes concluded during or following the Vietnam conflict have affected the law of naval warfare tangentially.

The 1971 Seabed Treaty’s prohibitions on planting or placing nuclear weapons or other weapons of mass destruction on the ocean floor in effect declares that enemy merchant ships may not be attacked by devices of that type, in that if the placement is illegal, then use would also be illegal. Similarly, the 1972 Bacteriological Convention’s prohibition on development, production, stockpiling, acquiring or maintaining bacteriological agents or toxins implicates their nonuse against enemy merchant ships. The 1972 Convention does not derogate from the 1925 Geneva Gas Protocol; in effect, it “perfects the prohibition on the use of biological and toxin weapons begun in the 1925 Protocol.” Probably the 1972 Convention does not articulate customary law, but the 1925 Protocol does. “[T]here appears to be no role for biological ship-to-ship weapons” at present, but the analysis has been included for the sake of trends in future naval weapons development and the law to accompany it.

The 1977 Environmental Modification Convention parties have pledged “not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.” The range of the Convention includes the whole Earth. The Convention does not directly deal with the problem of an attack on a merchant vessel, being concerned with techniques that change the environment, but it would seem that a method of attack whose ultimate environmental effect might be construed as the impact desired, rather than the initial result on the object, would be within the scope
of the Convention. A torpedo attack on a tanker, which results in a large oil spill, the intent being to destroy the tanker, would not be denounced by the Convention. On the other hand, if the intent of the attack was to cause the spill so that enemy naval vessels' injection scoops, steam plant condensers or intakes to desalinization plants would become fouled, thereby causing engineering plant casualties and loss of movement capability, such action would be within the Convention if "widespread, long-lasting or severe" environmental effects also ensued.

Negotiated with the law of land warfare, land-based air war and naval bombardment of land in mind, the 1977 Protocol I to the 1949 Geneva Conventions explicitly declares as much in Article 49(3). Nevertheless, the Protocol has strong overtones for objects of attack and methods and means of warfare that may influence the law of naval warfare. Some provisions explicitly refer to rules for naval warfare. The Protocol is not in force for the United States.

Protocol I, Article 52, declares that civilian objects, which are all objects that are not military objectives as defined in the Protocol, shall not be the object of attack or reprisal; attacks must be limited strictly to "military objectives..." [M]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstance ruling at the time, offers a definite military advantage." If there is doubt as to whether an object, normally thought of as civilian - e.g., "a place of worship, a house or other dwelling or a school" - is being used to effectively contribute to military action, the presumption is that it is not so used, according to Article 52.

This provision deserves close scrutiny. Its examples of places of worship, houses and schools demonstrate that it is clearly directed toward land warfare. However, there are maritime counterparts (e.g., passenger liners or cruise ships, houseboats, school ships or university research vessels). Is the phrase, "under the circumstances ruling at the time," appropriate for naval operations, given poor visibility and other identification conditions at sea, perhaps poor communications conditions among belligerents, and the present differences as to what is contraband? Should the presumption for civilian use in Article 52 be the same, or the reverse, perhaps coupled with a list of prohibited objects for which the presumption is as stated in Article 52 (e.g., hospital ships, other protected vessels, and passenger liners or cruise ships), and further demarcations through exclusion or war zones?

Protocol I, Article 53 prohibits attacks on cultural objects, their use as part of the military effort, or the object of reprisals, without prejudice to the 1954 Hague Cultural Property Convention. For reasons noted in the Introduction, this aspect of the Protocol as customary law may have carryover effect for naval warfare, in that the Protocol reinforces other wartime treaty or customary norms.
Starvation of civilians as a warfare method is prohibited by Article 54(1). The remainder of the article would be largely inapplicable to sea warfare, except for the prohibition on attacks, destruction, removal or rendering useless of foodstuffs "indispensable to the survival of the civilian population," regardless of motive. The foregoing prohibition is inapplicable if foodstuffs are solely for armed forces use or in direct support of military action. In no event can such actions leave the civil population without adequate food or water, such as to cause its starvation or forced movement. This aspect of Article 54 has obvious overtones for naval warfare in the context of what is and what is not contraband, and the issue of relief ships in general.

Echoing the 1977 Environmental Modification Convention, Article 55(1) of Protocol I declares:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

The same analysis for the Convention would appear to fit the Protocol. Article 56, denouncing attacks on dams, dikes or nuclear electric generating stations whose destruction would unleash "dangerous forces," is similar in theme but would seem to have little or no relevance to war at sea, unless a future treaty would denounce similar attacks on nuclear-powered merchant vessels or other bulk cargo ships whose burthen when released due to attack would unleash "dangerous forces." There are few if any nuclear-powered nonmilitary vessels in service today, even if one counts certain icebreakers as such, but liquid natural gas tankers might fall into this category. Article 56 also provides that parties to a conflict must try to avoid locating military objectives near works or installations that could loose dangerous forces. While this would seem to have no relevance for naval warfare, a parallel might be belligerents' sending ships with dangerous-force potential to sea; they would be required to be kept away from legitimate military objectives, e.g., a military convoy, if a Protocol I analogue came into effect.

The Protocol's precautionary measures chapter includes a specific provision for naval warfare:

In the conduct of military operations at sea . . . , each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

Article 57 also has general precautions to be observed for other attacks:
150 Targeting Enemy Merchant Shipping

(a) Those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) [A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

Last, the Article provides that if a choice is possible between several military objectives for a similar military advantage, the commander must choose the objective that should cause the least danger to civilian lives and objects.270 Articles 57(2)(a)(iii) and 57(2)(b), together with Article 51(5)(b), thus represent the first attempt at codification of the principle of proportionality, i.e., that the means of attack must not be such that incidental loss of civilian life, civilian injuries, or damage to civilian property, or a combination, cannot be excessive relative to the military advantage sought to be gained.

Article 58 adds that belligerents must try to remove civilians or civilian objects from the vicinity of military objectives, avoid locating military objectives within or near densely populated areas, and take precautions to protect civil populations, individual civilians and civilian objects under their control against dangers of military operations.272 While all but the first-quoted clause of Articles 57 and 58 apply to land warfare, certain implications may be seen to flow from the other provisions for war at sea. One obvious parallel is the principle for planning, deciding, cancelling and suspending attacks. The warning rule, if applied to naval warfare, would seem to contradict the customary rule of no warning for attack on enemy merchant ships if such ship is armed, is in an armed convoy, assists the enemy’s intelligence system, acts as a naval auxiliary, or is integrated into the enemy’s war-fighting/war-sustaining effort and the warning would subject an
attacking warship to imminent danger. (The customary rule requires – in the absence of these factors – that the enemy ship’s passengers, crew and papers be placed in a position of safety before attack, but all this is subsumed under “waming.”) The Article 57(c) principle would be congruent with naval warfare norms if the “circumstances do not permit” exception clause would apply to situations where the merchantman is armed, etc., on the theory that such situations would subject the attacker to imminent danger. “Circumstances do not permit” might easily include submarine attacks because of the nature of the modern submarine and its vulnerability on the surface. The same would also apply to aircraft attacking an armed enemy merchantman.

The Article 58 requirement of removing civilians and civilian objects, if removal be equated with placing in safety, would appear to be at variance with the customary norm. Protocol principles for choosing the military objective least damaging to civilian interests and for taking other necessary precautions to protect the civil population, etc., invite parallels for naval warfare. Article 58’s requirement for locating military objectives away from densely-populated areas, if applied to naval warfare, would raise problems for siting naval bases in forward areas. There are relatively few decent natural harbors, etc., today that do not already have a port city nearby.

The Protocol also bans indiscriminate attacks, which are:

(a) those which are not directed at a specific military objective;

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

The Protocol gives two examples of indiscriminate attacks: (1) use of a large weapon that destroys several separate discrete military targets at once when there are intervening civilian areas or civilian objects; (2) an attack that can be expected to cause excessive loss of civilians or civilian objects in relation to the “concrete and direct military advantage anticipated.” Naval warfare analogies might be cruise missiles employed in a scenario where neutral merchant ships close aboard a target might be hit instead of the target (it being assumed no warnings to the merchantmen were given), or use of shipkilling weapons directed against a fleeing vessel suspected of violating protected status (e.g., a passenger ship suspected of carrying troops) when under the circumstances a partially disabling shot would serve to stop the errant vessel. In other words, as the Basic Rules of the Protocol put it, parties do not have unlimited choice of methods or means.
of warfare; weapons, projectiles and materials and methods of warfare that cause superfluous injury or unnecessary suffering are prohibited.\textsuperscript{275}

Four years after signature of Protocol I, the 1981 Conventional Weapons Convention\textsuperscript{276} was signed, with three protocols elaborating upon prohibited weaponry. It too is not in force for the United States.

Protocol I of the Convention denounces use of weapons whose primary effect is bodily injury by fragments undetectable by x-rays.\textsuperscript{277} Although usually applicable to land warfare, the Protocol would deny use of such antipersonnel weapons in attacks on enemy merchant ships.

Protocol III defines incendiary weapons or munitions as devices whose primary purpose is to burn persons or objects. Munitions with incidental incendiary effects, such as white phosphorus illumination shells, or munitions combined with penetration, blast or fragmentation effects, such as armor-piercing shells, where the incendiary effect is not specifically designed to cause burn injuries, are excluded from the prohibition. Protocol III forbids incendiary attacks on the civilian population, civilians or civilian objects; or on a military objective within a concentration of civilians, if airborne weapon delivery is contemplated. If other than airborne delivery is contemplated, incendiary attacks may be used if there is clear separation between the military objective and civilian concentrations and precautions are taken to minimize collateral damage.\textsuperscript{278}

Protocol III should have little impact on war at sea, because incendiary weapons as defined in Protocol III are seldom used at sea; a rare example is the napalm attack on the \textit{U.S.S. Liberty}. Protocol III would not have applied to the assault on the \textit{Liberty}, which was a U.S. warship with only service people aboard.\textsuperscript{279}

However, the Protocol would apply to attacks on merchantmen crewed by civilians if they are not part of the war effort. Protocol III is concerned with the effect of incendiary weapons on civilians and civilian objects, and unless enemy merchant ships could be classified as civilian objects, Protocol III would not apply to the vessel. Unless the prohibitions against incendiary attack when the military objective (the ship) is surrounded by civilians could be construed to include the military objective surrounding civilians (the usual relationship of crew aboard a vessel), Protocol III would not apply to the merchant crew, if it be assumed that they would be classified as civilians, which is unlikely.\textsuperscript{280}

Protocol II of the Conventional Weapons Convention covers mine warfare and booby-traps but is limited to land warfare.\textsuperscript{281} Several provisions might be cited for analogous treatment for naval warfare, however. The Protocol bans indiscriminate use of mines; mines in civilian-concentrated areas unless close to a military objective or warnings are given civilians; remotely delivered mines unless used in a military objective area or an area with military objectives and locations are recorded or a neutralizing device is used, and advance warning is given civilians "unless circumstances do not permit" such. Belligerents must record minefield locations. If a U.N. peacekeeping force is employed,
belligerents must, if requested by the U.N. commander, remove or render harmless all mines, protect the force from effects of mines, and supply information on minefields. If a U.N. fact-finding mission is involved, belligerents must protect the mission from mines or supply minefield information if protection is not feasible.282 The same analysis with respect to indiscriminate use and civilian concentrations and incendiary weapons applies to Protocol II. The provisions governing remotely-delivered mines would have impact on enemy merchant ships; they could only be used in a military objective area or an area with military objectives, e.g., enemy merchantmen, e.g., a war zone or exclusion zone, and then only if locations are recorded or neutralizing devices are used, and if civilians (e.g., neutral merchant ships) are warned. Given the relatively temporary nature of zones and the availability of neutralizing devices - as much to protect one’s own forces from accidents - adaptation of Protocol II’s principles to maritime warfare would seem to pose few problems.

F. Falklands/Malvinas: 1982

The legality of the British attack on the fishing trawler Nanval during this conflict has been noted by NWP 9A. Nanval had an Argentine naval officer aboard and had been used for intelligence-gathering. (Nanval, as an oceangoing trawler, arguably might also be said to have been outside the exception because of her size, 1,400 tons).283

Both belligerents attacked merchant vessels employed in the enemy’s war-fighting or war-sustaining effort; there is no recorded protest. The United Kingdom employed over 50 STUFT (Ships Taken Up From Trade) vessels, privately owned ships, ranging in size from the liner Queen Elizabeth II to the cable ship Iris, that were requisitioned from their owners. The containership Atlantic Conveyor, lost to Exocet attack, was among the casualties of war. These vessels should be distinguished from Royal Fleet Auxiliary (RFA) ships such as Sir Galahad, also lost, and RFA tankers similar in function to requisitioned tankers. Argentina apparently used both STUFT-type ships and naval auxiliaries.284 The United Kingdom published the location of its hospital ships as operating in a “Red Cross box,” and Argentina respected this neutral zone. There is nothing in GWSEA requiring or approving such, and there appears to be no custom - apart from the cartel ship analogy - to permit such.285 Such a neutral zone may be established for land warfare,286 and demonstrates the possibility of adaptation of land war norms for conflict at sea.

On April 7, 1982 the United Kingdom declared a 200-mile Maritime Exclusion Zone (MEZ), to be effective April 12, for all Argentine shipping around the Falklands/Malvinas. On April 23 the United Kingdom established a Defensive Sea Area (DSA) or “defensive bubble” around its task force, warning that approach by Argentine civil or military aircraft, warships or naval auxiliaries would be dealt with “appropriately.” On May 1, when fighting started in the
Falklands/Malvinas, the MEZ was changed to a Total Exclusion Zone (TEZ) for all ships supplying the Argentine war effort; MEZ coverage was extended on May 7 to all sea areas more than 12 miles off the Argentine coast. Argentina had declared a 200-mile defense zone (DZ) off its coast and around the Falklands/Malvinas on April 13, after having protested the British action. MEZ enforcement capability came on the day of its enforcement. Presumably Argentina could have enforced the DZ if it had chosen to do so, although after the cruiser General Belgrano’s sinking, Argentine naval forces, except for naval aviation and possibly submarines, did not figure in the war. On May 11 Argentina declared all waters of the South Atlantic Ocean a war zone, threatening to attack any British vessel therein. Apparently the only neutral ship attacked by the Argentines in the war zone was the Hercules, a Liberian–flag tanker in ballast that was owned by United States interests. Although the Soviet Union belatedly protested the lawfulness of the British TEZ, it apparently did not object to the Argentine DZ, and did observe the U.K. TEZ. The United States had published warnings to U.S. vessels and vessels beneficially owned by U.S. interests like Hercules two days before she was hit. On July 12, active hostilities in the Falklands/Malvinas ended, but the United Kingdom continued the TEZ and economic sanctions. Ten days later, the TEZ was lifted, but the United Kingdom warned Argentina to keep military ships and aircraft away from the islands, declaring a 150-mile Protection Zone. The TEZ had been relatively successful, although Argentina succeeded in airlifting supplies in until the last days of the war. Apparently Argentine sealift efforts failed.

(1) Appraisal
Commander Fenrick proposed an analysis in 1986 for legality of the exclusion zone in the context of the Falklands/Malvinas War and the then ongoing Tanker War in the Persian Gulf:

If belligerents use exclusion 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 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 belligerent 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.  

He asserted, correctly, that Argentina's 200-mile zone around the Falklands/Malvinas "was probably adequate and ... its declaration that the entire South Atlantic was a war zone was disproportionate to its defense requirements and would affect shipping unconnected with the conflict." Thus the U.S. Court of Appeals was correct in assessing liability against Argentina for loss of the Hercules, a decision reversed by the Supreme Court of the United States on sovereign immunity grounds. Commander Fenrick also says that the 200-mile British TEZ, although seemingly "an arbitrary interference with the freedom of navigation of ... ships of non-parties to the conflict," was a reasonable temporary appropriation of a limited area of the high seas away from major shipping routes for self-defense purposes to prevent non-party clandestine participation in the conflict. The appropriation was accompanied by adequate notice, did not result in any casualties to the ships or aircraft of non-parties, and was terminated after a brief period on July 22, once the British consolidated their position in the Falklands. The British TEZ was, in the circumstances, compatible with the law of naval warfare for general wars and with limited warfare trends. Professor Goldie concurs with the Court of Appeals' and Commander Fenrick's views.  

War zones as to enemy merchantmen are clearly legitimate so long as they are proportional to the military effort. Professor Goldie and Admiral Miller have made the important point that such zones may be justified, even if illegal in terms of size, duration, etc., if such zones are legitimate reprisals to illegal acts of adversaries, e.g., the U.S. Pacific Ocean war zone during World War II and the allied Atlantic war zones during both World Wars. Even if a zone is legal in terms of proportionality, etc., such a lawful zone does not justify violation of principles of humanitarian law, e.g., shooting survivors in the water. The conflict also saw development of the U.K. view of self-defense in the Charter era.  

Besides the development of the law of exclusion zones, the war saw application of traditional principles applicable to capture or attacks on merchant shipping. The exception to the rule against capture or destruction of coastal fishing vessel was illustrated in the Nanval capture. The trawler had been used for intelligence-gathering and was probably too large to be considered a coaster. The U.K. action was similar to trends during the Korean War, the Chinese civil war, Vietnam, and the Paracel Islands campaign. Use of merchantmen to carry warfighting/war-sustaining cargoes made such ships liable to attack, and these vessels became targets as legitimate as the RFA ships. This repeated a trend from previous conflicts. On the other hand, exempted vessels, e.g., hospital ships, continued to carry the protections they have always enjoyed. And the attack on Hercules, a neutral-flag merchantmen, was illegal under prior practice.
(2) Other Trends

On December 10, 1982, the U.N. Convention on the Law of the Sea (UNCLOS) was signed. Repeating the U.N. Charter Article 2(4) pledges of refraining from any threat or use of force against the territorial integrity or political independence of any state, “or in any manner inconsistent with the principles of international law embodied in the Charter of the United Nations,” UNCLOS declares that the high seas shall be used only for peaceful purposes. 304 While UNCLOS thus does not apply to armed conflict situations, consideration of some of its terms remains important for two reasons: UNCLOS continues to apply to some relationships between belligerents and nonbelligerents, and some UNCLOS concepts may be urged for law of naval warfare rules. Although UNCLOS cannot be analyzed in detail, 305 certain provisions may be mentioned briefly. Its terms raise a number of potential issues for war at sea. UNCLOS is not yet in force and the United States did not sign the treaty, but many of its provisions have been accepted by the United States as a restatement of state practice. 306

The high seas are open to all states, as delimited by UNCLOS; freedom of navigation is guaranteed. 307 “No state may validly purport to subject any part of the high seas to its sovereignty.” The 1958 High Seas Convention has similar terms. 308 How should these claims be reconciled with a belligerent’s proclamation of a MEZ or a TEZ? Every state has the right to sail ships flying its flag on the high seas and may set conditions for granting nationality to its ships, for ship registration, and for the right to fly its flag. As with the 1958 High Seas Convention, there “must exist a genuine link between the State and the ship.” 309 The recent draft U.N. Ship Registration Convention would elaborate on the UNCLOS genuine link principles. 310 Will or should these provisions impact the “flag only” rule? Professor Wolfrum has stated that they do not. 311 UNCLOS also provides for the right of approach and visit, for pirates, slavers and narcotics trafficking, except for warships and vessels “used only on government non-commercial service,” which have complete immunity. 312 These provisions, in terms of procedures and immunities, appear congruent with the principles of naval warfare except, of course, the right of belligerents to attack and destroy enemy warships and naval auxiliaries, and the conditional right to attack enemy merchant ships. Other UNCLOS provisions declare the right to fish on the high seas subject to other treaty obligations, rights of coastal states, and the obligation to conserve high seas resources. 313 There are also requirements for preserving and protecting the marine environment. 314 These parallel principles of the 1977 Environmental Modification Convention and Protocol I, 315 and these UNCLOS principles might be invoked by neutrals. 316

The response to all these questions, which might arise in the context of nonbelligerent states’ claims, is met by UNCLOS Article 87(1), which subjects high seas usage to “conditions laid down by this Convention [UNCLOS] and
by other rules of international law;"317 i.e., the rules of armed conflict at sea, among other norms; there is a parallel provision in the 1958 High Seas Convention.318 To the extent that UNCLOS incorporates by reference other treaties,319 UNCLOS is subject to the treaty law of naval warfare, e.g., the 1907 Hague Convention IX regarding capture during naval war.320 Thus, UNCLOS stands on the same footing as the 1958 High Seas Convention; it is a treaty for those party to it — and important naval powers like the United States are not — with important exceptions to it.321 To the extent that UNCLOS Article 87(1) represents a customary norm — and about 30 years of practice under the analogous provision of the High Seas Convention would seem to have ripened the treaty rule into a customary norm — the result is the same for nations not party to UNCLOS, such as the United States. The provision, in Article 88 of UNCLOS, that the high seas shall be reserved for peaceful purposes322 must be read as subject to the Article 87(1) limitation. This is congruent with UNCLOS Article 301, "Peaceful uses of the seas," which provides:

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.325

Thus the law of the sea and naval warfare stands on the same footing as the law of land warfare and the U.N. Charter. States are subject to the Charter, including rights of self-defense under Article 51 and perhaps under customary law. UNCLOS governs uses of the sea, subject to other rules of international law, i.e., the law of naval warfare.324

Appearing in 1982, Professor O'Connell's International Law of the Sea traced the evolution of the rules evolving from World War II, and the traditional list of exceptions from attack, e.g., fishing boats, hospital ships, etc.325 O'Connell notes the military necessity principle, distinguishing between situations where overt activity (e.g., killing survivors of a sinking) would be illegal, and passive action (e.g., failure to pick up survivors of a sinking because of legitimate fear of being attacked by the enemy), which would be legal. He believes that "like other mediating rules, 'military necessity' does not annul the principle [of humanity], and must be strictly construed and applied if it is not to do so."326 He seems to take no clear position beyond World War II practice on the issue of sinking armed enemy merchant vessels, that submarines were exempted from the duties imposed on surface raiders.327 While restating the traditional rule that a ship's "enemy character is indicated by the flag . . . it is entitled to fly [] that is now to be read with the modern rules for attributing nationality to ships[,]" i.e., apparently with the genuine link theory,328 discussed and criticized earlier in the peacetime law of the sea context.329 As long as an exclusion zone has been
publicized and neutral shipping is not put unduly at risk, O'Connell would justify an exclusion zone as a reasonable means of self-defense.  

G. The Iran-Iraq War, 1980-88  

When Iraq invaded Iran on September 22, 1980, Iran declared Persian Gulf waters up to 40 miles off her coasts a war zone (officially titled an "exclusion zone"), announced new shipping lanes through the Strait of Hormuz, prohibited all transportation of materials to Iraqi ports, and warned of retaliations if Persian Gulf nations gave Iraq facilities. Iraq responded in early October, declaring that the Persian Gulf north of 29°30'N was a "prohibited war zone." This was the area for the Tanker War until March 1984. Iranian bomb attacks closed Iraq's oil terminals and blocked all of Iraq's commercial ports at the start of the war, thus forcing Iraq to use pipelines to non-Iraqi ports to send out oil or accept war-sustaining goods through other means, i.e., nearby neutral ports. "Whether classified as absolute or conditional contraband, oil and the armaments which its sale or barter on international markets [brought], were absolutely essential to the war efforts of the Persian Gulf belligerents." Neither side declared contraband lists, nor were high seas blockades instituted, although the Iranian exclusion zone, covering the Shatt al-Arab littoral, was in effect a blockade of Iraq's small coastline. No prize courts were established. Iran did patrol the Gulf in 1981, interrogating ships thought to be carrying contraband. A Kuwaiti survey ship and a Danish freighter were seized on suspicion of contraband, but both vessels were let go. Iraq protested seizure of the Danish ship as a flagrant violation of international law. Iran was careful, however, to avoid provoking its neighbors or major Western powers, being dependent on trans-shipments from the United Arab Emirates and food imports through the Gulf. The Danish vessel, the Elsa Cat, had been taken in the Strait of Hormuz; Iran declared that its navy "guarantee[d] the security of all ships in the Strait ... but will not allow Iraq or anybody else to abuse this wartime situation to carry war materials for Iraq."  

In September 1980, the United States, after pledging "strict neutrality," had declared that it intended to do what was necessary, including naval action, to keep open the Strait of Hormuz. By October 15, at least 60 Australian, French, U.K. and U.S. warships were in the Indian Ocean to protect the Strait oil route; there were 29 Soviet vessels in the area. The U.N. Security Council passed Resolution 479, calling for cessation of hostilities, also in September 1980.  

In late 1981, President Reagan reaffirmed and expanded the Carter Doctrine to include a U.S. interest in dealing with any threat to Saudi Arabia and a readiness to keep the Strait of Hormuz open if Iran tried to stop shipping there. The international aspect of this U.S. critical defense zone (CDZ) was undoubtedly lawful in its premise of defense from external aggression and the open nature of its communication. Moreover, the CDZ was definite in its boundaries and
proportional to the interest protected, *i.e.*, the flow of Gulf oil to the West and to Japan. (Saudi Arabia produces about 20 percent of the Earth’s oil consumption.)

By early 1982, Iraq could only export oil through the trans-Turkey pipeline; Syria closed the Iraqi pipeline to the Mediterranean. On January 14, of that year, Iraq issued a warning to international shipping “to keep clear of the western part of the Gulf as any ships traveling in that area would be treated the same way as three vessels which Iraq claimed to have sunk on January 11 as they were leaving the Iranian port of Bandar Khomeni.” On March 10, it was reported that Iraq had mined the channel linking this port and the port of Bandar Mashahr with the open sea. An Iranian tanker had been lost in February, probably due to mines.

On August 12, 1982, Iraq announced its Gulf Maritime Exclusion Zone (GMEZ) and two days later warned foreign shipping to stay clear of Iranian waters in the upper Gulf, including waters around Kharg Island, from which Iran was exporting up to 2 million barrels of petroleum a day to finance the war effort. On August 29, Iran responded, declaring it would protect foreign shipping, begin escorting foreign shipping, and deployed ships with surface-to-air missiles at Kharg. Iran began giving naval protection to shuttle convoys of Iranian-flag and neutral flag merchantmen that lifted oil from Iran’s northern Gulf ports to those farther down the shore for world export. Iraq conducted air strikes against these convoys throughout 1982, 1983 and 1984. When Iraq bombed Iran’s Nowruz oil offshore installations 40 miles west of Kharg Island in March 1983, a large oil slick resulted. Although early reports that the slick had equalled the area of Belgium were later discounted, it was big enough to threaten desalination plants in Bahrain, Qatar and Saudi Arabia before strong winds blew it offshore and partially dispersed it. Fish imports into the UAE were stopped because they were oil-contaminated. Iraq rejected Iran’s request for a partial truce so that oil cappers could try to stop the 2,000 to 5,000 barrels per day flow. Because of the Iraqi attacks on Gulf oil shipping, the London-based War Risks Rating Committee raised the rates for marine cargo insurance in 1982 and 1984.

Early in 1982, Iraq bombed the Nowruz offshore oilfield installations, causing an oil slick in the Gulf; previously Iraq had bombed Iran’s Kharg Island installations. An Iranian convoy of neutral flag tankers was hit by Iraqi aircraft. Throughout 1983 and early 1984, Iranian Navy-escorted convoys were hit. In September 1982 the Arab Summit urged an end to the war and compliance with the Security Council resolutions. In 1983 and 1984, the Council again called for a ceasefire, condemning the Iranian attacks, and affirming the right to free navigation and commerce in the Gulf. By now the United States had established its Central Command; France, Great Britain and the USSR were also maintaining a presence in the Indian Ocean. The USSR and other nations proposed a U.N. naval force to patrol the Gulf. The United States announced
new self-defense measures for its warships in Notices to Mariners and Notices to Airmen in January 1984; the measures were justified on self-defense grounds when Iran protested.\footnote{353}

In 1984, the GMEZ was extended to 50 miles around Kharg Island; the war was moving down the Gulf. Tankers were hit at Kharg. Iraq attacked neutral-flag vessels by aircraft and mining outside the GMEZ. Iran attacked neutral flag tankers on the high seas and in Saudi territorial waters; some were in ballast, some were destined for or headed from Saudi ports, and others were carrying Kuwaiti crude. Although there was a U.N.-sponsored ceasefire from June 1984 to March 1985, the attacks continued episodically. In May 1985 Iran again began attacking tankers bound to or from Saudi Arabia and Kuwait. In June and September 1985, the Iranian Navy intercepted and detained two Kuwaiti ships; in September Iran’s visit and search procedures, looking for Iraq-bound strategic materials, were stepped up. Ships stopped included Chinese, Danish, German, Kuwaiti, U.K. and U.S.-flag merchantmen. Some vessels bound for the United Arab Emirates were diverted by Iran to Bandar Abbas. A French warship began the precedent of defense of French-flag merchant ships in October. It positioned itself between the French merchantman Ville d’Angers and an Iranian warship, warning the latter that it would use force if the Iranian tried to intercept Ville d’Angers. (French rules of engagement declared that French warships would fire on forces refusing to break off attacks on neutral merchantmen under attack; the result had been a drop in attacks near French men-of-war.) Nevertheless, France announced that its navy would not convoy French tankers. In April 1986, a U.S. destroyer similarly had warned an Iranian warship off what may have been a planned boarding of the S.S. President McKinley, a U.S.-flag merchantman. By April 1987, Iran had searched 1200 ships over the previous 18 months and had confiscated 30 cargoes. It was becoming clear that although Iran could not close the Strait by military action, it might succeed in scaring off enough shipping to make a difference. Iran began to shuttle oil, which it sold to finance the war, down the coast from Kharg Island to the Sirri oil terminal.\footnote{354} Despite the action of the U.S. destroyer, the United States had recognized that “there is a basis in international law for ship searches by belligerents” in March 1986.\footnote{355} The United Kingdom had stated in January 1986 that a right of visit and search was an aspect of self-defense under Article 51 of the U.N. Charter.\footnote{356} The Netherlands similarly recognized a right of visit and search, but only as to ships proceeding to and from belligerents’ ports.\footnote{357} Only in 1987 did Iran enact legislation concerning prize law. By that time the GCC states - e.g., Kuwait and Saudi Arabia - had been regarded as having “unbelligerent” status.\footnote{358}

In 1982, U.N. Security Council Resolutions 514 and 522 called for an end to the war. Resolution 540 (1983) approved “the right of free navigation and commerce in international waters, call[ed] upon all States to respect this right and also call[ed] upon the belligerents to cease . . . hostilities in . . . the Gulf,
including all sea-lanes, navigable waterways... and to respect the integrity of
the other littoral States...." Resolution 552 of June 1, 1984 repeated the call
for "the right of free navigation," specifically condemning recent (i.e., Iranian)
attacks on commercial ships en route to and from states not party to the
conflict. 359

In the summer of 1984, mines detonated in the Gulf of Suez and the Strait
of Bab el Mandeb, damaging several ships. Although Iran along with Libya was
accused of laying the mines, Iran denied the charges, and it is thought that the
Libyan cargo ship Ghat laid them. Egypt exercised its rights under the Constan-
tinople Convention 360 to inspect all shipping, and a half dozen nations' navies
cooperated in locating and destroying the mines, clearly illegally laid under
international law. 361

One more Security Council resolution called for a ceasefire in late 1986. 362
In August Iraq bombed Iran's Sirri terminal for the first time; the war was moving
further down the Gulf toward the Strait of Hormuz. A British-registered, Hong
Kong-owned tanker was badly damaged at Sirri. Iran's Lavan and Larak terminals
were then hit. In November Iran hit the United Arab Emirates' Abu al-Bakoush
oil installations. 363 In September 1986, Iran had fired on, stopped and searched
the Soviet merchant ship Pyotr Emtsov, bound for Kuwait with arms ultimately
destined for Iraq. The USSR protested the incident. Both belligerents continued
to attack merchantmen in the Gulf, regardless of cargo or destination. The USSR
sent a Krivak-class frigate to escort four Soviet vessels carrying arms to Iraq from
the Straits of Hormuz to Kuwait, signalling to the belligerents that the USSR
would protect Soviet-flag ships. The Kitty Hawk carrier battle group deployed off
Oman in the Indian Ocean, the United Kingdom and France increased their
ship activity, and the U.K. Indian Ocean (i.e., Armilla) squadron began to spend
half its time in the Gulf. 364 The U.K. position on the Gulf shifted in 1986,
however, from statements of British "neutrality" in the "war" to U.K. "impar-
tiality" in "armed conflict," partly to attempt to ensure that the law of blockade
would not be applied to the detriment of British shipping. 365

Besides traditional seaborne boardings, Iran began using helicopters for visit
and search. 366 Some merchantmen began to carry chaff canisters to confuse
incoming missiles, while others were being repainted dull, non-reflective gray
for the same reason. Although most merchant ships remained unarmed, a U.S.
helicopter reported coming under missile fire from a Greek ship. Iran reportedly
completed testing Chinese antiship Silkworm missiles, and the United States
again expressed concern over keeping the Strait of Hormuz open. Press reports
said that the Iranian Air Force had established a suicide plane squadron to attack
merchant shipping like the Japanese kamikazi flights of World War II. 367 Clearly
the Gulf was becoming a more dangerous place as all actors prepared new tactics
and new technologies. In May 1987, Kuwait and the United States began
negotiations leading to transfer of 11 tankers from the Kuwaiti to the U.S. flag.
An Iranian patrol boat fired on and damaged another Soviet merchantman, the *Ivan Koroteav*. The United States and Kuwait completed reflagging arrangements, having preempted the USSR, which had to settle for chartering three of its tankers to Kuwait; the charters were renewed into 1988.\(^{368}\) Although assailed in some quarters, the U.S. re-flagging comported with international law.\(^{369}\) In mid-May, one of the USSR tankers hit a mine, said by the Soviets to have been placed by Iran. A day later, on May 17, *U.S.S. Stark* was hit by Iraqi fighter-launched Exocet missiles.\(^{370}\) The United States began revising its Rules of Engagement for possible interactions between U.S. and Iraq’s forces and, incidentally, anyone else displaying hostile intent or committing hostile acts. U.S. forces in the Gulf of Oman and the Persian Gulf were augmented.

The President ordered a higher state of alert for U.S. naval forces in the area and warned the belligerents that U.S. warships would fire if their aircraft approached U.S. vessels in a manner indicating hostile intent, unless they provided adequate notification of their intentions.

The warning was published to the international community through the issuance of a Notice to Mariners and a similar Notice to Airmen, warning ships and aircraft that U.S. Navy vessels in the Persian Gulf, Strait of Hormuz, Gulf of Oman, and North Arabian Sea were taking additional defensive precautions in response to the *Stark* attack and the continuing terrorist threat in the region. The Notice to Mariners requested ships and other vessels to establish radio contact with U.S. forces on prescribed international radio frequencies and to identify themselves and state their intentions as soon as they were detected. It advised that, in order to avoid inadvertent confrontation, ships and craft, including military vessels, might be requested to change course to remain well clear of U.S. naval vessels. The notice warned that failing to respond to requests for identification and intentions, or to warnings or a request to remain clear, and operating in a threatening manner could place the ship or craft at risk by U.S. defensive measures. It also advised that illumination of U.S. naval vessels with weapons fire control radar would be viewed with “suspicion” and could result in immediate defensive reaction. Finally, it stressed the U.S. forces would remain mindful of navigational considerations of ships and craft in their immediate vicinity, especially when operating in confined waters.

With a few exceptions, the Notice to Mariners and the Notice to Airmen [were] successful in reducing the risk of an inadvertent confrontation with other ships and aircraft. The notices [struck] a reasonable balance between high seas freedom of navigation and overflight and the inherent right of self-defense in protecting U.S. naval vessels from a belligerent or terrorist attack.\(^{371}\)

In July, the United States began convoying re-flagged tankers. The United States announced that its actions were consistent with international law, which recognized the right of a neutral to escort and protect ships flying its flag which did not carry contraband. The United States added that its ships would not be
carrying oil from Iraq and that neither Iran nor Iraq would thus have any basis for taking hostile actions against U.S. warships or the vessels they protected. If a Gulf belligerent attempted to conduct visit and search of a U.S.-flag vessel under protection of a U.S. man-of-war, the U.S. would examine the ship's cargo and would certify absence of contraband, thereby paralleling the rules of the unratified 1909 London Declaration. In August the re-flagged S.S. Bridgeton hit a mine; the U.S. Navy began providing mine protection. On September 21, 1987, the U.S. Navy caught the Iran Ajr laying mines in the shipping lanes and sank it, arguing that this was done in self-defense.

The U.K. position on the war was different from that of France or the United States:

Britain [did] not, on the whole, [refer] to the traditional law of war and neutrality at sea. Instead, it [had] couched its pronouncements in terms of freedom of navigation and the law of self-defense, based on Article 51 of the U.N. Charter. So enthusiastic [was] the British Government about basing its statements on this provision that the General Council of British Shipping (GCBS), which distributes guidance notes to its members, actually [reproduced] the text of Article 51 to be passed on to masters of British merchant ships entering the Gulf. Emphasis on Article 51 rather than the traditional law [was] particularly apparent in certain statements concerning visit and search. When the British merchant ship Barber Persens was stopped by Iranians in January 1986 and forced into an Iranian port, the British Government explained its position in this way.

The United Kingdom upholds the general principle of freedom of navigation on the high seas. However, under Article 51 of the United Nations Charter, a State, such as Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self defense to stop and search a foreign merchant ship on the high seas, if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicions prove to be unfounded and if the ship has not committed acts calculated to give rise to suspicion, then the ship's owners have a good claim for compensation for loss caused by the delay.

The general advice given by the Foreign Office and reproduced in the GCBS guidance notes of advice [was] that even if a ship [was] not carrying any contraband, it [was] usually better to submit to visit and search by the Iranian Navy and to point out to the Iranian officer conducting the search that if his suspicions [proved] to be unfounded and unreasonable, then the ship's owners [would] have a right to compensation.

The United Kingdom [had] protested against Iran's detention of ships on several occasions, not so much for exercising the right to visit and search per se, but for the delays that have occurred and, in some cases, on occasions where the Foreign Office believed an exercise of visit and search could not have been occasioned reasonably by suspicions of a ship carrying prohibited goods. Nevertheless, unlike
the French and U.S. Governments, the British Government [had] made no attempt to say that its warships would certify whether ships were carrying prohibited goods, and British warships [had] not intervened to prevent the exercise of visit and search. Nor [had] British pronouncements referred to the exercise of belligerent rights by Iran. They [had] been couched instead in terms of reference to Article 51.74

The Armilla Patrol began “accompanying” U.K. shipping - i.e., those vessels of U.K. registry or registered in a U.K. colony or dependent territory (e.g., Hong Kong), but not Commonwealth-registered ships - (e.g., Singapore) - and flag of convenience vessels whose majority ownership is British or in a British colony or dependence-as far north as Bahrain. U.K. protection did not extend to ships crewed by British mariners or to ships with no connection to the United Kingdom, as France and the United States were later prepared to do. The U.K. rules of engagement adhered to Britain’s view that U.N. Charter, Article 51, governed any U.K. response: “The rules of engagement [were] intended to avoid escalation, although the varied nature of potential threat and the possibility of surprise attack are recognized and the inherent right of self-defence of Royal Navy ships or British merchant vessels under their protection, is not circumscribed or prejudiced.” The result would have posed “interesting questions” as to whether a U.K. warship could have defended U.K. merchantmen, as defined above, or British-crewed ships. One “practical solution” might be that an attack on the merchant vessel “might reasonably be perceived as an attack on the warship as well. In that situation, the warship [would] be able to defend itself and in doing so defend the merchant vessel accompanying it.”375

All commentators seem to have agreed on the illegality of Iran’s use of unanchored mines, particularly in shipping lanes. The same is true for mines laid in the Red Sea in 1984. While a state may mine a defense area along its coast with due notice of the minefield, employment of drifting mines is not lawful.376

By mid-1987, Iran had attacked nearly 100 ships of 30 nationalities, using aircraft, helicopters, small boats and warships as platforms. Iraq had attacked over 200 vessels, mostly those owned or chartered by Iran.377 In late May 1987, the USSR had sent three minesweepers to join its two frigates that had been on patrol in the Gulf since 1986.378 The June Venice Economic Summit of major Western powers and Japan “agree[d] that new and concerted international efforts [were] urgently required to bring the Iran-Iraq war to an end.” Besides calling upon the belligerents to end the war and supporting the U.N., the Summit “reaffirmed that the principle of freedom of navigation in the Gulf is of paramount importance for us and for others and must be upheld. The free flow of oil and other traffic through the Strait . . . must continue unimpeded.” The Summit pledged to consult on ways to pursue these important goals effectively.379 On July 20, the Security Council, calling for a cease-fire, “deplor[ed] . . . the . . . attacks on neutral shipping . . . , the violation of international
humanitarian law and other laws of armed conflict," demanded that Iran and Iraq "discontinue all military actions on land, at sea and in air." The Council called on other nations "to exercise the utmost restraint and to refrain from any act which [might] lead to further escalation and widening of the conflict[]." In August Great Britain and France agreed to send minesweepers to the Gulf, and by September Italian, Belgian and Netherlands ships were on the way. In October 1987, the United States responded to an Iranian Silkworm missile attack on a U.S. re-flagged tanker, S.S. Sea Isle City, in Kuwaiti waters by destroying offshore oil rigs used as an Iranian gunboat base. The United States justified its attack on self-defense grounds, while others argued it was a "carefully calculated reprisal," bringing the United States in on Iraq's side. The U.S. strike was stated to be in specific response to the Iranian attack on Sea Isle City; any connection with the Iranian attack on the S.S. Sungari, which had occurred the day before Sea Isle City was hit, was avoided. Although Sungari was beneficially U.S.-owned, it flew the Liberian flag. This established some precedent, at least for that stage of the war, that the United States did not consider open registry ships, even if owned by U.S. interests, to have enough U.S. connection to merit protection. That view changed as the war deepened. In any event, in the destruction of the rigs, the U.S. response followed Charter era criteria for self-defense: it was proportional, in that only the source of the attacks - the host platforms - was destroyed and it was necessary, to remove a continued threat to neutral shipping. It was not a reprisal situation. A second incident came the next month.

In November 1987, a U.S. Navy frigate fired on a small boat that approached an American tanker. The boat did not fire at the tanker but ignored warning shots and closed to within 500 yards. The boat turned out to be an unarmed Arab fishing boat, not an Iranian patrol boat. The boat was hit and one person on board was killed. The incident occurred between the coast of the United Arab Emirates and Abu Musa Island, a small island from which Iranian speedboats had carried out raids on Gulf shipping. The United States again relied on the inherent right of self-defense under international law as the basis for its actions.

Fishing boats, if employed as such, are exempt from capture and destruction. This was not the issue here; it was a case of mistaken identity under suspicious circumstances. The U.S. plea of self-defense was justified, particularly in view of the warning shots that no one could ignore. In November, the Arab League Extraordinary Summit Conference "expressed anxiety at the continuation of the war and voiced ... indignation at [Iran's] intransigence, provocations and threats to the Arab Gulf States." The Summit "condemned Iran's ... procrastination in accepting ... Resolution 598 ... [and] called on Iran to accept the Resolution and implement it in toto...." The international community was asked to "shoulder its responsibilities, exert
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effective international efforts and adopt measures adequate to make [Iran]
respond to the calls for peace.” Iraq’s acceptance of Resolution 598 and its
positive response to peace initiatives were appreciated. The Summit confirmed
support for Iran’s defense of its territory and “legitimate rights” and declared
solidarity with Kuwait and Saudi Arabia.\(^\text{389}\) That same month Iran adopted,
apparently for the first time, what amounted to a declaration of contraband:

On November 17, 1987, Iran adopted a law according to which all goods
belonging to states at war with Iran were liable to capture and condemnation.
Goods belonging to neutral states or to neutral or enemy nationals were liable to
capture if they fell into certain categories. The first of these categories concerned
goods the transport of which to enemy territory was prohibited altogether. The
second concerned goods destined, directly or indirectly, for enemy territory, if
they effectively contributed to sustain the enemy’s war effort.\(^\text{390}\)

This did not of course cover the circumstances of destruction, without warning,
of neutral merchantmen, or indeed of destruction of enemy merchant ships.

In December 1987, a U.S. warship helped rescue a Cypriot crew after an
Iranian gunboat attack set their tanker ablaze, one of many such attacks in the
renewed war in the Gulf. Tanker captains began tailing convoys or simulating
them during night steaming.\(^\text{391}\) On April 14, 1988, \textit{U.S.S. Samuel B. Roberts} hit
a mine in a field laid in international waters. In response the United States
attacked Iranian oil platforms that had been supporting attacks on neutral
shipping on April 18. Four days later Iranian naval units attacked U.S. naval
vessels, which destroyed or damaged most of the attackers.\(^\text{392}\) By this time five
European NATO allies – Belgium, Britain, France, Italy and the Netherlands –
had sent more than 40 warships to the Gulf for escort and mine suppression
duty.\(^\text{393}\) The United States began extending protection to neutral ships in
distress, if those vessels were outside war/exclusion zones, were not carrying
contraband, and were not resisting legitimate visit and search by a Persian Gulf
belligerent, on April 29.\(^\text{394}\) This action also comported with international law.\(^\text{395}\)

In May, Iraqi aircraft hit Iran’s Larak oil terminal in the Strait of Hormuz; \textit{Seawise Giant}, Liberian-registered and the world’s largest supertanker, was among five
ships hit.\(^\text{396}\) In July 1988, a week after the Airbus incident of July 3, U.S.
ship-based helicopters attacked Iranian gunboats that had set afire a Panamanian-
registered tanker owned by Japanese interests.\(^\text{397}\)

On the diplomatic front, Saudi Arabia had broken diplomatic relations with
Iran in April 1988. In June the second Arab League Extraordinary Summit
reaffirmed its 1987 communique on the war.\(^\text{398}\) By mid-June, however, Great
Britain and France had restored diplomatic relations with Iran. Saudi Arabia
announced a $12-$30 billion arms deal with Great Britain, which included 6 to 8
minesweepers. Iran announced acceptance of U.N. Security Council Resolution
598 on July 18, and the U.N. Secretary-General announced a ceasefire effective August 20, 1988.399

The United States announced the end of escorted convoy operations in the Gulf in October 1988.400 In January 1989, “de-flagging” procedures for reverting the tankers to the Kuwaiti ensign began.401 By that time, the Western naval presence in the Gulf had been reduced sharply.402

(1) Appraisal
Commander Fenrick has summarized the Tanker War:

The Iran-Iraq conflict was a major war, not a small war. For the only time since World War II, deliberate and sustained operations were carried out against merchant ships. As a general statement, prior to March 1984, Iraq attacked all vessels in a proclaimed exclusion zone at the northern end of the Gulf. From March 1984 until the end of the conflict, Iraq switched the focus of its anti-shipping campaign in an effort to attack the weak link in Iran’s war economy and to arouse world interest in the conflict. Iraq directed most of its attacks against tankers, most of them neutral and unconvoyed, sailing to or from Kharg Island, the very heavily defended main Iranian oil terminal, located towards the northern end of the Persian Gulf. All the Iraqi attacks were delivered by shore-based aircraft and almost all involved the use of air launched missiles. Iraq appears to have devoted minimal effort to obtaining visual identification of the target before missile launch, with the result that accidents, such as the Iraqi attack on the USS Stark, did occur. Iran does not appear to have begun attacking commercial shipping until Iraq commenced its anti-tanker campaign in 1984. Since there was no sea traffic with Iraq, Iran attacked neutral merchant shipping destined to and from neutral ports in the Gulf, presumably in an effort to persuade Iraq’s financial backers, the other Gulf states, to dissuade Iraq from its campaign against the Kharg Island tankers. Iran’s attacks on merchant shipping were less numerous than those of Iraq and, in general, less costly in lives and property damage because they were conducted with rockets instead of missiles. In addition, it is understood that Iran devoted more effort to target identification than did Iraq. On the other hand, Iran did not conduct its attacks in declared exclusion zones and some of its attacks were carried out in neutral territorial waters.403

The result was the largest loss of merchant ships and merchant seamen’s lives since World War II:

Throughout the eight year course of the Gulf War, Iran and Iraq [had] attacked more than 400 commercial vessels, almost all of which were neutral State flagships. Over 200 merchant seamen [had] lost their lives because of these attacks. In material terms, the attacks [had] resulted in excess of 40 million dead weight tons of damaged shipping. Thirty-one of the attacked merchants were sunk, and another 50 declared total losses. For 1987 alone, the strikes against commercial shipping numbered 178, with a resulting death toll of 108. In relative terms, by the end of 1987, write-off losses in the Gulf War stood at nearly half the tonnage of merchant shipping sent to the bottom in World War II. In all, ships flying the
flags of more than 30 different countries, including each of the permanent members of the United Nations Security Council, [had] been subjected to attacks.

Only about one or two percent of the ship voyages in the Gulf involved attacks, however. Nevertheless, in terms of percentage of losses due to maritime casualties worldwide, the statistics were “staggering.” During 1982, the first year of the Tanker War, 47 percent of all Liberian-flag tonnage losses due to maritime casualty occurred in the Gulf. In 1986, the figure was 99 percent; in 1987, more than 90 percent, and the final percentages may have gone higher due to late declaration of constructive total losses. (Most of the Gulf tanker traffic flew flags of convenience, and a third were owned by U.S. nationals, with another substantial portion under charter to U.S. nationals.) Insured losses by marine underwriters were heavy, reaching $30 million in one month, with resulting tremendous increases in war risk premiums. If there were any good things [that could] be said of this conflict, they [were] that the Gulf War [became] the principal factor in reducing the overtonnaging of the world oil tanker fleet and in aiding a recovery of the tanker market, and second, that tremendous advances in marine firefighting equipment and techniques [were] directly attributable to recent experience in the Gulf.

To a government expert, “this [was] too thin a silver lining to justify the cloud.” Iran attacked ships of more 32 national flags, while Iraqi attacks mostly concentrated on vessels flagged or chartered by Iran. Iraq concentrated on attacking ships within the Iranian war zone, while Iran attacked vessels mostly in the lower Gulf, outside its or Iraq’s zones. Iraq tended to shoot first and identify later, while Iran conducted careful vessel reconnaissance and specific vessel identification. Iraq used aircraft for all its attacks, while Iran employed conventional aircraft, helicopters and surface warships or small boats, the latter manned by Revolutionary Guard forces. Iraq was never able to produce a major interruption in Iran’s oil exports to finance the war. The Tanker War was the most important part of the fighting at sea.

Writing in 1986, before the war had ended, Commander Fenrick noted that “It [was] futile to discuss exclusion zones used in this conflict utilizing presumed limited war standards, as both belligerents probably [had] gone beyond the standards hitherto considered permissible in general war.” Because it was debatable that unconvoyed neutral tankers could have been considered as part of Iran’s war effort, Commander Fenrick asserted that “Iraqi practice in using exclusion zones touche[d] the outer limits of legal acceptability and may well [have] overstep[ped] the boundary.” Iran’s conduct in attacking neutral ships outside the declared war zones and occasionally in neutral waters “was so flagrantly contrary to the laws of maritime warfare that nothing can be said in defence of it.”
Even if one concedes that the other Gulf states [were] providing financial support to Iraq, it does not appear possible to consider the neutral ships engaged in traffic with these states to be incorporated into the Iraqi war effort. Iran's desire to take action to force Iraq to refrain from attacking the Kharg Island tanker traffic [did] not legitimize its actions. It is somewhat surprising that the actions of Iran and Iraq in the Persian Gulf [did] not generate a stronger, or at least more vociferous, response on the part of other states. It is presumed the relative lack of response is owing to the desire of the superpowers to avoid conflict with each other in a sensitive area, and to the facts that there is a tanker surplus and an oil glut, that the tankers attacked usually belonged to flag of convenience states, and that the loss of life [had] been relatively limited.

Another author believes that the Iranian war zone, being more "defensive" in nature, was valid under international law. 409 Professor Goldie's excellent analysis would say, however, that both sides' zones were disproportionate and therefore illegal. 410 Professor Dinstein, while granting that war zones have been grafted onto the law of maritime warfare, would say that "the so-called exclusion zones [were] not proper war zones," because they were not mined or regularly patrolled, and there were no safe sea lanes for regulated neutral shipping. 411 While it is true that neither belligerent had traditional naval forces sufficient to conduct routine patrols, he does not account for the air surveillance.

Neither Iran nor Iraq published contraband lists. Nevertheless, it is clear that both nations considered petroleum exports critical to financing the war. 412 The war was also a "total war" insofar as the adversaries were concerned, 413 and a major conflict insofar as global standards can measure it. 414 The result is that Iraq was justified in attacking enemy (i.e., Iranian) merchant ships, if loaded with war-fighting/war-sustaining cargoes (e.g., oil) outbound from Iranian ports. 415 Iraq was also justified in attacking neutral merchantmen convoyed by Iranian warships, 416 particularly if those ships carried war-fighting/war-sustaining cargoes. Neutral vessels carrying such cargo for the Iranian war effort and steaming alone were likewise subject to attack by Iraq. 417 It has been argued that Iraqi attacks on merchantmen within the Iranian exclusion zone were not indiscriminate:

Can the Iraqi air attacks on merchant shipping be labeled as indiscriminate because they do not identify the targets visually before launching missiles? I believe not. First, the Iranian exclusion zone . . . made the Iraqi Air Force's target identification easier. Iraqi Air Force pilots apparently assume[d] that any large radar return from a ship located within the Iranian exclusion zone must be a tanker carrying, or destined to carry, Iranian oil. And second, there . . . [was] no evidence that any protected vessels . . . [were] found within the Iranian exclusion zone. 418

Fortuitously, Iraq pumped most of its oil to sell and sustain its war effort through pipelines to Syria, Saudi Arabia and Turkey and thence to the outside world, or financed its war effort through Saudi Arabia and Kuwait. (Whether Kuwait and
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Saudi Arabia had arms-length bargains with Iraq, or acted out of fear of their powerful neighbor, or otherwise, is less than clear. The result was that Kuwait, and to a lesser extent Saudi Arabia, were selling oil and turning over some of the proceeds to Iraq as loans. Clearly the cash or its equivalent to Iraq could have been seized as part of its war effort, but equally clearly the oil, sold to neutrals and carried in neutral tankers, could not be attacked. Thus, the Iranian attacks on neutral merchantmen were illegal; 

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\text{"[a]n attack upon a neutral merchant ship known to be engaged in inter-neutral trade [in this war, e.g., between Kuwait and an oil-consumer nation] [was,] therefore, a violation of law."} \]

Moreover, warships of neutral nations may convoy such neutral merchantmen. Thus the United States was legally justified in convoysing the re-flagged tankers, and indeed other neutral nations' merchantmen. U.S. convoysing carried with it the right of self-defense, and thus the U.S. responses (e.g., shooting back) were legally justified if they satisfied the criteria of proportionality, which was clearly the case. This was a continuation of trends in other conflicts of the era. The conflict included interactions with merchant ships in coastal states' EEZs; since the EEZ is part of the high seas, such interactions (e.g., visit and search, etc.) were as legitimate as if the situation occurred on the high seas.

The result may seem anomalous, in that Iraq received a net benefit from the operation of the law of neutrality. Its war effort could be financed, albeit indirectly, by neutral tanker traffic carrying Kuwaiti and Saudi oil for sale on world markets, while Iran could be condemned for its attacks on such vessels while suffering legally-justified attacks on its tankers, and the tankers of other neutrals carrying Iranian crude. Nevertheless, this is the result. As Professor Tucker put it most aptly, 

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\text{"[t]he fact that the exercise made of these neutral rights thereby places one of the belligerent at a disadvantage with respect to its opponent does not provide the disadvantaged belligerent with a lawful basis for claiming that it has been made the object of discriminatory measures."} \]

(2) Other Trends

Several major research efforts appeared as the Tanker War ended: Professor Levy's Code of International Armed Conflict (1986); the Restatement (Third), Foreign Relations Law of the United States (1988), NWP 9A (1989), and roundtables under the aegis of the International Institute of Humanitarian Law (IIHL), 1987 to date. Professor Ronzitti edited The Law of Naval Warfare (1988), in connection with the IIHL meetings; it includes a general introductory analysis, commentaries on treaties and other documents (e.g., the 1913 Oxford Manual) and the texts of treaties and other documents; references to these have been made throughout other parts of this article. What follows is an analysis of how the Code, the Restatement (Third), NWP 9A, and the ongoing work of the IIHL apply to the issue of targeting enemy merchant ships.
a. The Levie Code. Professor Levie’s Code restates the existing treaty and documents-based principles. However, “[t]his Code does not include rules of the customary international law of war which have never been formally stated in an international document of some nature.” He notes that many customary norms - e.g., the practice of states - have been “codified” in binding international agreements, e.g., the 1907 Hague Conventions; have been codified in international agreements that have never been ratified, e.g., the 1909 London Naval Treaty; have been restated or expressed in other documents prepared by international organizations but not in treaty format; or certain treaties such as the 1972 Bacteriological Convention or Protocol I of 1977 that eventually will become law. 427

Citing the 1930 London Naval Treaty and the 1936 London Proces-Verbal, he states the rule as to attacks on enemy merchant ships:

1. In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

2. In particular, except in the case of persistent refusal to stop, 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. 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 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.

Professor Levie says that there is some evidence that these are the rules despite contrary Allied practice during World War II. 428

This restrictive view of destruction of enemy merchantmen appears supported by his Code provisions on neutrals performing unneutral service. Vessels on one-shot service involving transport of enemy armed forces personnel, transmission of intelligence to the enemy, or persons who directly assist enemy operations, are subject to condemnation as though carrying contraband. 429 On the other hand, a neutral vessel will be condemned “and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel” if she

(a) “takes a direct part in hostilities;”

(b) “is under the orders or control of an agent placed on board by the enemy Government;”

(c) “is in the exclusive employment of the enemy Government; ”[or]
Thus a permanently dedicated vessel may be subject to more severe sanctions—"the same treatment as ... if she were an enemy merchant vessel"—which may mean capture and condemnation. These principles are stated to be customary law, based on the 1909 London Declaration. Whether action against such ships includes destruction, and under what circumstances, is less than clear, such being up to "pure" state practice in the absence of treaty or other document. Thus his Code does not necessarily stand for the proposition that enemy merchant vessels are not subject to destruction in appropriate circumstances. Whether those circumstances would include not placing passengers, crew and papers in safety in event of surface or sub-surface attack is debatable, in view of the 1930 London Treaty and the 1936 Proces-Verbal.

The Code recognizes the traditional exceptions prohibiting attacks on small coastal fishing or trading boats engaged as such, hospital ships, etc., and vessels carrying cultural property for which due notification has been given. Relying on Protocol I and the 1977 Environmental Modification Convention, Professor Levy states a rule of a general prohibition on methods or means of warfare "intended, or [which] may be expected, to cause widespread, long-term and severe damage to the natural environment." The Restatement (Third), Foreign Relations. The Restatement (Third), aside from noting the rule that war-coerced treaties are void and suggesting that hostilities might be a basis for ending or withdrawing from an agreement under fundamental change of circumstances principles, does not directly address the enemy merchantman attack problem. However, the Restatement does repeat the principles of the 1958 High Seas Convention, UNCLOS, the U.N. Ship Registration Convention and the Restatement (Second) with respect to the "genuine link" concept and duties of flag states to exercise effective authority and control over vessels. The traditional rules for freedom of the high seas are repeated but subject to a "reasonable regard to the interests of other states in their exercise of the freedom of the high seas." Conspicuously absent is the qualifier, in UNCLOS Article 87(1), that high seas freedoms are subject to "other rules of international law." The Restatement does acknowledge the right of warship high seas transit and asserts that use of warships for aggressive purposes would violate U.N. Charter norms. The right of self-defense is available on the high seas, but these principles are tucked away in the Comments and Reporters' Notes. The departure from UNCLOS Article 87(1) would render the Restatement less helpful in analyzing the relationship of the law of naval warfare to UNCLOS, but in a roundabout way, through citation of the Charter principles, the Restatement would seem to achieve the same result if it is considered that the law of naval warfare, in its treaty aspects, is subject to the Charter, and that
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other principles, e.g., those derived from custom, are viable in the context of the Charter. The Restatement (Third) cites the 1977 Environmental Modification Convention among many other treaties in finding a duty of states, “to the extent practicable under the circumstances,” to protect the natural environment, with state liability for violations. The 1949 Geneva Conventions and other law of armed conflict principles are not cited in the Restatement’s human rights provisions, and, although the major treaties are listed and analyzed, scant attention is paid the public emergency clauses. Restatement § 702 says:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

(a) genocide,

(b) slavery or the slave trade

(c) the murder or causing the disappearance of individuals,

(d) torture or other cruel, inhuman, or degrading treatment or punishment,

(e) prolonged arbitrary detention,

(f) systematic racial discrimination, or

(g) a consistent pattern of gross violations of internationally recognized human rights.

These are stated to be customary norms in the Comment, and (a) through (f) have jus cogens quality, such that a treaty – e.g., the public emergency clauses – cannot override them, according to the Restatement Reporters. This differs from the express language of the human rights convention, to which many nations are parties (but not the United States, except for its relatively recent ratification of the Genocide Convention.) Since law of armed conflict treaties, with one exception, are not cited in the Restatement, the usefulness of the Restatement, except for its general analytical framework, e.g., on sources of law, treaties, etc., is less than useful for armed conflict scenarios.

Given the relative paucity of treatment of law of armed conflict issues in the Restatement, the impact of the genuine link theory for ships and the claims for environmental protection and human rights in the armed conflict scenario remains improbable. However, the ready availability of the Restatement with its black-letter format, its prestigious authorship, and the similarity of treatment for some peace-oriented issues, e.g., the environment, may provoke a spillover effect into the law of naval warfare. Professor O’Connell, for example, would seem to attempt to read the genuine link theory into prize law or private international
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law (i.e., conflict of laws) involving capture of belligerent merchantmen. Nevertheless, the rule that nationality of a ship for purposes of visit and search or capture, etc. of an enemy merchant vessel depends on its flag, and the flag alone, remains well-established. The traditional rule was given additional support in the practice of the United States and Kuwait in re-flagging the tankers during the 1980-88 war. However, the genuine link argument is liable to be raised in future merchant ship visit and search, capture, diversion or destruction situations. Genuine link may be a useful concept for the calm of a prize or criminal case courtroom in the context of conflicts principles, but it is not a helpful concept for the naval commander attempting to observe international law at sea while defending the ship and protecting national interests.

c. NWP 9A. In 1989, NWP 9A's annotated supplement appeared. Separate provisions state the rules for surface, submarine and air attacks. For surface attack, enemy merchant ships may be attacked with or without warning if the merchantman:

(1) actively resists visit and search or capture;

(2) persistently refuses to stop upon being duly summoned to do so;

(3) sails under convoy of enemy warships or military aircraft;

(4) is armed;

(5) is incorporated into, or assists in any way, the enemy's armed forces intelligence system;

(6) acts in any capacity as a naval or military auxiliary to enemy armed forces; or

(7) is integrated into the enemy's war-fighting or war-sustaining effort and compliance with the 1936 Proces-Verbal to the 1930 London Protocol would, under circumstances of the specific encounter subject the warship to imminent danger or would otherwise preclude mission accomplishment.

Paragraph (4) does not distinguish between defensive and offensive armament, a previous distinction, because "[i]n the 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 against an enemy or merely defensively." Paragraph (7) is new and was:

added to cope with the circumstance [of a ship] carrying militarily important cargo that is not a naval or military auxiliary and to reflect the actual practice of nations, at least in general wars. Although the term 'war-sustaining' is not subject to precise
definition, “effort” that indirectly but effectively supports and sustains the belligerent’s war-fighting capability properly falls within the scope of the term.

The traditional rules applicable to surrenders and post-attack search and rescue of the shipwrecked, etc., continue to apply, and all of these provisions are premised on three fundamental principles of the law of armed conflict:

1. The right of belligerents to adopt means of injuring the enemy is not unlimited.

2. It is prohibited to launch attacks against the civilian population as such.

3. Distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.

These legal principles governing targeting generally parallel the military principles of the objective, mass and economy of force. The law requires that only objectives of military importance be attacked but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary (and wasteful) collateral destruction must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering must be prevented. The law of naval targeting, therefore, requires that all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war.

Only combatants and other military objectives may be attacked. Military objectives are those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations including the security of the attacking force.

NWP 9A adds that neutral vessels acquire enemy character when operating directly under enemy control, orders, charter, employment, or direction, or when such vessels resist an attempt to establish identity, including visit and search. Thus, as noted earlier, NWP 9A would appear to approve of Iraqi attacks on ships carrying oil outbound to sustain the Iranian war effort. The self-defense aspects of United States responses is less clear. The traditional list of forbidden targets - hospital ships, coastal fishing and trading boats engaged as such, etc. - follows, with the addition of civilian passenger liners at sea, unless they are being used for military purposes or refuse to respond to a warship’s directions. The inevitable civilian deaths in such a sinking “would be clearly disproportionate to whatever military advantage that might be gained” from their destruction.

Submarines may attack the same categories of enemy merchantmen, although the seven-point list has been compressed to four, and military exigencies and
the practicalities of submarine configurations are said to excuse more readily prior warning or the duty to recover shipwrecked, etc. The same rules for forbidden targets apply to submarines.

Aircraft may attack under the same circumstances as surface warships and submarines; the same forbidden target rules apply, and the same humanitarian rules for surrender and survivors, etc., apply equally to aircraft, although the practicalities of capacity to accept surrender or really help survivors may be limited.

Vessels operating under enemy charter possess enemy character, according to NWP 9A; there is no examination (or refutation) of the “genuine link” problems. NWP 9A adds that

There is no settled practice regarding the conditions under which the transfer of enemy merchant vessels to a neutral flag may be made. However, it is generally recognized that, at the very least all such transfers must result in the complete divestiture of enemy transfer and control. [A naval commander] is entitled to seize any vessel transferred from an enemy to a neutral flag when such transfer has been made either immediately prior to, or during, hostilities.

Thus NWP 9A would approve as legal the Kuwaiti-U.S. re-flagging procedures during the Tanker War.

NWP 9A approves as legal a temporary exclusion zone, although neutrals cannot be denied access. Although noting restrictions on chemical, biological and nuclear weapons, except as to collateral damage, NWP 9A does not appear to include environmental damage in the calculus of attack, and protective symbols used in the 1954 Hague Cultural Property Convention and 1977 Protocol I are supplied for informational purposes only. (As noted earlier, the United States is not a party to either treaty.) And although protections for the civil population are clearly discussed, including situations where the United States supports positions in Protocol I, the potential for claims of human rights violations is not considered.

NWP 9A also recites the traditional customary rules for neutral commerce, noting the difficulty in distinguishing between absolute and conditional contraband, the presumption for enemy destination, exemptions from contraband, and aircerti/clearcert/navicert procedures. Visit and search rules, “similar” to those for nonbelligerent visit and search, e.g., for drug interdiction, are set forth in full. Principles for capture and destruction of neutral vessels and aircraft take the traditional U.S. view, which includes forcible measures (i.e., possible destruction) of aircraft or ships resisting proper capture and destruction of prizes where the ship cannot be taken into port for adjudication or properly released, distinguishing between prizes and ships sent to port for visit and search. The customary blockade rules are recited, as are the norms for personnel aboard neutral platforms and those interned by neutral governments.
In summary, then, *NWP 9A* does an excellent job of presenting the law related to attacks on enemy merchant ships. Query, however, whether a future revision might combine the three recitations for surface, sub-surface and air attacks, since the lists of permitted targets and the list of forbidden targets are the same, the only differences being the circumstances of warning and post-attack procedures. Query also whether the whole list approach might be scrapped in favor of a general warning and navicert system plus use of temporary exclusion and war zones. On the other hand, a naval commander may not wish to disclose his presence, which is implicit in an exclusion zone warning. Moreover, in an all-ocean long war, exclusion zones may not be feasible as a matter of law in practice. Depending on development of the law of nonbelligerent interdiction as well as principles for merchant ship interdiction during armed conflict, the same methodologies for each procedure should be devised, to minimize confusion and simplify command and training problems. This, of course, is a function of law development and practice and not a suggestion for revision of *NWP 9A*, which reflects the law. Last, *NWP 9A* and other manuals should reflect the potential for U.N. Security Council action, which occurred in 1950 during the Korean conflict, again in 1965 with respect to Rhodesia, and tangentially in other situations.

d. The IIHL and Other Initiatives. Beginning with the Preliminary Round Table of Experts on International Humanitarian Law, held in 1987 at San Remo, Italy, the International Institute of Humanitarian Law (IIHL) has sponsored a series of conferences at which participants might express views on law of naval warfare issues. There has been discussion of the possibility of a draft treaty on the subject, but later IIHL conversations have considered preparing a "Restatement" approach analogous to the American Law Institute's series of *Restatements of the Law* in the United States, of which the most relevant for this analysis have been the *Restatements (Second)* and *Restatements (Third)*, *Foreign Relations of the United States*. The IIHL, founded in 1970, has a primary goal of promoting the application, development and dissemination of international humanitarian law as well as promoting human rights. Experts, from governments appearing in private capacities, from the academic community, and from the private sector have been invited to these conferences. A 1987 meeting resulted in an outline of basic principles of humanitarian law and outlined areas needing discussion in light of these principles. The 1988 meeting adopted a plan of action envisaging a series of further annual meetings to draft part of the *Restatement*-style document to serve "as a guide to accepted standards with possibly some compromise solutions where necessary." The last of the annual meetings was to be held in 1992. Thus far only the 1987 meeting papers and proceedings, the preparatory work for the 1988 meeting, and the principal papers and commentaries for the 1989 and 1990 meetings have been published. Besides the IIHL initiative, other groups of scholars have considered the subject, notably at the annual meetings.
of the American Society of International Law, at Syracuse University, and at the Naval War College, the latter of which sponsored the papers in this volume. Participants in the Syracuse and Naval War College meetings were for the most part members of the U.S. Planning Group, an informal association of U.S. academicians interested in the subject. Although three of the IIHL roundtables and publication of the predecessor volume in the War College International Law Studies series have occurred after the convening of the Naval War College symposium that resulted in publication of this book, it is appropriate to consider the principal papers presented to the IIHL experts insofar as they relate to the subject.

The Restatement approach of the IIHL has been criticized as a "precipitous move" to formulation of rules by a codification accomplished by private individuals who are not state representatives. "The term restatement causes confusion when the participants in the process are identified helter-skelter as academics or representatives of governments. . . . [T]here is a great need to identify state practice, but [there should be] restraint on the rush to codify." Despite these objections, the IIHL project is nearing completion, although its final product had not been published by press time for this volume. Drafts of its work have been circulated, but these cannot be assessed because they are subject to revision. Despite the criticisms of and limitations on the IIHL and other studies, the result will contribute, albeit perhaps at a secondary level, to the law of naval warfare.

(1) The 1987 IIHL Meeting at San Remo

In 1987, the IIHL Round Table identified the most difficult areas in the law of naval warfare today as first, when armed force could be used at sea, including the concepts of self-defense, necessity, and proportionality, and second, neutrality and belligerent rights at sea. The group then decided to focus on humanitarian issues and reaffirmed in a resolution the basic principles applicable to all kinds of war, namely, that the choice of means of warfare is not unlimited, that there must be a balance between military and humanitarian considerations, and that victims of war and the rights of neutrals must be respected.

The 1987 meeting at San Remo, Italy, had for its preparatory work The Law of Naval Warfare. Although only a published version of the preparatory essays, and therefore only a secondary source for international law, the book may gain considerable importance because it republishes international agreements and other documents, e.g., the 1913 Oxford Manual of Naval Warfare, together with commentaries by scholars on each document. For that reason, the conclusions of the commentators on the law of naval warfare affecting the targeting of merchant vessels are worth summarizing. Except for regional agreements and an introductory essay, The Law of Naval Warfare takes a chronological course,
beginning with the 1856 Declaration of Paris. 489 Not all agreements affecting the law of naval warfare, e.g. the 1958 law of the sea conventions, are analyzed, 490 and some that only tangentially impact it, e.g., Protocol I to the Geneva Convention of 1949, are included. Nevertheless, The Law of Naval Warfare is overall a useful book.

Professor Ronzitti’s introductory essay asserts that the conflicts between 1945 and 1990, analyzed in this chapter, have had a tendency to be fought close to the belligerents’ coasts and “even to their territorial waters. However, [he said] it is difficult to say whether this practice is dictated by a legal conviction to do so or by consideration of advantage, as, [e.g.,] when belligerents have limited naval capability.” 491 When the records of Korea and the Gulf War are added to the situations cited, e.g., the 1971 India-Pakistan war and the 1980-88 Tanker War, it is clear that state practice confirms the right of belligerents to conduct naval operations far from home (e.g., the United Kingdom and the United States in Korea, both belligerents in the India-Pakistan war, many nations in the Tanker War and the Gulf War) on the high seas as well as in the territorial sea. Ronzitti also questions the legality of the 1982 United Kingdom TEZ around the Falklands as violating the U.N. Charter, Article 51, while not mentioning the Argentine War Zone of the entire South Atlantic Ocean. Whether his view is correct is debatable. 492

Professor Guttry sees the 1907 Hague Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities as being somewhat useful today in the protection of private property at sea, citing state practice since its signature. 493 Professor Venturini observes problems with practice since 1907 for the strict terms of Hague Convention (VII) Relating to the Conversion of Merchant Ships into Warships, concluding that “it might be argued that State practice shows a tendency to the recognition of the combatant status of any merchant vessel integrated for all practical purpose[s] into a belligerent navy.” Whether Professor Venturini would agree with the United States view, stated in NWP 9A, depends on how the phrase “integrated for all practical purpose[s]” is interpreted. 494 Professor Levie’s analysis of Hague Convention (VIII) Relating to the Laying of Automatic Submarine Contact Mines notes that the rule against laying unanchored contact mines and the requirements of notice and for removal of mines remain valid law, but that these principles’ applicability to other types of mines could be disputed. 495 Professor Shearer’s analysis of Hague Convention (XI) Relating to Capture in Naval War restates the customary rules flowing from that treaty. 496

Professor Schindler’s commentary on Hague Convention (XIII) Regarding Rights and Duties of Neutral Powers in Naval War begins with the important point that since the founding of the United Nations:

If the Security Council of the United Nations decides on military or non-military enforcement measures according to Articles 39 ff. of the Charter, member States which are bound by such a decision have to deviate from the duties of neutrality. Their position can be described as one of qualified neutrality or non-belligerency.
Neutrality in its strict sense, however, remains possible under the Charter if the Security Council is not in a position to take any binding decision or if it takes such a decision but does not call upon a particular State to take part in the enforcement measures. Neutrality also remains untouched if the Security Council decides on enforcement measures when there is only a threat to the peace but no armed conflict, as it did in 1966 against South Rhodesia and in 1977 against South Africa. The law of neutrality applies only in case of armed conflict. Up to now the Security Council has never been able to decide on enforcement measures in case of an armed conflict. Members of the United Nations therefore have never since 1945 been prevented from remaining neutral and applying the law of neutrality. 497

He concludes that in the Charter era nations may either come to the aid of a victim of aggression under the self-defense principles of Article 51 of the Charter, remain neutral, or adopt an intermediate position of "nonbelligerency, "i.e., assisting the victim by other than military means. States cannot aid the aggressor nation. 498 The result is that the old law of neutrality can be divided into two sets of rules: those applying to all states not party to a conflict, including neutrals; and those applying particularly to neutrals only. The rights of neutrals, as well as the duty to tolerate certain belligerent measures, belong to all nations not party to the conflict, while the duties of abstention, prevention and impartiality apply only to neutrals in the strictest sense. 499 He concludes that with certain minor exceptions, e.g., the impact of UNCLOS on warship passage through neutral territorial waters, the 1907 Convention provisions are part of the customary law. 500

Professor Kalshoven’s careful analysis of the 1909 Declaration of London states that customary rules prevail today, but that subsequent treaty norms confirm that "neutral vessels should not be destroyed without cause." 501 The analysis of Professors Nwogugu and Goldie on the 1930 agreements involving submarine warfare are helpful recitations of practice that followed on them. 502 Professor Prott’s analysis of the 1954 Hague Cultural Property Convention notes the gaps for modern naval warfare, given the discovery of underwater archaeological discoveries and wrecks and the problems of the text, e.g., the military necessity exception included at U.S. and U.K. instance (neither of which are parties to the treaty), and that the subject may have lost its immediacy. 503 The rule for sunken military aircraft or warships – i.e., that title to them remains in the flag state 504 – is not mentioned, nor is there a citation to the Roerich Pact, a Western Hemisphere treaty on the same subject, 505 the 1970 convention on prohibition of the transport, etc., of illicitly-taken cultural property, 506 or the 1972 convention concerning the protection of the world cultural and natural heritage, 507 all of which may have naval warfare implications. Professor Bothe’s careful analysis of 1977 Protocol I to the Geneva Conventions of 1949 notes the general exemption of air and naval warfare from the Protocol’s terms while dismissing those parts that do apply. 508 Unfortunately, there is little discussion of general customary rules embedded in Protocol I and the possible impact of such customs, thus
strengthened by repetition in the Protocol for land campaigns, on war at sea. The United States is not a party to the Protocol, and has indicated it will not ratify it.

Two regional treaties are also analyzed. The commentator for the 1928 Havana Convention on Maritime Neutrality, to which the United States is a party, notes that the Convention repeats, and thereby strengthens, the rules of Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, being based on World War I experience. Professor Bring, commenting on the 1938 Stockholm Declaration Regarding Similar Rules of Neutrality, observes that not all Nordic states would observe them today (Denmark and Norway being NATO members, for example), but that the rules reaffirm in the relevant Hague Convention principles and customary law but today do not establish a specific regional or Nordic approach to the law of neutrality.

If it be taken as a handbook for its subject, The Law of Naval Warfare represents a reasonably complete but not exhaustive collection of relevant agreements and documents. There are gaps, as suggested above, and later editions will doubtless correct these. The commentaries accompanying the documents must be employed with care; they are but a secondary source of law, although sometimes an important (or the only additional) source for study of a problem.

At the 1987 San Remo roundtable, Professor Ronzitti found the United Kingdom's TEZ around the Falklands/Malvinas "difficult to reconcile" with the concept of neutrality, insofar as nonbelligerent merchant ships are concerned. Both Professor Levie, writing for the conference, and Commander Fenrick's earlier article, left open the issue of the TEZ and enemy merchant vessels. Professor Ronzitti also tentatively concluded that:

the practice shows a tendency to confine naval operations to areas close to the coast of belligerents, and even today, their territorial waters. However, it is difficult to say whether this practice is dictated by a legal conviction regarding the coastline or by considerations of opportunity, as for instance, when belligerents have limited naval capability.

Participants subsequently questioned whether enough practice had developed to support a customary norm, and whether a war zone was unlawful when applied to neutrals.

Professor Lowe, in another paper prepared for the San Remo conference, spoke of war zones in the UNCLOS Exclusive Economic Zone (EEZ) context:

The precedents in the Gulf and South Atlantic suggest that the establishment on the high seas during hostilities of war zones of reasonable size (having regard to the scale of the conflict, the range and type of weapons employed, and the number and distribution of ships and other facilities to be protected, and also the interests of other users of the seas in that area) is acceptable to the international community, as is the declaration that unauthorized ships in the zone may be presumed to
threaten combatant ships and facilities therein and are accordingly liable to attack.
The latter provision obviates the need to settle the question of the right to exclude
foreign vessels from the zone.

He also concluded that neutral states had the right to forbid hostile military
activities in adjacent sea areas “out to such a distance as affords them reasonable
protection from the consequences of hostilities.” The weight of practice does not
support the view that military uses can be made of the entire EEZ. “The high seas
should be regarded as free for all military activities, including those mentioned.”
Coastal states may restrict such uses on the bases of necessity and proportionality.
He concluded by suggesting that “any ship, regardless of its nationality, . . . under
the command, control or direction of combatant military authorities should be
assimilated to the status of a warship for the purposes of the foregoing rules.”

Professor Robertson stated that modern naval warfare had made the
1907 Hague Convention IX, relating to naval bombardment, obsolete before its
entry into force, and noted the general rule of proportionality in Protocol I and
the advent of modern over-the-horizon weapons. He asked whether the rules
for attack should be a seaborne version of Protocol I’s proportionality principle
or perhaps weapon-specific rules. The latter approach, he thought, would be
very difficult. The ensuing discussion recognized the problem of long-range
weapons, the difficulty of discrimination for certain weapons platforms, and the
general need to adhere to general rules of military necessity, military objective
and proportionality, perhaps on the model of the rules of air warfare, while
excluding certain vessels from attack, e.g., hospital ships and passenger liners.

Professor Levie stated that Protocol I did not apply to war at sea and inquired
whether exclusion zones were a legal method of warfare and whether such zones
should be limited in scope, and whether state practice had crystallized enough to
declare them legitimate. Commander Fenrick stated that persuasive arguments
for their legality could be made, and that common rules for aircraft and
submarine should be developed. The ensuing discussion also raised issues of
environmental damage resulting from combat at sea.

The San Remo conference closed with papers on protected vessels, the
ensuing discussion noting the “neutral zone” for hospital ships established by the
United Kingdom, rules of engagement and their relationship to armed
conflict, and reprisals.

The General Report of the San Remo conference stated:

Recalls that the principles and rules of international humanitarian law apply
impartially to international armed conflicts irrespective of the legality of the initial
resort to force or the justification given for any such conflict.
Recognizes the relevance of the principles of international law applicable in armed conflict to armed conflict at sea, in particular:

1) Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. The employment of weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering is prohibited.

2) Parties to a conflict shall at all times distinguish between civilian objects and military objectives. Attack shall be directed solely against military objectives.

3) Parties to a conflict shall ensure that in cases not covered by explicit legal provisions, those involved in an armed conflict remain under the protection and the rule of the principles of the law of nations, as they result from the law of humanity and the dictates of the public conscience.

4) The rules on the conduct of hostilities are subject to the fundamental principle of the need to balance military and humanitarian requirements.

5) Persons hors de combat and/or shipwrecked are entitled to respect for their lives and their physical and moral integrity.

Stresses that parties involved in an armed conflict at sea shall respect the rights of States not involved in the conflict,

Notes that new technologies and methods of naval warfare, new developments in the law of armed conflict and in the law of the sea and the increased possibilities of grave harm to the environment as a result of armed conflict at sea, require study in the light of the principles recognized above,

Notes the various studies and recommendations on the law of armed conflict at sea by the United Nations and the International Conferences of the Red Cross and Red Crescent,

Urges the dissemination of the results of ICRC’s and competent international organizations' work on the technical identification of protected vessels at sea,

Decides:

1) To study the means of applying the above-mentioned principles to the regulation of armed conflict at sea. The following should be taken into consideration, in particular:

- new technologies, for instance, sea mines and long-range weapons;
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- means of warfare at sea, for instance, the use of "exclusion zones", ruses of war, and submarine warfare;

- the use of maritime areas, for instance, neutralized zones, cartel ships, identification of protected vessels and aircrafts;

- humanitarian considerations, for instance, neutralized zones, cartel ships, identification of protected vessels and aircrafts;

- scope of application of the law of armed conflicts at sea, for instance, low-intensity operations;

- enforcement of the law of armed conflict at sea, for instance, reprisals, prosecutions of war crimes, fact-finding;

- armed conflict at sea adversely affecting the environment;

- the needs of shipping of States which are not taking part in the conflict.

2) To study and develop more effective means to secure the practical implementation of the law of armed conflict at sea on a national level, for instance, means of instruction to military personnel, including rules of engagement. . .

The Report is but a secondary source, or evidence of law, but its themes laid out the topics for subsequent IIHL meetings.

(2) The Madrid Meeting
At a meeting of the IIHL group in Madrid, Spain, in 1988:

it was decided that in future meetings the group's efforts should be focused on identifying areas of agreement on what the law is, as meetings hitherto had principally highlighted areas of disagreement. The participants at the Madrid meeting adopted a plan of action that envisioned a series of yearly meetings of experts on the law of naval warfare from around the world, including in particular military lawyers. Each meeting would operate as a working group to identify common areas of agreement and articulate those rules in a document that would be similar to a "restatement" of the law of naval warfare.

The first of the working groups met in Bochum, Federal Republic of Germany, the next year.

(3) The Bochum Roundtable
At the 1989 Bochum roundtable, Commander Fenrick's paper, The Military Objective and the Principle of Distinction in the Law of Naval Warfare, i.e., objects such as merchantmen that may be legitimately attacked, was presented. After reviewing trends in the law, the influence of the 1977 Protocol  to the
Geneva Conventions of 1949, and current preparations of military manuals, Commander Fenrick concluded:

If one accepts the most permissive provisions in the manuals referred to above as a starting point, then, on one view, enemy merchant vessels may be attacked and destroyed when they:

a) engage in acts of war on behalf of the enemy such as laying mines, minesweeping, cutting undersea cables, visiting neutral merchant ships or attacking merchant ships on one’s own side,

b) act as a de facto auxiliary to an enemy’s armed forces by, for example, carrying troops or acting as a replenishment vessel,

c) are incorporated into, or assist in any way, the intelligence system of the enemy’s armed forces,

d) are armed,

e) actively resist visit and search or capture,

f) refuse to stop upon being duly summoned,

g) sail under convoy of enemy warships or military aircraft, or

h) are 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 specific encounter, subject the attacker to imminent danger or otherwise not be feasible.

Further, neutral merchant ships could be attacked and destroyed for the reasons specified under heads (a), (b), (c), (e), (f) and (g) above. It is clear that head (d) is not an adequate reason in and of itself for attacking a neutral merchant vessel. The key question which remains, however, is: should neutral merchant ships be subject to attack for the reasons specified in head (h)? Is there a valid legal reason why neutral merchant ships should be immune from attack when they are employed on tasks functionally indistinguishable from those where enemy merchant vessels are subject to attack? If neutral merchant ships which are incorporated into the enemy’s war-fighting/war-sustaining effort are not, for that reason alone, subject to attack then most of the attacks directed by Iraq against neutral tankers travelling to and from Iran during the Tanker War were unlawful. It is not essential that international law, to be valid, should always be compatible with state practice. If, however, the law of naval warfare is to have an impact on the conduct of warfare, there should be a crude congruence between law and practice so that it is marginal, extreme conduct which is condemned, not activities which are routine operations of war.
The analysis does not answer the reciprocal question of Iranian attacks on vessels proceeding to and from neutral Kuwaiti or Saudi ports, which would *a fortiori* be illegal, or the sub-issue of Iraqi attacks on vessels proceeding in ballast or with cargoes that would not be considered part of an opponent's warfighting/war-sustaining effort. Ultimately, the Bochum conference found, according to Dr. van Hegelsom:

... [T]he general principles of military objective and of distinction, as codified in the First Additional Protocol to the Geneva Conventions (Additional Protocol I) are valid in the naval environment. The experts identified the obligation to distinguish at all times between civilians and combatants and between civilian objects and military objectives and the obligation to limit attacks strictly to military objectives. 536

As noted above, the precise formulation of the rules is still in draft form.

Additional IIHL conferences on the law of naval warfare have been held since the Newport conference that is the subject of this book. 537

(4) Appraisal of the IIHL Process

The discussions of the IIHL conferences have been entirely unofficial; military and diplomatic officers have attended in a private capacity, along with academic and International Committee of the Red Cross representatives. All the proposals have been subject to revision by the conferees, and there has been feedback revision in future meetings. Nevertheless, these discussions point toward possible development of a "restatement" of rules, perhaps similar to Professor Levie's *Code*, entirely unofficial, and therefore only a secondary source of law, 538 or perhaps evidence of primary sources of law - custom, treaties and general principles - under the *Restatement (Third)* view. 539 As noted above, there has been opposition to this approach. 540 Whether the IIHL conferences' results, in restatement form or otherwise, will have an impact on national manuals on the law of armed conflict like *NWP 9A*, in citations of scholars, or in state practice, remains for the future. To the extent that the IIHL work-product is congruent with existing and developing custom and general principles or international agreements and their interpretations, those primary sources will be reinforced. To the extent that the IIHL rules are cited in court decisions or the product of researchers, or perhaps incorporated in resolutions of international organizations such as the ICRC or the U.N. General Assembly, 541 they will remain in the huddle of secondary sources or evidences of primary sources. (If the U.N. Security Council picks up the IIHL rules as binding norms, they will be elevated to primary status. 542) Where the IIHL principles state only progressive development of the law, *e.g.*, rules concerning attacks on liners that are not part of the customary or conventional rules, 543 their influence will be the least. Even if the IIHL process has no direct impact on the law, it will have had the beneficial
function of raising issues and stimulating debate, and thereby bring broader attention to bear on the law of naval warfare. 544

III. Summary and Conclusions

Although there have been at least ten naval conflicts that have involved enemy merchant shipping or neutral vessels that have acquired enemy character between 1945 and 1990, the change in the practice of states has been relatively incremental since World War II. The rule book has been thrown out the porthole on occasions, e.g., during the 1971 India-Pakistan and the Tanker Wars, but not enough to establish a new rule or that there are no rules. One of the difficulties in surveying the period has been lack of hard evidence, due to security classifications and the fact that governments do not publish diplomatic papers for many years after the event, and then only selectively. Thus this chapter’s Discussion and the resulting Summary may be lacking in critical details that could alter a view of state practice radically. The reason for this caveat lies in the way international law looks at state practice, or custom. Not only must there be a sustained practice, but it must be accepted as law by nations affected, under the majority view. 546 Whether one or two claims would be enough to support a trend may be doubtful to some; in almost all recent cases opinion juris – acceptance of the practice as law – the record may be meager. The exceptions may be the Falklands/Malvinas War (1982) and the Tanker War (1980-88), but even here the picture may be less than complete.

The Korean conflict would seem to have stretched to the line the rule that small coastal fishing vessels when plying their trade are not subject to capture or attack, 547 but the attacks might be justified under another theory generally – but not universally – approved today, i.e., destruction of vessels as part of the enemy’s war-sustaining effect. 548 Pretty clearly the small fishing boats and coastal traders carrying weapons during the Vietnam War were part of the North Vietnam war effort, and attacks were justified. 549 The United Kingdom’s attack on Nanval was justified on one officially-stated ground, Nanval’s supporting Argentine intelligence, but attack might have been also vindicated because Nanval was a 1600-ton trawler and obviously not a coastal boat. 550

Hospital ships – another forbidden target – were respected during the Falklands/Malvinas War through the medium of the “Red Cross box” neutral zone – a new wrinkle, borrowed from the law of land warfare. 551

The record is mixed on belligerents’ attacks on traditional oceangoing ships steaming alone. During the Arab-Israeli conflicts, there were attacks on neutral vessels and an Israel-bound tanker, and an Egyptian-declared blockade of tankers coming from Eilat. 552 Whether the Israel-bound tanker was carrying war-sustaining petroleum (probably it was) or whether Sinai oil was helping finance the Israeli war effort is not clear from the research. During the 1971 India-Pakistan
conflict, India instituted naval control of shipping, which would have subjected those vessels to Pakistani attack if the Indian vessels were convoyed or were involved in the war effort. India declared a blockade of what was then East Pakistan (now Bangladesh), and captured Pakistani merchantmen. Whether these were supporting the enemy war effort and therefore subject to capture or were wrongfully seized is less than clear; one commentator has asserted that India ignored the rules.553

During the Vietnam conflict the United States published notice of its mining North Vietnamese harbors, thus warning all ships, in accordance with international law, whether they would have been classified as enemy merchantmen on war service or neutrals performing unneutral service. This might be compared with the illegal use of mines in the Red Sea and Persian Gulf. U.S.-flag merchant vessels were the subject of shoreside attacks, with no evidence that warnings were given. Two were sunk, one loaded with cement. There is no evidence of a claim by North Vietnam of the cement hauler’s being on war service.554 Both RFA and STUFT ships were attacked during the Falklands/Malvinas War while on war-sustaining missions, and there is no evidence of protests.555 Under established principles, both classes of vessels were legitimate targets.

During the Tanker War, Iraq attacked enemy merchant ships, and was legally entitled to do so, when these vessels carried Iranian petroleum that would be sold or bartered to support the war effort.556 Neutral-flag tankers carrying belligerents’ petroleum, the sale of which would support the war effort, were also subject to attack when convoyed by Iranian warships.557 (If a belligerent chose to attack, and was subjected to necessary, proportional defensive responses, those responses were also consonant with international law.) On the other hand, neutral vessels carrying neutral goods were not subject to attack, and attacks by Iran or Iraq on foreign-flag ships of this nature were clearly illegal under international law, whether convoyed by neutral nation warships or steaming alone.558 Neutral nations could respond proportionally in self-defense to such attacks, whether the response came from convoying warships, warships in the area, or by other means of self-defense.559

Blockades in the traditional sense were declared in several of the conflicts (Korea, 1950; India-Pakistan, 1971; Arab-Israel, 1973; Iran-Iraq, 1980; Lebanon, 1982),560 and the traditional rules seem to have been applied, despite the contentions of some that the rules had become functionally obsolete.561 Quarantine – in which merchantmen supplying an adversary are stopped and diverted in a nonwar context – was an innovation. This practice was first developed in the Algerian civil war under a self-defense rationale, and was employed by the United States during the 1962 Cuban missile crisis, by the United Kingdom in the Rhodesian interdiction operation with U.N. Security Council approval, and by the United States in mining operations in North Vietnamese territorial waters and South Vietnam in the South China Sea.562
Some have questioned the legal validity of such operations when the claim has been based on self-defense in the wake of the 1986 *Nicaragua Case*, but there has been no authoritative guidance on the issue beyond state practice to the contrary and the Security Council's decisions in the case of Rhodesia. Under the circumstances, a conditional conclusion is that such quarantines are legal under a self-defense theory, so long as they are necessary and proportional in response and otherwise conform to international norms—e.g., a quarantine cannot obstruct freedom of navigation of third-nation warships, nor can it bar a hospital ship from a port.

The period 1945–90 also witnessed a re-emphasis on the exclusion zone used perhaps in the Korean War, and certainly in the Falklands/Malvinas War, and the Tanker War. The principle that has emerged is that such zones are legal, so long as they are published and reasonable in area and duration, i.e., that they obey the general principles of necessity and proportionality. Wartime reprisals may permit a wider zone.

Besides the developing rules from practice, however, decision makers must consider the impact of treaty law clearly applicable to naval warfare. Two post-World War II examples are the GWSEA prohibition on attacks on small coastal rescue craft, and the 1977 Environmental Modification Convention. New general principles of law, perhaps analogized from emerging human rights norms, may further complicate the picture.

Then there is the problem of "radiations" from other bodies of law that may affect the rules of practice in maritime warfare. One recent example is the "Red Cross box" concept in the Falklands/Malvinas War, a procedure borrowed from the law of land warfare by the United Kingdom and respected by Argentina. That was a good idea, but consider commentators' attempts to incorporate the UNCLOS "genuine link" concept into the rule that enemy character is determined by the flag flown, or attempts to incorporate 1977 Protocol I wholesale into the law of naval warfare. Both appear to be erroneous conceptions of the current state of the law, but these analyses point the way for attempts at possible inclusion of concepts, in whole or in part, from these and other sources in future considerations of law of naval warfare issues: as established practice human rights; the 1954 Hague Cultural Property Convention, not in force for the United States but with potential overtones for legitimation of state practice; the High Seas Convention and UNCLOS; the 1977 Protocol I additional to the 1949 Geneva Conventions; the 1981 Conventional Weapons Convention; and resolutions of the U.N. Security Council or other international organizations.

Throughout the 1945–1990 period, commentators assessed the subject matter of this paper. These sources, and indeed the new military manuals such as *NWP 9A*, have their place in the analysis, either as secondary sources or as expositors of state practice to date. It is for this reason that they have been included too, and
must be considered along with state practice, treaties, general principles of law, and other sources.

In sum, the place of state practice in the law of naval warfare is much more complicated today than before the advent of the U.N. Charter in 1945. Perhaps it is for this reason that the IIHL and others have begun a series of roundtables to attempt to "restate" the law of naval warfare. Whether this is a wise methodology, and whether the results will be acceptable to states, is not clear today because of the ongoing nature of the project. What is fairly certain is that more than state practice will be considered in its deliberations, and should be considered by national decisionmakers assessing law of naval warfare issues related to projected or ongoing situations.

There has been discussion of a general treaty on the law of naval warfare. A treaty offers certain advantages:

1. If congruent with custom, the rule is strengthened;
2. Treaties may be the preferred source for some states;
3. Custom can be elusive in content, relying on the happenstance practice of states during a naval war, and the particulars of a particular practice may be sealed in archives for decades;
4. State practice for wartime rules during armed conflict can be an awfully expensive way to write law;
5. For naval decision makers, there is the advantage of a "black letter" format, e.g., the 1949 Geneva Conventions' provisions;
6. Training in the subject can be simpler; the black letter format of treaties lends itself to easier learning.

These propositions could be countered:

1. Inconsistent custom can eventually obliterate an outmoded treaty;
2. If a treaty is tied to current technology, it may be out of date before the ink is dry, and the problems of arguing by analogy or under the principle \textit{inclusio unius exclusio} may arise;
3. Custom has the advantage of adapting to new situations that cannot now be contemplated;
4. Treaties are always subject to reservations or understandings by the signatories, which can result in as much confusion as to the state of the law as in the case of custom, an example being Soviet bloc and other reservations to the 1949 Geneva Conventions;
5. If issues over which there is sharp disagreement arise during the treaty negotiation process, the result can be protracted negotiations, a breakup of the negotiations with no treaty resulting, states may refuse to sign, as in the case of U.S. refusal to sign UNCLOS, states may decline to ratify the agreement, as in
the case of the United States and SALT II, or a treaty that reflects the lowest common denominator on the subject may result, which accomplishes little;

(6) The internal ratification process for many nations can result in outright rejection of the treaty, considerable delays, further reservations by the legislative body (e.g., the Senate under the U.S. Constitution), or lack of legislative support for implementing statutes;\footnote{592}

(7) Carefully-written "black letter" rules for custom can be incorporated into military manuals, to be employed by decisionmakers or in an instructional setting.\footnote{593} Indeed, it has been necessary to condense the detail of treaties such as the 1949 Geneva Conventions to make them more understandable for users;\footnote{594} thus a treaty can suffer from ambiguity of words, even as custom carries a risk of ambiguity of rules.

With the demise of the Soviet Union and a resulting unipolar world with the United States as the only true military superpower, the inclination to engage in multilateral agreement negotiations may be decreasing. State practice may be the rising modality for determining international law.\footnote{595} The continued trends in fragmentation of nations - Czechoslovakia, the USSR and Yugoslavia being the most recent examples - would suggest that the babble of claims and counterclaims\footnote{596} as to what is the law, or should be the law, further militates against beginning the treaty process now.\footnote{597} Yet this very process of disintegration and the resultant relative weakness of nations to counter threats from within and without argues for establishment of some norms to guide what may be the beginning of a new season of conflict. For now, the patchwork of traditional custom and general principles, treaties perhaps modified by practice or interpretation, and the often-conflicting urgings of scholars and groups such as the IIHL, plus the modifications in state practice that have characterized naval conflicts since World War II, will be the principal guide to naval powers as they confront relatively new bodies of law pressing from the periphery. The latter include the U.N. Charter, UNCLOS, the 1977 Protocols, and the law of human rights. The result may be the dawn of a new world order or a fresh descent into international chaos.

Notes

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1. International agreements may evidence custom, or state practice, even though states are not formal parties to the agreement through the ratification process. Natalino Ronzitti, The Crisis of the Traditional Law
Targeting Enemy Merchant Shipping


4. Compareart. 51, Statute, para. 3(b)(6), (general principles of law recognized by civilized nations a primary source, hi, supra note 4, paras. 4 and judicial opinions as subsidiary means for determining the law) with Restatement (Third), supra note 1, §§ 102(2), 103(2) (general principles common to major legal systems are a subsidiary source; judgments and opinions of national and international tribunals, judgments and opinions of international arbitral tribunals, scholars' writings, and "pronouncements by states that undertake to state a rule of international law [e.g., resolutions of international organizations], when such pronouncements are not seriously challenged by other states.") The Restatement (Third) formula draws on the Statute, which is binding on litigation before the World Court. Cf. id. § 102, reporters' note 1.

5. See, e.g., the use of scholars' writings in The Pacquete Habana, 175 U.S. 677 (1900).

6. NWP 9A, supra note 4, para. 7.4, notes that such ships may be subject to visit and search, but not to capture or destruction, by belligerents.

7. Id. paras. 8.2, 8.2.1.

8. Cf. id. paras. 8.2.3. As will be seen infra in Parts II.E-II.F, vessels such as coastal fishing craft may lose their protected status if they engaged in combat operations, e.g., by gathering intelligence or by transporting war material or troops.


10. U.N. Charter, art. 51, says that the right continues "until the ... Council has taken measures necessary to maintain international peace and security." Hence, to the extent the Council would fail to act, perhaps because of a veto or less than super-majority vote under id. art. 27, or to the extent that the scope of a Council decision under id. arts. 25, 48 does not cover a situation that might involve self-defense, Members are free to exercise that right. An example from any of the situations discussed infra in this chapter would be the circumstance of a submarine attack on, or display of hostile intent to, a warship steaming far away from the geographic zone of a conflict controlled by a Council action. Alternatively, a state whose freedom of action is totally regulated by Council action regarding a localized conflict (the classic case that might have involved such being the 1982 Falklands/Malvinas conflict, Part II. F infra) would not have denied those states the right to take self-defense measures in other contexts. For example, if there had been an attack or a threat of attack on Great Britain's home islands by a third power (or by Argentina for that matter), the United Kingdom could have responded proportionally in self-defense.

11. Id., arts. 33-38. For further analysis, see Leland M. Goodrich et al., supra note 11, ch. 6.


13. Id., art. 44. We also noted supra note 9, paras. 8.2.3. An example from any of the situations discussed infra in this chapter would be the circumstances of a submarine attack on, or display of hostile intent to, a warship steaming far away from the geographic zone of a conflict controlled by a Council action. Alternatively, a state whose freedom of action is totally regulated by Council action regarding a localized conflict (the classic case that might have involved such being the 1982 Falklands/Malvinas conflict, Part II. F infra) would not have denied those states the right to take self-defense measures in other contexts. For example, if there had been an attack or a threat of attack on Great Britain's home islands by a third power (or by Argentina for that matter), the United Kingdom could have responded proportionally in self-defense.


15. Leland M. Goodrich et al., supra note 11, at 333.

16. U.N. Charter, arts. 25, 48-49. If a party to a successful suit in the International Court of Justice cannot get compliance from the losing state, the Council also has authority to recommend, or decide on, measures to give effect to the judgment. Id., art. 94(2).

17. NWP 9A, supra note 4, paras. 4.3.2 - 4.3.2.1, citing, inter alia, the Caroline Case, 2 John B. Moore, Digest of International Law 209-14 (1906). See also infra note 24 and accompanying text.


20. UNCLOS, supra note 2, arts. 91, 92; Convention on the High Seas, Apr. 29, 1938, arts. 5, 6, 13 U.S.T. 2312, 2315, 1 I.A.S. No. 5200, 450 U.N.T.S. 82, 84, 86 [hereinafter 1938 High Seas Convention]; Restatement (Third), supra note 1, § 501. See also infra notes 304-30 and accompanying text.

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

* * * * *

(d) An attack by the armed forces of a State on the land, sea or air forces, marine and air fleets of another State;

Compare Definition of Aggression, art. 3, reprinted in 69 A. J. Int'l L. at 482, with, e.g., the version in Julius Stone, Conflict Through Consensus 186, 188 (1977), or the draft version reprinted in 13 Int'l Legal Mat'ls 321, 324 (1974). The I.CJ cited the Resolution, art. 3(g), in the Nicaragua Case, supra note 1, 1986 I.C.J. at 103-04, and did:

not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

The decision is only a secondary source of law and carries no preponderential weight. I.C.J. statute, arts. 38(1), 59. It may be significant that the Security Council has not taken the bait of the Resolution, preamble, para. 4, in citing the Resolution in any of the situations, 1974-90, analyzed in this study, although some, e.g., Falklands/Malvinas, infra part II-F, were clear cases of aggression as defined in the Resolution. Most authorities question whether the Resolution is a codification of custom in all respects. For example, Bengt Broms, chair of the I.C.J. Committee that produced the Resolution, made no such assertion in The Definition of Aggression, 154 Recueil Des Cours 299, 385-88 (1978). Yoram Dinstein, supra note 19, at 124, cites no authority for the proposition that the whole Resolution restates customary law. For a trenchant analysis of the Resolution, see, e.g., Julius Stone, supra ch. 9.


27. W. Michael Reisman, * supra* note 25, at 589, cites the Monroe Doctrine as an example.


30. Julius Stone, * supra* note 18, at 43, 94-98; Yoram Dinstein, * supra* note 19, at 207. As in the case of his “interception” theory for self-defense, see * supra* notes 23-24 and accompanying text, Professor Dinstein seems to be very close to the majority view when he says “armed reprisals are prohibited unless they qualify as self defense under [U.N. Charter,] Article 51.” Yoram Dinstein, * supra* at 203.


35. See infras notes 178-179, 183, 198, 308-13, 328-29, 374, 422, 441, 465 and accompanying text.


39. See * supra* note 34 and accompanying text.


41. For analysis of these jut ad bella issues in the context of the Falklands/Malvinas War, see Alberto R. Coll, *Philosophical and Legal Dimensions of the Use of Force in the Falklands War*, in *Alberto R. Coll & Anthony C. Arend, the Falklands War: Lessons for Strategy, Diplomacy and International Law* 34 (1988).


43. See U.N. SCOR, Supp. (June - Aug. 1950) at 50, U.N. Doc. S/1580 (1980), reprinted in 10 Marjorie M. Whitman, *Digest of International Law* 866-67. See also James A. Field, *History of United States Naval Operations: Korea 42 (1962); Message of the U.S. Joint Chiefs of Staff to the Commander in Chief, Far East (General Douglas MacArthur), July 1, 1950, 7 U.S. Department of State, *Foreign Relations of the United States 1950 (Korea)* 271 (1976), authorizing the blockade by “such means and forces . . . to deny unauthorized ingress to and egress from the Korean coast . . . to suppress seaborne traffic to and from North Korea and to prevent movement by sea of forces and supplies for use in operations against South Korea. Care should be
taken to keep well clear of the coastal waters of Manchuria and USSR." Notices to governments and mariners were to be issued from Washington.

44. Malcom W. Cagle & Frank A. Manson, The Sea War in Korea 281-83 (1957); see also id. at 299-300, 304, 353-57, 570-73. James A. Field, supra note 43, at 54, reports at least one submarine incident early in the war. There were periodic periscope sighting claims later. Id. at 349, 395. Id. at 372 estimates that a submarine campaign would have been effective. Indirect blockading was an ROE responsibility. Id. at 58-59. See id. at 61, 125, 158, 444 for actions connected with the blockade. Id. at 187, 193, 358-59, 372, 444, 447 discusses USSR involvement with North Korean mining. If a Russian merchantman attempted to enter a blockaded port, the vessel would be stopped, and, if necessary, fired upon to enforce the blockade. If a Russian warship attempted to enter such a port, it would be allowed to enter and leave. If the warship escorted a Russian merchantman, and the two tried to enter a blockaded port, the merchant vessel would be stopped, but the warship would be allowed to proceed. If the warship tried to interfere with measures taken to stop the merchantmen, and fired on the blockading vessel, the latter would return fire in self-defense. Memorandum of Conversation by U. Alexis Johnson, Deputy Director of U.S. State Department Office of Northeast Asian Affairs, July 8, 1950, 7 Foreign Relations of the United States: 1950, at 332-33 (1976). As the Memorandum noted, this was "normal international practice." See London Declaration Concerning the Laws of Naval War, Feb. 26, 1909, arts. 5-6, 20, in The Law of Naval Warfare, supra note 1, at 223, 228, 232; NWIP 9A, supra note 4, para. 7.7; see also supra notes 11-39 (self-defense and related issues).

46. See infra notes 207-08 and accompanying text.
47. See infra notes 73-76 and accompanying text.
48. Compare supra notes 43-44 with, e.g., NWIP 9A, supra note 4, para. 7.7.2.
51. See, e.g., NWIP 9A, supra note 4, para. 8.2.3.
52. See, e.g., id. at 8-19 & n. 59.
54. Id. at 372.
55. Id. at 71-74. Thirty SCAJAP ships; 13 MSTS vessels; 26 U.S.-chartered, U.S.-flag cargo ships; and 4 Japanese-flag merchantmen participated in the Inchon landing. Id. at 181. The Woman invasion involved 30 SCAJAP ships and "MSTS shipping as assigned," which included Japanese mano, i.e., merchantmen. Id. at 223, 240. SCAJAP and chartered Japanese vessels were employed in the Hungnam and other military evacuations, where civilians were also evacuated. Id. at 291. For a summary of cargoes carried, see id. at 382-83.
56. See supra notes 49-51 and accompanying text.
57. NWIP 9A, supra note 4, para. 8.2.2.2; see also U.S. Department of the Navy, Law of Naval Warfare (NWIP 10-2) para. 503(b)(3) (Change 6, 1955) [hereinafter NWIP 10-2].
59. See Gabriella Venturini, Commentary, in The Law of Naval Warfare, supra note 1, at 120.
60. See id. at 122.
61. NWIP 9A, supra note 4, para. 8.2.3 at 8-19, citing Malcolm W. Cagle & Frank A. Manson, supra note 44, at 296-97; see also Myers S. McDougall & Florentino P. Feliciano, supra note 18, at 594.
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65. Proclamation of ROK President Rhee, Jan. 18, 1952, reprinted in id. at 531-32; see also id. at 1184-86.

66. Note, supra note 64; id. at 1186.

67. Daniel P. O'Connell, supra note 19, at 167.

68. See, e.g., 2 Daniel P. O'Connell, supra note 11, at 1109-10.

69. See supra note 42.


71. Under UNCLOS, supra note 2, arts. 55-85, coastal states may assert rights to explore, exploit, conserve and manage natural resources of the exclusive economic zone (EEZ) and the continental shelf. Under UNCLOS, the EEZ may extend out to 200 nautical miles from territorial sea baselines, and the continental shelf extends outward to the same distance, with certain exceptions. There is a right of freedom of navigation in these waters. See generally NWP 9A, supra note 4, para. 1.5.2, 1.6.


76. G.A. Res. 2625, reprinted in 9 Int'l Legal Mat'ls 1292 (1970); G.A. Res. 3314, supra note 21. Nations have also negotiated similar statements of regional importance, such as the nonbinding Helsinki Accords of 1975. See Conference on Security and Co-Operation in Europe, Final Act, Aug. 1, 1975, 73 Dep't State Bull. 323 (1975), 14 Int'l Legal Mat'ls 1292 (1975).

77. Statement of the President of the United States, June 27, 1950, 23 Dep't St. Bul. 5 (1950), James Cable, Gunboat Diplomacy 1919-1979, at 222 (2d ed., 1981) rates this operation as a "successful" use of gunboat diplomacy. Besides the Patrol, U.S. naval commanders warned their subordinates of the possibility of an attack "from across the Yellow Sea," a special antisubmarine patrol was established at Sasebo, Japan, there was an unconfirmed intelligence report that the USSR was planning an all-air attack on Japan, and on December 6 the U.S. Joint Chief of Staff "sent out a general alarm to American forces throughout the world." James A. Field, supra note 43, at 274. The United States also experimented with methodologies for intercepting a junk invasion fleet in 1951. Id. at 343-44.


83. Statement of the President of the United States, June 27, 1950, 23 Dep't St. Bul. 5 (1950).

84. See generally, 4 Majorie M. Whiteman, supra note 64, at 538-41.

85. Id. at 541-42.

87. James Cable, supra note 77, at 227.

88. Id. at 228, 230. See also 1 Edwin B. Hooper et al, The United States Navy and the Vietnam Conflict 357-59 (1976).

89. Bruce Swanson, supra note 86, at 213.

90. Ely Maurer, Legal Problems Regarding Formosa and the Offshore Islands, 39 Dep't St. Bull. 1005, 1011 (1958), quoted in 4 Marjorie M. Whiteman, supra note 64, at 407. See also James Cable, supra note 77, at 235.

91. Bruce Swanson, supra note 86, at 221.

92. See supra notes 79-80 and accompanying text.

93. See supra notes 11-39 and accompanying text.

94. Hague Convention (XI) on Restrictions with Regard to Capture in Naval War, Oct. 18, 1907 [hereinafter Hague XI], art. 171, 174. For note 19, at 9, notes that this would be an issue of customary international law, which was an issue of the ICJ in the case of the USA - Panama.(1988).


96. NWIP 10-2, supra note 57, paras. 503(c)(6), citing, inter alia, Hague XI, supra note 62. NWIP 10-2 continued the U.S. Navy's manual for the law of naval warfare through a 1974 revision. Id. at iii, and was the basis for the U.S. Air Force's 1976 view on the subject of exemptions from attack. U.S. Dep't of the Air Force, International Law - The Conduct of Armed Conflict and Air Operations: AFP 110-31, para. 4-4(c) (1976) which did add, however, that "[t]he 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, the intensity, the parties to the conflict and various geographical, political and military factors," before quoting NWIP 10-2, supra, para. 503(b)(3).

97. 2 Lasta Oppenheim, International Law 477-78 (Hersh Lauterpacht ed., 1955).

98. 2 id. at 462-71, 531-32; Robert W. Tucker, supra note 62, at 57-72; see also NWIP 10-2, supra note 57, para. 503(a)(6), from which the list format was taken.

99. NWIP 10-2, supra note 57, paras. 430(b), 520(a).

100. Robert W. Tucker, supra note 62, at 359-422.

101. Id. at 299 n.39.

102. Id. at 276-77, 300, the latter citing NWIP 10-2, supra note 57, paras. 430(b), 520(a).

103. 2 Lasta Oppenheim, supra note 97, at 278-83, 682-84, 807, 814-19, 862-68.


106. Cf. NWIP 9A, supra note 4, para. 8.2.2.2. On the other hand, general World War II arming of merchant ships and orders to resist was interpreted as taking part in hostilities, which made crews liable to prisoner of war status. 2 Daniel P. O'Connell, supra note 11, at 1117.

107. See supra note 1 and accompanying text.


111. Nicaragua Case, supra note 1.
One early judicial application of general principles of humanity was the Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22, in which Albania was held liable for deaths of British navy people in 1947 when British warships, enforcing the right of freedom of navigation through the Strait of Corfu, were damaged or sunk by Albanian-laid mines in time of peace. Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541, was not applicable because no armed conflict existed. The Nicaragua Case, supra note 1, found similar liability in 1986. The late Judge Baxter once lamented the unnecessary dichotomy between human rights law and the humanitarian law of armed conflict. George K. Walker, The Law of Armed Conflict Fought in a Comparative Criminal Law Context, in 1 Touro J. Transnat'l L. 153 (1988). Future wars, and the laws and the inevitable claims resolution process flowing from them, may provide the confluence of these now-discrete bodies of law. On this point, see Gerard J.A.D. Draper, Human Rights and the Law of War, 12 Va. J. Int’l L. 326 (1972).


114. Lyndel V. Prott, Commentary, in The Law of Naval Warfare, supra note 1, at 582.


116. Id. art. 13, 249 U.N.T.S. 250.

117. Id. art. 14(1), 249 U.N.T.S. 252.

118. Id. art. 14(2), 249 U.N.T.S. 252. For further analysis, see Prott, supra note 114, at 585.


120. Id. arts. 9, 11(1), 249 U.N.T.S. 248.

121. Id. art. 11(3), 249 U.N.T.S. 250. See also Lyndel V. Prott, supra note 114, at 585, 586 for further analysis.

122. Over 70 nations have ratified the Convention, supra note 113, and the same points made at supra note 1 concerning a finding of customary law from the text of treaties apply, albeit with less vigor, since less than half the nations of the world have ratified the Convention. Over 70 states’ ratifications do represent a very strong trend, however.

123. See supra note 113.


125. 3 Marjorie M. Whiteman, Digest of International Law 1088 (1964), citing official Egyptian sources.


127. 3 Marjorie M. Whiteman, supra note 125, at 1088.


130. Id. at 440, 442–44, 447.

131. Id. at 446; see also The Fjeld, 17 I.L.R. 345, 347 (Prize Ct. Alexandria, Egypt, 1950).


133. See supra note 34 and accompanying text.

134. 3 Marjorie M. Whiteman, supra note 125, at 1089, citing telegram of U.S. Department of State to the U.S. Embassy, Cairo, Aug. 7, 1950; dispatch of U.S. Embassy, Cairo, to U.S. Department of State, Sept. 2, 1950; see also Leo Gross, supra note 128, at 538.

136. Daniel P. O'Connell, supra note 19, at 112.
137. 3 Marjorie M. Whitman, supra note 118, at 1090, 1095.
138. James Cable, supra note 77, at 228-29. British warships had sought, often unsuccessfully, to intercept immigrants to what became Israel in 1947, and three U.S. destroyers had the "impossible" task of assisting Count Folke Bernadotte in maintaining peace between Israelis and Arabs in 1948, but they did succeed in evacuating the U.N. team from Haifa in July 1948. Id. at 225-26.
139. See 3 Marjorie M. Whitman, supra note 125, at 1090.
142. See generally 3 Marjorie M. Whitman, supra note 125, at 1092-94; Leo Gross, supra note 126, at 538-40, 559.
143. 3 Marjorie M. Whitman, supra note 125, at 1092; Grous, supra note 125, at 561.
144. Daniel P. O'Connell, supra note 19, at 112; see also Charles B. Selak, Jr., A Consideration of the Legal Status of the Gulf of Aqaba, 52 Am. J. Int'l L. 660 (1958). The omission generated a spirited debate that spilled over into the negotiations for what became the 1958 law of the sea conventions, infra notes 174-82, as to whether the Gulf of Aqaba was part of the open seas for freedom of navigation. Although the Arab states argued that the Gulf was a closed sea, the prevailing view was that the Gulf was open to navigation by all states, including Israel, whose port of Eilat is at the northern end. See generally Charles B. Selak, Jr., A Consideration of the Legal Status of the Gulf of Aqaba, 52 Am. J. Int'l L. 660 (1958); Alexander Melamid, Legal Status of the Gulf of Aqaba, 53 id. 412 (1959); Leo Gross, The Geneva Conference on the Law of the Sea and the Right of Innocent Passage Through the Gulf of Aqaba, id. 565 (1959).
145. See generally 3 Marjorie M. Whitman, supra note 125, at 1097-1130. The Treaty of Constantinople, Oct. 22, 1888, arts. 1-7, reprinted in 3 John Basset Moore, A Digest of International Law 264-65 (1966), provides for use of the Canal in peace and war, to all shipping, including belligerents' warships. The Canal cannot be blockaded, belligerents' warships are limited in their visits and may not be stationed off the access ports, and belligerent warships must follow opponents through the Canal at 24-hour intervals. Charles B. Selak, Jr., The Suez Canal Base Agreement of 1954, 49 Am. J. Int'l L. 487, 491-95 (1955) describes how the Canal had been subject to an international regime, "although its status appears to fall short of neutralization, since the convention provides that it is open to warships, even in wartime." See also 3 James B. Moore, supra at 267, who says flatly that the Convention does not neutralize the Canal, a position with which other authors agree. Charles B. Selak, Jr., supra at 491 n. 21. The 1954 agreement was abrogated on January 1, 1957, but Egypt reaffirmed the terms of the Constantinople Convention April 24, 1957. Egyptian Presidential Decree Abrogating 1954 Agreement with the United Kingdom, Jan. 1, 1957, 51 Am. J. Int'l L. 672 (1957); Egyptian Declaration on the Suez Canal, Apr. 24, 1957, art. 1, id. at 673.
146. James Cable, supra note 77, at 233-38; 1 Edwin B. Hooper et al., supra note 88, at 351.
149. The Inge Toft, 31 I.L.R. at 512-15; The Lea Lott, 28 id. 652, 653-56 (United Arab Repub. Prize Ct. 1959), which approved a seizure without any mention of aggression and therefore breach of the armistice.
150. See supra note 45 and accompanying text.
151. The Inge Toft, 31 I.L.R. at 518.
152. Cf. Natalino Ronzitti, supra note 1, at 4-5.
153. Leo Gross, supra note 121, at 539-41.
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154. Compare id. with, e.g., NWP 9A, supra note 4, para. 4.3.2.
155. Leo Gross, supra note 128, at 552-54.
156. See supra note 140 and accompanying text. Similarly, the Council declared in 1956 that "[i]t is not innocent passage that is not innocent—this covers both political and technical aspects [and]. . . [t]he operation of the Canal should be insulated from the politics of any country." S.C. Res. 118, U.N. Doc. S/Res/118 (1958), reprinted in Karel C.Wellens, supra note 42, at 22. This action was taken when Egypt nationalized the Suez Canal Company and the Canal’s freedom and security was threatened.
161. Daniel P. O’Connell, supra note 19, at 112, had similarly criticized a 1951 Council resolution. See supra note 144 and accompanying text.
162. Wolf von Heinegg, supra note 147, at 29. Denied overflight routes because of the contemporaneous Organization of Petroleum Exporting Countries oil embargo threat, the United States resupplied Israel by air. James Cable, supra note 77, at 21, 250-51.
163. Daniel P. O’Connell, supra note 19, at 101-03; see also James Cable, supra note 77, at 20.
164. Chaim Herzog, supra note 157, at 266-69.
165. Supra note 145.
170. See supra notes 125-37, 162-64, 168-69 and accompanying text.
171. See supra note 165 and accompanying text. See also supra notes 138-45 and accompanying text.
172. See supra note 157 and accompanying text.
173. See supra note 158 and accompanying text.
175. NWP 9A, supra note 4, para. 1.1, at 1-2, n.4.
176. 1958 High Seas Convention, supra note 20, art. 2, 13 U.S.T. 2314, T.I.A.S. No. 5200, 450 U.N.T.S. 82-84. See Francis V. Russo, Jr., Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law, 19 Ocean Devel. & Int’l L. 381, 384 (1988) for the point that the law of the sea, as partly stated in the High Seas Convention and other agreements, exists alongside the law of naval warfare and other applicable rules of international law. This view is confirmed by the commentary of the International
Different considerations appeared to the Commission to apply to the case of an outbreak of hostilities between parties to a treaty. It recognized that the state of facts resulting from an outbreak of hostilities may have the practical effect of preventing the application of the treaty in the circumstances prevailing. It also recognized that questions may arise as to the legal consequences of an outbreak of hostilities arising from treaties. But it considered that in the international law of today the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States. Thus, the Geneva Conventions codifying the law of the sea contain no reservation in regard to the case of an outbreak of hostilities notwithstanding the obvious impact which such an event may have on the application of many positions of those Conventions; nor do they purport in any way to regulate the concept of such an event. It is true that one article in the Vienna Convention on Diplomatic Relations (article 44) and a similar article in the Convention on Consular Relations (article 26) contain a reference to cases of "armed conflict." Very special considerations, however, dictated the mention of cases of armed conflict in those articles and then only to underline that the rules laid down in the articles hold good even in such cases. The Vienna Conventions do not otherwise purport to regulate the consequences of an outbreak of hostilities; nor do they contain any general reservation with regard to the effect of this outbreak on the application of their provisions. Accordingly, the Commission concluded that it was justified in considering the case of an outbreak of hostilities between parties to a treaty to be wholly outside the scope of the general law of treaties to be codified in the present articles; and that no account should be taken of that case or any mention made of it in the draft articles. (emphasis added).

The ILC was established in 1947 by U.N. General Assembly resolution. Its 25 members, all distinguished scholars, are representative of the world community and are elected by the Assembly on the basis of government nominations. The view of Herbert W. Briggs, then the U.S. member, coincided with the ILC position; other sources must be examined in conflict situations. Herbert W. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 Am. J. Int'l L. 51 (1974).

177. Territorial Sea Convention, *supra* note 159, art. 24(1), 15 U.S.T. at 1612, T.I.A.S. No. 5639, 516 U.N.T.S. at 220; Frederick C. Leiner, *Maritime Security Zones: Prohibited Yet Perpetuated*, 24 Va. J. Int'l L. 967, 980-81 (1984). The assertion contained in *Id.* at 980 that the 1958 conventions "conclusively rejected the legality of peacetime maritime security zones" is not correct. As Bernard H. Oxman, *supra* note 159, at 811, demonstrates for UNCLOS, *supra* note 2, and by inference for the 1958 Convention these agreements are concerned with peacetime uses of the seas but are subject to other bodies of international law, e.g., the law of maritime warfare. A security zone is a feature of the latter, and as will be developed infra, is lawful so long as it is necessary and proportional for its purposes under the law of self-defense.


184. *But cf.* *id.* § 64.
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186. Rudiger Wolfrum, supra note 176, at 393.


189. Myres S. McDougal & Florentino P. Feliciano, supra note 18, at 587-96, which is part of their chapter on combat situations, e.g., "regions of war" or "theaters of war." Cf. id. at 568-72, which is more concerned with land warfare and areas excluded from attack.

190. Compare id. at 501-09 with id. at 597.


192. Id. at 695-99, 786-94.

193. Id. at 528-31.

194. NWIP 10-2, supra note 57, para. 503(b)(3), discussed supra note 57 and accompanying text.


196. See id. at 55-56, 89-90, 93, 129-30.


198. Id. at 1033. See also supra notes 178, 183 and accompanying text.

199. 2 Daniel P. O'Connell, supra note 11, at 805-06.


202. Wolfr von Heinegg, supra note 147, at 34.

203. 10 Keesing's Contemporary Archives 15277 (1956); 11 id. 16080, 16184 (1958).

204. In 1958 Iceland unilaterally extended her exclusive fishing zone limit from 4 to 12 miles. Regulations Concerning the Fishing Limits Off Iceland, June 30, 1958, quoted in 4 Marjorie M. Whiteman, supra note 64, at 1157-58. A seven-nation conference, including Britain, protested and announced they would continue to fish in the eight-mile belt. Britain had announced it would send armed escorts to protect its trawlers and their crews, although other states' trawlers remained outside the 12-mile limit. Icelandic Ministry for Foreign Affairs, British Aggression in Icelandic Waters 5-13 (June 1959), quoted in 4 Marjorie M. Whiteman, supra at 1163-69. British trawler owners voluntarily withdrew from the disputed area in 1960, pending the then-ongoing Geneva Conference on the Law of the Sea. Id. at 1174, citing dispatch of the U.S. Embassy, London, to U.S. Department of State, Apr. 29, 1960, and N.Y. Times, May 13, 1960, at 2, and id., Aug. 12, 1960, at 2. The conference broke up in disagreement over the breadth of the territorial sea. See Robert D. Powers & Leonard R. Hardy, How Wide the Territorial Sea? in Carl M. Franklin, The Law of the Sea: Some Recent Developments 304 (1961). The dispute was resolved in 1961 by Exchange of Notes Between Great Britain and Iceland, Mar. 11, 1961, 397 U.N.T.S. 275. In 1972 Iceland asserted a 50-mile fishing zone, assail on British and German trawlers began, and Britain filed suit against Iceland in the International Court of Justice, which indicated interim measures and ultimately held that Iceland could not unilaterally exclude Great Britain from historic fishing waters. The litigants were admonished to negotiate differences. Fisheries Jurisdiction Case (U.K. v. I.c.), 1973 I.C.J. 12 (request for interim measures); 1973 I.C.J. 3; 1974 I.C.J. 4 (merits); James Cable, supra note 77, at 249-50. The U.S. reaction to similar seizures, occurring primarily off the west coast of Latin America and in the Gulf of Mexico by nations claiming territorial seas or economic zones in excess of those claimed by the United States, was an insurance compensation system to secure release of crews and boats, coupled with diplomatic protests. Theodor Meron, The Fisherman's Protective Act: A Case Study in Contemporary Legal Strategy of the United States, 69 Am. J. Int'l L. 290 (1975). Although the Act is still on the books, 22 U.S.C. §§ 1971-80 (1980), its efficacy has been limited by the broader view the United States has taken today of offshore jurisdictional claims, e.g., for the EEZ through the Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801 et seq. (1988), unless the seizure otherwise violates international law as recognized by the United States. There is a further proviso, however, that would appear to broaden the Protective Act's coverage.

206. E.g., Vaughan Lowe, supra note 19, art. 128, 137 referring to Nicaragua Case, supra note 1, which held, inter alia, that a customary right of self-defense existed alongside those rights articulated in the U.N. Charter, art. 51, but that the United States was not entitled to rely on collective self-defense because Nicaragua's providing rebels in El Salvador with arms or logistical or other support was not an "armed attack," so that the right of self-defense was not triggered. 1986 I.C.J. at 94-100, 103-05, citing, inter alia, the Rio Treaty, supra note 205, art. 3, 62 Stat. at 1700, T.I.A.S. No. 1838, 21 U.N.T.S. at 95-97, which articulates the inherent right of self-defense of U.N. Charter, art. 51. The quarantine response was under article 6 and 8, which involved "aggression...not an armed attack." 207. S.C. Res. 216, 217, U.N. Doc. S/RES/216, 217 (1965), reprinted in 5 Int'l Legal Mat'l's 167-68 (1966).


209. 16 Keesing's Contemporary Archives 22525 (1968).


211. See infra notes 569-73 and accompanying text.

212. See supra notes 89, 92-93, infra notes 73-77, 399, 425-27, and accompanying text.

213. Cf. U.N. Charter, art. 42. See also NWP 9A, supra note 4, para. 4.3.2, 7-7, and infra note 229 and accompanying text.

214. See supra note 45 and accompanying text.


216. See generally P. Sharma, The Indo-Pakistan Maritime Conlicts, 1965: A Legal Appraisal (1970). For an abbreviated discussion of Charter issues, see supra notes 11-32 and accompanying text. The Indian Navy effort during the Goa campaign of the early sixties was "confined to territorial waters." D. K. Pali, The Lightning Campaign: The Indo-Pakistan War 1971, at 145 (1972). Goa generated heated debate in the U.N. Security Council and a World Court decision that in effect supported India's occupation of the Portuguese enclave. See Sanctions of Goa, 16 U.N. SCOR (987th mtg) at 10-11, 16; id. (988th mtg) at 7-8; Case Concerning Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6. The initial Pakistani list of absolute contraband included:

(a) All kinds of arms, ammunition and explosives, and all kinds of materials or appliances suitable for use in chemical, biological or atomic warfare; machines for the manufacture or repair of any of the foregoing; component parts thereof; articles necessary or convenient for their use; materials or
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ingredients used in their manufacture; articles necessary or convenient for the production or use of such materials or ingredients.

(b) Fuel of all kinds; all contrivances for, or means of, transportation on land, in water or air, and machines used in their manufacture or repair, component parts thereof; instruments, articles and animals necessary or convenient for their use; materials or ingredients used in their manufacture, articles necessary or convenient for the production or use of such materials or ingredients.

(c) All means of communication, tools, implements, instruments, equipment, maps, pictures, papers and other articles, machines, or documents necessary or convenient for carrying on hostile operations; articles necessary or convenient for their manufacture or use.

(d) Precious metals and objects made thereof, coin bullion, currency, evidence of debts, debentures, bonds, coupons, materials, dies, plates, machinery, or other articles necessary or convenient for their production, manufacture.

Schedule II on conditional contraband comprised:

All kinds of food, foodstuffs, feed, forage and clothing and manufactured textile products; tobacco, articles and material necessary or convenient for their production, manufacture or use.

A later list did not distinguish between absolute and conditional contraband:

(a) All kinds of arms and ammunitions and explosives; their components and ingredients, radio-active materials.

(b) Crude oil and fuel and lubricants of all kinds.

(c) All means of transportation on land, in water or air, and components thereof.

(d) Electronics and telecommunication equipment.

(e) Optical equipment specially designed for military use.

(f) Precious metals and objects made thereof, coin bullion, currency, evidence of debts, debentures, bonds, coupons, stocks, and shares or any negotiable or marketable security; precious or semi-precious stones, jewels.

Wolff von Heinegg, supra note 147, at 30, citing All Pak. Legal Decisions 437, 472 (1965). In September 1965 India copied the initial Pakistani list of absolute contraband. No list was officially ratified. Wolff von Heinegg, supra, at 30.


219. See supra notes 73–76 and accompanying text.

220. A U.S. naval task force, sent to facilitate evacuation of U.S. nationals from Bangladesh, arrived after hostilities were over. D. K. Palit, supra note 216, at 144–50; Wolff von Heinegg, supra note 147, at 31. Both belligerents published contraband lists, including materials traditionally considered absolute contraband. NWP 9A, supra note 4, pars. 7.4.1, at 7.25 n. 98, citing Belligerent Interference with Neutral Commerce, in Contemporary Practice of the United States Relating to International Law, 66 Am. J. Int’l L. 386–87 (1972). Pakistan issued a contraband list almost identical with that of 1965, supra note 216, with these additions:

(g) Implements and apparatus for manufacture or repair of all types of military hardware equipment.

(h) All other types of goods and equipment, and parts and accessories thereof, that can be used or may assist in the conduct of war.

See supra note 216.
India transmitted this contraband list to the New Delhi diplomatic community:

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. gunmountings, limber boxes, limbers, military wagons, file 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. armour plates,
9. warships, including boats, and their distinctive component parts of such nature that they can only be used on a vessel of war,
10. aeroplanes, airships, balloons, and aircraft of all kinds and their component parts, together with accessories and articles recognizable as intended for use in connection with balloons and aircraft,
11. implements and apparatus designed exclusively for the manufacture of war, for the manufacture or repair of arms, or war material for use on land and sea,
12. surface to surface missiles, surface to air missiles, air to surface rockets and guided missiles and warheads for any of the above weapons, mechanical or electronic equipment to support or operate the above items,
13. any other class of materials or items as may assist the army in the prosecution of the armed conflict against the Union of India.

Eight Indian ports were declared subject to control on December 8, and on December 15, 1971 the Bengal Chamber of Commerce advised neutral shipping it would not risk attack in the Bay of Bengal if these instructions were obeyed:

(a) No ship should approach Sandheads to a distance less than 40 miles between dusk and dawn.

(b) Masters should be warned that they are liable whilst on passage in the Bay, to be challenged by Units of Indian Navy to establish their bonafides; they should cooperate and they will get courtesy and considerate treatment.

(c) For such ships as have left Calcutta having been detained here on account of their contraband cargo, which they had to discharge in accordance with official instructions it is strongly suggested that masters should obtain an endorsement from customs to the effect that all contraband cargo has been discharged. In addition, it is further recommended that agent should obtain an endorsement from the Indian Navy to the same effect and the officer to be contacted in this respect is . . .

The next day the Indian Parliament adopted the Naval and Aircraft Prize Act, 1971, which declared in part:

"Prize" [is defined as] anything which . . . may be subjected to adjudication . . . including a ship or an aircraft and goods carried therein irrespective of whether the ship is captured at sea or seized in port or whether the aircraft is on or over land or sea at the time of capture or seizure. [According to Section 3 (3) the Act is applicable] during war or as a measure of reprisal during an armed conflict or in the exercise of the right of self-defense [and according to Section 4(3) the Prize Court]. . . . shall adjudge and condemn all such ships, vessels, aircraft and goods belonging to any country or state or the nationals, citizens or subjects thereof.
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251. Cf. Luigi Migliorino, Commentary, in Law of Naval Warfare, supra note 1, at 615, 620; Horace B. Robertson, Jr., A Legal Regime for the Resources of the Seabed and Subsoil of the Deep Sea: A Brewing Problem for International Lawmakers, Nav. War Col. Rev. 61 (Oct. 1968); Tullio Treves, Military Installations, Structures, and Devices on the Seabed, 74 Am. J. Int'l L. 808 (1980); Rex J. Zedalis, A Response, 75 id. 926 (1981), and Tullio Treves, Reply, id. 933 (1981); discuss these issues in the context of the UNCLOS, supra note 2, negotiations. For analysis of UNCLOS in the context of merchant ship issues, see infra notes 304-30 and accompanying text.


255. Howard S. Levine, Nuclear, Biological and Chemical Weapons, in Horace B. Robertson, Jr., supra note 19, at 331, 333-45. NWP 9A, supra note 4, paras. 10.3.2.1, 10.4.2, states the U.S. position that first use of chemical weapons and any use of biologicals would violate customary international law.


259. Michael Bothe et al., New Rules for Victims of Armed Conflict 290-91 (1982); Michael Bothe, Commentary, in The Law of Naval Warfare, supra note 1, at 760; Yves Sandoz et al., Commentary on the Additional Protocols of 8 June 1979 to the Geneva Conventions of 12 August 1949, at 605-06 (1987); W.F. Fenrick, supra note 62, at 41; Howard S. Levine, Means and Methods of Combat at Sea, 14 Syracuse J. Int'l L. & Comm. 727, 729-30 (1988). As Yves Sandoz et al., supra at 606, and Michael Bothe, supra at 761, note, however, other parts of the Protocol - not directly germane to this analysis - are not thus limited and do apply to sea warfare.


264. See supra notes 1, 2 and accompanying text.


268. See supra notes 257-58 and accompanying text.


270. Id., art. 57, in The Law of Naval Warfare, supra note 1, at 730-31.

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275. Id., arts. 35(1), 35(2), in The Law of Naval Warfare, supra note 1, at 719.


279. James Ennes, supra note 158, at 67-68, 70, 81, 92, 152. See also supra note 158 and accompanying text.


283. NWP 9A, supra note 4, para. 8.2.3, at 8-19, citing Max Hastings & Simon Jenkins, The Battle for the Falklands 158 (1983); Martin Middlebrook, Operation Corporate: The Falklands War 186-87 (1985); I Howard S. Levie, The Code of International Armed Conflict 186 (1985). See also Howard S. Levie, The Falklands Crisis and the Laws of War, in Alberto R. Coll & Anthony C. Arend, supra note 41, at 64, 67. USSR surveillance ships and aircraft, plus satellites, could monitor the task force movement, but it is not clear whether the ships could or did enter the MIZ or the DSA; USSR aircraft could approach Ascension Island, the British staging area, but could not reach the Falklands/Malvinas. 3 Anthony H. Cordesman & Abraham R. Wagner, The Lessons of Modern War 280 (1990). On May 10, Britain declared a 100-mile controlled airspace around Ascension. Id. at 250.


293. W.J. Fenrick, *supra* note 288, at 125, citing inter alia, NWIP 10-2, supra note 57, paras. 430(b), 520(a).


296. L.F.E. Goldie, *Maritime War Zones & Exclusion Zones*, in Horace B. Robertson, Jr., *supra* note 19, at 156, 174. Leckow, *supra* note 188, at 635-36, agrees as to the British zone. He does not consider legality of the Argentine South Atlantic zone, but presumably would say it was illegal because, in his view, “war zones can be justified only in very restricted circumstances, where inconvenience to neutral vessels is kept to a minimum.” Id. at 635.

297. Cf. 2 Daniel P. O’Connell, *supra* note 11, at 1111-12; W.J. Fenrick, *supra* note 288, at 94, 113, 121; L.F.E. Goldie, *supra* note 296, at 194; Prof. Lagoni, in *Panel*, *supra* note 19, at 163, argues that a “defensive protection zone is admissible only if it is adjacent to the coast of the state establishing it,” a position seemingly contrary to other commentators. If his view is taken, the U.K. DSA, or “defensive bubble,” *supra* note 287 and accompanying text, was illegal under international law. Lagoni’s is a minority position among commentators.


299. See also *supra* notes 11-39 and accompanying text.


302. See *supra* notes 286-87 and accompanying text.

303. Compare *supra* notes 289 and accompanying text with *supra* notes 54-60, 82-86, 199-201, 221-23.

304. UNCLOS, *supra* note 2, arts. 88, 301.

305. For analysis of UNCLOS, primarily in the context of the peacetime environment, see, e.g., 2 Daniel P. O’Connell, *supra* note 11, ch. 25.

306. See *supra* note 2.

307. UNCLOS, *supra* note 2, arts. 87, 89.
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311. UNCLOS, supra note 2, arts. 95-96, 110.

312. See supra notes 185-86 and accompanying text.

313. UNCLOS, supra note 2, arts. 116-20.

314. Id. arts. 192-96.

315. See supra notes 257-58, 266-68, and accompanying text.

316. Vaughan Lowe, supra note 292, at 664, raises some of these issues from the UNCLOS perspective.

317. UNCLOS, supra note 2, art. 87(1).

318. 1986 High Seas Convention, supra note 20, art. 2, 13 U.S.T. 2314, T.I.A.S. No. 5200, 450 U.N.T.S. 82-84. See also supra note 176 and accompanying text.

319. E.g., UNCLOS, supra note 2, at 116(a) (obligations under treaties an exception to the right to engage in fishing).

320. Hague XI, supra note 62, art. 3, 36 Stat. 2408-09, T.S. No. 544 (coastal fishing and trading boats exempt from capture so long as they do not take part in hostilities).

321. Compare UNCLOS, supra note 2, art. 87(1) with 1958 High Seas Convention, supra note 20, art. 2, 13 U.S.T. 2314, T.I.A.S. No. 5200, 450 U.N.T.S. 82-84. See also supra notes 174-84, and accompanying text.

322. UNCLOS, supra note 2, art. 88.

323. Id. art. 301. For analysis of the right of self-defense and other Charter issues, see supra notes 11-39 and accompanying text.


325. 2 Daniel P. O’Connell, supra note 11, at 1106-26.

326. Id. at 1105-66.

327. Id. at 1108-09. See also id. at 1131-37.

328. Id. at 1112-13, referring to id. at 747-69.

329. See supra notes 174-84 and accompanying text.

330. 2 Daniel P. O’Connell, supra note 11, at 1109-12.


334. 2 Anthony H. Cordesman & Abraham R. Wagner, The Lessons of Modern War 90-91, 101-02, (1990); Francis V. Russo, Jr., supra note 176, at 393, reports that Kuwait and Saudi Arabia also made substantial cash grants to Iraq to help finance its war effort. See also Farham Mehr, Neutrality in the Gulf War, 20 Id. 105 (1989).

335. NWP 9A, supra note 4, para. 7.4.1, at 7-25 n.98, citing, inter alia, Milton Viorst, Iran at War, 65 Foreign Aff. 349, 350 (1980); see also 2 Anthony H. Cordesman & Abraham R. Wagner, supra note 334, at 92; J. Ashley Roach, Missiles on Target: The Law of Targeting and the Tanker War, in Panel, supra note 19, at 154, 155-57; J. Ashley Roach, supra note 332, at 596-97, 600-01. Captain Roach has stated that even though Iraq did not follow the formalities of blockade - announcement and effectiveness - an argument could be made
that Iraq was enforcing an air blockade of Iran, and that neutral ships assumed the risk of attack if they chose to carry Iranian oil during the conflict. J. Ashley Roach, supra, at 157; id at 607-08. Yoram Dinstein, Commentary, in Panel, supra note 261, at 606, 608 says that "no blockade [was] proclaimed . . . , and had it been . . . , it would have been a 'paper blockade.' Consequently, the law of blockade [was] inapplicable." Paper blockades are by definition ineffective. 2 Daniel P. O'Connell, supra note 11, at 1150-51, citing Paris Declaration Respecting Maritime Law, Apr. 16, 1856, art. 4, The Law of Naval Warfare, supra note 1, at 61; 65; London Declaration Concerning the Laws of Naval War, Feb. 26, 1909, art. 2, The Law of Naval Warfare, supra at 223, 227-28. Professor Dinstein also stated that oil shipped out of the Gulf could not have been contraband, since the right to capture as contraband is defined in that article. Thus the agent could reconsign the goods to the enemy. It would seem a logical extension of this to say that if enemy goods (e.g., oil) are sold for the benefit of the war effort, and the proceeds are then sent, perhaps by electronic funds transfer, to enemy bank accounts where they can further the war effort, the practical result is condemning. Declaration of London, supra, arts. 30-39, in The Law of Naval Warfare, supra at 238-41. 2 Daniel P. O'Connell, supra note 11, at 1144-47 subscribes to the general theory but notes the tendency of nations to treat goods as enemy-destined cargo when the consignee is an enemy agent in neutral territory where the goods could reach the enemy. It would seem a logical extension of this to say that if enemy goods (e.g., oil) are sold for the benefit of the war effort, and the proceeds are then sent, perhaps by electronic funds transfer, to enemy bank accounts where they can further the war effort, the practical result is the same. Thus Professor Dinstein is technically correct as to the exact words of the 1909 London Declaration, which perhaps reflects the commercial and economic warfare practices of its day or earlier conflicts, but today's realities are that outgoing shipments of warfighting/war-sustaining goods are also contraband, albeit by the circumlocutious analysis stated above.

336. Panel, supra note 19, at 170 (Remarks by Mr. Burnet); Panel, supra note 261, at 609 (Remarks by Mr. Wiswall).

337. 2 Anthony H. Cordesman & Abraham R. Wagner, supra note 334, at 126-27; Wolff von Heinegg, supra note 147, at 35. 338. 28 Keesing's Contemporary Archives, supra note 343.

339. The United States also stopped shipments on turbines for Iraqi frigates being built in Italy. 27 id. 31011 (1981). See also Council Calls on Iran and Iraq to Settle Dispute Peacefully, 17 U.N. Chron. 5, 7 (Sept. 1980).


341. W. Michael Reisman, supra note 25, at 589, 590; see also Samuel P. Menefee, supra note 331, at 586, who reports USSR Premier Leonid Brezhnev's December 1980 speech on Soviet principles for the Gulf:

Not to set up military bases in the Persian Gulf and on contiguous islands and not to deploy nuclear or any other weapons of mass destruction there;

Not to use or threaten to use force against the Persian Gulf Countries and not to interfere in their internal affairs; . . .

Not to create any impediments or threats to normal trade exchange and the use of maritime communications connecting the states of this region with other countries.

342. 2 Anthony H. Cordesman & Abraham R. Wagner, supra note 334, at 133-34.


345. 29 Keesing's Contemporary Archives 32594-95 (1983).

346. 28 id. 31850 (1982); 30 id. 33058 (1984).


348. Final Declaration of 12th Summit of Arab Heads of State, Sept. 6-9, 1982, 21 Int'l Legal Mat's 1144, 1145-46 (1982). For other peace initiatives of these years, see generally 28 Keesing's Contemporary Archives 31852 (1982) (GCC); 29 id. 32595 (1983); 30 id. 33058 (1984) (GCC condemns Iranian aggression); 31 id. 33561 (1985) (Arab League, among others); 32 id. 34264-65 (1986) (GCC claimed Iran persisted in ignoring efforts to end the war).

right of neutral shipping engaged in interneutral commerce to be free from intentional attack on the high seas. Further, Resolution 552 clearly [did] not condemn the Iraqi attacks, and thus implies ... its acceptance of

their legality.” J. Ashley Roach, in Panel, supra note 19, at 158; J. Ashley Roach, supra note 332, at 604. The resolutions were not meant to impede customary rights of visit and search, however. Francis V. Russo, Jr., supra note 176, at 395.


352. Panel, supra note 19, at 171 (Remarks by Mr. Kaladkin).


356. The precipitating event was Iranian interception of the U.K. merchantman Barber Perseus. Panel, supra note 19, at 158-59 (Remarks by Professor Greenwood).

357. Frits Kalshoven, Commentary, in The Law of Naval Warfare, supra note 1, 272, 274.


361. 31 Keesing’s Contemporary Archives 33371-73 (1985). As noted, supra at note 112 and infra at note 381 and accompanying texts, laying mines under these circumstances was unlawful.


365. Christopher Greenwood, in Panel, supra note 19, at 158.

366. 32 Keesing’s Contemporary Archives 34514 (1988).


369. Caspar Weinberger, A Report to Congress on Security Arrangements in the Persian Gulf, 26 Int’l Legal Mat’s 1434, 1448, 1450-52, 1458, 1461-63 (1987); Comment, Reflagging Kuwaiti Tankers: A U.S. Response in the Persian Gulf, 1988 Duke L.J. 174, 202; David L. Peace, in Panel, supra note 19, at 150-51; David L. Peace, supra note 332, at 553-54; Frank L. Wiswall, supra note 354, at 662 n. 12; Rutlieger Wolfrum, supra note 185, at 386-94; Statement by Assistant Secretary of State Richard William Murphy, May 19, 1987, 87 Dep’t St. Bull. 58-60 (July 1987); onita, Yoram Dinthein, in Panel, supra note 261, at 608-09, who may not have had access to other indicia of a “genuine link.” Query whether a “genuine link” is necessary at all from the perspective of the law of armed conflict. See supra notes 176-86, 197, 310-11, 328 and accompanying text.

See also Panel, supra note 261, at 610 (Remarks by Mr. Wiswall). Wiswall, supra at 622-23 says that the reflagging was not a departure from U.S. Merchant Marine policy and was not anomalous. Statement by Michael H. Armacost, Undersecretary of State for Political Affairs, to U.S. Senate Foreign Relations Comm., June 16, 1987, 26 Int’l Legal Mat’s 1429, 1431 (1987) notes that Kuwait had already reflagged two tankers under the U. K. ensign. One practical reason for reflagging was that the U.S. Navy did not have enough ships to escort all vessels beneficially owned by U.S. nationals, which may have been a third or more of the tankers in the Gulf. Frank Wiswall, in Panel, supra note 261, at 595-96. For a contemporary debate on reflagging and other Tanker War issues, see Conference Report, The Persian/Arabian Gulf Tanker War: International Law or International Chaos, 19 Ocean Devel. & Int’l L. 299 (1988); see also Francis V. Russo, Jr., supra note 176, for another thoughtful analysis.


3 Anthony H. Cordesman \& Abraham R. Wagner, supra note 334, at 318-19; Brad C. Hayes, supra note 371, at 47-48; letter of President Ronald Reagan to U.S. Speaker of the House Jim Wright, Sept. 4, 1987, 23 \textit{Weekly Comp. of Pres. Doc. 1066-67} (1987). Commentators have differed on whether the U.S. claim of self-defense was legitimate under the circumstances, but Theodor Meron, Remarks, in \textit{Panel, supra note 19, at 164; John H. McNell, supra note 205, at 638-39; David L. Peace, in \textit{Panel, supra note 19, at 151-52; and David L. Peace, supra note 332, at 554-57, conclude that the attack on \textit{Iran Afj} was allowable under international law.}

4 Christopher Greenwood, in \textit{Panel, supra note 19, at 159 (footnote omitted), quoting answer by the Minister of State, Foreign and Commonwealth Office to a parliamentary question, Jan. 28, 1986, 90 PARI. DEB., H.C. (6th ser.) 426} (1986). For the French attitude, see supra note 354 and accompanying text.


778. Norman Cigar, supra note 364, at 64; Brad C. Hayes, supra note 364, at 655-60.


781. Saudi Arabia also committed its four minesweepers to clearance operations. 2 Anthony H. Cordesman \& Abraham R. Wagner, supra note 334, at 300, 304, 313-14; Brad C. Hayes, supra note 368, at 655-60.


383. Frank L. Wirzwall, supra note 354, at 622.

384. See infra notes 394-95 and accompanying text.

385. Compare supra notes 383-84 and accompanying text with supra notes 11-39, and accompanying text; \textit{see also} Vaughan Lowe, supra note 19, at 129.

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“Splashed” and Rescued by a Neutral in the Persian Gulf Area, 31 Va. J. Int’l L. 610 (1991). One reason for particular concern with respect to possible small craft attacks was that the Iranian Navy had been conducting maneuvers in Iran’s exclusion zone and territorial waters, including simulated speedboat attacks on suicide runs. Peter Hayes, supra note 368, at 658.

387. See supra notes 283, 302.

388. David L. Peace, in Panel, supra note 19, at 153-54; David L. Peace, supra note 332, at 558. This might be contrasted with the Dogger Bank Case (U.K. v. Russ.) (1905), J. Scott, Hague Court Reports 403 (1916), in which a Russian battleship division fired on English fishing boats on the Dogger Bank in the North Sea, killing two fishermen, wounding six, sinking one boat and damaging four other craft, during the 1904-05 Russo-Japanese War. The Russian fleet had been warned of the possibility of Japanese torpedo-boat attacks, quite similar to the U.S. concern over speedboat suicide runs, supra note 386. The difference was that the Russian warships opened fire without any warning shots. The commission of inquiry held Russia liable; Russia accepted the decision and paid damages. The incident very nearly resulted in war between Russia and Great Britain. Richard F. Lebow, Accidents and Crises: The Dogger Bank Affair, 31 Nav. War Coll. Rev. 66, 69-73 (No. 1, 1978).


390. Wolf von Heinegg, supra note 147, at 35.

391. 2 Anthony H. Cordesman & Abraham R. Wagner, supra note 334, at 336-37; Bradd C. Hayes, supra note 368, at 660.


393. The Federal Republic of Germany sent ships to the Mediterranean Sea to replace ships sent to the Gulf. 2 Anthony H. Cordesman & Abraham R. Wagner, supra note 334, at 313-17, 570; U.S. Department of State, Western Defense: The European Role in NATO 16-17 (1988). 2 Anthony H. Cordesman & Abraham R. Wagner, supra at 528, credit the U.S. convoying as catalyzing other nations’ participation in the operation.


400. John H. Cushman, Jr., Navy to End Convoys in Gulf But It Will Still Protect Ships, N.Y. Times, Sept. 17, 1988, at 2; See also Ronald O’Rourke, supra note 392, at 48.


402. Id. at 400-01.

403. W.J. Fenrick, supra note 62, at 20-21; see also W.J. Fenrick, supra note 62, at 260.

404. Francis V. Russo, Jr., supra note 176, at 397; Frank L. Wiswall, Remarks, in Panel, supra note 261, at 594-95; Frank L. Wiswall, supra note 354, at 621.

405. Frank L. Wiswall, supra note 261, at 595; cf. Frank L. Wiswall, supra note 354, at 621. Although Professor Goldie would agree on most of these points, he would argue that the threat of an oil surplus in the 1980s and “the favorable conditions of insurance . . . rendered such attacks relatively less unacceptable to the tanker fleets’ owners than did such attacks during the World Wars,” when there was a scarcity of shipping and cargoes, L.F.E. Goldie, supra note 296, at 176.


408. W.J. Fenrick, supra note 268, at 121-22; see also Boleslaw Boczek, supra note 332, at 258.

409. Ross Leckow, supra note 188, at 639.
410. L.F.E. Goldie, supra note 296, at 176. 
411. Yoram Dinstein, in Panel, supra note 261, at 608. 
413. See generally, e.g., 2, Anthony H. Cordesman & Abraham R. Wagner, supra note 334, and supra note 335 and accompanying text. 
414. See supra notes 403-04 and accompanying text. 
415. W. Thomas Mallison, supra note 195, at 121; Boleslaw Boczek, supra note 332, at 258; J. Ashley Roach, supra note 19, at 156; see also NWP 9A, supra note 4, para. 8.2.2.2, at 8-12, and Robert W. Tucker, supra note 62, at 69 n.53. 
417. W. Thomas Mallison, supra note 195, at 121; NWP 9A, supra note 4, para. 8.2.2; David L. Peace, in Panel, supra note 19, at 148-49; David L. Peace, supra note 332, at 318; J. Ashley Roach, in Panel, supra note 19, at 156; J. Ashley Roach, supra note 332, at 606-07; Wolff von Heineseg, supra note 147, at 35-36; but see Robert W. Tucker, supra note 62, at 66, and compare id. at 69 n. 13; contra Rainer Lagoni, in Panel, supra note 19, at 163. Francis V. Russo, Jr., supra note 176, at 396-97, says that the legality of attacks would depend on a variety of factors: the relationship of a State with which a ship is trading to the hostilities; the ship's cargo; the cargo's ultimate use; the extent to which the cargo directly or indirectly supports the belligerent's war economy. This argument is analogous to the problem of defining contraband, which has baffled prize courts for years, or the genuine link theory for ships urged by at least one commentator. See supra notes 178-79, 183, 198, 308-29, 328-29, 369 and accompanying text. While Commander Russo's approach shows real analysis of the complexities of the problem and may be helpful for prize court jurisprudence, it does not solve the problem of an attack and sinking followed by claims of law violations under international law, unless the attacking state is willing to run that risk. Assuming a high seas scenario outside a war zone, it would seem that the ideal preventive (or risk minimization) approach would be a declaration by a belligerent as to what is contraband, acknowledgment of such by the world community, use of a warning system by neutrals (see, e.g., supra note 289 and accompanying text), and a navicert or clearcert system such as those used in World Wars I and II, particularly if the conflict is protracted. The notification/warning/navicert/clearcert methodologies should be feasible in today's world of facsimile and other instantaneous communication, even in the event of partial communications disruptions. For a discussion of the navicert system developed during World Wars I and II, see 7 Green H. Hackworth, Digest of International Law 212-17 (1943); 1 William N. Medlicott, The Economic Blockade 436-42 (1952); 2 id. 153-59, 420-27 (1959); 11 Marjorie M. Whiteman, Digest of International Law 38-51 (1968). The older terms were passport or sea-letter. Many bilateral agreements stated the terms for these during the eighteenth and nineteenth centuries. 2 John B. Moore, International Law Digest 1045-69 (1906). John H. McNeill, supra note 205, while citing NWP 9A, supra, questions whether the rules have now changed from visit, search, and capture to attack and sink for ships carrying warfighting/war-sustaining cargo. 
419. 2 Anthony H. Cordesman & Abraham R. Wagner, supra note 334, at 90-92, 101-02, 133-34, 170, 186; Fetha Mahk, supra note 334, at 105; Francis V. Russo, Jr., supra note 176, at 393. 
420. W. Thomas Mallison, supra note 195, at 132; Boleslaw Boczek, supra note 332, at 258-59; J. Ashley Roach, supra note 332, at 157. Iran's argument of the right of retaliation, or repelal, has been properly rejected. Boleslaw Boczek, supra at 259-60; see also supra notes 28-32 and accompanying text. 
422. Boleslaw Boczek, supra note 332, at 261-62; see also supra notes 11-39 and accompanying text; see also Rainer Lagoni, in Panel, supra note 19, at 163-64, who regards defense of merchantmen of flags other than the warship's as an open question. 
423. Compare, e.g., supra notes 54-60, 89-90, 92-93, 135-38, 157-58, 163, 204, 212, 237, 284, 289, 303, and accompanying text, with supra notes 421-22. 
424. Rainer Lagoni, in Panel, supra note 19, at 163. 
427. 1 Howard S. Levie, supra note 283, at xxxii. 
428. Id. at 162-63. 
429. 2 id. at 821-23. 
430. Id. at 821-24. 
431. Note Professor Levi's careful omission of reference to pure state practice not grounded in a treaty or other significant document, supra note 427 and accompanying text. 
432. See supra note 428 and accompanying text.
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434. 1 id. at 107-08.
435. Restatement (Third), supra note 1, §§ 331(2)(c), 336 & reporters’ note 4.
436. Id. §§ 501-02.
437. Compare id. § 521 with UNCLOS, supra note 2, art. 87(1). See also supra notes 317-23 and accompanying text.
438. Restatement (Third), supra note 1, § 521, comment b & reporters’ notes 1, 2; § 905, comment g & reporters’ note 7, discussing differences in the scope of the right of self-defense after ratification of the U.N. Charter. See also supra notes 11-39 and accompanying text.
439. U.N. Charter, art. 103, invalidates provisions of any other international agreement inconsistent with the Charter. Nothing is said in the Charter about the place of custom.
440. The Nicaragua Case, supra note 1, found that a customary norm equated to the U.N. Charter, art. 51, right of self-defense. Id., art. 93(1), declares that all states that are Members of the United Nations “are ipso facto parties to the Statute of the International Court of Justice.” I.C.J. Statute, art. 38(1), lists treaties, custom and general principles of law as coequal sources of international law, and thus it could be argued that insofar as a customary norm has developed, it should be considered along with any treaty principles. If there are no treaty principles, custom or general principles should prevail. Whether a custom in derogation of the Charter would be upheld, given the broad sweep of Charter purposes and principles, U.N. Charter, arts. 1, 2, and the possible finding of a customary norm parallel to them, is unlikely. On the other hand, since under the I.C.J. Statute, art. 59, decisions of the International Court of Justice are not given precedential value and are given secondary status under id., art. 38(1)(g), whether the reasoning of the Nicaragua Case, supra note 1, would be followed is open to argument in the next case before the Court and may be a test for dispute resolution in other contexts. Others have argued differently. Cf., e.g., Vaughan Lowe, supra note 19, at 128, 137. If there is no source – i.e., no custom, treaties, etc., that apply to a situation – the Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 says that parties are free to act in the interest of their own jurisdiction. See generally George K. Walker, supra note 1, at 9.
441. Restatement (Third), supra note 1, Part VI.
442. See generally id. §§ 701-11.
443. Cf. id. §§ 701, reporters’ note 6, and 702, reporters’ note 11. The reporters’ notes, although informative, are not considered part of the “restated law” as the comments are. George K. Walker, supra note 1, at 36.
444. Restatement (Third), supra note 1, § 702, Comment a, reporters’ note 1.
445. Id., reporters’ note 11. See also, e.g., George K. Walker, supra note 1, at 32-33, citing different theories of the scope of ius ad bellum and its application to treaties, and see supra note 443 for the weight to be given Restatement reporters’ notes.
448. See supra note 328 and accompanying text.
449. See supra notes 368-69 and accompanying text, which indicate that the United States and Kuwait at least considered the possible impact of the genuine link theory, in that underneath the change of flags were actions that would have satisfied the theory.
450. The lack of need for a warning is explained by the advent of modern technology – e.g., satellite communications, over-horizon weapons and antisip missile systems – that make lack of warning imperative in some cases for the attacking warship. NWP 9A, supra note 4, para. 8.2.2. Sally V. Mallison & W. Thomas Mallison, supra note 62, at 287, omitted the controversial seventh category from their recapitulation, in 1991, of their list of enemy merchant vessels subject to attack and destruction. Commander Fenrick included the seventh category in his 1989 report to the IIHL Roundtable at Bochum, adding the caveat that the 1936 London Protocol must be followed unless under the specific circumstances of the encounter, the attacker would be subject to “imminent danger” or it would otherwise be infeasible to comply. See infra note 535 and accompanying text. John H. McNell, supra note 205, at 633-34, asks whether the seventh category represents a change in the rules, from the traditional rights of visit, search and capture to a claim of right to attack and sink.
452. NWP 9A, supra note 4, para. 7.5.
453. See supra note 411 and accompanying text.
See supra note 415 and accompanying text. See also NWP 9A, supra note 4, paras. 4.3.2, 4.3.2.1.

NWP 9A, supra note 4, para. 8.2.3.

Compare id. para. 8.3.1 with id. para. 8.2.2.

See supra notes 178-79, 183, 198, 308-13, 320-29, 369, 396 and accompanying text.

See supra note 374, at 1450-51.

See supra notes 374-75, 377, and 406 which show that some time intervened between reflagging and sailing the ships.

See supra note 4, para. 7.8.

See id. ch. 10.

See id. para. 11.10.2, at 11-22.

See id. ch. 11.

See id. para. 7.4.

Compare id. para. 7.6 with id. para. 3.8, the latter referring to OPNAVINST 3120.32B, which is not published with NWP 9A.

Compare NWP 9A, supra note 4, paras. 7.6, 7.9, 7.9.1.

See supra note 4, at para. 7.7.

See supra paras. 7.9.2-7.10.

See supra notes 11-39, 52-45, 207-08 and accompanying text.


See supra notes 19, 261, 479.

See supra note 479, at 146-47 (Remarks by Professor Goldie).

See supra note 39, a series of commentaries on NWP 9A, supra note 4.

See supra note 474, at 149 (Remarks by Professor Reisman). See also id. at 149-52 (Remarks by other participants), which noted development of the analogous Oxford Manual of Naval Warfare (1913), reprinted in The Law of Naval Warfare, supra note 1, at 277, by the Institut de Droit International.

1 L.C.J. Statute, art. 38(1)(d); Restatement (Third), supra note 1, § 103(2)(c).

See supra note 477 and accompanying text.

1 L.C.J. Statute, art. 38(1)(d); Restatement (Third), supra note 1, § 103(2)(c).


Natalino Ronzitti, supra note 1, at 4-5.

Compare id. at 6-7, 39-41, with the analysis, supra notes 287-98; see also NWP 9A, supra note 4, paras. 7.8, 7.8.1. Professor Lagosi, in Panel, supra note 19, at 163 would similarly assert that defensive protection zones are valid only if adjacent to the coast of a nation establishing such. See also supra note 297 and accompanying text.
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495. Howard S. Levy, Commentary, in Law of Naval Warfare, supra note 1, at 140, 146, analyzing Hague Convention (VIII) Relating to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541; see also NWP 9A, supra note 4, para. 9.2, which says Hague VIII is a "guide" to the law on employment of naval mines, and supra note 376 and accompanying text on mine warfare during the 1980-88 Trawler War.

496. Ivan A. Shearer, Commentary, in Law of Naval Warfare, supra note 1, at 183, analyzing Hague (XI) supra note 62; see also NWP 9A, supra note 4, para. 8.2.3, which lists other vessels exempt from capture under other agreements.


499. Id. at 213-14; for analysis of these rights and duties, see id. at 215-21.
500. Id. at 221.
503. Lyndel V. Frott, Commentary, in Law of Naval Warfare, supra note 1, at 582, analyzing 1954 Hague Cultural Property Convention, supra note 113. See also supra notes 113-22, 263 for further analysis.
504. See NWP 9A, supra note 4, paras. 2.1.2.2, 3.4, citing, inter alia, 9 Majorie M. Whiteman, Digest of International Law 221, 434 (1968); Marian Leich, Digest of United States Practice in International Law: 1980, at 999-1006 (1986).
505. Roettich Pact, supra note 113.
508. Michael Bothe, Commentary, in The Law of Naval Warfare, supra note 1, at 760, analyzing Protocol I, supra note 260. See also supra notes 259-75 and accompanying text.
509. L.D.M. Nelson, Commentary, in The Law of Naval Warfare, supra note 1, at 779, 783, analyzing Havana Convention on Maritime Neutrality, supra note 488 and Hague Convention (XIII) Concerning Rights and Duties of Neutral Powers in Naval War, supra note 496, noting the U.S. reservation to article 12(3) of the Havana Convention, which would have equated armed merchantmen with warships with respect to sojourn and provisioning limitations.
511. See, e.g., supra notes 490, 500-07 and accompanying text.
512. See supra note 298 and accompanying text.
514. Howard S. Levy, supra note 283, at 737; W.F. Feinrick, supra note 288, at 102.
515. Natalino Ronzitti, supra note 518, at 575; see also id. at 578 and Daniel P. O'Connell, supra note 200, at 27-39, who articulates the same ambivalence.
517. Id. at 590 (Remarks of Mrs. Dorwald-Beck); id. at 590-91 (Remarks of Professor Lowe), 594 (Remarks of Professor Robertson).
518. Vaughan Lowe, supra note 292, at 672-75; but see also Commentary, 14 Syracuse J. Int'l L. & Comm. 677, 683-85, 690-91 (1988) (Remarks of Professors Lowe and Kalshoven), and Commentary, id. at 704, 715, 718 (Remarks of Commander Fenrick and Professor Robertson).


523. Id. at 705-13, 726, 722-25 (Remarks of Commander Fenrick, Dr. Van Hegelsom, Professor Robertson, Mrs. Doswald-Beck, Dr. Bring, Professor Delupis, Col. Dahl, Professor Kalshoven, Professor Gordon, Professor Amer). See also Horace B. Robertson, Jr., supra note 521, at 169-70.

524. Howard S. Levine, supra note 259, at 728-30, 736-38; see also Discussion & Notes, id. at 741, 747-48, 749, 752-53 (Remarks of Professor Levine, Mr. Halkiopoulos, Dr. Van Hegelsom). But see id. at 751 (Remarks of Dr. Fischer).

525. Discussion & Notes, id. at 748-49 (Remarks of Commander Fenrick), citing W. Thomas Mallison, supra note 195, at 117-23, and W.F. Fenrick, supra note 288; see also Discussion & Notes, supra note 751-53, 756 (Remarks of Professor Delupis, Admiral Clara, Professor Reisman).

526. Discussion & Notes, supra note 524, at 749, 751, 753, 756, 758 (Remarks of Professor Delupis, Colonel Dahl).

527. Antoine A. Bouvier, supra note 285; Commentary, 14 Syracuse J. Int'l L. & Comm. 765 (1988) (Remarks of Commander Fenrick, Mr. Eberlin); see also supra notes 285-86 and accompanying text.

528. Ivan A. Shearer, supra note 371. The conference also had available Selected United States Rules of Engagement, Vietnam Era, id. at 795 (1988), reprinted from 121 Cong. Rec. S9897-S9905 (1975). Classified ROEs are subject to the state secrets privilege. Zuckerbraun v. General Dynamic Corp., 935 F.2d 544 (2d Cir. 1991), affirming dismissal of a wrongful death suit involving a deceased U.S. Stark sailor; the claims were against missile defense system manufacturers, designers and testers and required technical details of the Phalanx close-in defense weapons system, alleged to have malfunctioned in the Iraqi attack on Stark during the Tanker War. See also supra note 370 and accompanying text.


531. Compare I.C.J. Statute, art. 38(1)(d) with Restatement (Third), supra note 2, § 103(2)(c).

532. Panel, supra note 474, at 146 (Remarks by Mrs. Doswald-Beck).

533. W.J. Fenrick, supra note 62.


535. W.J. Fenrick, supra note 62, at 63-64. This paper was presented at the beginning of the conference, and participants were invited to submit comments, which are also being published, but which are not cited here because of space limitations.


537. In 1990 the group met in Toulon, France; see id.; in 1991, in Bergen, Norway; see Christopher Greenwood, supra note 19 and Wolff von Heinegg, supra note 147; in 1992, in Ottawa, Canada; see Horace B. Robertson, Jr., The "New" Law of the Sea and the Law of Armed Conflict at Sea 43 n.1 (1992), originally presented as the introductory report to the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflict at Sea, Ottawa, Canada, Sept. 25-28, 1992. Additional conferences have been planned.


539. Restatement (Third), supra note 1, § 103(2)(c).

540. See, e.g., supra note 483 and accompanying text.

541. Restatement (Third), supra note 1, § 103(2)(d) & Comment c.

542. U.N. Charter, arts. 24, 25, 37, 39, 41, 42, 48. See also supra notes 45-47, 73-76 and accompanying text.

543. NWP 9A, supra note 4, para. 8.2.3 & n.61, says that liners should not be attacked unless carrying troops or military cargo because civilian loss of life would be disproportionate to any military advantage gained.
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545. E.g., the reluctance of the U.S. Government to publish the Vietnam ROE. Ivan A. Shearer, supra note 371, at 767-68.

546. Cf. I.C.J. Statute, art. 38(1)(b); Restatement (Third), supra note 1, § 102. See also George K. Walker, supra note 1, at 7-13.

547. See supra note 62 and accompanying text.

548. See supra note 61 and accompanying text.

549. See supra notes 226-27 and accompanying text.

550. See supra note 283 and accompanying text.

551. See supra notes 285-86, 527 and accompanying text.

552. See supra notes 128-29 and accompanying text.

553. See supra notes 200, 205, 207-08, 237-38.

554. See supra note 206.

555. See supra note 63 and accompanying text.

556. See supra notes 287-92 and accompanying text.

557. See supra notes 332, 347, 354 and accompanying text.

558. See supra note 112, 233-42, 361, 373, 376 and accompanying text.

559. See supra note 206.

560. See supra notes 257-58 and accompanying text.


562. See supra notes 108, 242-43 and accompanying text.

563. See supra notes 110-12 and accompanying text.

564. See supra notes 107-12 and accompanying text.

565. See supra notes 286-87 and accompanying text.

566. See supra notes 338-29 and accompanying text.

567. See supra notes 110-12 and accompanying text.

568. See supra notes 113-23 and accompanying text.

569. To fail to consider these additional sources may invite an incomplete analysis. Cf. the difficulty with relying exclusively on Howard S. Levie, supra notes 427-34, who carefully notes the lack of analysis of customary norms not generated by other documents such as treaties.

570. See supra notes 108, 242-43 and accompanying text.

571. See supra notes 257-58 and accompanying text.

572. Cf. I.C.J. Statute, art. 38(1)(c), and Restatement (Third), supra note 1, §§ 102, 103; see also George K. Walker, supra note 1, at 31-32.

573. See supra notes 107-12 and accompanying text.

574. See supra notes 286-87 and accompanying text.

575. See supra notes 338-29 and accompanying text.

576. See sources supra at note 259.

577. See supra notes 110-12 and accompanying text.

578. See supra notes 113-23 and accompanying text.

579. See supra notes 174-86, 304-17, 328-29 and accompanying text.

580. See supra notes 259-75 and accompanying text.

581. See supra notes 276-82 and accompanying text.

582. See, e.g., supra notes 344, 349, 362, 379, 389, 393-399.

583. Cf. I.C.J. Statute, art. 38(1)(d); Restatement (Third), supra note 1, § 103.

584. See supra notes 473-537 and accompanying text.

585. David L. Larson, supra note 474, at 156; Natalino Ronzitti, supra note 1, at 51.

586. Both the I.C.J. Statute, art. 38(1), and the Restatement (Third), supra note 1, § 102 list custom, treaties and general principles of law as co-equal source of law, the Restatement restricting principles to a supplementary function for the other two. This contrasts with the primacy of treaties over custom in U.S. practice. See, e.g., George K. Walker, supra note 1, at 7, 41-45.


588. See id at 7.


590. James Russell Lowell put it poetically: New occasions teach new duties; Time makes ancient good uncouth;
They must upward still, and onward,
Who would keep abreast of Truth.

_The Present Crisis_ (1844), 1 James R. Lowell, Poetical Works 185, 190 (1890); _see also_ Philip C. Jessup, _supra_ note 34, at 98; Myres S. McDougal, _supra_ note 34, at 63. This point can be a correlative of the previous one. _See infra_ note 591 and accompanying text. On the other hand, a situation may arise in which there is little or no treaty law on point; examples are air and space warfare in this century.

591. _See_ e.g., 6 U.S.T. 3267-3310, 75 U.N.T.S. 419-62, for a partial recitation. The United States also reserved to use the death penalty. _See also_ Richard R. Baxter, _The Geneva Conventions of 1949_, Nav. War Coll. Rev. 59 (Jan. 1956); Gerald Draper, _Rules Governing the Conduct of Hostilities: The Laws of War and Their Enforcement_, id. 22 (Nov. 1965).

592. The London Declaration Concerning the Laws of Naval War, Feb. 26, 1909, _The Law of Naval Warfare, supra_ note 1, at 223, was rejected by the U.K. House of Lords, for example. Frits Kalshoven, _Commentary, in id. at 271._

593. This was the approach taken with NWP 9A, _supra_ note 4, which has two versions. The text version of 1989, _reprinted in_ Horace B. Robertson, Jr., _supra_ note 19, at 385, is designed for naval commanders and for instructing nonlawyers. The annotated version, also issued in 1989, is copious in its citations and bibliography. A revision, to appear as NWP 9B, is currently underway. _See also_ George K. Walker, _Book Review, 45 Nav. War Coll. Rev. 172_ (No. 2, 1992).

594. Frits Kalshoven, _Noncombatant Persons, in_ Horace B. Robertson, Jr., _supra_ note 19, at 300, 301, 325 notes this problem for the drafters of NWP 9A.

