

Chapter V

The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea

by
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The *Commander's Handbook on the Law of Naval Operations*,¹ issued by the United States Department of the Navy in July 1987, is a model of clarity and conciseness. Given the audience for which it was intended, it is resoundingly successful in explaining the intricacies of the law. Its clear and authoritative style, however, sometimes conceals the controversial nature of some of the statements which it includes. It is the purpose of this paper to review the *Handbook*, discussing the more controversial pronouncements and setting it against the background of the contemporary, and sometimes unsettled, Law of the Sea. The comments made are in no sense intended as a criticism of the drafting of the *Handbook* as an exposition of the United States' view of international law, which could scarcely be bettered. They merely point out some of the difficulties which attend that view of the law, which for the most part could not reasonably be canvassed in the *Handbook* itself. The comments are not an exhaustive catalogue of the cases where the legislation or views of third States or commentators differ from that of the United States, but they are illustrative of the kinds of questions which might arise from strict adherence to the account given in the *Handbook*.

The *Handbook* is divided into two parts, The Law of Peacetime Naval Operations and the Law of Naval Warfare, which will be discussed in turn. First, however, it is necessary to deal with certain general issues raised in the Preface to the *Handbook*.

The *Handbook* claims disarmingly to set forth "general guidance," and not to be "a comprehensive treatment of the law" or "a substitute for the definitive legal guidance provided by judge advocates and others responsible for advising commanders on the law."² However, while there are certainly detailed points of interpretation upon which the *Handbook* is not to be taken as a definitive guide, it is plain that the *Handbook* is intended to represent United States Navy thinking on the broad lines of international law, and hence to some extent will operate as a constraint upon those who give more detailed

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advice. For instance, the Preface lists only two sources of international law: custom and treaties. There is no suggestion of recourse to resolutions of international organizations for the determination of what international law might be. This is unfortunate since, quite apart from the crucial importance of such resolutions in the particular context of the legality of operations on the deep sea-bed, resolutions adopted by bodies such as the International Civil Aviation Organization are of great significance in the adumbration of the law concerning other maritime zones of more immediate concern to naval commanders.

Moreover, the definition of customary international law given in the Preface, though according closely with classical formulations which treat customary law as a homogeneous body of law applicable to all States, gives no sense of the decisive importance of persistent objection and acquiescence in State practice, which can, respectively, except States from the binding force of emergent norms of customary international law or bind them to acceptance of norms which command less than general acceptance in State practice.³ Given that the United States persistently objected to territorial sea claims in excess of three miles until its conditional acceptance of wider claims in 1983 or so,⁴ and that some of the statements in the *Handbook* amount to novel interpretations of the law of the sea, persistent objection and acquiescence remain important considerations in the accurate determination of the rules of international law applicable in any concrete dispute.

The Law of Peacetime Naval Operations

1. Legal Divisions of the Oceans and Airspace. The first chapter in this part of the *Handbook* deals with the legal divisions of the oceans and airspace, and it begins with a summary of the law concerning baselines. Two points call for comment. First, while acknowledging the propriety of straight baselines drawn along coastlines where it is impracticable to utilize the low-water mark, as where the coastline is deeply indented or fringed by islands,⁵ the *Handbook* notes that “the United States, with few exceptions, does not employ this practice and interprets restrictively its use by others.”⁶ It is true that the restrictions on the use of straight baselines set out in the 1958 Territorial Sea Convention were recently reaffirmed in the 1982 Convention, and there was no significant support at UNCLOS III for any substantial relaxation of those restrictions. On the other hand, State practice is clearly moving towards a liberal interpretation of the circumstances in which straight baselines can be used. A recent study⁷ sets out straight baseline claims made by 46 States, including many (such as those made by Algeria, Burma, Colombia, Cuba, Ecuador, France, Guinea, Iran, Italy, Kenya, Madagascar, Morocco, Mozambique, Senegal, Spain and Vietnam) which are by no means easy to

reconcile with the conventional and customary law criteria for the use of such baselines.

It is understood that the United States has protested against some of these claims, reserving its legal rights. There is a risk of the United States being held to have acquiesced in the validity of other claims, although since the acquiescence only arises from silence in circumstances which demand a protest because they affect the actual (as opposed to the abstract) interests of a State, this possibility is theoretical rather than real. However, there is a more insidious danger. If the pattern of liberal use of baselines persists and spreads, a view might emerge that it represents either an agreed interpretation of the conventional rules or a development in the customary law, in either case allowing such claims. This gives rise to complex questions of treaty law concerning the ability of what may ultimately be a minority (perhaps a small minority) of parties to hold out against an interpretation of a multilateral treaty adopted by the other parties. This problem is compounded by the difficult question whether the boundaries of a State, determined *inter alia* by its baseline, can differ *vis-a-vis* different States. While it would probably overstate the case to say that the United States is in danger of having its legal rights eroded by this development in State practice, there is at least a cause for concern here which should be recognized.

The second point concerns claims to historic bays, such as the Libyan claim to the Gulf of Sirte which has occasioned difficulties in the past.⁸ The *Handbook* states that “[t]he United States has taken the position that an actual showing of acquiescence by foreign nations in such a claim is required, as opposed to a mere absence of opposition,”⁹ if the historic claim is to be valid. This is controversial for two reasons. First, it might be said that it is not the acquiescence of foreign nations, but only of the United States, which need be shown: if the United States had acquiesced in the claim, it would be bound to accept its validity, whether or not other States had acquiesced in it. Acquiescence by the United States is, however, unlikely. In the Gulf of Sirte, for instance, the United States put beyond doubt its rejection of the Libyan claims by asserting its freedom to use the disputed waters as high seas. Secondly, the requirement of acquiescence, as opposed to the mere absence of protest, is itself less clearly settled than the *Handbook* might imply. The International Court in the *Anglo-Norwegian Fisheries* case suggested that the general toleration of a notorious claim—the mere absence of protest—is enough to render the claim valid, and controversy over the matter is alive in academic circles.¹⁰ This point might also be argued in relation to straight baseline systems, which are simply a means of defining those waters which could become internal waters of a State by way of historic title even if the original drawing of the baseline was unlawful. Here again is a possibility that the *Handbook* points to in the rejection of certain maritime claims which might be held by an international tribunal to be opposable to the United States.

The *Handbook* turns next to the definition of the various maritime zones which might be claimed by States. Although these definitions are not of central importance, the rights and duties of States within the zones being dealt with in more detail elsewhere in the *Handbook*, it is worth noting that some of the definitions are questionable. Paragraph 1.5 of the *Handbook* is headed "International Waters," and covers the contiguous zone, Exclusive Economic Zone (EEZ), high seas and security zones. The contiguous zone is stated, with an impeccable adherence to the wording of the 1958 and 1982 Conventions,¹¹ to be the zone within which a State may prevent and punish infringements of its customs, fiscal, immigration and sanitary laws and regulations that occur within its territory or territorial sea. That definition is, however, arguably too restrictive. Many State claims to contiguous zones assert the right to punish not only infringements committed within the territory or territorial sea of the State, but also infringements committed within the contiguous zone itself; in short, they claim both jurisdiction to enforce and jurisdiction to prescribe in the contiguous zone. However, the terms of the conventional definition adopted in the *Handbook*, whether construed literally or in the light of the *travaux préparatoires* of article 24 of the 1958 Territorial Sea Convention, grant only jurisdiction to enforce in the contiguous zone.¹² Moreover, the list of interests which may be protected in the contiguous zone, which is limited to customs, fiscal, immigration and sanitary matters, sits awkwardly with United States judicial practice. In cases such as the *Taiyo Maru*¹³ and *Gonzalez*,¹⁴ United States courts have taken a liberal view of the rights of coastal States to exercise jurisdiction beyond the territorial sea in what may loosely be termed as the contiguous zone, extending in terms of subject matter beyond the limits laid down in the 1958 and 1982 Conventions. It has, however, to be said that the more conservative line taken in the *Handbook* accords with that taken by the Geographer of the United States Department of State.¹⁵ In particular, the refusal of the *Handbook* to admit the validity of contiguous zones for security purposes¹⁶ is consistent with the views of the Geographer.¹⁷

Perhaps the most significant divergence from the wording of the international conventions in this section of the *Handbook* concerns the Exclusive Economic Zone (EEZ). While the description of these 200-mile zones as "resource-related zones" might be regarded as a reasonable simplification of their nature, the description of the rights of third States in the zone is more controversial. It is stated that "in the EEZ all nations enjoy the right to exercise the traditional high seas freedoms of navigation and overflight, of the laying of submarine cables and pipelines, and of all other traditional high seas uses by ships which are not resource related."¹⁸ That is not what the 1982 Convention says. Article 58 of the Convention expressly ascribes to third States in the EEZ only

[T]he freedoms referred to in article 87 [on the freedoms of the high seas] of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the seas related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

The controversy centers upon the legality of activities such as weapons testing and naval exercises, and the laying of submarine monitoring systems (such as the SOSUS chains) in the EEZ, without the permission of the coastal State.

One view, advanced in the *Handbook*, is that all such traditional high seas activities fall within the concept of “other internationally lawful uses of the seas related to” the freedom of navigation and pipe- and cable-laying set out in article 58, and that they are therefore lawful if committed in the EEZ of a third State, even if the State objects to such activities.¹⁹ That view is not shared by all States. For example, Brazil, Cape Verde and Uruguay have asserted that various military activities, such as exercises involving the use of weapons, may not be conducted within the EEZ without coastal State consent.²⁰ States taking this position might argue that weapons testing and the deployment of underwater monitoring systems are neither expressly listed in article 58 as specific “high seas” freedoms preserved in the EEZ nor included within the category of “other internationally lawful uses of the seas related to” the specified freedoms. Naval exercises in an area of EEZ involving the use of guns, bombs and rockets, for example, might be said to be essentially different from and unrelated to the freedom of navigation, as may the sowing of unarmed mines.²¹ The laying of SOSUS chains which monitor shipping movements in the area might equally be said to be distinct from normal pipe- and cable-laying activities, where the pipes and cables are used for transportation across the zone in question rather than for the collection of intelligence from it. Furthermore the exclusive right, of the coastal state, under article 60 of the 1982 Convention, to authorize and construct installations and structures in the EEZ which may interfere with the exercise of its rights in the zone offers an alternative basis for coastal interference. It might be said, for instance, that a SOSUS chain which stretches across the EEZ of a State so as to make it impossible for coastal State naval vessels to put to sea without detection by a third State interferes with the right of the coastal State to police and defend the waters adjacent to its coast. Finally, the coastal State might claim that any of the foregoing arguments are sufficient to create a doubt as to the respective scope of coastal and third State rights, and that a proper interpretation of article 59 (not 58) of the 1982 Convention resolves that issue “on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.”

The merits of these opposing arguments have been canvassed elsewhere,²² and that task will not be repeated here. It should be clearly stated, however, that the views ascribed to Cape Verde have been expressed only by a tiny minority of States, and have been plainly rejected by rather more States (including the United States in the statement made at the signing of the Final Act of UNCLOS III)²³ and also by the overwhelming majority of commentators. It is, of course, entirely proper that the *Handbook* should refrain from raising what might reasonably be considered to be specious objections to the United States' view. However, it is equally proper that arguments which may yet be deployed against the United States should be noted in a commentary on the *Handbook*. If these disagreements over the interpretation of the 1982 Convention were to be resolved, that would do no more than clear the way for the even more difficult question of the extent to which the details of the Convention's provisions on the EEZ and other matters (and in particular article 59) have entered into customary law. The only point being made here is that the question of third-State rights in the EEZ is not quite as cut and dried as might appear from the *Handbook*.

Briefly, the *Handbook* adopts the definition of the continental shelf set out in the 1982 Convention, according to which coastal State rights over the shelf extend, broadly speaking, to the limits of the geological continental margin or to 200 miles from the baseline, whichever is farther.²⁴ The provision is significant for many States, notably in the Pacific Ocean, whose geological shelves are much narrower than 200 miles. Some might question whether contemporary customary law does yet follow the 1982 Convention in automatically ascribing the seabed out to 200 miles to the coastal State, where the continental margin does not extend out to that distance, and where the coastal State has not claimed seabed rights out to 200 miles. However, the *Handbook*, if it departs at all from customary law, concedes rights which the U.S. might otherwise have reserved and is therefore unlikely to generate international friction.

The final, minor, point on the definitions set out in chapter 1 of the *Handbook* concerns the assertion that in the absence of treaty constraints there is a freedom to use "international airspace (that over contiguous zones, exclusive economic zones, the high seas, and territory not subject to the sovereignty of any nation)."²⁵ It may be noted that this view has been challenged by some States. Argentina, Brazil and Uruguay are reported to have suggested that coastal States have the right to regulate by national legislation all aeronautical activities in their EEZ's.²⁶ However, the drafting history of the 1982 Convention clearly supports the United States' view, and this is supported by a recent report to the International Civil Aviation Organization which concludes that there is no basis for the assertion that the 1982 Convention gives coastal States jurisdiction over overflight in the EEZ.²⁷ While this conclusion is certainly right, the attitude of Brazil and others, mirroring

similar arguments concerning military uses of the EEZ, outlined above, should be seen as signalling that free overflight of the EEZ might not always and in all circumstances be regarded in practice as unquestionable by all states despite the true position in law.²⁸

2. *International Status and Navigation of Warships and Military Aircraft.* The second chapter of the *Handbook* raises more acute issues of law touching upon naval operations. The definition of warships and military aircraft and the account of their immunities follows the terms of the 1958 and 1982 conventions on the Law of the Sea and is in general uncontroversial, although it should be noted that naval auxiliaries, while enjoying the same immunities as warships, are not within the definition of warships given in the *Handbook* or the conventions.²⁹ One aspect of the definition is, however, controversial. The *Handbook* adopts the view taken by the major maritime States that “[n]uclear powered warships and conventionally powered warships enjoy identical international legal status.”³⁰ That view is contested by some States. For instance, Djibouti is reported to require no advance notification or permission for the passage of warships through its territorial sea, but does require advance notification for the passage of nuclear-powered ships, and Egypt requires prior permission for the passage of nuclear-powered, but only prior notice of the passage of conventional, warships.³¹ Furthermore, States are of course entitled in exercising discretions allowed to them by international law to draw a distinction between those warships which are powered by or carry nuclear materials and those which do not. Perhaps the clearest example of such a discretion concerns the admission of warships to ports and internal waters. As the *Handbook* notes, in the absence of some treaty arrangement to the contrary, warships and auxiliaries have no right of entry to the ports or internal waters of a foreign state.³² The Treaty of Raratonga, which implemented an agreed move by certain Pacific States towards the establishment of a nuclear-free zone in a large area of the southern Pacific around and to the east of Australia, provides in article 5.2 (headed “Prevention of stationing of nuclear devices”) that:

Each party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lane passage or transit passage of straits.³³

As discussions in recent years between the governments of New Zealand and the United States have shown, there is considerable potential for lawful discrimination by coastal States against warships carrying nuclear materials, at least in relation to the entry by such ships into ports and other internal waters.³⁴ While special provision may be made to regulate their passage,³⁵ discrimination against ships carrying nuclear materials amounting to a denial

of passage through straits and archipelagic sea lanes does not appear to be lawful, nor does such discrimination in relation to rights of innocent passage *simpliciter*, although the scope of the right of innocent passage through the territorial sea has been clouded by the drafting of the 1982 Convention.

Article 19 of the 1982 Law of the Sea Convention, which defines innocent passage, is one of the most problematic provisions of that Convention from the point of view of naval operations, although most of the problems operate at the level of legalistic arguments against the robust good sense of the *Handbook*. Article 19 opens, in its first paragraph, with the definition used in the 1958 Territorial Sea Convention: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law."³⁶ The second paragraph then states that:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

...

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

...

(j) the carrying out of research or survey activities;

...

(l) any other activity not having a direct bearing on passage.

The problems of interpretation are manifold. The question whether the list of activities incompatible with innocence in article 19(2) is illustrative or exhaustive is clearly answered in the *Handbook*, which is surely correct in regarding the list as merely illustrative.³⁷ No answer is given to the further question, whether the *ejusdem generis* principle applies to the construction of article 19, requiring that there be some *activity* on a par with those listed in article 19(2) before innocence be lost. If that construction is correct, it would follow that the mere fact of the presence of a passing warship, not engaged

in any "activity" of the sort listed in article 19(2), could not be the basis for a finding that its passage is non-innocent. Similarly, a law stating that the mere carriage on a merchant ship through the territorial sea of "cargo or any appliance or apparatus the use of which or persons who may constitute a threat against the sovereignty, territorial integrity or political independence of the Republic, shall be deemed to be not innocent . . ." could not be lawful.³⁸ Under the 1958 definition, which now constitutes article 19(1) of the 1982 Convention, a coastal State could argue persuasively in some circumstances that the very presence of a warship or carriage of such cargo prejudiced its peace, good order or security. For instance, the mere passage of a superpower naval squadron close to the shore during hours of darkness at a time of substantial civil unrest or insurrection might well be perceived by a government having a precarious hold on power, but nonetheless recognized internationally as competent to act on behalf of the State, as prejudicing the peace and good order of the State; the government might accordingly determine that such passage is non-innocent.³⁹ That government might, furthermore, take the plausible view that the right of a coastal State to take "the necessary steps in its territorial sea to prevent passage which is not innocent"⁴⁰ means that it is entitled to use the lowest effective level of force available to it at the time to prevent passage, and it is conceivable that there might be nothing available between the extremes of a radio message and a Silkworm missile. If such a situation were to arise, and the commander of the naval force were to rely on a different interpretation of article 19, requiring that his warships engage in some "activity" additional to mere passage before they lose their innocence, this doctrinal dispute could quickly develop into an international incident.

That does not exhaust the difficulties of interpreting article 19. Among the other difficulties which have been noted by commentators are the problems of article 19(2)(a): would the passage of a naval force threatening the use of force against a third State be a "threat . . . of force . . . in violation of the principles of international law embodied in the Charter of the United Nations," and would the passage of a naval force intended to assist a government put down an insurrection which is regarded in the United Nations as an attempt by the people of the country concerned to wrest the right of self-determination from an unwilling government fall within that provision, in either case resulting in the loss of innocence and possible political pressure on coastal States to attempt to prevent the passage? At what point, for instance, do monitoring coastal installations and broadcasts, soundings on the seabed or the testing of the salinity or temperature of the water amount to the collection of information to the prejudice of the defense or security of the coastal State, or to research or survey activities, proscribed by paragraphs (c) and (j)? Is the towing of a military device such as a towed sonar array, put overboard before entry into the territorial sea and taken aboard after

leaving the territorial sea, caught by paragraph (f)? And what “activities” are comprehended by paragraph (l): the movement of missiles onto launchers, or shadowing foreign submarines, or monitoring the seabed for military devices which might be emplaced there? Do proscribed activities automatically deprive passage of its innocence, even if there is no actual prejudice to the peace, good order or security of the coastal State?

Here, as elsewhere in this paper, the response may be given that there was a clear understanding at UNCLOS III as to the interpretation which is to be given to the terms of the 1982 Convention. This is a perfectly adequate justification for the approach taken in the *Handbook*, which was not drafted as a watertight legal document but as an operational guide. But this is not an entirely adequate response to the problem of coping in practice with the complex underlying legal questions which might be raised by States determined to hold to interpretations of the law diverging from those held by the United States.

Many of the provisions of the 1982 Convention, among them article 19, are finding their way into national legislation.⁴¹ There is a real possibility that the interpretation of such national laws by national agencies, inevitably colored by the canons of interpretation applied in the relevant legal systems, may diverge from the interpretation of the 1982 Convention. Moreover, political considerations may induce States to interpret the words of the Convention itself in a manner different from that contemplated during the conference which spawned it—and if the world has learned anything from the U.S. legal system and its most skillful practitioners, it has surely learned that an agreement may be used ruthlessly against parties who neglect to ensure that the agreement actually says what they wanted it to say, and says no more. Most important, the underlying argument throughout this contribution to the debate is that States do differ in their interpretations of the law, and consequently the law is not always so clear and precise as to produce certainty, either concerning the rights and duties of the United States Navy or the likely attitudes and reactions of other States to the use of their waters by United States forces. This lack of certainty demands a certain circumspection in the exercise of the more controversial rights. It was, after all, the vigorous assertion by Libya of a claim to historic waters in the Gulf of Sirte, which most States would have regarded as wholly without legal merit, which produced fatal armed clashes with United States forces.

There are two further points concerning innocent passage to be made. The first concerns the statement in the *Handbook* that innocent passage may be temporarily suspended in specified areas of the territorial sea when this is essential for the protection of the security of the coastal State.⁴² That statement is consistent with the provisions of the conventions,⁴³ and with the position taken by the United States in protesting against attempts by Libya to close certain areas of its territorial sea permanently.⁴⁴ It sits less happily

with State practice, which contains several examples of laws which have purported permanently to forbid navigation in specified areas adjacent to military dockyards and installations.⁴⁵ In practice, such claims do not appear to have given rise to international incidents; pragmatism and prudence may have prevailed over principle.

It may seem strange to leave until last the fundamental question, whether warships enjoy the right of innocent passage at all. The well-known controversy over this question has been debated at length over the years since Elihu Root, sometime Secretary of State of the United States, addressed to the arbitral tribunal in the *North Atlantic Coast Fisheries* case his much-quoted (and subsequently, no doubt, much regretted) remark concerning the territorial sea: "Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and repass because they do not threaten."⁴⁶ In essence, his argument was that because warships are inherently threatening to the coastal State they are inherently non-innocent and outside the scope of the right of innocent passage. Many States adopt a similar position. Nine or so require prior notification as a condition of passage, and a further twenty-eight or so require prior authorization, the States concerned being drawn from all the major power blocs and regions.⁴⁷ This position is not, however, the one taken by major maritime States such as the United States and the United Kingdom, both of which assert a right of innocent passage for warships without prior notification or authorization. Nonetheless, few international incidents have occurred, largely because of the *practice* of giving low-level and informal notice of passage on the occasions when naval vessels are sent into the territorial seas of States requiring notification or authorization, which may be followed by a purported "authorization" not sought by the passing ships: such ambiguous procedures save honor on both sides.⁴⁸ Important as the controversy is as an academic matter, in practice the world has lived more or less happily with the contradictory interpretations of the law now for many years, and the assertion of the right of innocent passage for warships in the *Handbook*⁴⁹ is unlikely to upset this *modus vivendi*.

One of the most critical elements in the package deal worked out at UNCLOS III was the safeguarding of rights of passage through strategic straits and archipelagic sea lanes in return for the acceptance of extended coastal State territorial seas and jurisdiction over the economic resources of the seas off their coasts. The parts of the *Handbook* dealing with rights to transit such waters are therefore of particular importance.

The 1982 Convention itself establishes a right of transit passage through international straits and a substantially identical right of archipelagic sea lanes passage through archipelagic sea lanes, which are much broader than the rights of innocent passage enjoyed in the territorial sea.⁵⁰ Transit passage and archipelagic sea lanes passage do not depend upon a showing of "innocence;" they include a right of overflight, which does not exist over the territorial

sea; they appear to allow submerged passage by submarines, which is forbidden in the case of innocent passage; and they impose strict limitations upon the regulatory competence of the coastal State over ships exercising the rights of passage. Here the status of the 1982 Convention is of critical importance. Iran, for example, has stated that the right of transit passage is "contractual," existing only for parties to the 1982 Convention, and presumably only once the Convention enters into force.⁵¹

There is little support evident for the Iranian position, and much that can be said against it. It is not the view taken in the *Handbook* or by the major maritime States. Thus, when the United Kingdom extended its territorial sea to twelve miles in 1987, it announced, albeit without using the term "transit passage," that rights equivalent to those established under the conventional transit passage regime would be accorded to ships sailing through the Straits of Dover and certain other straits around the United Kingdom.⁵² Moreover, it is arguable that rights wider than the right of innocent passage existed through international straits under customary international law even before the adoption of the 1982 Convention. In support of this view it has been said that transit through and overflight of certain key straits such as Gibraltar has long been conducted in a manner which, like transit passage itself, is more akin to high seas freedom of navigation than to innocent passage. Furthermore, it might be said, this earlier practice offers an explanation for the rapid acceptance of the transit passage provisions into the Law of the Sea Convention and, perhaps more significantly, for the inclusion in the 1979 Treaty of Peace between Egypt and Israel of a right of "unimpeded and non-suspendable freedom of navigation and overflight" for all States through the Straits of Tiran and Gulf of Aqaba.⁵³

Against this view it must be said that the evidence on passage through straits is by no means always clear. For instance, in the case of the Straits of Gibraltar, until the 1980s the United States recognized only a three mile territorial sea and accordingly acted on the basis that there was a high seas corridor through the strait—an assumption which, if correct, would render the exercise of freedoms of navigation and overflight through the strait uncontroversial, and preclude the counting of that practice towards the establishment of a right to exercise such freedoms through straits constituted entirely by the territorial seas of the littoral States. It should also be noted that several littoral States have stated that they do not recognize the right of transit passage in customary international law. The 1971 Declaration made by Indonesia, Malaysia and Singapore is but one among many examples.⁵⁴

Moreover, there are certain technical problems with the view favoring the wider right. It is difficult to see how States such as the United States and United Kingdom, parties to the 1958 Territorial Sea Convention which, in article 16(4), gives merely a non-suspendable right of innocent passage through international straits, can claim wider rights as against other parties,

such as Malaysia and Spain, which border international straits. This problem is exacerbated by the fact that the 1958 Territorial Sea Convention contains no provision for its termination or denunciation, and the United Kingdom has recorded the view (in relation to a purported denunciation by Senegal of, among others, the Territorial Sea Convention) that denunciation is not possible.⁵⁵ There is, therefore, some difficulty in explaining how the parties to the Territorial Sea Convention can escape the restrictive rights of passage through straits which that Convention sets out.

It might be argued that only where a treaty intends to exclude wider customary law rights can the latter be curtailed by a restrictive treaty provision, and that this is not the case in relation to the law on passage through straits. But the difficulty of adducing unequivocal evidence to sustain claims to a customary law right analogous to transit passage or freedom of navigation through international straits which pre-dates the transit passage provisions of the 1982 Convention must cast serious doubts upon the legal validity of such claims. The better course is to argue that the transit passage provisions have passed into customary law since their elaboration at UNCLOS III so as to modify the pre-existent treaty rights under the 1958 Convention, and to seek to establish that position on the basis of State practice, including the assertion of such rights by the United States Navy, among others.

The most plausible explanation of this process might lie in the doctrine of desuetude, or disuse. It is said that for desuetude to operate, four requirements must be satisfied: 1) frequently repeated violations of the treaty, 2) which are imputable to a government and not merely to individuals, and 3) which have no reasonable explanation (other than as a violation of the treaty), and 4) which have not been negated by the protests of the injured party.⁵⁶ It is not clear, however, that the body of action and acquiescence is yet sufficiently persuasive to justify the conclusion that the provisions of the 1958 Convention have been swept away. It may be unwise to seek to force modifications of treaty rights which States appear willing to accept within any doctrinal straitjacket. The United Kingdom at one stage rejected the validity of archipelagic baselines claimed by Indonesia, another party to the Territorial Sea Convention, but it would now accept the validity of such baselines drawn in conformity with the provisions of the 1982 Convention. This position should perhaps best be seen as illustrating either the proposition that treaty obligations can be modified, with the agreement of the parties, by subsequent changes in customary law, or the proposition that States can choose to waive violations of their treaty rights. Whether this should be described as an application of the doctrine of desuetude, or as a consensual modification of treaty rights, or as some other form of development in the law, is less important than the fact of the change. If rights of transit passage are asserted often enough, and are not seriously challenged, such rights will become established in law.

If the claim is accepted that customary law includes a right similar to the conventional right of transit passage, further problems concerning transit passage remain. The *Handbook* states that the right of transit passage obtains in "straits used for international navigation through the territorial sea between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."⁵⁷ There is nothing wrong with that statement, which follows the wording of article 37 of the 1982 Convention. The problem lies in determining what it means in practice, and the *Handbook* offers no guidance. Differences have arisen between the United States and other States over whether a particular strait falls within the category of "straits used for international navigation." For example, the United States has argued that the Northwest Passage through the Canadian archipelago is an international strait, but Canada has contested this, arguing that the waters in question are historic internal waters through which passage is subject to Canadian control and regulation. It might also be argued that the volume of traffic through the strait is so small as to disqualify it from the category of straits used for international navigation.⁵⁸ In such cases the account of transit passage given in the *Handbook* is of limited value: the critical factor is the political decision on the vigor with which the United States wishes to press its view and assert the rights which it claims in relation to such disputed straits.

Despite the admirable clarity of the definition of transit passage in the 1982 Convention, there are difficulties in determining its precise scope, highlighted by the manner in which the relevant rules are presented in the *Handbook*. The assertion that submarines may transit submerged⁵⁹ is commonly accepted, although this right is not spelled out in the 1982 Convention. It is an inference, albeit a reasonable one, from article 39(1)(c) of the 1982 Convention, which requires passing vessels to refrain from activities other than those incident to their "normal modes of continuous and expeditious transit" which, it is said, can only mean that submarines may transit submerged. More troublesome is the statement that warships may engage in "formation steaming and the launching and recovery of aircraft."⁶⁰ Formation steaming might be acceptable as a normal precaution for the security of the vessels concerned, but the 1982 Convention is silent on the question of launching and recovering aircraft. The right of overflight alone does not seem sufficient warrant for such activities, which are markedly different in nature from overflight between points lying outside the territorial sea of the littoral States, and the justification must be found in the nature of the right of transit passage itself. Whatever understandings may have been reached at UNCLOS III, these aircraft rights are not included in the Convention's actual provisions, and their validity will turn largely upon their unopposed exercise in practice, constituting an "agreed interpretation" of the Convention for the parties and a rule of customary law for non-parties.

It should also be noted that there is some doubt as to whether it is true in all circumstances that transit passage may not be suspended for ships engaged in armed conflict with a third State.⁶¹ It is certainly true that the right of transit passage does not depend upon any criterion of innocence. However, it is stated, in article 38(3) of the 1982 Convention, that “[a]ny activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.” This raises the question, what “activities” put a vessel outside the scope of transit passage? At one extreme, it might be argued that *any* activity other than continuous and expeditious transit of the strait would have this effect. On the other hand, the duty of vessels engaged in transit to refrain from the threat or use of force against the littoral States is not included as an element of the definition of the right of transit passage in article 38, but as an ancillary duty in article 39 of the 1982 Convention, thus suggesting that there are activities other than mere transit which, though unlawful, do not deprive the passage of its transit character. Here again, the correct interpretation of the law will have to be constituted by State practice.

Undoubtedly, the major naval powers will choose to see transit passage as a right close to the high seas freedom of navigation, and will tend to argue that whatever a vessel in transit through the strait might do while it is in transit the right of passage cannot be denied, and any complaint of unlawful behavior must be pursued through the normal channels for settling international disputes. Of course, a vessel not engaged in transit but, say, deliberately stationed at anchor in the strait (the anchoring not being incidental to its passage) would fall outside the right of transit passage; and because it would by definition be in the territorial sea it would fall under the rules applicable to that zone, including the rules allowing the coastal State to use reasonable force to prevent non-innocent passage.

The foregoing remarks on transit passage apply equally to the provisions in the *Handbook* concerning the right of archipelagic sea lanes passage.⁶² A further problem arises from the position taken by the Philippines, which stated on signature of the 1982 Convention that

The provisions of the Convention on archipelagic passage through sea lanes do not nullify or impair the sovereignty of the Philippines as an archipelagic State over the sea lanes and do not deprive it of authority to enact legislation to protect its sovereignty, independence, and security.

The concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines, and removes straits connecting these waters with the economic zone or high sea from the rights of foreign vessels to transit passage for international navigation.⁶³

One of the main aims of the provisions on archipelagic sea lanes passage was, of course, to “impair” the sovereignty of the littoral State, in the sense of limiting the right of the State to impose its laws on or restrict the movements of passing ships, and to give such ships transit rights through the major

established international seaways crossing the archipelago substantially identical to transit passage rights; and there is no doubt that this is precisely what the 1982 Convention does. The Philippine position appears absurd, but it is not entirely devoid of a certain superficial plausibility. It is true that the 1982 Convention does not detract from the rights of any State to act in self-defense under the provisions of article 51 of the United Nations Charter, and there is no obvious reason why an archipelagic State party to the 1982 Convention should not enact legislation to that effect, so long as it does not attempt to regulate passage through the sea lanes in a manner inconsistent with the 1982 Convention provisions. That said, it is difficult to believe that the Philippine statement was seeking merely to establish this banal proposition. It is also true that in the section of the 1982 Convention dealing with straits, the transit passage provisions do not extend to straits connecting the high seas or EEZ with the territorial or internal waters of a State. Furthermore, the transit passage regime, *stricto sensu*, does not apply to passages through archipelagic waters, although the provisions on archipelagic sea lanes passage, which are very similar to the transit passage provisions, do so apply. But again, it is hard to believe that these rather inconsequential points motivated the Philippine statement. It is scarcely surprising that several governments have registered forceful objections to the Philippine statement, characterizing it as an attempt to evade the obligation to accord rights of archipelagic sea lanes passage to foreign ships and aircraft.⁶⁴ If nothing else, the declaration offers a fine illustration of the danger of States adopting tortured interpretations of the 1982 Convention whenever it might suit them to do so.

Apart from the question of Flight Information Regions and Air Defense Identification Zones, which fall outside the scope of this paper but which have led to serious controversy in the past,⁶⁵ there are three further matters in the second chapter of the *Handbook* which call for comment and which are not dealt with elsewhere in this paper: they are the establishment of closed areas of the high seas, and certain particular problems arising in the Arctic and Antarctic. The high seas point can be dealt with swiftly. The *Handbook* states that

Any nation may declare a temporary closure or warning area on the high seas to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. . . . Ships and aircraft of other nations are not required to remain outside a declared closure or warning area, but are obliged to refrain from interfering with activities therein.⁶⁶

Although it has sometimes been asserted that there is a right to close off areas of the high seas temporarily, using force to prevent the entry of foreign ships, the statement in the *Handbook*, based on the freedom to use the high seas with due regard for the interests of other high seas users, seems to this writer to

be as accurate as it is succinct, and to be an admirably clear expression of the prevailing law.

The passages concerning the Arctic and Antarctic will also appear unobjectionable to most readers. However, the view that there is a high seas freedom of navigation and overflight on, over, and under the waters and icepack of the Arctic would not pass undisputed by all States.⁶⁷ As was mentioned above, Canada, for instance, has claimed certain waters in the Canadian Arctic archipelago as historic internal waters—a claim which, if valid, would necessarily oust the high seas freedoms in the areas concerned. Similarly, the United States position concerning Antarctica is premised upon its refusal to recognize any of the territorial claims on that continent: such claims have been made by Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom. In practice, however, international cooperation over the management of Antarctica has been and continues to be remarkably successful, and there is little danger of any serious international difficulties arising from the non-recognition of the various claims.

3. *Protection of Persons and Property at Sea.* From this point onwards in the *Handbook*, matters become much less clear. In most cases, where “pure” law-of-the-sea questions become enmeshed with questions concerning the legality of the use of force to protect persons, property or rights, one is faced with an array of possible justifications, one shading off into another so imperceptibly that it is often of little practical value to seek to determine the limitations of any particular justification. This is particularly true of the right of self-defense. It must be said at this point that the present paper does not attempt an exhaustive analysis of this unsettled area of the law. Such a task demands a paper in itself. With that proviso, an attempt is made in the following paragraphs to identify the main areas of controversy.

The first such area arises in the context of piracy. The *Handbook* gives a plain account of the rules on the repression of piracy, adhering for the most part to the wording of the relevant provisions of the 1958 High Seas Convention and the 1982 Law of the Sea Convention.⁶⁸ Thus, piracy is confined to cases of illegal acts of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons and property on board. Specifically excluded from this definition are cases of mutiny and passenger hijacking, which do not constitute piracy because they do not involve acts committed by one ship or aircraft against another.⁶⁹ The definition is a matter of international law. Individual States may choose to enact municipal legislation describing hijackings as “piracy,” but such acts would not constitute piracy as a matter of international law and so would not be subject to the exceptional jurisdictional rules allowing

any State to seize pirate ships on the high seas.⁷⁰ This point is considered further below.

This scrupulous adherence to the terms of international conventions breaks down in the provisions concerning the pursuit of pirates. The *Handbook* states categorically that

Pursuit of a pirate vessel or aircraft through or over international straits overlapped by territorial waters or through or over archipelagic sea lanes may proceed with or without the consent of the coastal nation or nations, provided the pursuit is expeditious and direct and the transit passage rights of others are not unreasonably constrained in the process.⁷¹

This view is probably based on the understanding that the *purpose* of transit or archipelagic sea lanes passage is irrelevant to its legality, and that only the *manner* of such passage is so relevant. That interpretation may draw support from the ruling of the International Court of Justice to similar effect in the context of innocent passage in the *Corfu Channel* case.⁷² Nonetheless, it does not necessarily overcome the objection that pursuit may constitute an “activity” additional to mere passage which would, under articles 39(1)(c) and 54 of the 1982 Convention, take the pursuing ship outside the scope of transit or archipelagic sea lanes passage. The United States view is, presumably, that pursuit is not another “activity” and that it does not result in the loss of transit rights. But if that be so, it is not immediately apparent why the same claim to a right to pursue through straits and archipelagic sea lanes is not made in the context of hot pursuit. The part of the *Handbook* dealing with that topic, however, states that the right of pursuit ceases as soon as the ship pursued enters its own or a third State’s territorial sea.⁷³ While it may be thought that no State could wish to object to the pursuit of pirates, as the common enemies of mankind, some coastal States may yet be jealous of their sovereignty. If that point is unsettled, it is perfectly plain that the pirate vessels may not be *seized* in or over territorial or archipelagic waters. Such seizure would, if committed without the consent of the coastal State concerned, undoubtedly violate that State’s sovereignty, and it is unfortunate that the *Handbook* does not make this clear.

As was noted above, the definition of piracy excludes mutinies and passenger hijackings. However, as the *Handbook* notes in a later section,

International law, embodied in the doctrines of self-defense and protection of nationals, provides authority for the use of proportionate force by U.S. warships and military aircraft when necessary for the protection of U.S. flag vessels, U.S. citizens (whether embarked in U.S. or foreign vessels), and their property against unlawful violence in international waters.⁷⁴

That claim, evident in the United States’ action in the *Achille Lauro* affair,⁷⁵ puts in issue the current ambit of the right of self-defense and allied rights. Although the right to use force in peacetime to protect national flag vessels might be well established, the use of force to protect nationals on foreign

flag ships is much more controversial.⁷⁶ The *Handbook* notes the primary responsibility of the coastal State in internal, archipelagic and territorial waters for the protection of all persons and vessels lawfully within its territory, and cautions against interference with the exercise of jurisdiction by such coastal States.⁷⁷ But even in relation to action on the high seas or in the EEZ, it is at the very least arguable that forcible action to protect U.S. citizens on foreign flag ships cannot lawfully be taken unless the flag State concerned has requested or consented to such use of force, or is in violation of its duty to take all reasonable steps to secure the safety and release of the victims, or immediate action is required to protect human life. Indeed, those criteria are quite properly set out in the *Handbook* as governing the use of force to protect foreign flag vessels and foreign persons.⁷⁸

The *Handbook* is, understandably, somewhat reticent on the detailed rules concerning the use of force to protect U.S. interests. It refers to the peacetime rules of engagement, which are “carefully constructed to ensure that the protection of U.S. flag vessels and U.S. citizens and their property at sea conforms with U.S. and international law and reflects national policy.”⁷⁹ It may be that those rules of engagement impose strict limitations on the circumstances in which such protection is to be forcibly asserted. Without sight of them, there is little more that can be said by way of a critique of the position adopted in the *Handbook*.

4. Safeguarding of U.S. National Interests in the Maritime Environment. The fourth and final chapter in the part of the Law of Peacetime Naval Operations sets out the obligations under the United Nations Charter to use peaceful means to settle international disputes and to refrain from the threat or use of force against the territorial integrity or political independence of States or in any other manner inconsistent with the purposes of the United Nations, with the exception of the right to use force in self-defense preserved by article 51 of the Charter. It also emphasizes the requirements of necessity and proportionality which attend the use of force in self-defense.

The scope of the right of self-defense is, of course, one of the most debated issues in contemporary international law, and the comments offered here do not approach an exhaustive nor even comprehensive survey of the subject. As the debate continues, the tendency is for official formulations of the doctrine to retreat into the Delphic wisdom of the *Caroline* formula, and the *Handbook* is no exception to this tendency. Self-defense is dealt with in three paragraphs.⁸⁰ The first sets out the right in general terms, and cites a number of examples of protective action “premised on the broader principle of self-defense,” among them the Cuban quarantine of 1962; the second lays claim to a right of anticipatory self defence; and the third, in effect, says that all the important rules are to be found outside the *Handbook*, in the peacetime Rules of Engagement.

The first of these paragraphs raises the question of the kinds of action justified under the doctrine of self-defense. The Cuban quarantine focused attention on the difficulties of using self-defense against threats which are neither threats of the use of armed force, nor threats of immediate and unlawful injuries to a State. Indeed, as Abram Chayes recalls in his excellent study of the Cuban Missile Crisis, even within the United States administration there were considerable misgivings concerning the applicability of the doctrine in that context, and attempts were made to rest the justification of the action on the supposed "authorization" of the action by the Organization of American States.⁸¹ These difficulties have been increased by the decision of the International Court in the *Nicaragua* case, in which the majority (in passages open to serious criticism) appeared to hold that the right of self-defense exists only in the face of an armed attack, and not acts which do not amount to an armed attack.⁸² It is inconceivable that the Court which delivered the *Nicaragua* judgment should have held the Cuban quarantine to be a lawful exercise of the right of self-defense. The *Handbook's* assertion that the quarantine "has been widely approved as a legitimate exercise of the inherent right of individual and collective self-defense" may be true.⁸³ It is also true, but not stated, that the quarantine has been widely criticized as failing to meet the requirements for the invocation of that doctrine, and that such criticisms have received powerful support from the *Nicaragua* judgment.⁸⁴

It requires but little prescience to see that, post-*Nicaragua*, States are likely to place greater reliance on the right of *anticipatory* self-defense, consideration of which was expressly excluded from the International Court's judgment in that case.⁸⁵ Although reputable commentators have questioned the existence of a right of anticipatory self-defense, their views are bewildering. One wonders what, exactly, they think defense is. Certainly, the idea that an attack must be suffered before a right of defense arises makes no sense. It is not the preceding attack that justifies the use of force, for that would be an essentially punitive response. The justification lies in the use of force to ward off a continuation of the attack, or further attacks. In that sense, the existence of an actual attack can have only an evidential role, putting beyond doubt the hostile intent of the aggressor. But if that intent can be otherwise established (as it must be if anticipatory action is to be lawful, since the right is one of anticipatory self-defense, not preemptive attack), there seems no earthly reason why the right of self-defense cannot be invoked. Regrettably, but for obvious reasons, the *Handbook* does not detail the circumstances in which hostile intent will be presumed by the United States Navy. Such matters are dealt with in the Rules of Engagement. There is little point in speculating on what those rules might be. However, it may be helpful to offer three general comments.

First, the *Handbook* follows the *Caroline* formula and requires that there be a “clear necessity that is instant, overwhelming, and leaving no reasonable choice of means.”⁸⁶ The word “reasonable” is important. It is difficult to believe that Professor O’Connell was right in suggesting that “in the exercise of sea power one must expect to sustain an initial casualty before going into action under the cover of self-defense.”⁸⁷ Such an attitude towards the determination of hostile intent cannot in all circumstances be realistic. If, for instance, the “initial casualty” suffered by the United Kingdom in the Falklands conflict had been one of its aircraft carriers, it is quite possible that the British action would have had to be aborted. If losing an initial casualty means losing the conflict, the right of self-defense can only mean that there is a right to use force to avert the initial casualty.

Second, the difficulty of establishing proportionality in the context of self-defense should be noted. To return to the Falklands example, the threat presented by the *General Belgrano* itself to the British fleet was limited; the threat presented by the entire Argentinian Navy was considerable. If sinking the *General Belgrano* was arguably a disproportionate response to the threat which it alone presented, could it not be argued also that the sinking was an economical and proportionate use of force to avert the threat presented by the entire Argentinian Navy (which did not, indeed, further threaten the British task force after the sinking)? Proportionality would be a beautifully clear test, if only it were clear what has to be counted in establishing the proportions.

A third, and related, point is that the right of anticipatory self-defense may exist in circumstances which appear close to reprisals. For example, the attack by the United States on an Iranian oil platform on October 19, 1987, three days after the United States merchant ship *Sea Isle City* had been hit by an Iranian missile, appears at first sight to be an act of reprisal, since the attack on the *Sea Isle City* (and other vessels around the same time) was over and done with. But here, as in other circumstances where there is a “pinprick” pattern of repeated attacks, each relatively limited in scope, it is surely legitimate to take action in order to avert future attacks of the same kind if (and only if) satisfactory evidence of the likelihood of future attacks can be adduced.⁸⁸

The situation in the Gulf underlines the swiftness with which States can move from a situation of dealing with isolated violations of their rights to outright armed conflict. One of the most important passages in this chapter of the *Handbook* is the observation that, “[i]n recent years . . . the concepts of both ‘war’ and ‘peace’ have become blurred and no longer lend themselves to clear definition. Consequently, it is not always possible, or even useful, to try to draw neat distinctions between the two.”⁸⁹ That observation is critical to an understanding of the significance of the second part of the

Handbook, which deals with the Law of Naval Warfare, and to that part attention will now be turned.

The Law of Naval Warfare

5. Principles and Sources of the Law of Armed Conflict. Nothing which is said subsequently must be allowed to detract from one crucial point which goes to the very heart of the defensibility of all of this part of the *Handbook*. Put simply, it is by no means clear that the traditional Laws of War retain their validity today. This point arises clearly in chapter five, which details the principles and sources of the "Law of Armed Conflict." The statement of principles, based on the use of minimum force and the distinction between combatants and non-combatants, is unremarkable. The statement of the sources from which those principles are distilled raises one of the most important controversies in contemporary international law.

The customary Law of War is treated with appropriate caution:

It is frequently difficult to determine the precise point in time at which a usage or practice of warfare evolves into a customary rule of law. In a period marked by rapid developments in technology, coupled with the broadening of the spectrum of warfare to encompass insurgencies and state-sponsored terrorism, it is not surprising that nations often disagree as to the precise content of an accepted practice of warfare and as to its status as a rule of law. This lack of precision in the definition and interpretation of rules of customary law has been a principal motivation behind efforts to codify the law of armed conflict through written agreements (treaties and conventions).⁹⁰

It is the reference in the last sentence to treaties and conventions which gives rise to difficulty. The *Handbook* proceeds to list the principal international agreements "reflecting the development and codification of the law of armed conflict." The list is headed by certain of the Hague Conventions of 1907,⁹¹ which exemplify the traditional Laws of War. None of those Hague Conventions has more than about one-fifth of the States which presently constitute the world community as parties, and many of the parties have entered reservations to parts of those Conventions; and although there are isolated examples of States notifying in recent years the continued applicability of some of them,⁹² there must be considerable doubt as to the extent to which the Conventions represent current law.

These doubts arise from a number of specifically legal considerations (quite apart from the doubts created by technical developments in weaponry and from widespread failures to comply with some of the supposed rules, such as those in the 1936 London Submarine Protocol)⁹³ which are familiar and can be briefly stated. First, there is the argument that since the outlawing of the use of force by the United Nations Charter, no state of "war" can lawfully arise. Accordingly the criterion for the applicability of the Laws of War cannot be met, the legality of all uses of force henceforth being judged by reference to the terms of the Charter. The *Handbook* disposes of this

argument by stating that “[w]hether or not resort to armed conflict in a particular circumstance is prohibited by the United Nations Charter (and therefore unlawful), the manner in which that armed conflict is conducted continues to be regulated by the law of armed conflict.”⁹⁴ That proposition might command widespread assent, but does not wholly resolve the argument. Some of the provisions of the Hague Conventions, and rather more of the traditional customary Law of War, cannot easily be reconciled with the Charter. For example, article 1 of Hague Convention XI concerning the right of capture in naval war assumes the legality of the blockade of ports. On the other hand, the United Nations has taken the view that blockade constitutes an act of aggression, and that no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.⁹⁵ Blockade could only be justified as an act of self-defense, but in that case the requirements of necessity and proportionality inherent in the doctrine of self-defense create substantial problems for the interdiction of third-State shipping by means of blockade.⁹⁶ Plainly, the Laws of War must be read in the light of the Charter, and the Charter itself requires that it prevail in the case of any inconsistency between them.⁹⁷ Only uses of force authorized by the United Nations or kept within the confines of the right of self-defense are lawful, and the rights and duties of States under the traditional Laws of War must be regarded as having been modified accordingly.⁹⁸

The second consideration is that the Laws of War, as will be seen, conflict in many particulars with the rules set out in the 1958 and 1982 conventions on the Law of the Sea.⁹⁹ This conflict arises even at the most general level. Article 88 of the 1982 Convention reserves the high seas (and, by virtue of article 58, the EEZ) for peaceful purposes. Article 301 of the Convention requires States using the seas to refrain from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations. The combined effect is no more, and certainly no less, than to tie the legality of uses of the seas to compliance with the constraints on the use of force under the Charter. The natural inference is that the use of force, whether or not authorized under the Laws of War, could only be lawful under the 1982 Convention to the extent that it is justifiable under the Charter—*i.e.*, for practical purposes in this context, justifiable according to the rules on self-defense, embodied in article 51 of the Charter.

This in turn raises the question whether the 1982 (or 1958) conventions apply in case of armed conflict. While none of the 1958 conventions on the Law of the Sea expressly so provide, it is true that the International Law Commission, which prepared draft articles on the subject for consideration by the Geneva Conference, intended the articles to apply in time of peace.¹⁰⁰

The 1982 Law of the Sea Convention is similarly silent, although here, too, it was understood that the Conference was concerned with the peacetime Law of the Sea. If the rules on self-defense are regarded as governing all uses of force, no problem arises, since the right of self-defense will (almost) always, as a matter of law, allow the use of force in violation of treaty obligations.¹⁰¹ But if the Law of War is regarded as still operative, there arises the considerable problem of knowing when the peacetime conventional rules are overridden by the Law of War. This problem might be answered for practical purposes for the U.S. Navy by the invocation of the wartime rules of engagement,¹⁰² but this does not dispose of the legal question: might the wartime rules of engagement, as a matter of international law, be incorrectly invoked?

That said, it must be admitted that the United States is not alone in referring to the old Laws of War as still operative.¹⁰³

The significance of these issues can be illustrated with a single example. The traditional Law of War allows neutral coastal States to deny belligerents passage through the territorial sea. The 1958 and 1982 Conventions give a right of innocent passage, and even though that right may be suspended temporarily for security reasons, such suspension may not discriminate in fact or form between foreign ships.¹⁰⁴ May a coastal State deny passage to belligerent ships, but not to non-belligerent foreign ships? If so, at what point does the right to override the provisions of the Law of the Sea conventions arise, in cases where there is no express declaration of war or recognition of belligerency? Does it make any difference if either or both (or all) of the belligerents claim to be using force in self-defense, and does it further modify the position if the coastal State, or States generally, or the United Nations, or the International Court, have recognized that such claims of self-defense are legally valid? Would the coastal State's rights to suspend passage be any different if it sought to justify its own action under the rules of self-defense—would that permit a discriminatory denial of passage to the belligerents alone? There are no easy answers to such questions, and no answers at all which do not depend in large measure upon the position which is adopted concerning the relationship of the United Nations Charter, the Laws of War, and the peacetime Law of the Sea.

It is, moreover, apparent that there is no settled international consensus upon what that relationship might be. The issue is rarely addressed directly, but divergences in States' views may be inferred from their practice. To take one further example to contrast with the approach adopted in the *Handbook*, in the recent Iran-Iraq conflict, the United Kingdom clearly tied the question of the legality of the practice of the belligerent States in visiting and searching neutral flag merchant ships in the Persian/Arabian Gulf to article 51 of the United Nations Charter:

[U]nder article 51 of the United Nations Charter a state such as Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self defence, to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. 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.¹⁰⁵

The language is permeated by the essence of self-defence: the particular ship must be suspicious; the suspicion must be one of carrying arms; and, must be one of carrying them to the other side. The right of action is tightly bound by the requirements of necessity and the imminence of the threat against which the State is defending itself.

Contrast that statement with the approach adopted in the *Handbook*:

Visit and search is the means by which a belligerent warship or belligerent military aircraft may determine the true character (enemy or neutral) of merchant ships encountered outside neutral territory, the nature (contraband or exempt "free goods") of their cargo, the manner (innocent or hostile) of their employment, and other facts bearing on their relation to the armed conflict.¹⁰⁶

The whole approach is quite different, the *Handbook* not ruling out the systematic, precautionary visit and search of foreign merchant ships. Indeed, the two passages illustrate what appears to be a significant difference between the approaches of the United States and the United Kingdom. Both in the Falklands conflict in 1982 and in its reactions to the recent Gulf conflict, the United Kingdom has striven to avoid any recourse to the language of the traditional Law of War or any other suggestion that those rules are applicable, and has sought to pin all questions of the legality of armed action to the doctrine of self-defence under article 51 of the Charter. The *Handbook*, on the other hand, freely uses the vocabulary of the Laws of War and appears to admit a considerable role for the traditional law.¹⁰⁷ If NATO has not yet attempted to resolve such differences, which could crucially affect the feasibility of joint NATO action in contexts such as the Gulf conflict, it should attach a high priority to doing so.

The remaining comments upon this second part of the *Handbook* must be understood against that background. The comments are made, for the most part, on the assumption that the United States' perception of the role of the Laws of War is correct, although that position is not one which commends itself to the present author, who prefers the view that those laws must be read in light of the constraints on the use of force imposed by the United Nations Charter.

6. Adherence and Enforcement. Chapter six of the *Handbook* is concerned with the responsibility of States and individuals to comply with the Laws of War. The most notable provisions concern reprisal, defined as "an enforcement measure under the law of armed conflict consisting of an act which would

otherwise be unlawful but which is justified as a response to the unlawful acts of an enemy.”¹⁰⁸ The legal status of reprisals involving the use of force is not wholly settled. The United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, adopted by the General Assembly in 1970 by consensus, provides that “States have a duty to refrain from acts of reprisal involving the use of force.”¹⁰⁹ This is difficult to reconcile with the traditional right of belligerents to take reprisals. Perhaps the most satisfactory justification of armed reprisals is to be gleaned from a statement in the *Handbook* itself: “[t]he sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict.”¹¹⁰ Reprisals are, on this view, emphatically not retaliatory: on the contrary, they are essentially defensive, being aimed at the prevention of further actions in violation of the Laws of War against the State taking reprisals. They may be reconciled with the Charter by regarding them as an aspect of the doctrine of self-defense,¹¹¹ and accordingly they must be confined to the action necessary to avert a real and imminent threat, and proportionate to the magnitude of the harm threatened. The criteria for valid reprisals given in the *Handbook* are consistent with the traditional rules and with the account given here, with one exception.¹¹² It is said that the reprisal must be proportional to the original violation. That may be quite different from the proportion which it would bear to the harm threatened in the future, against which the proportionality of defensive action should be measured. For example, the shooting down without warning of a civil aircraft known to be carrying key enemy politicians might occur in circumstances which make it plain that only that aircraft and the politicians on it were regarded as a military target. There might be no threat of repetitions of the action, and in that case “reprisals” would not be justified under article 51 of the Charter. In fact, since the *Handbook* criteria specify that reprisal action must desist as soon as the enemy is induced to desist from its unlawful activities, this point is probably covered. Furthermore, the *Handbook* notes that the United States has historically been reluctant to resort to reprisal because of the risk of triggering retaliatory escalation, and that the National Command Authorities alone may authorize the taking of reprisal action.¹¹³ It may therefore be expected that the obligation to confine action taken by way of reprisal within the limits of proportionality and necessity will be a paramount factor in deciding upon the permissibility of any proposed reprisal action.

7. The Law of Neutrality. The most complex questions concerning the Laws of War at sea arise in the context of what used to be called—and is still called by the *Handbook*—the Law of Neutrality. Here there is a direct confrontation between the demands or expectations of States not involved in the conflict that they be allowed to enjoy their peacetime rights, and on the other hand

the demands or expectations of the combatants that they be allowed to engage in operations necessary for the protection of their security and their other rights under international law. The position is complicated from the outset by the fact that, both under the United Nations Charter and under treaties of collective self-defense, States may be obliged to intervene in a conflict on behalf of one of the combatant States, and to that extent neutrality is not an option.¹¹⁴ However, as experience in the recent conflict between Iran and Iraq shows clearly, there is still an important role for the institution of neutrality.

Chapter seven of the *Handbook* sets out an account of the rights and duties of neutral States, in what is for the most part a clear and concise restatement of the traditional rules. Thus, for instance, the "24-hour rule" in Hague Convention XIII, requiring that belligerent vessels be given a day to leave neutral ports at the outbreak of armed conflict, and the rule limiting the number of warships of any belligerent allowed to be in a neutral port simultaneously (absent special legislation by the neutral State) to three, are repeated here.¹¹⁵ It was noted above that there are some doubts as to the continuing validity of these rules, and as to their applicability in a post-Charter world. But the remaining comments on this chapter will deal with broader issues, in which the conflict between the Law of Neutrality and peacetime rights and duties under the Law of the Sea is most apparent.

The problem of reconciling the traditional neutral right to close territorial waters to belligerent warships¹¹⁶ with the duty to suspend innocent passage only on a non-discriminatory basis was remarked upon above, in the comments on chapter five of the *Handbook*. Other problems arise in the same context. One of the most important of these is the uncertain relationship between acts of passing vessels which deprive them of their innocence, and acts which violate the neutrality of the coastal State. It is not difficult to imagine circumstances where the "mere" passage of a belligerent warship steps onto the borderline between mere passage and the use of neutral waters as a sanctuary or base of operations, but without prejudicing the peace, good order or security of the coastal State. This may be true, for instance, in cases where the duration of passage exceeds 24 hours.¹¹⁷ What is the coastal State to do? It may feel obliged to apply the peacetime rule, relying upon its rights to suspend innocent passage, to terminate non-innocent passage and to act in self-defense in order to safeguard its rights and interests. On this basis, it may feel obliged to permit what it regards as innocent passage. The other belligerent may regard a more protracted passage as a violation of coastal neutrality, and assert a right to engage in self-help enforcement actions in cases where the neutral State cannot or will not enforce its neutrality.¹¹⁸

In the absence of an authoritative determination of the point at which the peacetime rules yield to the Laws of War and Neutrality, the dangers of disputes arising between the "neutral" and "belligerent" States (use of the

terms begs the question) is only too apparent.¹¹⁹ If the Laws of War and Neutrality are to be invoked, there is no obvious solution to this problem. If, on the other hand, the actions of combatant and neutral States are judged by reference to the rules of self-defense, the legal significance of the transition from peace to war is greatly reduced, and the position somewhat more certain. The coastal State's rights remain as stated above; but the belligerents may not use self-help in response to every uncorrected breach of neutrality, but only in response to those breaches which threaten some immediate injury to themselves.

The assertion of the right to engage in self-help enforcement actions is itself controversial.¹²⁰ Certainly, the judgment of the International Court in the *Corfu Channel Case* suggests that forcible self-help is unlawful in international law.¹²¹ There is, indeed, very little evidence, outside the cases of the use of force to protect nationals (which are better regarded as instances of the use of force in self-defense), of the international community accepting the legality of self-help actions.¹²² However, the applicability of the view to cases of the enforcement of neutral duties might be doubted. Castren, writing in 1954, took the same view as that taken in the *Handbook*. He wrote that "If . . . a neutral State has neither the desire nor the power to interfere and the situation is serious, other belligerents may resort to self-help."¹²³ The question only becomes relevant where combatants violate the neutrality of another State which in turn is unable or unwilling to prevent such violation, and is therefore unlikely to arise commonly. But if such extreme cases do arise, it seems probable that where military considerations demand it, States will not shrink from taking such action in self-help, no matter how dubious its legality. It should also be recognized that in some cases justifications for action might be made on the broad ground of self-defense.

Similar difficulties attend the attempts to justify the traditional rules on visit and search and blockade. Exercise of visit and search interferes with the freedom of navigation on the high seas and innocent passage through the territorial sea. At what stage in a conflict, and in what circumstances, do the conventional rights of visit (which, under the 1958 and 1982 Conventions, do not extend to visit and search for the purpose of interdicting supplies to the enemy) give way to the traditional belligerent right of visit and search?¹²⁴ As was noted above, the British view appears to be that each individual instance of visit and search must be justified as an exercise in self-defense, whereas the *Handbook* appears to contemplate systematic visit and search. Pragmatism suggests that the difficulties of determining the nature of cargoes carried by merchant ships should tend to support a right of systematic visit and search, but it must be admitted that this is difficult to reconcile with the normal navigational rights of neutral States under the 1958 and 1982 Conventions (and, of course, under customary law).

Associated with the question of visit and search is the troubled question of contraband. It is often observed that because the war effort of a country is so inextricably rooted in its general economy, the distinction between materials which contribute to the war effort and those which do not simply cannot be drawn with anything approaching clarity. There has been a steady move in this century towards the extension of the category of contraband. To speak of contraband consisting in goods "susceptible to use in armed conflict" hardly narrows the field significantly, as those who recall the collection of domestic saucepans and park railings for use by the armaments industry in World War II will attest.¹²⁵ And if the list of goods the export of which has been embargoed on security grounds under the United States Export Administration Act is anything to go by, the list of contraband goods will be a long one.¹²⁶ The *Handbook* specifies medicines, clothing, shelter and food, etc., for the civilian population and sick and wounded combatants as exempt from capture as contraband, provided there is not serious reason to suppose that such goods will be diverted for military purposes or will release other goods for military use and give the enemy a definite military advantage.¹²⁷ This might compromise the notion of contraband in abstract, since all such goods can contribute to the war effort. But the humanitarian considerations are rightly to the fore in these cases, and these are more likely to be secured by clear statements of the goods exempt from capture than by attempting to formulate a coherent and comprehensive definition of contraband.

Consideration of contraband leads naturally to a consideration of blockade. Here again, the foremost question is whether the legality of blockade must be referred to article 51 of the United Nations Charter, or whether there is a more general right for combatants to use this tactic. If article 51 is the crucial provision then the blockade must be mounted against an imminent threat—and under the rules set out in the *Nicaragua* case, an imminent threat of an armed attack. Precautionary blockades of the kind used in the Cuban Missile Crisis are not lawful. Reference of the question to the Laws of War raises the general issue of the persistence of those rules and of the manner in which the expectation of the continued enjoyment of freedom of navigation and innocent passage under the 1958 and 1982 Conventions is to be accommodated, and the determination of the point, if any, at which those conventions are overridden by the Laws of War. That question has taken on an added significance in the light of the International Court's ruling in the *Nicaragua* case that the mining of Nicaraguan ports by the United States infringed third States' freedom of communication and maritime commerce.¹²⁸ That said, the account of blockade given in the *Handbook*¹²⁹ is, in terms of the traditional Laws of War, unexceptionable. There are some debatable points, such as the old chestnuts as to whether a blockade can lawfully be mounted by mining alone,¹³⁰ and whether the prohibition in Hague

Convention VIII on the use of naval mines “with the sole purpose of intercepting commercial shipping” in effect prohibits the use of mines for blockade. But such questions seem devoid of substance today.¹³¹ There can be little doubt that mines will be used for the purposes for which they are designed, which include the interdiction of shipping bound for enemy ports, and that such uses are unlikely to be challenged on the basis of an alleged incompatibility with the Laws of War—although challenges might be based on interference with the freedom of navigation established in the (peacetime) Law of the Sea.¹³²

The final matter for discussion in this chapter is the section on belligerent control of the immediate area of naval operations.¹³³ Put briefly, the *Handbook* asserts a right to establish zones around naval operations from which neutral ships may be excluded, so long as such ships are not thereby denied access to international straits or to neutral nations, and within which neutral ships are subject to control by the belligerent naval commander; neutral ships not complying with orders in the zone, or engaging in activities benefitting the enemy (such as the carriage of contraband, or communicating military information) are liable to capture or destruction. Such zones were established by both sides in the Second World War, but it must be noted that they are different in nature and justification from exclusion zones of the kind established by the United Kingdom during the Falklands conflict. The latter did not purport to exclude neutral shipping; rather, ships therein were regarded as operating in support of the Argentinian occupation of the islands, and therefore hostile and liable to attack, unless the ships had obtained the consent of the British Government to transit the zone.¹³⁴ The zones were conceived as a means of dealing with the problem of determining the “hostile intent” of foreign ships which would justify the British Navy in using force in self-defense: mere presence in the zone constituted *prima facie* evidence of hostile intent. The legality of any action against Argentinian or other ships would by this view still have to be judged under article 51 of the United Nations Charter. War zones, on the other hand, claim to draw their validity from the Laws of War, and to the extent that action is taken in them which goes beyond the limits of lawful self-defense under article 51, their legality must be regarded as being at best highly controversial. The crucial provisions are likely to be found in the Rules of Engagement which supplement the account given in the *Handbook*.

8. The Law of Naval Targeting

9. Conventional Weapons and Weapons Systems

10. Nuclear, Chemical and Biological Weapons

11. Noncombatant Persons

12. Deception During Armed Conflict

The remaining chapters of the *Handbook* raise few issues relating specifically to the Law of the Sea, and will be dealt with briefly. Chapter eight includes a valiant attempt to salvage some sane and humanitarian rules from the 1936 London Protocol after the savagery of submarine warfare during World War II. However, the obligation to place the crew of a merchant ship in a place of safety before destroying it is one which favors States with large navies at their disposal, and despite all the honorable intentions of the drafters of the *Handbook*, one is left with the suspicion that this is likely to be one of the first provisions to disappear in the downward spiral of violation and reprisals which has characterized all the major wars this century. Furthermore, the exceptions which the *Handbook* admits, allowing attack without warning of, *inter alia*, armed merchant ships,¹³⁵ are likely to increase the danger to merchantmen. The arming of merchant ships may well be seen as a necessary and prudent step at an early stage in a conflict, especially if (as is the case in the recent Gulf conflict) merchantmen have been subjected to surprise attacks by light surface vessels.

Chapter nine contains some interesting remarks on naval mines. Modern influence mines do not, of course, come within the literal wording of Hague Convention VIII, but the *Handbook* applies the principles enshrined in the Convention to them by analogy. The view that controlled mines may be freely laid during peacetime in a State's internal, archipelagic or territorial waters, or on the high seas or EEZ (provided that they do not unreasonably interfere with other uses of the high seas or EEZ) without notification, because they do not constitute a hazard to navigation, is noteworthy.¹³⁶

As far as international waters are concerned, this view is controversial. It might be argued that the sowing of controlled mines constitutes a threat of force, to be justified under article 51 of the Charter. Certainly, it is difficult to see the mining of international waters as anything other than a preparation for the threat or use of force, and such preparation may itself be regarded as an unlawful threat of force under article 2(4) of the United Nations Charter, although there may be some difficulty in identifying the State against which the supposed threat is made. Such mining may also conflict with the peacetime Law of the Sea. The sowing of controlled mines in the EEZ of another State in peacetime gives rise to the argument rehearsed above concerning the extent of third-State rights in the EEZ; and if mining is regarded as an "unattributed" right under the 1982 Convention, the legality of which falls for decision under article 59, it is unlikely that a claim to a right to lay controlled mines could be supported except in cases where self-defense provides a justification. The laying of controlled mines on the high seas, with the proviso stated in the

Handbook, may also conflict with the Law of the Sea. If the argument concerning the breach of article 2(4) of the Charter sketched out above is accepted, such mining would violate article 301 of the 1982 Convention, which requires States using the seas to comply with obligations expressed in wording which follows the terms of article 2(4). Technically, this could be important. It might be argued that breach of article 301 allows other States to suspend the operation of the Convention in relation to the defaulting State.¹³⁷ However, even if this argument were to be accepted, it is unlikely to give States rights against the defaulting State which they would not otherwise enjoy under the doctrine of self-defense, the right to prevent non-innocent passage, and so on.¹³⁸

These objections have little force in relation to the mining of a State's own waters, since laying controlled mines may be seen as a defensive measure which the State is entitled to take. Any such mines must not in fact constitute a hazard. If there is any real risk of injury to shipping from a controlled mine, once the mine is armed, notification would be necessary. Mines could, moreover, only be sown in a manner which did not have the practical effect of denying to foreign ships such rights of passage as they might have in the waters in question.

Sowing armed mines is a different matter. Coastal States are certainly entitled to mine their own waters, subject to the duty to notify their location and not to hamper the exercise of the right of innocent passage except temporarily and in limited areas for security reasons. Mining international waters is a different matter. The International Court in the *Nicaragua* case characterized the mining of Nicaraguan ports as an infringement of the freedom of communications and of maritime commerce, and condemned the failure to notify the existence of the minefields as a breach of the principles of humanitarian law.¹³⁹ It did not decide that the use of mines in peacetime as a measure of self-defense is *per se* unlawful. The statement in the *Handbook* that international waters may be mined before the outbreak of armed conflict only under the most demanding requirements of individual or collective self-defense, and subject to prior notification of the location and the anticipated date of removal, appears justifiable. Indeed, the tone of the passage in the *Handbook* is markedly more restrained than an earlier State Department paper on the subject.¹⁴⁰ If the threat or use of force implicit in the mining is justified on the grounds of self-defense, prior notification is given, and the areas mined are not so extensive or so important to third-State navigation as to amount to an unreasonable restraint on the freedom of navigation, then the mining of international waters should be regarded as a lawful use of the high seas.

The account of the legal limitations on mining in wartime, which follows closely the terms of Hague Convention VIII, is not controversial.¹⁴¹ It will be noted that the *Handbook* regards the emplacement of nuclear mines on the

seabed beyond the territorial sea as prohibited by the Seabed Arms Control Treaty.¹⁴²

By the time the lawyer gets to chapter ten, which deals with weapons with an unusual potential for causing indiscriminate and unnecessary suffering, he or she is likely to feel that the time for legal debate is fast drawing to an end. Experience of the wars since 1945 offers little encouragement to those who try to preserve in war at least the basic moral and humanitarian values, in whose name so many wars are fought. The prohibitions on the first use of lethal chemicals, and the use of biological weapons, are soberly recited, as is the prohibition on the targeting of civilian populations with nuclear weapons. The latter, in particular, will warm the hearts of those who find the targeting of enemy cities with long-range nuclear missiles morally repugnant and legally indefensible. The legality of the use of nuclear weapons against enemy combatants is, however, affirmed. Apart from expressing the fervent hope that these provisions remain of academic interest, and that some thought has been given as to ways of preserving in practice the distinction between combatants and noncombatants in nuclear exchanges, there is little that the lawyer can add.

Concluding Remarks

This paper has concentrated on the Law of the Sea in peacetime, because that is still the law most commonly relevant. Before closing, the central point made in relation to the section of the *Handbook* on the Law of War should once more be emphasized. The very idea that the Laws of War, in particular the eighty-year old Hague Conventions, remain binding is one which is open to serious doubt. The principles which underlie those laws and conventions no doubt remain valid, but there is much to be said for the view that there should be but one section in this *Handbook*, on the Law of the Sea, and that all questions concerning the use of armed force should be referred to the rules on the use of force and self-defense embodied in the United Nations Charter. The choice between these two approaches appears to be open, and the law unclear. The final decision in practice, which will in turn yield the authoritative answer in law as to which of the two is correct, lies in the hands of those in the United States and elsewhere who write and implement handbooks such as that reviewed here. Their practice will constitute the new customary law. As a matter of policy there is much to be said for the certainty and predictability which the detail of the Laws of War inject into armed conflict, minimizing the risk of unwanted escalations of the use of force. But there are problems in reconciling them with the Charter and with the peacetime Law of the Sea, and those problems must be attended to. Peace is fragile enough without the opening up of a body of law outside the Charter to which States may appeal when the constraints of article 51 do not suit

them. The *Handbook* is an excellent starting point for the task of revising the Laws of War to bring them in line with contemporary law and contemporary warfare. That task is an urgent one.

Notes

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1. U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Washington: 1987) [hereinafter referred to as the *Handbook*], superseding U.S. Department of the Navy, *Law of Naval Warfare* NWIP 10-2 (Washington: 1955).

2. *Handbook*, *supra* note 1, p. 27.

3. See further A. V. Lowe, "Do General Rules of International Law Exist?," *Review of International Studies*, v. 9, pp. 207-213 (1983) and *id.*, v. 10, pp. 183-87 (1984); Theodore Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law," *Harvard International Law Journal*, v. 26, pp. 457-82 (1985).

4. See the 1958 Convention on the Territorial Sea and Contiguous Zone, *United Nations Treaty Series*, v. 561, p. 205, and the 1982 United Nations Convention on the Law of the Sea, U.N. Pub. Sales No. E.83.V.5, article 7; cf. *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. Reports, p. 116. The Conventions may hereafter be referred to as the Territorial Sea Convention and the 1982 Convention respectively. References to the 1958 Conventions are to the legal regime established in the Territorial Sea Convention, the 1958 Convention on the High Seas, *United Nations Treaty Series*, v. 450, p. 82, and the 1958 Convention on the Continental Shelf, *United Nations Treaty Series*, v. 499, p. 311.

5. *Handbook*, *supra* note 1, par. 1.3.2.

6. *Handbook*, *supra* note 1, par. 1.3.2.

7. G. Francaloni, et al. (eds.), *Atlas of the Straight Baseline Part I: Article 7 of the Convention of the United Nations on the Law of the Sea* (Milan, 1986).

8. See Francesco Francioni, "The Gulf of Sidra Incident (United States v. Libya) and International Law," *Italian Yearbook of International Law*, v. 5, pp. 85-109 (1980-81); and see generally "Symposium on Historic Bays of the Mediterranean," *Syracuse Journal of International Law and Commerce*, v. 11, pp. 205-415 (1984).

9. *Handbook*, *supra* note 1, par. 1.3.3.1.

10. [1951] I.C.J. Reports, p. 116, at pp. 138-39. Cf. L.F.E. Goldie, "Historic Bays in International Law," *Syracuse Journal of International Law and Commerce*, v. 11, p. 211, at pp. 222-23 and *passim* (1984).

11. Territorial Sea Convention, *supra* note 4, article 24; 1982 Convention, *supra* note 4, article 33.

12. See A. V. Lowe, "The Development of the Concept of the Contiguous Zone," *British Yearbook of International Law*, v. 52, p. 109 (1981); Sir Gerald Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea," *International and Comparative Law Quarterly*, v. 8, p. 73 (1959). *Contra*, S. Oda, "The Concept of the Contiguous Zone," *id.*, v. 11, p. 131 (1962).

13. *United States v. Taiyo Maru*, 395 F.Supp. 413 (M. D. Maine 1975), *American Journal of International Law*, v. 70, pp. 138, 549, 554 (1976). The District Court for the District of Maine held that "[a]lthough Article 24 only affirmatively recognizes the right of a coastal State to create a contiguous zone for one of the four enumerated purposes, nothing in the Article precludes the establishment of such a zone for other purposes, including the enforcement of domestic fisheries law." 395 F.Supp. at 419.

14. *United States v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985), *American Journal of International Law*, v. 80, p. 653 (1986). The United States Court of Appeals for the Eleventh Circuit held that foreign nationals on foreign ships outside the U.S. territorial sea could be prosecuted by the United States "under the 'protective principle' of international law . . . which permits a nation to assert jurisdiction over a person whose conduct outside the nation's territory threatens the nation's security or could potentially interfere with the operation of its governmental functions" and that "there is no fixed rule among the customs and usages of nations which prescribes the limits of jurisdictional waters other than the rule of reasonableness, that a nation may exercise authority upon the high seas to such an extent and to so great a distance as is reasonable and necessary to protect itself and its citizens from injury." 776 F.2d at 938-39 [citations omitted].

15. See U.S. Department of State, Office of the Geographer, *National Maritime Claims 1958-1985* (Washington: 1985), p. 25.

16. *Handbook*, *supra* note 1, par. 1.5.4. *But see* note 14 *supra*.

17. *Supra* note 15. The Geographer lists the following States as claimants to security zones: Bangladesh, Burma, Cambodia, Haiti, India, Pakistan, Sri Lanka, Vietnam and Yemen (Aden). Cf. *Handbook* par. 2.4.4.

18. *Handbook*, *supra* note 1, par. 1.5.2.

19. See *Handbook*, par. 4.3.1, where it is said that, "U.S. warships and military aircraft enjoy the full spectrum of the high seas freedoms of navigation and overflight, including the right to conduct naval maneuvers" in the waters beyond the territorial sea; and par. 2.4.2, where it is said that since such high seas rights exist, "the existence of an exclusive economic zone need not, of itself, be of operational concern to the naval commander." See further, e.g., Horace B. Robertson, Jr., "Navigation in the Exclusive Economic Zone," *Virginia Journal of International Law*, v. 24, p. 865 (1984).

20. United Nations, Office of the Special Representative of the Secretary-General for the Law of the Sea, *Law of the Sea Bulletin*, No. 5 (New York: 1985), pp. 6-7, 8, 24.

21. Par. 9.2.2 of the *Handbook* regards the sowing of controlled mines in the EEZ as permissible so long as this does not unreasonably interfere with the interests of other high seas users.

22. See A. V. Lowe, "Some Legal Problems Arising from the Use of the Seas for Military Purposes," *Marine Policy*, v. 10, p. 171 (1986); Barbara Kwiatkowska, "Military Uses of the EEZ—a Reply," *id.*, v. 11, p. 249 (1987); A. V. Lowe, "Military Uses in the EEZ—a Rejoinder," *id.*, p. 250. Since the latter exchange, the Government of Uruguay has confirmed that my interpretation of its position set out in the rejoinder to Dr. Kwiatkowska is correct. Letter from the Ambassador, Embassy of the Oriental Republic of Uruguay, London, August 18, 1987. See also the materials cited *supra* note 19.

23. United States Statement made in exercise of the right of reply, March 8, 1983, UNCLLOS III *Official Records*, v. XVII, pp. 243-44. Cf., statements made by the Federal Republic of Germany and Italy. *Id.*, pp. 240-41, 241-42, respectively.

24. *Handbook*, *supra* note 1, par. 1.8; 1982 Convention, *supra* note 4, article 76. The actual position is rather more complicated, as article 76 and Annex II to the Final Act of UNCLLOS III make clear.

25. *Handbook*, *supra* note 1, par. 1.8. Antarctica is "territory not subject to the sovereignty of any nation," at least in the view of the United States.

26. See the report to the Council of the International Civil Aviation Organization, *United Nations Convention on the Law of the Sea: Implications, if any, for the Application of the Chicago Convention, its Annexes and Other International Air Law Instruments*, ICAO Doc. No. C-WP/8077, October 1, 1985, pars. 10, 29. The Report is reprinted in *International Organizations and the Law of the Sea: Documentary Yearbook*, v. 1, 1985 (London/Dordrecht/Boston, 1987), p. 310.

27. Report to the Council of the International Civil Aviation Organization, *supra* note 26, pars. 26-33.

28. The *Handbook*, *supra* note 1, par. 2.5.2, states that "[m]ilitary aircraft may engage in flight operations, including ordnance testing and firing, surveillance and intelligence gathering" over the EEZ, a formula which touches upon Brazilian views on both military uses of the EEZ and overflight rights, and which might be argued to be subject to the "article 59" conflict resolution procedure under the 1982 Law of the Sea Convention. See *supra* text at note 20.

29. *Handbook*, *supra* note 1, pars. 2.1, 2.2; High Seas Convention, *supra* note 4, articles 8, 9; 1982 Convention, *supra* note 4, articles 29, 32, 96.

30. *Handbook*, *supra* note 1, par. 2.1.2.1.

31. U.S. Department of State, Office of the Geographer, *National Maritime Claims: 1958-1985* (Washington: 1985), p. 10. That report does not list Spain as making special provision for the passage of nuclear-powered ships, but Spanish Act No. 25/64, April 29, 1964, article 7, stated that the passage of nuclear-powered ships through the territorial sea was to be considered an exception to the right of innocent passage. See translation of the Act reprinted in United Nations, *United Nations Legislative Series*, U.N. Doc. ST/LEG/SER.B/16, p. 45.

32. *Handbook*, *supra* note 1, par. 2.3.1.

33. Text reprinted in *International Legal Materials*, v. 24, p. 1440 (1985) and United Nations, *Law of the Sea Bulletin*, No. 6 (New York: 1985), p. 24. The Treaty entered into force on December 11, 1986.

34. See J. C. Woodliffe, "Ports Visits by Nuclear Armed Naval Vessels: Recent State Practice," *International and Comparative Law Quarterly*, v. 35, p. 730 (1986); Hisakazu Fujita, "The South Pacific Nuclear Free Zone Treaty and the Anti-nuclear Policy of New Zealand," *Kansai University Review of Law and Politics*, v. 8, p. 1 (1987).

35. 1982 Convention, *supra* note 4, articles 22, 23, 41, 42, 54.

36. For the 1958 definition, see Territorial Sea Convention, *supra* note 4, article 14(4).

37. *Handbook*, *supra* note 1, par. 2.3.2.1.

38. South African Maritime Traffic Act, No. 2 of 1982, section 8, as amended by the Maritime Traffic Amendment Act, No. 5 of 1983. The automatic deprivation of innocence would be difficult to justify under any interpretation of the law. International law requires actual, not "deemed," prejudice to the peace, good order or security of the territorial State.

39. A good example occurred in Panama. General Noriega is reported to have "accused the United States of escalating its aggression against Panama by sending the helicopter carrier Okinawa through the Panama Canal. A U.S. spokesman said the ship's journey was routine, but General Noriega claimed that

U.S. military intervention was imminent.” “Noriega Stands on Panama’s ‘dignity,’ ” *The Independent* (London), March 31, 1988, p. 6. The status of the waters is different, but the principle is the same.

40. Territorial Sea Convention, *supra* note 4, article 16(1); 1982 Convention, *supra* note 4, article 25(1).

41. For enactments of the provisions on innocent passage, see the law of France (Decree No. 85/185, reprinted in United Nations, *Law of the Sea Bulletin*, No. 6 (New York: 1985), p. 14) and Southern Yemen (Act No. 45 of 1977 concerning the Territorial Sea, Continental Shelf and other Marine Areas, reprinted in United Nations Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, ST/LEG/SER.B/19 (New York: 1980), p. 21). *Cf.*, the 1984 Soviet Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) of the U.S.S.R. and the Internal Waters and Ports of the U.S.S.R., reprinted in *International Legal Materials*, v. 24, p. 1715 (1985).

42. *Handbook*, *supra* note 1, par. 2.3.2.3.

43. Territorial Sea Convention, *supra* note 4, article 16(3); 1982 Convention, *supra* note 4, article 25(3).

44. See the Communication transmitted to the Permanent Missions of the States Members of the United Nations at the request of the Permanent Representative of the United States to the United Nations, July 10, 1985 (Reference NV/85/11), reprinted in United Nations, *Law of the Sea Bulletin*, No. 6 (New York: 1985), p. 40, where it is stated: “International law does not permit a coastal State to subject an area of its territorial sea to a permanent prohibition of navigation.”

45. See, e.g., Decree of 10 October 1951 concerning the Territorial Sea and Internal Waters of the People’s Republic of Bulgaria (article 8), reprinted in United Nations Legislative Series, *Laws and Regulations on the Regime of the Territorial Sea*, ST/LEG/SER.B/6 (New York: 1957), p. 80; Decree No. 39 of January 28, 1956, concerning the regulation of the regime of territorial waters of the Republic of Romania (article 5), *id.*, p. 238. See also the Soviet Law on the State Frontier, November 24, 1982 (article 17), reprinted in United Nations, *Law of the Sea Bulletin*, No. 4 (New York: 1985), p. 24; and the Soviet Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) of the U.S.S.R. and the Internal Waters and Ports of the U.S.S.R., *supra* note 41, at p. 1717.

46. North Atlantic Coast Fisheries Arbitration, *Proceedings*, v. II, p. 2007.

47. The figures are taken from United States Department of State, Office of the Geographer, *National Maritime Claims: 1958-1985* (Washington: 1985), p. 10.

48. See D. P. O’Connell, *The Influence of Law on Sea Power* (Manchester: Manchester University Press, 1975), p. 140.

49. *Handbook*, *supra* note 1, par. 2.3.2.4.

50. 1982 Convention, *supra* note 4, articles 37-44, 53-54.

51. United Nations, *Law of the Sea Bulletin*, No. 5 (New York: 1985), p. 42.

52. House of Lords, *Parliamentary Debates*, v. 484, col. 382, February 5, 1987.

53. Treaty of Peace between the Arab Republic of Egypt and the State of Israel, reproduced in *International Legal Materials*, v. 28, p. 362 (1979). For academic argument on the point, see e.g., W. Michael Reisman, “The Regime of Straits and National Security: An Appraisal of International Lawmaking,” *American Journal of International Law*, v. 74, p. 48; John Norton Moore, “The Regime of Straits and the Third United Nations Conference on the Law of the Sea,” *id.*, p. 77; D. P. O’Connell, *The International Law of the Sea* (Oxford: Oxford University Press, 1982), v. I, chapter 8.

54. Reproduced in Robin Churchill & Myron Nordquist, *New Directions in the Law of the Sea* (Dobbs Ferry, N.Y.: Oceana Publications, 1975), v. IV, p. 330.

55. See the British letter of January 2, 1973, to the Secretary General of the United Nations, quoted in United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1985*, U.N. Doc. ST/LEG/SER.E/4, p. 682. The Law of the Sea Convention does provide for denunciation, on one year’s written notice (article 317). See G. M. White, “UNCLOS and the Modern Law of Treaties,” in W. E. Butler, (ed.), *The Law of the Sea and International Shipping: Anglo-Soviet Post-UNCLOS Perspectives* (New York/London/Rome: Oceana Publications, 1985), p. 15, at pp. 29-31.

56. See Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 518.

57. *Handbook*, *supra* note 1, par. 2.3.3.1. Note the qualifications, which follow the provisions of articles 35, 36 and 45 of the 1982 Convention, in pars. 2.3.3.1, 2.3.3.2, and 7.3.5. The qualifications are not entirely comprehensive. Article 38(1) of the 1982 Convention excepts from the transit passage regime straits formed by the mainland and an offshore island of a state if there is a high seas or EEZ route of similar convenience seaward of the island, and article 35(c) preserves the validity of long-established treaty rules governing international straits, such as those in the 1921 Convention on the Non-Fortification and Neutrality of the Aaland Islands (*League of Nations Treaty Series*, v. IX, p. 212), the 1940 Finland-Soviet Union Agreement on the Demilitarization of the Aaland Islands (*United Nations Treaty Series*, v. 67, p. 139), the 1857 Treaty of Copenhagen (C. Parry, (ed.), *Consolidated Treaty Series*, v. 116, p. 357), and the 1881 Argentina-Chile Boundary Treaty, *id.*, v. 159, p. 45), in addition to the 1936 Montreux Convention on the Turkish Straits (*League of Nations Treaty Series*, v. 173, p. 213) which alone is cited in the *Handbook*.

58. See T. L. McDorman, "In the Wake of the *Polar Sea*," *Marine Policy*, v. 10, p. 243 (1986). Similar problems have arisen in relation to passage through controversial straits in the Soviet Arctic. See W. E. Butler, *The Northeast Arctic Passage* (Aalphen and den Rijn: Sijthoff & Nordhoff, 1978), *passim*.

59. *Handbook*, *supra* note 1, par. 2.3.3.1.

60. *Id.*

61. *Id.*

62. *Id.*, par. 2.3.4.1.

63. United Nations, *Law of the Sea Bulletin* No. 5 (New York: 1985), p. 19.

64. See objections made to the Philippine declaration by the following: Byelorussian Soviet Socialist Republic, reproduced in United Nations, *Law of the Sea Bulletin*, No. 6 (New York: 1985), p. 9; Czechoslovakia, *id.*, p. 10; Ukrainian Soviet Socialist Republic, *id.*, pp. 11-12; Union of Soviet Socialist Republics, *id.*, pp. 12-13; Bulgaria, *id.*, No. 7 (New York: 1987), pp. 7-8.

65. See, e.g., the controversy over the Greek Flight Information Region in Institute for Political Studies, *The Status Quo in the Aegean* (Athens: undated), pp. 14-15; association of Journalists, *The Aegean Realities . . .* (Istanbul: undated), pp. 23-26.

66. *Handbook*, *supra* note 1, par. 2.4.3.1.

67. *Id.*, par. 2.4.5.1.

68. *Id.*, pars. 3.4 to 3.4.3.2. Cf., High Seas Convention, *supra* note 4, articles 14-22; 1982 Convention, *supra* note 4, articles 100-07, 110.

69. *Handbook*, *supra* note 1, par. 3.4.2.4.

70. See Patricia W. Birnie, "Piracy: Past, Present and Future," *Marine Policy*, v. 11, p. 163 (1987). Note, for example, that the hijackers of the *Achille Lauro* were sought by the United States on charges of, *inter alia*, piracy. See the critical discussion of these charges in Dr. Birnie's paper. *Id.*, p. 177.

71. *Handbook*, *supra* note 1, par. 3.4.3.2.

72. *Corfu Channel Case*, Judgment of April 9, 1949, [1949] I.C.J. Reports, p. 4.

73. *Handbook*, *supra* note 1, par. 3.9. This accords with article 23 of the High Seas Convention and article 111 of the 1982 Law of the Sea Convention.

74. *Handbook*, *supra* note 1, par. 3.11.1.

75. See J. P. Pancraccio, "L'affaire de l'*Achille Lauro* et le Droit International," *Annuaire Francaise de Droit International*, v. 31, p. 221 (1985).

76. See, e.g., Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Boston: Martinus Nijhoff Publishers, 1985); C. J. Greenwood, "International Law and the United States Air Operation Against Libya," *West Virginia Law Review*, v. 89, p. 933 (1987), and references therein.

77. *Handbook*, *supra* note 1, par. 3.11.1.1.

78. *Id.*, par. 3.11.2. The position is rather different if the foreign flag ships are in a United States convoy. It is arguable that an attack on any ship is an attack on the convoy itself, so justifying the use of force in self-defense by the United States warships.

79. *Id.*, par. 3.11.1.

80. *Id.*, pars. 4.3.2. to 4.3.2.2.

81. Abram Chayes, *The Cuban Missile Crisis* (Oxford: Oxford University Press, 1974), pp. 15, 108-09 and *passim*. The present writer shares the view of Professor Henkin, annexed to the Chayes study at p. 149, that the "authorization" of the quarantine by the Organization of American States was not an adequate legal justification for it. The justification must be found in article 51 of the United Nations Charter, if it is to be found anywhere.

82. [1986] I.C.J. Reports, p. 12, at pp. 92-94, 109-11. See the criticisms made by Judge Schwebel, at pp. 347-48, with which the present writer has much sympathy.

83. *Handbook*, *supra* note 1, par. 4.3.2.

84. Objections need not be based on a reading of article 51. The British Government, questioned on its attitude to the mining of Nicaraguan ports by the United States, replied, "[W]e are committed to the principle of freedom of navigation and deplore the mining of Nicaraguan ports." House of Commons, *Parliamentary Debates*, v. 58, col. 470, April 13, 1984.

85. [1986] I.C.J. Reports, p. 12, at p. 93.

86. *Handbook*, *supra* note 1, par. 4.3.2.1.

87. D. P. O'Connell, *The Influence of Law on Sea Power* (Manchester: Manchester University Press, 1975), p. 83.

88. This was the basis of British support for the action. "[I]t is our view that the action taken by the United States on 19th October was entirely justifiable in exercise of their right of self-defence in the face of the imminent threat of future attacks." House of Lords, *Parliamentary Debates*, v. 490, col. 724, November 25, 1987. The statement would have held closer to the *Caroline* formula if it had referred to "the threat of imminent attacks."

89. *Handbook*, *supra* note 1, par. 4.1.

90. *Id.*, par. 5.4.1.

91. Hague Convention (IV) Respecting the Laws and Customs of War on Land, *Consolidated Treaty Series*, v. 205, p. 227; Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, *id.*, p. 299; Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, *id.*, p. 331; Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, *id.*, p. 345; Hague Convention (X) for the Adaptation to Maritime War of the Principles of the Geneva Conventions, *id.*, p. 360; Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, *id.*, p. 367; and Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, *id.*, p. 395.

92. For instance, notifications of the continued application of Hague Convention VIII (on Automatic Submarine Contact Mines) were made by Fiji in 1973 and South Africa in 1978.

93. See D.P. O'Connell, *The Influence of Law on Sea Power* (Manchester: Manchester University Press, 1975), pp. 44-52, 92-96.

94. *Handbook*, *supra* note 1, par. 5.1.

95. See articles 3 and 5 of the United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression, General Assembly, *Official Records*, 29th Session, Supp. 21, reprinted in *American Journal of International Law*, v. 69, p. 480 (1975). The resolution was adopted by consensus, without a vote.

96. See remarks of the International Court of Justice in the *Nicaragua* case. [1986] I.C.J. Reports, p. 12 at p. 112.

97. U.N. Charter, article 103.

98. For an interesting example of an argument recasting the requirements of the Hague Conventions (Convention VIII, on Automatic Submarine Contact Mines) in the light of the Charter, see U.S. Department of State, *Use of Naval Mines in the Exercise of Self Defense* (Washington: April 13, 1984).

99. The major conflicts are listed in a paper entitled, "The Impact of the Law of the Sea on Naval Warfare," presented by the present writer to the Preliminary Round Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, San Remo, Italy, June 15-17, 1987, printed in *Syracuse Journal of International Law and Commerce*, v. 14, pp. 657-87, (1988).

100. United Nations, International Law Commission, *Yearbook of the International Law Commission 1956*, v. II (New York: 1957), p. 256.

101. There are exceptional cases, concerning the rules of humanitarian law, where this is not true.

102. *Handbook*, *supra* note 1, par. 5.5.

103. See Judgment of the International Court of Justice in the *Nicaragua* case, [1986] I.C.J. Reports, p. 12 at 112 (reference to Hague Convention VIII); and the Swedish declaration on signature of the 1982 Law of the Sea Convention, reproduced in United Nations, *Law of the Sea Bulletin*, No. 5 (New York: 1985), p. 22 (reference to Hague Convention XIII).

104. Territorial Sea Convention, *supra* note 4, article 16(3); 1982 Convention, *supra* note 4, article 25(3).

105. House of Commons, *Parliamentary Debates* (Weekly Hansard), v. 90, col. 428, January 28, 1986. The statement was repeated *verbatim* in response to a further Parliamentary question in 1988. *Id.*, v. 127, cols. 425-26, February 15, 1988.

106. *Handbook*, *supra* note 1, par. 7.6.

107. This position is by no means confined to the *Handbook*. See, e.g., U.S. Department of State, Special Report No. 166, *U.S. Policy in the Gulf* (Washington: July 1987), *passim*.

108. *Handbook*, *supra* note 1, par. 6.2.3.

109. United Nations, General Assembly, Resolution 2625 (XXV).

110. *Handbook*, *supra* note 1, par. 6.2.3. An alternative explanation might be that reprisals in the context of armed conflict belong to the body of law concerning Unfriendly Relations and Non-Cooperation among States, and are not addressed by the Declaration.

111. See Robert W. Tucker, "Reprisals and Self-Defense: The Customary Law," *American Journal of International Law*, v. 66, p. 586 (1972).

112. *Handbook*, *supra* note 1, par. 6.2.3.1.

113. *Id.*, par. 6.2.3.3.

114. *Id.*, par. 7.2.1, 7.2.2.

115. *Id.*, par. 7.3.2, 7.3.2.1.

116. *Id.*, par. 7.3.4.1 to 7.3.6.

117. *Id.*, par. 7.3.4.1.

118. *Id.*, par. 7.3.4.

119. See *Correspondence between His Majesty's Government in the United Kingdom and the Norwegian Government respecting the German Steamer "Altmark"* (London: His Majesty's Stationery Office, 1950), Cmd. 8012.

120. See, e.g., Julius Stone, *Legal Controls of International Conflict* (London: Stevens & Sons, Ltd., 1954), pp. 400-01 [hereinafter referred to as "Stone"].

121. *Corfu Channel Case*, *supra* note 72, p. 35.
122. *See, e.g.*, the comments of Christopher J. Greenwood, "International Law and the United States' Air Operation against Libya," *West Virginia Law Review*, v. 89, p. 933, at pp. 952-53 (1987).
123. Erik Castren, *The Present Law of War and Neutrality* (Helsinki: Suomalaisen Tiedeakatemia Toimituksia, 1954), p. 442.
124. High Seas Convention, *supra* note 4, article 22; 1982 Convention, *supra* note 4, article 110.
125. *Handbook*, *supra* note 1, par. 7.4.1.
126. *See, e.g.*, J. P. Murphy and A. T. Downey, "National Security, Foreign Policy and Individual Rights: The Quandary of U.S. Export Controls," *International and Comparative Law Quarterly*, v. 30, p. 791 (1981).
127. *Handbook*, *supra* note 1, par. 7.4.1.2.
128. [1986] I.C.J. Reports, p. 12 at p. 112. Curiously, the Court referred in the same place to Hague Convention VIII as if it were still operative "in time of war," although this comment was unaccompanied by any reasoning on the question and should be treated cautiously.
129. *Handbook*, *supra* note 1, pars. 7.7 to 7.7.5.
130. Ingrid Detter Delupis, *The Law of War* (Cambridge: Cambridge University Press, 1987), p. 268, asserts that the answer is no, but the authority which she cites (Hague Convention VIII, article 8) does not support her view.
131. Stone, *supra* note 120, p. 585, footnote 89, says of the latter question, "The incongruity in the contemporary context of the Convention's attempt to prevent the use of mines off the enemy's coast 'with the sole object of intercepting commercial navigation,' is a measure of the inevitable obsolescence in 1953 of any convention which could have been drawn up in 1907."
132. Note that the Soviet and Chinese objections to the mining of Haiphong were based on interference with the freedom of navigation under the 1958 High Seas Convention, and not on alleged violations of the Hague Conventions or Laws of War. D. P. O'Connell, *The Influence of Law on Sea Power* (Manchester: Manchester University Press, 1975), p. 95.
133. *Handbook*, *supra* note 1, pars. 7.8, 7.8.1.
134. For the relevant declarations, *see* House of Commons, *Parliamentary Debates*, v. 21, col. 1045, April 7, 1982 (Maritime Exclusion Zone); *id.*, v. 22, cols. 296-97, April 28, 1982 (Total Exclusion Zone); *id.*, v. 27, col. 235, July 22, 1982 (Falkland Islands Protection Zone).
135. *Handbook*, *supra* note 1, pars. 8.2.2.2.
136. *Id.*, par. 9.2.2.
137. *See* Vienna Convention on the Law of Treaties, article 60.
138. Article 60 of the Vienna Convention on the Law of Treaties allows unilateral suspension of a convention only in limited cases—essentially, where a State is specially affected by the breach, or the breach radically changes the position of all parties. Otherwise, suspension requires the unanimous agreement of all parties.
139. [1986] I.C.J. Reports, p. 12, at p. 112.
140. U.S. Department of State, *Use of Naval Mines in the Exercise of Self Defense* (Washington: April 13, 1984).
141. *Handbook*, *supra* note 1, par. 9.2.3.
142. *Id.*, par. 10.2.2.1.