

The Law of Naval Exclusion Zones

A Thesis Submitted for the Degree of
Doctor of Philosophy

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Abstract

The present work examines naval exclusion zones, with particular emphasis on the *jus in bello* applicable to such zones. The issues presented by the establishment and use of naval exclusion relate to many aspects of the law of the sea and naval warfare. Naval exclusion zones represent an important issue for national security policy makers, in that the use of such zones during armed conflicts at sea can limit the geographic scope of the conflict. While such zones may promote the principles enshrined in Article 51 of the UN Charter and discourage belligerents from waging naval warfare on a global scale, the use of such zones have the potential for disaster, in that naval commanders who mistakenly operate under the assumption that such zones are “free-fire zones” run the risk of unlawfully sinking hospital ships or other protected vessels. Moreover, naval exclusion zones have become increasingly common during modern naval conflicts, including the Falklands, Iran-Iraq and Persian Gulf Wars. Finally, even when used within the bounds of international law, naval exclusion zones still have the potential to disrupt commercial uses of the seas since they often cut across the claims of neutrals, potentially interfering with neutral commerce, oil exploration or fishing.

This thesis traces the development of naval exclusion zones, with particular emphasis on the following:

- The historical uses of such zones
- The permissible theatres of naval operations under the modern law of the sea regime
- The permissible scope of activity within such zones vis-à-vis belligerent warships and merchant vessels
- The rights of neutrals in and around naval exclusion zones
- The legality of such zones as analysed through the traditional sources of international law

The thesis then concludes with recommendations for clarifying and strengthening the rules concerning the scope of permissible activity within such zones.

Declarations

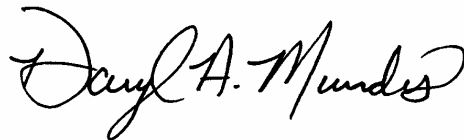
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I declare that my thesis consists of 90,847 words, excluding the bibliography and Appendix, in accordance with Regulation 4.1.2.(f), of the 2006/2007 MPhil/PhD Research Student Handbook of the Law Department.

A handwritten signature in black ink, reading "Daryl A. Mundis". The signature is written in a cursive, flowing style with a large initial 'D' and 'M'.

Daryl A. MUNDIS

Dated this 15th Day of May 2008
The Hague
The Netherlands

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Abbreviations and Recurring Citations

NOTE: See also Table of Cases and Table of Treaties for additional short citations.

1863 Lieber Code	Instructions for the Government of Armies of the United States in the Field, General Order No. 100, 24 April 1863, Schindler and Toman #1.
1913 Oxford Manual	The Laws of Naval War Governing the Relations Between Belligerents. Manual adopted by the Institute of International Law at Oxford; <i>Institut de Droit International</i> , 9 August 1913, 26 <u>Annuaire de l’Institut de Droit International</u> , pp. 641-672 (1913); J.B. Scott, ed., <u>Resolutions of the Institute of International Law</u> , pp. 174-201 (1916); Schindler and Toman #71; Ronzitti #10.
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ASIL Proceedings	<u>Proceedings of the American Society of International Law</u>
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Helsinki Principles	Helsinki Principles on Maritime Neutrality, International Law Association, Report of the 68 th Conference (1998), p. 497 <i>et seq.</i>
ICAO	International Civil Aviation Organisation
ICLQ	<u>International and Comparative Law Quarterly</u>
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICRC Additional Protocols Commentary	ICRC, <u>Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949</u> (1987)

ICRC Model Manual	<u>Fight It Right: Model Manual on the Law of Armed Conflict for Armed Forces</u> , ICRC (1999).
ICRC Customary IHL Study	<u>Customary International Humanitarian Law</u> , 3 vols., Jean-Marie Henckaerts and Louise Doswald-Beck, eds. 2005.
ICTY	International Criminal Tribunal for the former Yugoslavia
ILD	<u>International Law Documents</u> , U.S. Naval War College, cited by year and volume.
ILM	<u>International Legal Materials</u>
ILS	<u>International Law Situations with Solutions and Notes</u> , U.S. Naval War College, cited by year and volume.
IMO	International Maritime Organisation
Interim New Zealand Manual	New Zealand Defence Force, Directorate of Legal Services, <u>Interim Law of Armed Conflict</u> , DM 112, 26 November 1992.
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UNCLOS	United Nations Conference on the Law of the Sea
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YBIL	Yearbook of International Law

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<i>Galić Judgement</i>	<i>Prosecutor v. Stanislav Galić</i> , Judgement, ICTY Case No. IT-98-29-T, 5 December 2003, Trial Chamber I
<i>Gulf of Maine</i>	Gulf of Maine Case (<i>Canada v. United States</i>), 1984 ICJ Reports 345
<i>The Hostages Case</i>	The Hostages Trial (Wilhelm List et al), 8 LRTWC, Case No. 47, pp. 38-92 (U.S. Military Tribunal, Nuremberg, 1947-1948)
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1936 Montreux Convention	Convention Regarding the Regime of Straits, 20 July 1936, 173 L.N.T.S. 213, reprinted in 31 <u>AJIL</u> 1936 Supplement 4, entered into force 9 November 1936.
1936 London Protocol	<i>Procès-Verbal</i> Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, 6 November 1936, 173 L.N.T.S. 353, Schindler and Toman #74; Ronzitti #11C, entered into force 6 November 1936.
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1959 Antarctic Treaty	The Antarctic Treaty, 1 December 1959, 402 UNTS 71, TIAS 4780, 12 UST 794, entered into force 23 June 1961.
1967 Treaty of Tlateloco	Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlateloco), 14 February 1967, 64 UNTS 281, TIAS 7137, 22 UST 762 (and two additional protocols), entered into force 22 April 1968.
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1982 LOS Convention	1982 United Nations Convention on the Law of the Sea, 10 December 1982, U.N. Doc. A/CONF.62/122 (1982), reprinted in 21 <u>ILM</u> 1261, entered into force on 16 November 1994
1985 Treaty of Rarotonga	South Pacific Nuclear Free Zone Treaty, 6 August 1985, 24 <u>ILM</u> 1442, 11 December 1986.
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Chapter 1

Introduction

“On the basis of the history of the use of exclusion zones, it is reasonable to conclude that such zones will be used in some future conflicts.”¹

I. Purpose and Methodology

The purpose of the present work is to examine naval exclusion zones (“NEZs”),² with particular emphasis on the *jus in bello* applicable to such zones. The concept of the NEZ as such appears to be settled as a matter of law, although exclusion zones may not possess distinct juridical status, since the same body of law applies both inside and outside of the declared zone. The central thesis of this dissertation is that notwithstanding the fact that the establishment of naval exclusion zones do not confer additional rights on belligerents, zones are a distinct method of naval warfare, which have defining characteristics derived, in part, from other means or methods of naval warfare. Notwithstanding the fact that NEZs may not possess a distinct juridical status, there is a coherent body of law applicable to such zones, as well as valid policy reasons for establishing them.

As will be seen throughout the present study, the language used to describe NEZs may be characterised as “legal” language. This fundamental reality, however, is insufficient to confer juridical status *as such* upon the concept of the NEZ. Thus, if one defines the law as obligations imposing rights and duties both upon belligerent and non-belligerent parties, then it may not be said that there exists a unique “law of naval exclusion zones,” since the same body of law applies both inside and outside of declared NEZs. At the same time, there are clear rules covering the *jus in bello* for NEZs. Therein lies the problem: is there a “law of naval exclusion zones”?

This conundrum may be resolved by recognising that NEZs are a distinct method of naval warfare, even though the law that applies to such zones are not exclusive to this method of warfare. As a distinct method of naval warfare, exclusion zones must be distinguished

¹ Fenrick, p. 122.

² Although generally referred to in the present work as NEZs or “exclusion zones,” the literature—particularly older sources—makes use of a number of terms, including “war zones,” “barred zones (or areas),” “maritime security zones,” “blockade zones,” “maritime operational zones,” “areas subject to long distance blockade,” “areas dangerous to shipping” and simply “zones.”

from blockades (including long-distance blockades) and from mined areas. Although these methods of naval warfare are similar in some aspects to NEZs, the differences are significant: in effect, NEZs are *sui generis*, as reflected in the fact that modern military manuals and restatements of the law of naval warfare consider zones as a specific method of modern naval warfare.

Naval exclusion zones merit attention for a number of reasons. First, they represent an important issue for national security policy makers in that the use of such zones during armed conflicts at sea can limit the geographic scope of the conflict. Thus, the use of NEZs may promote the underpinnings of Article 51 of the UN Charter and discourage belligerents from waging naval warfare on a global scale.³ Second, naval exclusion zones have become increasingly common during modern naval conflicts, including the Falklands, Iran-Iraq and Persian Gulf Wars. Third, the use of such zones have the potential for disaster, in that naval commanders who mistakenly operate under the assumption that such zones are “free-fire zones” run the risk of unlawfully sinking hospital ships or other protected vessels. Finally, even when used within the bounds of international law, NEZs still have the potential to disrupt commercial uses of the seas since they often cut across the claims of neutrals, potentially interfering with neutral commerce, oil exploration or fishing.

Armed conflicts that include a maritime component have historically been waged by the belligerents on a global scale, reflecting at least in part, the fact that the naval forces of maritime powers typically operate at great distance from territorial waters. Two examples from the 20th century, the 1914 Battle of the Falklands⁴ and the *Graf Spee* incident⁵ illustrate

³ In 1979, D.P. O’Connell suggested that a rule was emerging requiring the belligerents in an armed conflict at sea to confine naval hostilities to the territorial waters of the belligerents and the high seas adjacent to those territorial waters. D.P. O’Connell, “Limited War at Sea Since 1945,” in Michael Howard, ed., *Restraints on War*, p. 123. Christopher J. Greenwood, while apparently sympathetic to this view in general, has written that this notion is “plainly untenable today.” Greenwood *Bochumer Schriften*, p. 155.

⁴ Shortly after the outbreak of the First World War, German Admiral Maximilian von Spee, commanding the German China Squadron, consisting of two heavy and three light cruisers, had crossed the Pacific to the Chilean coast. A Royal Navy squadron, consisting of two elderly heavy cruisers, one light cruiser and a converted merchant ship auxiliary cruiser intercepted the German squadron off Coronel, Chile. In the ensuing battle, the British lost the two heavy cruisers with all onboard. Fearing that von Spee’s squadron was heading towards the South Atlantic, the Admiralty dispatched two battle cruisers, under the command of Vice Admiral Sir F.D. Sturdee, from home waters to seek out von Spee’s squadron. On 8 December 1914, von Spee attempted to raid the British wireless and coaling station in Port Stanley, Falklands Islands. Sturdee’s ships were refueling in Port Stanley when von Spee’s forces arrived and after a brief chase, the Royal Navy destroyed four of the five vessels in von Spee’s squadron, resulting in the loss of more than 1,800 German sailors. R. Ernest Dupuy and Trevor N. Dupuy, *The Collins Encyclopedia of Military History*, 4th ed., 1993, pp. 1035-1036.

this point. By contrast, modern conflicts at sea are usually fought for limited objectives over a relatively short period of time, and in the absence of a global conflict, it is difficult to imagine how any useful purpose would be served in attacking “even legitimate targets in an area remote from that in which the conflict was being conducted.”⁶ This conclusion results from the direct application of the United Nations Charter to the conduct of warfare at sea. The right of self-defence under Article 51 of the Charter permits the use of force “only for the achievement of certain limited ends and only of such force as is reasonably necessary for the achievement of those ends.”⁷ The use of NEZs, assuming that the requirements of the *jus in bello* are fully complied with, mesh with the Charter requirements, in that they seek to limit the geographic scope of the armed conflict. Naval exclusion zones can play an important role in ensuring that only that force necessary to achieve the military goal is expended. As such, NEZs fit into the post-World War II trend in which naval conflicts generally have been “conducted in a much more restrained manner than were the naval conflicts of the world wars.”⁸

A number of military manuals, restatements and commentators have analysed NEZs, but there appears to be no full-length study of such zones. This dissertation is an attempt to fill this gap. As such, the present study seeks to accomplish two primary goals: (1) to restate the current state of the law relating to NEZs, to include all aspects of naval warfare, including the areas of the seas in which naval warfare can be conducted, the legal principles governing

⁵ From September through December 1939, the German pocket battleship, *Graf Spee*, under the command of Captain Hans Langsdorff, undertook a cruise of the South Atlantic, venturing between Pernambuco, Brazil and Cape Town (and even entering the southern Indian Ocean east of South Africa). During these manoeuvres, the *Graf Spee* captured and sank eleven British merchantmen between mid-September and early December 1939. A small Allied armada, consisting of a Royal Navy aircraft carrier and six cruisers, two French cruisers and ten Allied destroyers, were searching for the German battleship. Early in the morning of 13 December 1939, a Royal Navy squadron consisting of one heavy cruiser and two light cruisers caught up with the *Graf Spee* near the mouth of the Plate River, between Argentina and Uruguay. In a battle lasting only 80 minutes, the German vessel was seriously damaged and made for the port of Montevideo, where Langsdorff expected the neutral Uruguayan authorities to permit him to land his wounded and make the necessary emergency repairs to the *Graf Spee*. The Uruguayan authorities would only permit him sanctuary for 72 hours, however. Realising that this amount of time would prove inadequate to make the necessary repairs, he scuttled the ship and was interned with his crew in Montevideo, where he committed suicide three days later. See O’Connell Influence, pp. 27-39; R. Ernest Dupuy and Trevor N. Dupuy, *The Collins Encyclopedia of Military History*, (4th ed., 1993), p. 1153.

⁶ Greenwood Bochumer Schriften, p. 155. For a study on the law of naval warfare in the context of a limited conflict, see Fenrick Developments. D.P. Connell was the major proponent of the concept of a law of limited naval conflict. See especially O’Connell Influence.

⁷ Greenwood Bochumer Schriften, p. 175.

⁸ Fenrick Falklands, p. 30.

armed conflict at sea and the rights of neutrals; and (2) to analyse how various aspects of naval warfare have influenced the development of the zone as a distinct method of naval warfare.

Naval exclusion zones touch upon a large range of issues relevant to naval warfare, including the areas of the maritime environment in which belligerents may engage in armed conflict and interfere with commercial shipping. In many respects, NEZs resemble other means and methods of naval warfare, such as the blockade and naval mine and submarine warfare. Targeting is obviously a major issue of concern in any area in which armed conflict occurs and NEZs are certainly not an exception in this regard. All of these topics are addressed, since, notwithstanding the primary argument that NEZs are *sui generis*, the concept of the exclusion zone did not develop in a vacuum. The following sub-section of this chapter highlights many of the issues raised by NEZs.

Since NEZs slowly developed from State practice, and particularly the practices employed in the First and Second World Wars, commentators seized on the then-existing laws and principles in explaining and characterising zones as either lawful or unlawful when viewed from the perspective gained through observing State practice relating to barred areas or long-distance blockade, for example. Consequently, while some of these analyses are dated or are so case-specific as to be of limited value, they are set forth herein both for what they bring to the subject, and also because they have had an impact upon the development of the NEZ.

In order to achieve the purpose of the present work, therefore, it is necessary to trace the development of the concept of the zone in naval warfare, commencing with the practices developed and employed in the First World War. The second chapter defines naval exclusion zones and lays the groundwork for distinguishing such zones from blockades. An historical survey of naval exclusion zones during the course of armed conflicts at sea during the 20th century is then undertaken. This chapter briefly discusses the historical facts of naval exclusion zones as established during *inter alia* World War I, the Spanish Civil War, World War II, the Korean War and Vietnam, before examining, in greater detail, the use of exclusion zones in the 1980s and early 1990s, in the Falklands and Iran-Iraq Wars.

Chapter 3 then analyses the legal requirements for establishing such zones from the perspective of the traditional sources of international law. Treaty law, customary international law (including whether freedom of navigation is a customary rule of international law), general principles of international law, judicial decisions concerning naval exclusion zones, and the writings of publicists regarding naval exclusion zones will be

examined. Of course, of these traditional sources of international law, custom plays the most important role with respect to the establishment of NEZs and this section draws upon the historical examples of State practice set forth in Chapter 2. Other issues raised by exclusion zones and discussed in Chapter 3 include the rights of neutrals to legitimate uses of the seas, including in those areas designated as naval exclusion zones, during periods of armed conflict; whether there is a requirement for necessary safe passage for non-belligerents through naval exclusion zones under certain circumstances; and the requirements and scope of public declarations and notifications of the naval exclusion zone.

Chapter 4 provides an overview of the law of the sea regime as it relates to ocean zones, freedom of navigation and naval warfare. This may seem a curious subject for an examination into the *jus in bello* relating to naval exclusion zones, since the primary treaty governing the law of the sea, the United Nations Convention on the Law of the Sea (“1982 LOS Convention”), does not specifically address armed conflict at sea. However, the 1982 LOS Convention divides the sea into areas that are subject to different legal regimes and this necessarily has an impact on the law of war at sea, particularly the rules related to exclusion zones proclaimed by belligerents which cut across the divisions of the 1982 LOS Convention. Thus, notwithstanding the fact that the 1982 LOS Convention does not have detailed provisions governing armed conflict, the divisions of the sea that it sets forth have relevance for an analysis of the *jus in bello* in naval warfare. Consequently, this chapter will show how the evolution of the law of the sea has impacted on belligerent claims to control the seas during periods of armed conflict. As Professor Oxman, an authority on the law of the sea has noted:

[T]he Convention does contain rules for dividing the oceans into different jurisdictional zones. Some of the rules of warfare and neutrality vary with the status of geographic areas. The integration of the new regimes of the law of the sea with the rules of naval and air warfare is accordingly a subject that merits attention.⁹

Moreover, as O’Connell, has written:

The drafting of naval Rules of Engagement presupposes a clear understanding of the Law of the Sea on the part of naval staffs, and it is desirable that all operational commanders and their staffs have sufficient understanding of it to minimize the risk of misinterpreting the expressions of international legal significance which are employed.¹⁰

⁹ Oxman, p. 811.

¹⁰ O’Connell Contemporary Naval Operations, p. 82.

The fourth chapter, therefore, presents a brief analysis of the customary law of the sea, examines the three United Nations Conferences on the Law of the Sea, and analyses the divisions of the seas under the 1982 LOS Convention. The status of the 1982 LOS Convention during periods of armed conflict is then considered and the chapter concludes with a discussion of the permissible regions for conducting naval operations under international law. The main focus of this chapter is the effect of the new divisions of the oceans on the ability of belligerents to employ NEZs. More detail concerning the legal divisions of the world's oceans and superjacent airspace is set forth in the Appendix.

The fifth chapter focuses on naval warfare and neutrality. The chapter commences with a brief discussion of the history of neutrality before examining whether the law of neutrality continues to form a part of international law and the applicability of neutrality in the absence of a formal declaration of war.

The sixth chapter examines the law of armed conflict¹¹ as it relates to war in a maritime environment, including distinction, proportionality, military necessity and the attack precautionary principle. The law of armed conflict is not designed to thwart the conduct of hostilities, but rather to ensure that the violence inherent in conducting hostilities is not used to cause unnecessary human suffering or physical destruction. This chapter also discusses targeting issues, including enemy and neutral merchantmen, as well as describing what types of vessels are immune from attack, provided that certain requirements are met. The central issue presented concerns specific actions that may be taken against other ships and aircraft that enter the zone. This chapter concludes with a note on belligerent reprisals.

Having examined the historical circumstances of the establishment of naval exclusion zones, the law governing the environment where naval armed conflict occurs, and the general legal principles governing armed conflict at sea, the seventh chapter examines specific means and methods of naval warfare, in order to distinguish the NEZ from these other means and methods. This chapter also discusses how belligerents may interfere lawfully with neutral shipping on the high seas, including visit, search, diversion and capture. Although of limited value to the present study, these well-established principles demonstrate clearly that even on the high seas, merchant vessels are subject to a certain degree of belligerent control. Based on the historical development of the NEZ, however, the primary thrust of this chapter is on those means and methods of naval warfare that are particularly germane to NEZs: the naval blockade (including the "long-distance" blockade), naval minefields and submarine warfare.

¹¹ This term is used interchangeably with "international humanitarian law" in this study.

The eighth and final chapter then sets forth the conclusions reached and recommendations for clarifying and strengthening the rules concerning the scope of permissible activity within such zones. It is likely that NEZs will feature in any future armed conflict—whether limited or general—at sea and thus naval commanders and policy-makers alike need to understand the limits of permissible activity in exclusion zones.

II. Issues Presented by Zones

As will be clear from the following study, NEZs present a number of issues for policy-makers, naval commanders and lawyers. This section identifies a number of the more important issues, highlighting the some of the more salient discussions in the chapters that follow. One recurring theme in virtually all of these issues concerns the location of the zone. Put simply, NEZs established in or near major sea lanes of communication raise significantly more problems than those that are situated away from such shipping lanes.

A. May NEZs be Established in EEZs?

Chapter 4 addresses the environment in which naval armed conflict is waged¹² and the law that regulates the sea and those States that send vessels into that often harsh milieu. The 1982 LOS Convention, which restates and updates the law of the sea regime contains few provisions that address of the law of naval warfare. While the world's seas are generally divided into territorial waters and the high seas—with specific rules governing how these areas may be used (or not used) by belligerents—the 1982 LOS Convention introduced a new concept, the Exclusive Economic Zone (“EEZ”).

As defined by the 1982 LOS Convention, the high seas comprise all parts of the oceans beyond the territorial seas of littoral States. There are three obligations that warships must meet in conducting their operations on the high seas: 1) the duty to refrain from the unlawful threat or use of force; 2) the duty to have “due regard” for the rights of other States to use the high seas; and 3) all other duties arising from treaties or other rules of international law.¹³ Historically, assuming that these obligations were met, belligerents were free to

¹² The Appendix contains further background on the law of the sea under the 1982 LOS Convention.

¹³ Oxman, p. 837.

conduct naval warfare throughout the high seas without limitation based on where in the high seas such armed conflict was occurring.¹⁴

With the introduction of contiguous zones, EEZs and continental shelves into the modern law of the sea regime, however, certain additional limitations on this unrestricted right have developed, based on the additional requirement that warships have “due regard to the rights and duties of the coastal State” in the EEZ.¹⁵ The relevant provision of the San Remo Manual provides:

If hostile actions are conducted within the exclusive economic zone or on the continental shelf of a neutral State, belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard for the rights and duties of the coastal State, *inter alia*, for the exploration and exploitation of the economic resources of the exclusive economic zone and the continental and the protection and preservation of the marine environment. They shall, in particular, have due regard for artificial islands, installations, structures and safety zones established by neutral States in the exclusive economic zone and on the continental shelf.¹⁶

The 1995 U.S. Navy Commander’s Handbook indicates that these requirements do not pose significant problems with respect to naval operations:

Since all ships and aircraft, including warships and military aircraft, enjoy the high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms, in and over those waters, the existence of an exclusive economic zone in an area of naval operations need not, of itself, be of operational concern to the naval commander.¹⁷

Similarly, the majority of writers take the position that the establishment of the EEZ regime does not significantly affect military operations in the high seas.¹⁸ For example,

¹⁴ German Manual, para. 1013.1, p. 414. See also Oxman, pp. 835-841.

¹⁵ 1995 U.S. Navy Commander’s Handbook, paras. 2.4.2, 2.4.3; U.K. Manual, paras. 13.21-13.23; Canadian Manual, paras. 821, 823-824; San Remo Manual, para. 34; Oxman, pp. 837-838.

¹⁶ San Remo Manual, para. 34.

¹⁷ 1995 U.S. Navy Commander’s Handbook, para. 2.4.2. See also German Manual, para. 1011.

¹⁸ Robertson, pp. 24-26; Lowe July 1986, pp. 178-181; Christopher Greenwood, Comment No. 9 in Robertson Bochumer Schriften, pp. 105-106; Rauch, p. 38; Rose, p. 90; Francioni, pp. 368-370; and Boleslaw A. Boczek, “Peacetime Military Activities in the Exclusive Economic Zones of Third Countries,” 19 *Ocean Development and International Law*, pp. 445-468 (No. 4, 1989). Oxman, however, takes the position, based on Article 58(3) of the 1982 LOS Convention, that although naval operations are permissible in the EEZ in principle, if they prevent the lawful enjoyment of natural

Roach writes, “there is no basis for concluding from the terms of the [1982] LOS Convention that the EEZ is to be equated to the territorial sea in so far as the application of the rules of neutrality are concerned.”¹⁹

During the UNCLOS III negotiations, there were unsuccessful attempts by some coastal States to introduce the principle of the coastal State’s consent prior to carrying out naval operations other than navigation in the EEZ.²⁰ Notwithstanding the failure of these efforts, Brazil declared upon signing the 1982 LOS Convention that foreign States were not authorised to “carry out military exercises or manoeuvres within the Exclusive Economic Zone, particularly when these activities involve the use of weapons or explosives, without the prior knowledge and consent of the coastal State.”²¹ The United States opposed all attempts at hindering freedom of navigation through the EEZ.²² Notwithstanding the positions of these

resources by the coastal State, they may not necessarily be lawful. See Oxman, pp. 835-841. A Chinese participant in the San Remo Manual drafting process took a different view on EEZs and naval operations:

Since the coastal States have the sovereign rights and management and protection of the natural resources and exploiting installations in their EEZ and the continental shelf, they must, *by all means, eliminate any actions that infringe their lawful rights* and are harmful to their normal exploiting activities. *Any tolerance shown to the belligerents conducting hostile operations in the said areas of the neutral States will certainly lead to conflicts between the neutral States and the parties of the hostile operations.* The logical result of the conflicts will be extension of armed conflicts, drawing the neutral States into the war or armed conflicts that already exist.

Jianye, Comment No. 12, in Robertson Bochumer Schriften, p. 121 (*emphasis added*).

¹⁹ Robertson Bochumer Schriften, p. 36.

²⁰ Francioni, pp. 361-384, p. 369.

²¹ Statement of the Delegate of Brazil, Plenary, 187th meeting, UNCLOS III, Official Records, Vol. XVII, p. 40, para. 28. Similar declarations were made by Cape Verde (Statement of the Representative of Cape Verde, Plenary, 188th meeting, 7 December 1982, UNCLOS III, Official Records, Vol. XVII, p. 62, para. 124.) and Uruguay (Statement of the Representative of Uruguay, Plenary, 192nd meeting, UNCLOS III, Official Records, Vol. XVII, p. 120, para. 55.) In addition, Brazil, Guyana, India, Maldives, Mauritius, Mauritania, Nigeria, Pakistan, Russia and the Seychelles made declarations and/or enacted legislation regulating the navigation of foreign vessels in the EEZ or designated parts thereof. See 1995 U.S. Navy Commander’s Handbook, para. 2.4.2., footnote 58; p. 210, Table A2-7; and p. 211, Table A2-8. Moreover, Brazil asserts that no State may place or operate any type of installation or structure in the EEZ or continental shelf without the consent of the coastal State. *Ibid.*, p. 21, para. 1.5.2, footnote 50.

²² See, for example, “United States of America Statement in Right of Reply,” 8 March 1983, reprinted in 1995 U.S. Navy Commander’s Handbook, p. 27, Annex A1-1:

[A]ll States continue to enjoy in the [Exclusive Economic] Zone traditional high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, which remain qualitatively and quantitatively the same as those freedoms when exercised seaward of the zone. Military operations, exercises and activities have always been regarded as internationally lawful uses of the

coastal States, which are contrary to Articles 58 and 87 of the 1982 LOS Convention, the majority view has been summarised by Rear Admiral Robertson as follows:

[I]t seems incontestable that, despite the assertions of a few States and publicists, the Exclusive Economic Zone may be equated to the high seas insofar as the law of neutrality is concerned.²³

Given the fact that the contiguous zone and continental shelf overlap the EEZ, it would follow that the same conclusion holds with respect to those areas.²⁴

The drafters of the San Remo Manual posed several interesting questions related to EEZs and naval warfare. As an illustration of the limitations facing belligerents in conducting military operations in the EEZs or continental shelves of neutrals, consider the example cited in the San Remo Manual: the laying of naval mines. In the event a belligerent opts to lay mines in a neutral State's EEZ or continental shelf, the belligerent must notify the neutral State and ensure that such minefields do not interfere with the neutral State's right to enjoyment of its EEZ or continental shelf.²⁵ Moreover, belligerent States must have due regard for the protection and preservation of marine life in EEZs and on the continental shelf.²⁶

Other interesting (and unsettled) questions include the following: What is implied by the "due regard" requirement and how does that impact upon the conduct of naval operations in neutral EEZs?²⁷ May a neutral State declare a NEZ in its *own* EEZ, in light of the fact that it has no general right to exclude warships from its EEZ?²⁸ Does the answer change if the

sea. The right to conduct such activities will continue to be enjoyed by all States in the Exclusive Economic Zone.

See also, United States Oceans Policy, Statement by the President, 10 March 1983, 19 Compilation of Presidential Documents 10 (14 March 1983), pp. 383-385, reprinted in 1995 U.S. Navy Commander's Handbook, p. 43, Annex A1-3.

²³ Robertson, p. 27. See also Lowe July 1986, pp. 180-181 and Lowe July 1988, pp. 292-293.

²⁴ Robertson, p. 23.

²⁵ San Remo Manual, para. 35.

²⁶ Ibid.

²⁷ Christopher Greenwood, Comment No. 9 in Robertson Bochumer Schriften, p. 106. Doswald-Beck argues that since a coastal State would have significant difficulties in fishing or otherwise exploiting the EEZ if naval battles are being fought there, "due regard" implies some "genuine restrictions on belligerent States wishing to use EEZs based on the coastal States' genuine needs which belligerents ought to make an effort to find out about to the extent feasible." Louise Doswald-Beck, Comment No. 3, in Robertson Bochumer Schriften, p. 75, para. 2.

²⁸ Christopher Greenwood, Comment No. 9 in Robertson Bochumer Schriften, p. 106.

naval activity in the neutral State's EEZ is threatening the safety of its fishing fleet, exploration vessels or fixed installations?²⁹

In some respects, the EEZ regime does not adequately address certain technological advances that have implications for naval warfare, particularly those relating to the emplacement of military devices on the seabed of the continental shelf.³⁰ For example, may naval powers deploy non-explosive military devices, such as submarine detection equipment, including sonabuys on the surface, or sonar arrays on the seabed, of EEZs of other States? Although 1982 LOS Convention Article 60 vests in the coastal State the sole legal right to construct certain types of enumerated installations in the EEZ, that article, as indeed all of Part V of the 1982 LOS Convention, pertains to economic uses of the sea contained in the EEZ. Several commentators have argued that the relevant provisions of the 1982 LOS Convention do not prohibit other States from deploying such devices on the grounds that such devices are both non-economic and do not interfere with the coastal State's enjoyment of resource rights.³¹

Because the EEZ falls between territorial waters and the high seas in terms of the coastal State's rights over the waters within the EEZ, some States and commentators take the view that NEZs may not be established in EEZs. This approach is too conservative. Since the EEZ may be treated as other areas of the high seas for military purposes, and based on the above analysis of State practice concerning the adoption of the 1982 LOS Convention and the positions taken by most commentators, there is no legal prohibition on the establishment of a NEZ in the EEZ of a neutral State, provided that the rights of neutrals with respect to exploration and the exploitation of marine resources. Thus, the State seeking to establish an NEZ in an EEZ must exercise caution in terms of balancing the scope of the proposed zone with the rights of the coastal State to exploit the resources in the the EEZ. In any event, adequate warning should be provided prior to the establishment of the NEZ to ensure that all vessels of the coastal State that are in the EEZ have time to depart the area safely.

²⁹ Ibid.

³⁰ Rose, p. 77; W. J. Fenrick, in Robertson *Bochumer Schriften*, Comment No. 4, p. 78.

³¹ Rose, p. 77. Nevertheless, Rose acknowledges that his position takes advantage of the ambiguities that are present in the 1982 LOS Convention. Ibid., pp. 77-78. Robertson concurs with this analysis. See Robertson, pp. 28-30. See also Lowe July 1986, pp. 179-180.

B. What are the Applicable Legal Principles Within NEZs?

It cannot be stressed enough that NEZs are not free-fire zones. The law on this point is absolutely clear: by proclaiming a NEZ, no State may escape from its legal obligations under the laws of naval warfare. The same body of law applies both inside and outside the zone and thus the proclaiming State gains no legal rights by establishing the zone. Consequently, the decision to establish a NEZ must rest on other grounds, including operational requirements and policy considerations.

Because the same body of law applies regardless of the establishment of the zone, the present work includes chapters on the applicable legal principles of naval warfare in general and on naval targeting specifically.

C. How do NEZs Affect Neutrals?

Zones established in major shipping lanes have the potential to significantly interfere with the rights of neutrals, notwithstanding the fact that the State establishing the zone must demonstrate due regard for neutral rights to legitimate uses of the seas. Naval warfare obviously increases the risks that neutral shipping may be hit accidentally by missile, submarine or other naval weapons systems. However, the mere existence of the zone may force neutral merchant shipping to divert course, leading to increased fuel costs and sailing times.

D. How do NEZs Relate to Other Means and Methods of Naval Warfare?

Naval warfare has historically served as a means to deny enemy forces the resources required to wage war. In order to fulfil this commerce denial role, navies employ the concepts of visit, search, diversion and capture. The naval blockade is also an important tool to hinder the enemy's ability to re-supply and further its war aims. Although certain characteristics of NEZs resemble visit and search or blockade, it is important to recall that the purpose of NEZs is not confiscation or destruction of contraband. The post-World War II revolution that has occurred in the field of merchant shipping—in terms of the immense size of modern merchant vessels and the use of standardised shipping containers—has had major effects on the ability of naval powers to rely upon visit and search, with the result that this form of naval practice is simply no longer feasible in most instances.

Nevertheless, certain elements from other means and methods of naval warfare have been “borrowed” in developing the concept of the NEZ. The notion of the naval exclusion zones did not develop in a vacuum. Consequently, it is important to understand these other means and methods of naval warfare so that NEZs may be properly understood. Moreover, NEZs do not necessarily have to be relied upon in isolation. Rather, their establishment and use may be part of a broader naval strategy and NEZs may be used in conjunction with one or more of the more traditional means and methods of naval warfare.

E. What are the Legal Requirements for Establishing NEZs?

Reflecting the rules governing blockades, there are certain legal requirements that States must comply with in order to establish a zone. These include public declarations and notifications concerning the geographic and temporal dimensions of the zone and safe passage through the zone under certain conditions. The establishing State must ensure that due regard is given to the rights of neutrals to enjoy legitimate uses of the seas.

F. How Do NEZs Impact on Targeting Decisions?

Although the same body of law—including the law of targeting—applies both within the zone as well as outside of it, it may be easier to reach targeting decisions with respect to vessels that have entered the zone, depending on the location of the zone and the effectiveness of the required warnings concerning the zone. Zones that have effectively served as screening mechanisms should significantly reduce the number of vessels that are in the zone, with the result that the naval commander can focus his intelligence-gathering on a smaller number of vessels. This should increase the likelihood that he will successfully distinguish between legitimate and other vessels in reaching his decision to engage the vessel in question.

This is not to suggest that the establishment of zones will lead to a presumption that all vessels entering the zone are legitimate targets. However, within zones that are effectively noticed to the international community and which are far from busy sea lanes of communication, such as those employed by the Royal Navy in the Falklands, naval commanders should have a high degree of confidence in making targeting decisions within such zones.

G. What are the Policy Considerations in Establishing NEZs?

A number of policy considerations underlie the decision to establish NEZs, and the single most important policy reason to establish NEZs is to reduce the likelihood that a merchant vessel will be inadvertently attacked. This aspect has two components: first, the NEZ serves as a screening or warning mechanism; second, it tends to contain the armed conflict to a limited geographic area, although of course, the belligerents are not confined to the NEZ in terms of their interaction vis-à-vis each other. Thus, the establishment of NEZs may serve to advance the goals enshrined in international humanitarian law by reducing the threats to merchant shipping.

Operational requirements may also affect the decision to establish a NEZ. For example, by reducing the number of vessels in the immediate area of naval operations, the local naval commander greatly reduces the opportunity for “innocent” vessels to gather intelligence on the whereabouts and activities of his forces. A number of States employ what appear to be “innocent” fishing trawlers but which are actually highly sophisticated electronic intelligence-gathering platforms. Admiral Woodward encountered and sunk one such Argentinian vessel, the *Narwal*, during the Falklands War.³² Naval exclusion zones are an effective way of ensuring that such vessels stay far away from and naval operations and the actual hostilities.

While the screening function that NEZs bring to naval warfare is important, the location of the zone with respect to busy international shipping lanes must be factored into the equation. A zone established in or around major sea lanes of communication—particularly in narrow sea lanes like those in the Iraq-Iran War or a zone established near the Indonesian archipelago—is less likely to be successful in serving this purpose.

III. Note on Terminology

A. Armed Conflict at Sea

The definition of attack set forth in the 1977 Additional Protocol is used throughout the present work: “attacks” are acts of violence against the adversary, whether used in offence or defence.³³ The use of the term “war,” as used herein does not necessarily imply the

³² Woodward, pp. 126-127, 191-197.

³³ 1977 Additional Protocol I, Article 49(1). This definition has widely adopted by military manuals and

announcement of a formal declaration of war; rather that word and the term “armed conflict” are used interchangeably.

It is important to note that unlike other forms of warfare, which tend to use the phrase, “armed attack,” the term “hostile act” is generally used in naval circles.³⁴ Moreover, “hostile acts” must always be distinguished from “hostile intent.” With respect to the latter term, O’Connell wrote (in 1970) that:

In times of limited war ‘hostile intent’ is normally manifested only when a hostile act is actually committed, and operational orders may well limit the expression ‘hostile act’ to the actual employment of a weapon. Naval thinking has not proceeded to the point of clarifying the ambiguous borderland between ‘hostile intent’ and ‘hostile act,’ and is dominated by the notion that no exercise of force against a foreign ship is legitimate unless in response to a hostile act, and is then to be restricted in scale to countering that hostile act.³⁵

O’Connell went on to state that it is important to attempt to specify precisely when “hostile intent” translates into a “hostile act,” so that the potential attacker does not gain the tactical advantage.³⁶

B. Warships and Military Aircraft

Under the relevant treaties, and as used throughout the present work, “warships” are defined as being those vessels:

Belonging to the armed forces of a State and bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.³⁷

restatements, including the U.K. Manual (at para. 5.20) and the San Remo Manual (at para. 13[b]). See Note on Military Manuals and Restatements, *infra*.

³⁴ O’Connell Contemporary Naval Operations, p. 25. The U.S. Navy defines “hostile intent” as being an “imminent threat to use force.” 1995 U.S. Navy Commander’s Handbook (see Note on Military Manuals and Restatements, *infra*), para. 4.3.2, footnote 27. See also Australian Manual, paras. 7.8, 7.11 (the latter paragraph contains a list of factors to be considered in determining whether a vessel has the intention to attack).

³⁵ O’Connell Contemporary Naval Operations, p. 25.

³⁶ *Ibid*.

³⁷ 1982 LOS Convention Article 29; 1958 High Seas Convention, Article 8(2) contains a virtually identical definition. See also 1907 Hague Convention VII, Articles 2-5 and the San Remo Manual, (see Note on Military Manuals and Restatements, *infra*), para. 13. By contrast, the 1995 U.S. Navy Commander’s Handbook (see Note on Military Manuals and Restatements, *infra*), p. 112, para. 2.1.3,

Similarly, “military aircraft” are all aircraft belonging to the armed forces of a State and which bear external markings indicating their nationality. A member of the armed forces must command such aircraft and the crew must be subject to military discipline.³⁸

IV. Note on Rules of Engagement

It is important not to underestimate the importance of Rules of Engagement (or “ROE”), since such guidelines establish “when armed force may be used and what methods and means of combat may be employed.”³⁹ O’Connell dedicates an entire chapter to ROE, and states, “it is in the drafting of these that international law today most directly impinges upon naval planning.”⁴⁰ The U.S. Department of Defence defines Rules of Engagement as:

Directives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.⁴¹

Although primarily drafted by lawyers, ROE take into consideration operational, political and diplomatic factors as well and thus ROE are more restrictive than international law dictates, since these other factors generally constrain the political and military leadership

defines “Auxiliaries” as “vessels, other than warships, that are owned by or under the exclusive control of the armed forces.” The German Manual (see Note on Military Manuals and Restatements, *infra*), para. 1003, prefers the term “Support ships” to auxiliaries, and defines support ships as vessels crewed by civilians or operated by the government and which perform support services for naval forces without being warships. German Manual, para. 1006. “Government ships” are those which are owned or operated by States and which are used in non-governmental commercial service, such as for customs or law enforcement purposes. “Merchant vessels” are ships other than warships or government ships and which are used exclusively for commercial purposes, such as fishing or freight or passenger transport. German Manual, para. 1004. See also Australian Manual (see Note on Military Manuals and Restatements, *infra*), para.3.5.

³⁸ German Manual (see Note on Military Manuals and Restatements, *infra*), para. 1007. “State aircraft” are those planes belonging to or used by a State for non-military purposes, such as customs or law enforcement. German Manual, para. 1008. “Civilian aircraft” are all aircraft other than military or State aircraft and which are used exclusively for the transport of cargo or passengers. German Manual, para. 1009.

³⁹ Fenrick Falklands, p. 36.

⁴⁰ O’Connell Influence, p. 169. See also *ibid.*, Chapter XIII. For other discussions of ROE, see Australian Manual, paras. 7.27-7.31; Richard J. Grunawalt, “The JCS Standing Rules of Engagement: A Judge Advocate’s Primer,” 42 *Air Force Law Review* 245-258 (1997); James C. Duncan, “The Commander’s Role in Developing Rules of Engagement,” 52 *NWCR*, pp. 76-89 (No. 3, Summer 1999); Dieter Fleck, “Rules of Engagement for Maritime Forces and the Limitation of the Use of Force under the UN Charter,” 31 *German YBIL* 165-186 (1988).

⁴¹ Department of Defense Dictionary of Military and Associated Terms, Joint Pub 1-02, 23 March 1994, p. 329.

when adopting the ROE.⁴² Typically, separate ROE are adopted for peacetime and wartime, and wartime ROE permit a wider range of uses of military force, but still represent constraints on the commander to ensure that force is employed to achieve the desired political goals.⁴³ It is important to stress, however, that ROE do not constrain the commander's right—and obligation—of self-defence to use force to protect his command.⁴⁴

Most militaries operate under Standard ROE, which can be modified when necessary for specific deployments or armed conflict. Rules of Engagement are not generally publicised,⁴⁵ making full discussion and analysis of such rules difficult. To the extent such rules are within the public domain, the present study will make use of them in discussing the cases.⁴⁶

V. Note on Military Manuals and Restatements

Military manuals may be evidence of customary international law,⁴⁷ although since they are not enacted by legislatures they are not legal instruments that are binding upon courts or tribunals applying the rules of law.⁴⁸ Nevertheless, insofar as such manuals are produced by the militaries of the States concerned and purport to state what the law is at the time they are adopted, these manuals are an important source for determining the *opinio juris* of the

⁴² See Roach ROE. See also James C. Duncan, "The Commander's Role in Developing Rules of Engagement," 52 *NWCR*, pp. 76-89 (No. 3, Summer 1999).

⁴³ Roach ROE, p. 877.

⁴⁴ *Ibid.*, pp. 877-878.

⁴⁵ The U.S. has published the Standing ROE promulgated by the Joint Chiefs of Staff on 1 October 1994. See 1995 U.S. Navy Commander's Handbook, Annex A4-3, pp. 277-285. These ROE are referred to hereinafter as "U.S. Standing ROE."

⁴⁶ For example, the commander of the Falklands Battle Group Commander, Admiral Sandy Woodward, refers on several occasions to the ROE in effect during the Falklands War in his memoirs. See Woodward, pp. 100-102, 106-108, 126, 153, 155, 158. For a discussion of the formulation of the ROE relating to Desert Shield/Desert Storm, see Dalton, pp. 77-80.

⁴⁷ See *The Hostages Case*, pp. 51-52; *The Peleus Trial*, p. 19; *The Belsen Trial*, pp. 148-149; *The Abbaye Ardenne Case*, p. 110; 1995 U.S. Navy Commander's Handbook, p. xxxv and footnote 1 therein (see footnote 24, *infra.*); U.S. Army FM 27-10, para. 1 (see footnote 24, *infra.*); LRTWC, Digest of Law and Cases, pp. 21-22; W. Michael Reisman and William K. Leitzau, "Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict," in *The Law of Naval Operations*, pp. 1-18; Jane Gilliland Dalton, "A Comparison Between the San Remo Manual and the 1995 U.S. Navy Commander's Handbook" 36 *Israel YB on Human Rights* (2006), pp. 71-87 at pp. 74-75; Brownlie, p. 6.

⁴⁸ Military manuals may be binding as regulatory instruments on members of the armed forces of the State that promulgated the military manual.

promulgating States, thus reflecting State practice. Perhaps more importantly for the present purposes, it must be borne in mind that military commanders rarely have formal legal training and although it is increasingly common for commanders to have access to professional judge advocates, military manuals play an important role in informing commanders of their legal obligations. This is especially true in the case of naval commanders, who frequently operate across wide areas of the sea with little or no contact with judge advocates or other trained legal professionals. Several important maritime States have adopted military manuals that are publicly available, including the United States,⁴⁹ United Kingdom,⁵⁰ Germany,⁵¹ Australia,⁵² Canada,⁵³ New Zealand⁵⁴ and the Soviet Union.⁵⁵ The ICRC has also produced a Model Manual for armed forces that may not have the resources to develop manuals themselves.⁵⁶

⁴⁹ In July 2007, the U.S. Navy promulgated *The Commander's Handbook on the Law of Naval Operations* (NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A). Throughout the present work, this publication is referred to as the "U.S. Navy Commander's Handbook." The U.S. Navy Commander's Handbook replaced the October 1995 version and the 1997 Annotated Supplement to the 1995 U.S. Navy Commander's Handbook on the Law of Naval Operations. The latter document has been reprinted as Volume 73 of the U.S. NWC International Law Series, 1999 (A.R. Thomas and James C. Duncan, editors). The 1999 annotated version is cited herein as 1995 U.S. Navy Commander's Handbook. The 1995 U.S. Navy Commander's Handbook updated the 1989 version (NWP 9 [Rev. A]/FMFM 1-10), which in turn had replaced the 1955 Law of Naval Warfare, which is reprinted in the Appendix to Tucker. For a particularly insightful analysis of the 1989 version of the U.S. Navy Commander's Handbook, see A.V. Lowe, "The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea," in Robertson, pp. 109-147. Similarly, the U.S. Army has promulgated a field manual, FM 27-10, *The Law of Land Warfare* (1956), referred to hereinafter as "U.S. Army FM 27-10."

⁵⁰ The U.K. MoD published a tri-service manual in 2004. See *The Law of Armed Conflict*, UK Ministry of Defence, Oxford UP, 2003. Throughout the present work, this publication is referred to as "U.K. Manual."

⁵¹ In August 1992, the German *Bundeswehr* adopted Joint Service Regulations (ZDv) 15/2, and a handbook, *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, was published in 1994 (C.H. Beck Verlag, Munich). Under the editorship of Dieter Fleck, this book was translated into English and published in 1995 with commentaries by noted experts in international humanitarian law as *The Handbook of Humanitarian Law of Armed Conflicts*. For ease of reference, this publication shall be referred to throughout the present work as "German Manual."

⁵² *Manual of International Law*, Royal Australian Navy, 1998, ABR 5179), referred to hereinafter as "Australian Manual."

⁵³ *Law of Armed Conflict at the Operational and Tactical Levels*, Joint Doctrine Manual, Chief of Defence Staff, Canadian National Defence, B-GJ-005-104/FP-021, 13 August 2001, available at: <http://www.forces.gc.ca/jag/training/publications/law_of_armed_conflict/loac_2004_e.pdf>. Referred to hereinafter as "Canadian Manual."

⁵⁴ *Interim Law of Armed Conflict*, New Zealand Defence Force, Directorate of Legal Services, DM 112, 26 November 1992), referred to hereinafter as "Interim New Zealand Manual."

⁵⁵ *Manual of International Maritime Law*, Barabolya, Piotr D., *et al.*, U.S. Government Printing Office, Washington, DC, 1968 (Translation of *Военно-Морской Международно-Правовой Справочник*. Military Publishing House [Военное Издательство], Moscow, 1966.) Referred to hereinafter as

Similarly, restatements, such as the 1913 Oxford Manual⁵⁷ or the more recent San Remo Manual⁵⁸ and Helsinki Principles,⁵⁹ although not formal sources of the law, are prepared by experts and generally reflect the state of the law at the time they are produced. As such, they synthesise and analyse custom and treaties, providing a clear and concise explanation of the law.⁶⁰ In the sections governing naval warfare, both the U.K. and Canadian Manuals draw heavily on the San Remo Manual, with many provisions quoted *verbatim*.⁶¹ While this might not be surprising given the fact that the San Remo Manual drafting process included military practitioners and experts from a number of States, including the United Kingdom and Canada, it also clearly demonstrates the weight given to the San Remo Manual by leading naval powers.

VI. Note on Military Principles of Warfare

All modern militaries operate under doctrines that include a number of well-developed principles that may be applied at the strategic, operational or tactical level and which are known as the principles of warfare. There are slight variations in the phrasing and descriptions

“Soviet Manual.”

⁵⁶ Fight It Right: Model Manual on the Law of Armed Conflict for Armed Forces, ICRC (1999). Referred to hereinafter as “ICRC Model Manual.”

⁵⁷ The 1913 Oxford Manual was adopted by the Institute of International Law and was intended to a “complete, objective, rule book for naval warfare.” Pietro Verr, Commentary to 1913 Oxford Manual, Ronzitti, pp. 329-341 at p. 330. The failure of the States that had adopted the 1909 London Naval Declaration to ratify that document played an important role in the Institute of International Law’s decision to set up the special commission that ultimately drafted the 1913 Oxford Manual. *Ibid.*, at 329.

⁵⁸ The San Remo Manual was prepared under the auspices of the International Institute of Humanitarian Law and took seven years to complete. The San Remo Manual contains 183 paragraphs and accompanying commentary, and was viewed as its drafters as the “modern equivalent” of the 1913 Oxford Manual. (San Remo Manual, p. 62.) For additional information on how this manual was produced, see San Remo Manual, Explanation, Introduction, pp. 61-69; Louise Doswald-Beck, “The San Remo Manual on International Law Applicable to Armed Conflicts at Sea,” 89 *AJIL* pp. 192-208 (1995). See also Heintschel von Heinegg San Remo, pp. 119-148; Jane Gilliland Dalton, “A Comparison Between the San Remo Manual and the U.S. Navy Commander’s Handbook” 36 *Israel YB on Human Rights* (2006), pp. 71-87; Steven Haines, “The United Kingdom’s Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared,” 36 *Israel YB on Human Rights* (2006), pp. 89-118, at pp. 103-104.

⁵⁹ The International Law Association, “Helsinki Principles on Maritime Neutrality,” Report of the 68th Conference (1998), at p. 497 *et seq.*

⁶⁰ But see Busuttil, who notes that the drafters of the San Remo Manual indicated that certain provisions were the subject of controversy and disagreement, and thus the manual “must be handled with care.” Busuttil, p. 10, footnote 82, citing to San Remo Manual, p. 65.

⁶¹ While the U.S. Navy Commander’s Handbook rarely includes *verbatim* quotes from the San Remo Manual in its governing provisions, there are extensive citations to that manual in the footnotes and text.

of these principles among the world's major military forces, although the following concepts are common to all published doctrines:⁶²

- **Objective:** Direct every military objective toward a clearly defined, decisive and attainable objective.
- **Offensive:** Seize, retain, and exploit the initiative.
- **Mass:** Mass the effects of overwhelming combat power at the decisive place and time.
- **Economy of Force:** Employ all combat power available in the most effective way possible; allocate minimum essential combat power to secondary effects.
- **Maneuver:** Place the enemy in a position of disadvantage through the application of flexible power.
- **Unity of Command:** For every objective, seek unity of command and unity of effort.
- **Security:** Never permit the enemy to acquire unexpected advantage.
- **Surprise:** Strike the enemy at a time or place or in a manner for which he is unprepared.
- **Simplicity:** Prepare clear, uncomplicated plans and concise orders to ensure thorough understanding.
- *Maintenance of Morale:* High morale fosters the offensive spirit and the will to win.
- *Administration:* Logistic considerations are often the deciding factor in assessing the feasibility of an operation.

While a judge advocate or military lawyer in an operational environment will generally rely on the legal principles described above in advising the military commander, the commander will have a more thorough background in these principles of warfare. These principles will have been the framework through which the commander has trained his unit. In many important ways, however, these principles complement the values underlying the law of armed conflict, and when these legal and operational principles operate together, the likelihood of military success will increase while the risks of civilian death or injury and collateral damage will decrease.

⁶²

See, for example, Design for Military Operations – The British Military Doctrine (“BMD”), prepared under the direction of the Chief of the General Staff, Army Code No. 71451, D/CGS/50/8, 1996, Annex A; U.S. Army Field Manual FM 100-5, Headquarters, Department of the Army, June 1993, pp. 2-4 – 2-5. Terms employed in the BMD are in *italics*; those from FM 100-5 are in **bold**; items in ***bold italic*** are commonly phrased in both BMD and FM 100-5. These principles have been distilled through the works of Jomini, Clausewitz and J.F.C. Fuller.

For example, the principles of proportionality, military necessity and economy of force are closely related and when applied consistently, can increase the odds of successfully completing a military mission. Although the U.S. Navy has not formally adopted the Principles of Warfare as doctrine,⁶³ the 1995 U.S. Navy Commander's Handbook highlights the inter-relationship between these concepts:

Together, the law of armed conflict and the principles of warfare underscore the importance of concentrating forces against critical military targets while avoiding the expenditure of personnel and resources against persons, places, and things that are militarily unimportant. However, these principles do not prohibit the application of overwhelming force against enemy combatants, units and material.⁶⁴

Similarly, the development of high morale contributes to good order and discipline, which in turn increases the likelihood that individual unit commanders and sailors or marines do not violate the laws of armed conflict. Thus, there are clearly synergies between the legal principles and the principles of war.

⁶³ 1995 U.S. Navy Commander's Handbook, para. 5.2, footnote 9.

⁶⁴ 1995 U.S. Navy Commander's Handbook, para. 5.2. See also *ibid.*, para. 8.1 indicating that the principle of distinction parallels the principles of the objective, mass and economy of force.

Chapter 2

Naval Exclusion Zones: An Historical Survey

“Typically, in an armed conflict, one State will claim a right to interfere with the navigational rights of States not party to the conflict in a manner that the latter find objectionable.”¹

“Twentieth-century State practice has stood in direct conflict with the traditional international law of naval warfare, belligerent parties seeking to restrict severely the rights of commercial ships in order to permit more aggressive military operations on the high seas.”²

I. Introduction and Definitions

While Professor Lowe’s assertion is certainly borne out by State practice during armed conflicts at sea, it is equally true that such interference is not limited to the navigational rights of non-belligerents, since the primary objective of naval warfare is to deny the opponent use and control of the sea. This necessarily requires a belligerent State to interfere with the navigational rights of other belligerent States. The use of naval exclusion zones has become a common method of achieving this goal during naval warfare. What sets the use of NEZs apart from other forms of naval warfare, however, is the assertion by a belligerent State of rights to certain delineated areas of the sea, coupled with prior announcement of military intentions with respect to the zone. It should also be noted that NEZs are a feature of international—and not internal—armed conflict.³

The present work uses the definition for NEZs set forth by William J. Fenrick, a noted authority on international humanitarian law and naval warfare:

An exclusion zone, also referred to as a military area, barred area, war zone, or operational zone, is an area of water and superjacent air space in which a party to an armed conflict purports to exercise control and to which it denies access to ships and aircraft without permission. It thus interferes with the normal rights of passage and

¹ Lowe July 1986, p. 183.

² Ross Leckow, “The Iran-Iraq Conflict in the Gulf: The Law of War Zones,” 37 *ICLQ* (Part 3, July 1988), pp. 629-644, p. 629.

³ Heintschel von Heinegg Legal Issues, p. 160. (“Being a method of naval warfare such a zone—whatever its purpose of legality may be—cannot be made use of in times other than international armed conflict.”)

overflight of ships and aircraft of non-parties. Unauthorized ships or aircraft entering the zone do so at the risk of facing sanctions, often including being attacked by missiles, aircraft, submarines or surface ships, or of running into minefields.⁴

Although a survey of the literature reveals that there are several different definitions and characterisations of NEZs, such definitions often reflect the authors' negative views regarding the legality of such zones. For example, one commentator has written that:

[A] war zone, beyond pretexts, wishful assurances, or euchologies, is essentially a free-fire zone which has been historically designed and operated so as to legitimise, or at least to waive responsibility for indiscriminate attack on enemy or neutral merchant ships.⁵

Similarly, in the view of another author, "the common denominator of all war zones is the declaring belligerent's claim to suspend in the zone some or all of the rules of naval warfare."⁶ Notwithstanding these opposing definitions, other writers have cited the formulation advanced by Fenrick approvingly, with one characterising it as the "classical definition."⁷

Although the terms "total exclusion zone" or "maritime exclusion zones" have also been used to refer to NEZs, the latter term includes both TEZs and MEZs and notwithstanding the specific terminology adopted by the proclaiming State, if the zone falls within the scope of Fenrick's definition, it is treated as a NEZ for purposes of the present work.

Armed conflict at sea has always had an economic element, with the most common manifestations of this generality being blockades and the capture for prize of merchant vessels.⁸ At the outset of this historical survey of the use of NEZs, therefore, it is necessary to differentiate such zones from more traditional methods of denying freedom of the seas to other States, such as blockades. Based on the above definition, NEZs may be distinguished from blockades and the *cordon sanitaire*⁹ based on the following formulation:

⁴ Fenrick, p. 92.

⁵ Politakis, p. 38.

⁶ Karl Zemanek, "War Zones" in Rudolf Bernhardt (ed.) Encyclopedia of Public International Law (1982), volume 4, p. 337.

⁷ Pocar, p. 219.

⁸ See, for example, Harry H.G. Post (ed.), International Economic Law and Armed Conflict (1994); Politakis, Chapters 5 and 6. See also Chapter 7 of the present work.

⁹ Regarding the notion of the *cordon sanitaire*, see S.F. Gilchrist, "The *Cordon Sanitaire*: Is It Useful? Is It Practical?" 35 NWCR (1982), p. 60.

Exclusion zones are different from the more traditional blockade zones because in blockade zones the primary risk is that of capture, while in exclusion zones it is, frequently, the risk of attack on sight; they are also different from more recent devices such as the *cordon sanitaire*, which is intended to be used primarily in a period of tension prior to the commencement of hostilities.¹⁰

Thus, unlike the use of blockades or the *cordon sanitaire*, the establishment of a NEZ relates more to the strategy employed to conduct the hostilities, than to any specific anticipated economic goal to be achieved. That is, the NEZ is set up as a key component of the naval strategy of the State establishing such a zone. D.P. O’Connell concisely stated the issue of NEZs as follows: “The question is whether areas of the high seas can be closed to international shipping on the pretext of naval operational uses.”¹¹

The establishment of NEZs must also be distinguished from warning zones and the customary right of belligerents to control the immediate area or vicinity of naval operations.¹² Heintschel von Heinegg, a leading commentator on the law of naval warfare, puts it this way:

It is generally acknowledged that belligerents are entitled to take all measures necessary against neutral vessels and aircraft whose presence may otherwise jeopardize naval operations in that area. While in many cases such measures will consist of a belligerent control over the communications of these vessels and aircraft, they may, depending on the circumstances, include the closure of the sea area in which naval operations are conducted.¹³

This chapter will describe the use of NEZs during periods of armed conflict at sea in the 20th Century and will provide the foundation for the discussion of the role of custom concerning NEZs, discussed in the following chapter. The focus of this chapter will be upon the factual situations concerning the NEZs; an analysis of the legality of the establishment of such zones will be considered in subsequent chapters. Moreover, because the concept of the NEZ evolved from the naval strategies of unrestricted submarine warfare and mining, some of the examples that follow do not fit precisely with the definition of NEZ as set forth above. Similarly, some of the examples in this chapter are more analogous to the traditional concept of blockade. These examples are set forth, however, in order to explain both how naval forces

¹⁰ Fenrick, p. 92.

¹¹ O’Connell Influence, p. 164.

¹² 1995 U.S. Navy Commander’s Handbook, para. 7.8; U.K. Manual, para. 13.80; San Remo Manual, para. 108; Helsinki Principles, para. 3.3.

¹³ Heintschel von Heinegg Legal Issues, pp. 163-164 (footnotes omitted).

have dealt with both belligerent and non-belligerent vessels in the seas constituting the conflict zone and how NEZs evolved during the 20th century. After briefly describing the naval components of 20th century armed conflicts, the primary thrust of this chapter will be detailed descriptions of the use of NEZs during the Falklands and Iran-Iraq Wars.

II. World War I¹⁴

A. Allied Zones

World War I marked the first conflict in which the belligerents extensively used what would come to be recognised as NEZs.¹⁵ The precursor to the establishment of the first NEZ was the laying of mines almost immediately after the commencement of the war.¹⁶ Britain was the first belligerent to acknowledge that it had undertaken a policy of mine laying in response to alleged similar conduct by the Germans. On 2 October 1914, Britain duly notified the existence of a minefield in the Strait of Dover off the Belgian Coast.¹⁷ France quickly followed suit, sowing a minefield in the Adriatic Sea in response to the mining of that sea by the Austro-Hungarian Navy.¹⁸ Similarly, based on the presence of German submarines and mines near the Gulf of Finland and Russian coast, the Russians warned of a zone encompassing the Russian coast, the Gulf of Riga and the coastal waters of the Aland Archipelago.¹⁹ Upon its entry into the war in 1917, the United States also declared several “defensive sea areas.”²⁰

¹⁴ In general, see Garner; Politakis, pp. 40-54.

¹⁵ It has been suggested that Japan established a NEZ during the Russo-Japanese War of 1904-5, although the precise nature of that zone is debatable. Compare O’Connell Influence, p. 166, Garner, Vol. I, pp. 351-352, and Politakis, pp. 39-40.

¹⁶ See the documents reprinted in 11 AJIL (Supplement, No. 4, October 1917), pp. 4-41; for succinct discussions concerning mine warfare at sea in World War I, see Busuttil, pp. 30-33; Politakis, pp. 174-187.

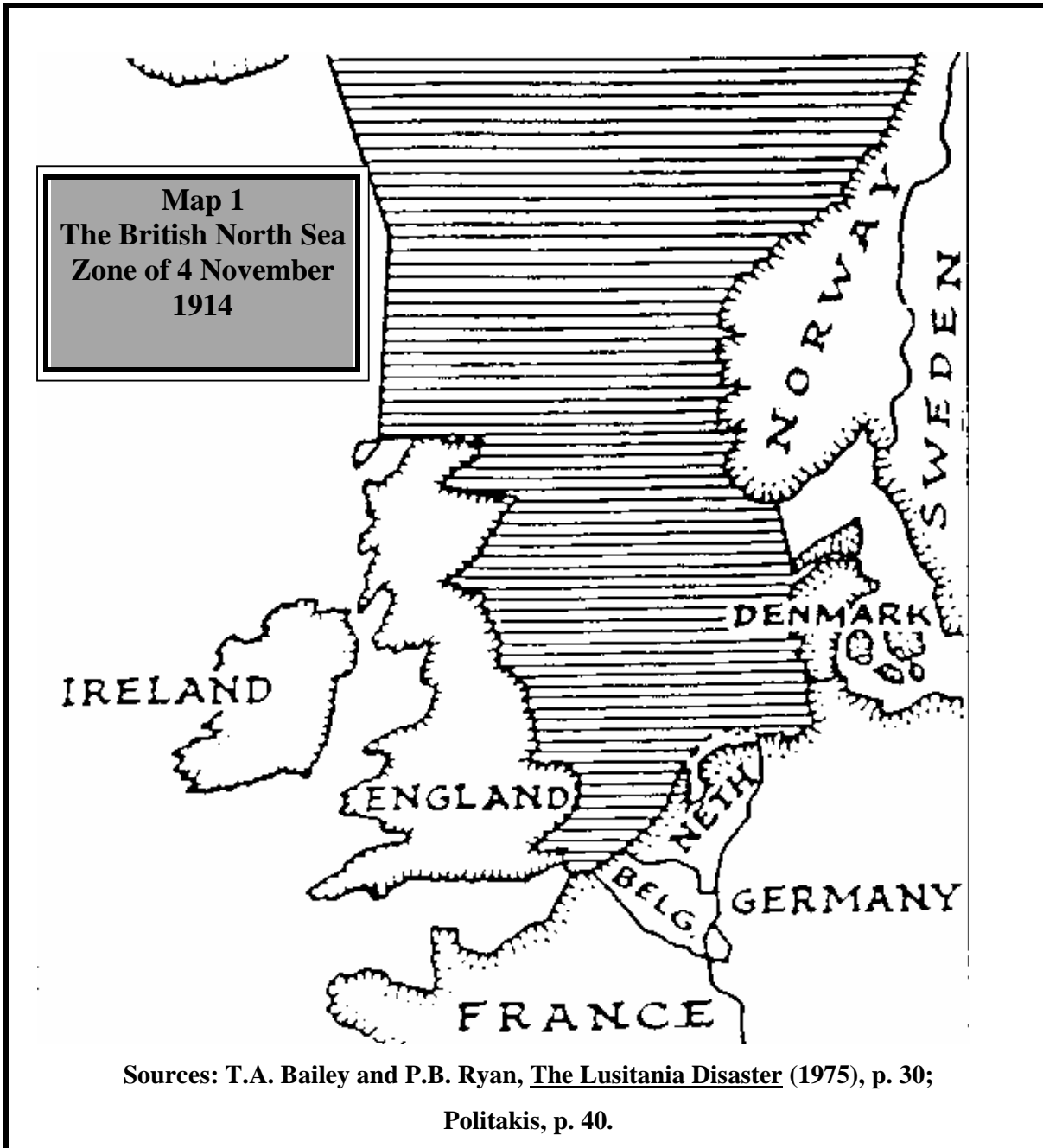
¹⁷ See Telegram from Sir Edward Grey to Sir Cecil Spring Rice, 2 October 1914, reprinted in 11 AJIL (Supplement, No. 4, October 1917), pp. 11-12. The scope of this minefield was subsequently extended. See Telegram from Ambassador W.H. Page to Secretary of State Robert Lansing, dated 2 May 1916 and Telegram from Ambassador W.H. Page to Secretary of State Robert Lansing, dated 29 May 1916, reprinted in 11 AJIL (Supplement, No. 4, October 1917), pp. 33-34.

¹⁸ See Note from Ambassador Herrick to Secretary of State Robert Lansing, reprinted in 11 AJIL (Supplement, No. 4, October 1917), pp. 12-13.

¹⁹ Editorial Comment, “Mines, Submarines and War Zones—The Absence of Blockade,” 9 AJIL (No. 2, April 1915), pp. 461-471, p. 463.

²⁰ See Executive Order Establishing Defensive Sea Areas, No. 2584, 5 April 1917, reprinted in 12 AJIL

The British were the first party to the conflict to establish a NEZ, termed a “danger zone,” on 4 November 1914, depicted in Map 1, below. This zone was established in response to indiscriminate mine laying on the high seas by Germany, and in declaring the entire North Sea to be a war zone, Britain declared:



(Supplement, No. 1, January 1918), pp. 13-16; Executive Order Establishing Additional Defensive Sea Area, No. 2597, 14 April 1917, reprinted in 12 AJIL (Supplement, No. 1, January 1918), p. 21; and Regulations for Carrying into Effect the Executive Order of the President Establishing Defensive Sea Areas, 5 April 1917, reprinted in 12 AJIL (Supplement, No. 1, January 1918), pp. 16-20.

Owing to the discovery of mines in the North Sea, the whole of that sea must be considered to be a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft, and all other vessels will be exposed to the gravest dangers from mines which it has been necessary to lay and from war-ships searching vigilantly by night and day for suspicious craft.²¹

Although the British order went on to state that every effort would be made to warn merchant and fishing vessels of the dangers posed by transiting this area, the order also indicated that from 5 November 1914 onwards, “all ships passing a line drawn from the northern point of the Hebrides through the Faroe Islands to Iceland do so at their own peril.”²² The British war zone was extended on several occasions in 1916²³ and 1917.²⁴

In 1915, the British employed a number of other tactics to wage naval warfare against the Germans, including the arming of merchant vessels and the use of such ships to ram German U-Boats.²⁵ On 31 January 1915, the British Admiralty ordered British merchant vessels to fly the flags of neutral States to avoid being attacked by German submarines.²⁶

In response to the German exclusion zone established around Great Britain on 4 February 1915 (described below), the British and French Governments established what came to be known as a “long-distance” blockade of Germany, depicted in Map 2 below.²⁷ The first of three orders, which were expressly justified as retaliatory measures, was issued by Great Britain on 11 March 1915,²⁸ with France following suit two days later.²⁹ The intent behind the

²¹ The full text of this order is reprinted in Garner Questions, p. 595. See also enclosure to the letter from the British Ambassador Cecil Spring Rice to the U.S. Secretary of State Robert Lansing, dated 3 November 1914, reprinted in 11 AJIL (Supplement, No. 4, October 1917), pp. 14-16.

²² The full text of this order is reprinted in Garner Questions, p. 595.

²³ Admiralty Notice to Mariners No. 618, 1916, reprinted in 11 AJIL (Supplement, No. 4, October 1917), p. 35; Busuttil, p. 32.

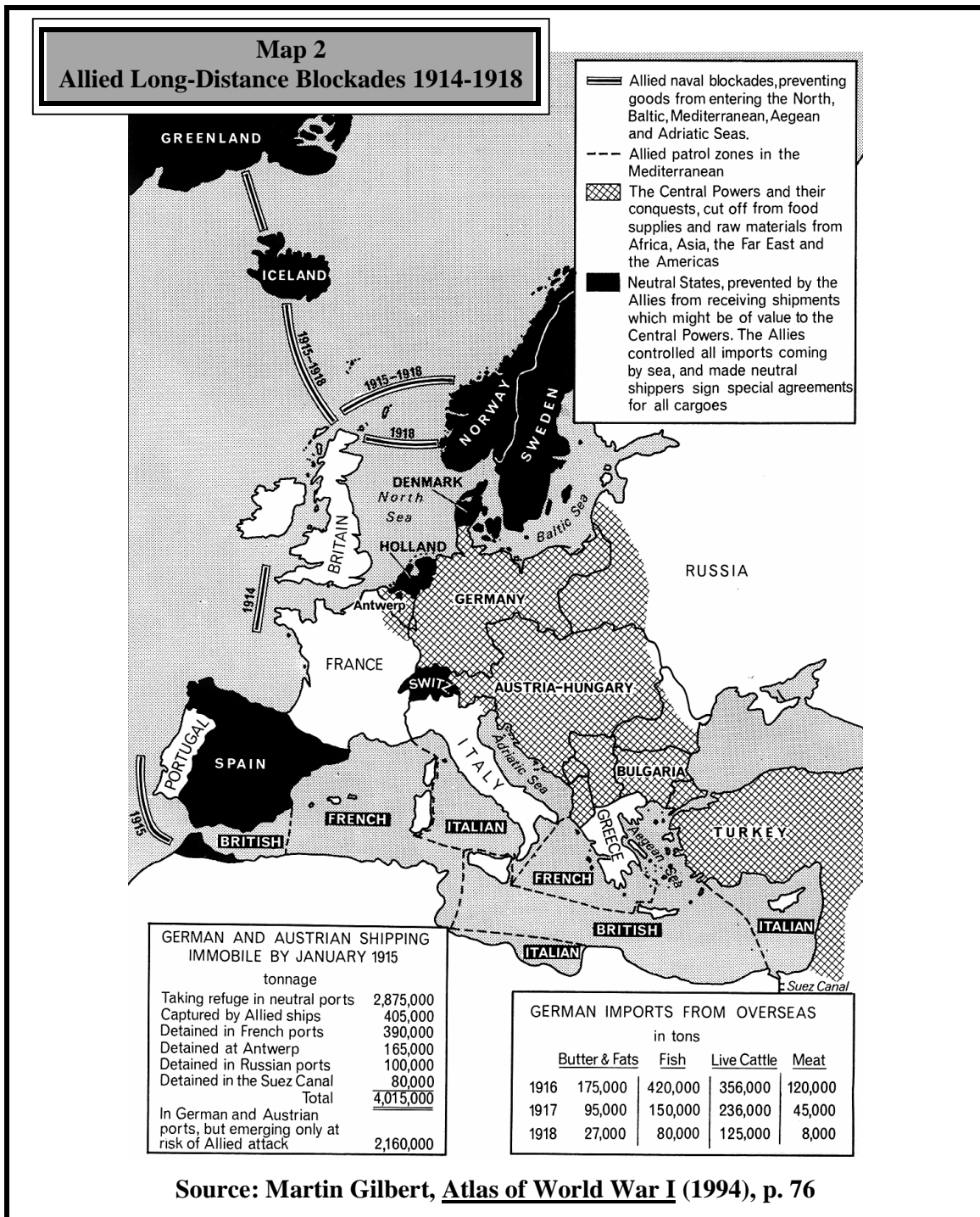
²⁴ Telegram from U.S. Ambassador W.H. Page to U.S. Secretary of State Robert Lansing, 25 January 1917, reprinted in 11 AJIL (Supplement, No. 4, October 1917), p. 36; Telegram from U.S. Ambassador W.H. Page to U.S. Secretary of State Robert Lansing, 15 February 1917, reprinted in 11 AJIL (Supplement, No. 4, October 1917), pp. 36-37; Telegram from U.S. Ambassador W.H. Page to U.S. Secretary of State Robert Lansing, 23 March 1917, reprinted in 11 AJIL (Supplement, No. 4, October 1917), pp. 38-39; Busuttil, p. 32.

²⁵ See James Brown Scott, “The Execution of Captain Fryatt,” 10 AJIL (No. 4, October 1916), pp. 865-877; Garner, Vol. I, pp. 407-413; Fenrick, pp. 96-97, fn. 19.

²⁶ O’Connell Contemporary Naval Operations, p. 46.

²⁷ Tucker, pp. 305-315.

²⁸ Order in Council, Retaliatory Measures Against Trade of Germany, 11 March 1915, reprinted in 1917 ILD, pp. 138-140. The second order was issued on 10 January 1917. See Order in Council, Retaliatory

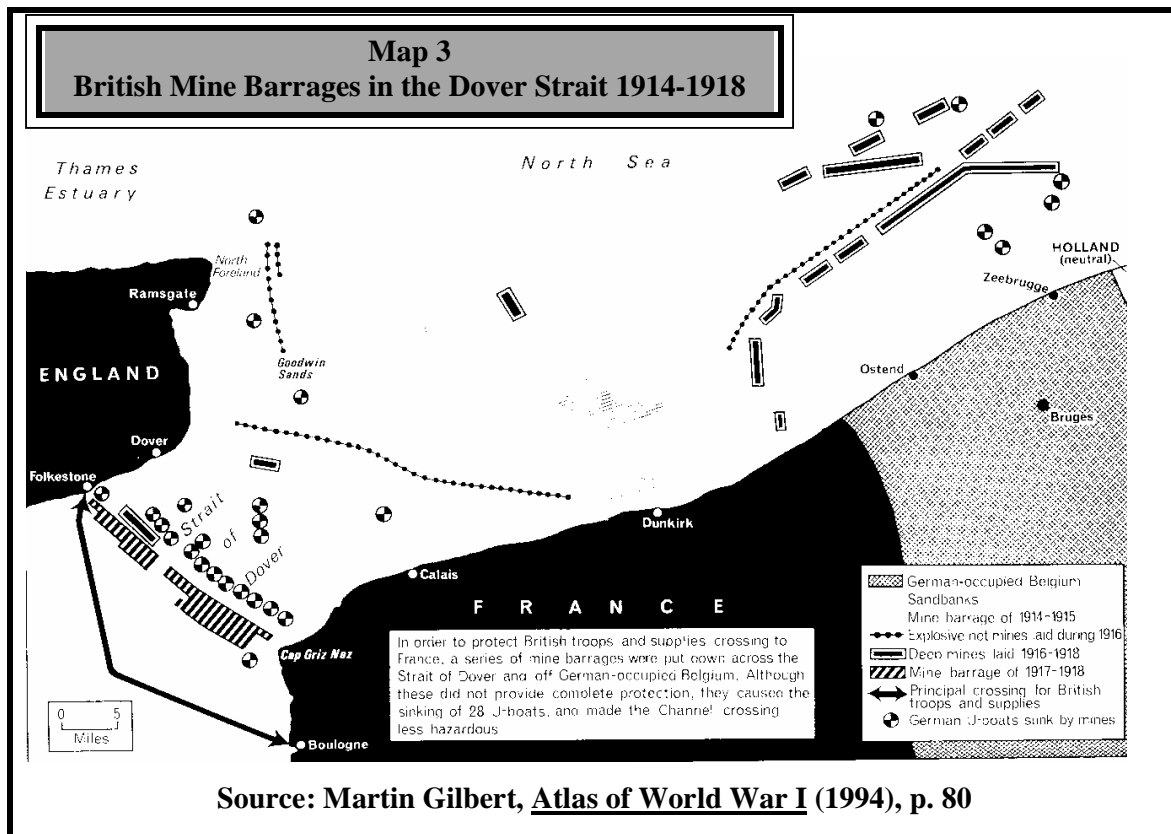


Measures Against German Trade, 10 January 1917, reprinted in 1917 *ILD*, pp. 141-142.. The third order was issued on 11 February 1917. See Order in Council, Retaliatory Measures Against German Trade, 16 February 1917, reprinted in 1917 *ILD*, pp. 142-143.

Decree Authorising Retaliatory Measures Against Trade of Germany, 13 March 1915, reprinted in 1917 *ILD*, pp. 94-96.

long distance blockade, which was the subject of U.S. notes of protest,³⁰ was to ensure that no goods of any kind were to reach or leave German ports.

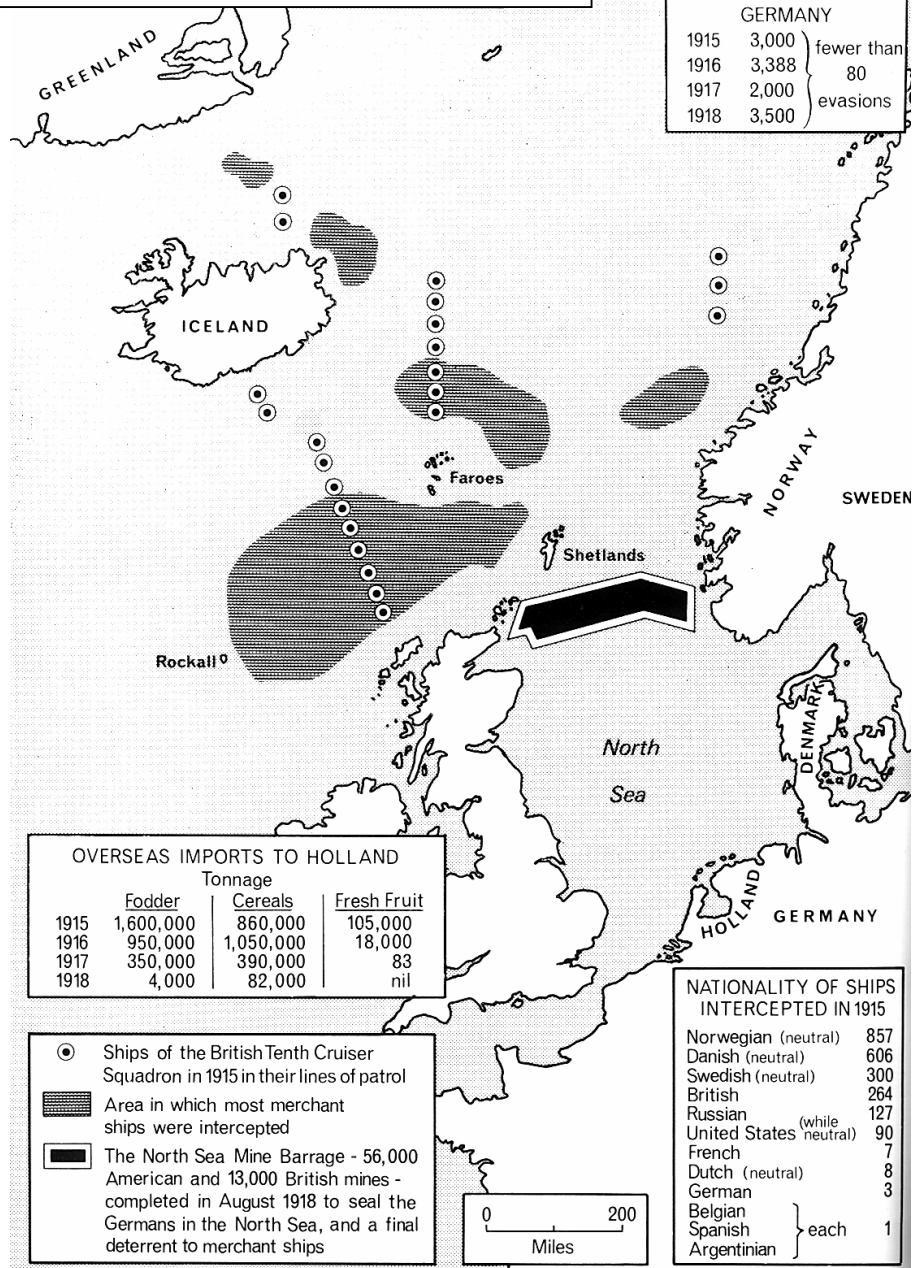
In late 1917 and early 1918, the Royal Navy, in cooperation with the U.S. Navy, sought to seal off the North Sea by expanding the minefields in the English Channel (depicted below in Map 3 and known as the Dover Strait or Folkestone-Gris Mine Barrage) and in the North Sea between the Orkney Islands and Norway (known as the the North Sea Mine Barrage and depicted in Map 4 on the following page).³¹



³⁰ See Hackworth VII *Digest of International Law*, 134-138; 9 *AJIL* (1915 Special Supplement), pp. 117, 157 and 10 *AJIL* (1916 Special Supplement), pp. 72, 134. These protests were directed at the 1915 announcements, since by the time the 1917 blockade orders were issued, the U.S. was on the verge of becoming a party to World War War. See Tucker, p. 308, footnote 63. Goldie argues that the fact that after entering World War I, the U.S. embraced the policy of adopting similar zones tends to undermine the significance of the protest. Goldie, p. 180.

³¹ Politakis, pp. 182-187.

Map 4 North Sea Mine Barrage 1918



Source: Martin Gilbert, *Atlas of World War I* (1994), p. 74

B. German Zones

On 4 February 1915, in response to the initial British exclusion zone declaration and the British re-flagging policy, the German government noticed the establishment of a war zone around the British Islands, shown on Map 5 on the following page, which was effective as of 18 February 1915:

The waters around Great Britain, including the whole of the English Channel, are declared hereby to be included within the zone of war, and after the 18th inst. all enemy merchant vessels encountered within these waters will be destroyed, even if it may not be possible always to save their crews and passengers.³²

The German order addressed neutral vessels, stating that “within this war zone neutral vessels are exposed to danger” and proclaimed that such ships “cannot always be prevented from suffering the attacks intended for enemy ships,” as the result of the misuse of neutral flags and the general hazards of naval warfare.³³ Germany subsequently extended and modified its declared exclusion zone, waging war on British commerce with mines and submarines in response to the relative success of the British economic warfare campaign, coupled with the naval superiority of the Royal Navy surface fleet vis-à-vis Germany.³⁴

On 31 January 1917, Germany adopted a policy (effective the following day) of unrestricted submarine warfare in a zone covering the entire North Sea, including the waters around Great Britain, extending north to the Faroe Islands, westward from France and Britain for five hundred miles, and southward to within a few miles of the Spanish Coast. With a few exceptions, all navigation, including that of neutrals, was prohibited and the announcement stated, “all ships met within that zone will be sunk.”³⁵ No warnings would be provided prior to attack and no provisions were made for the safety of crews and passengers of such vessels.³⁶

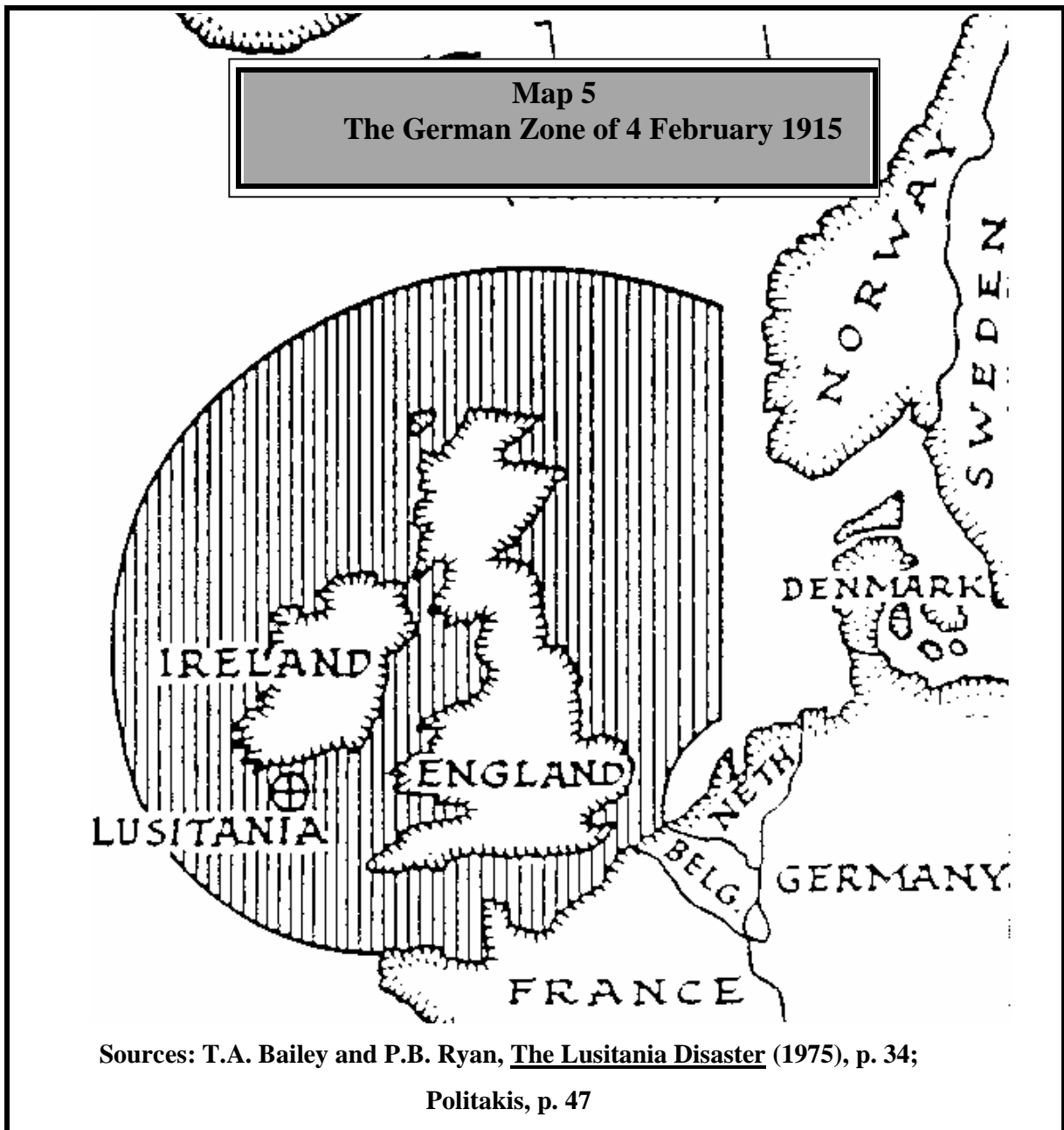
³² The full text of this order is reprinted in Garner Questions, p. 594.

³³ Ibid.

³⁴ Fenrick, pp. 96-97.

³⁵ Hackworth, VI Digest of International Law, p. 481.

³⁶ Garner, Vol. I, pp. 337-338.



This German zone, which was described as a “barred” area, covered more than one million square miles of sea, including a large portion of the Mediterranean Sea.³⁷ Narrow navigation lanes were established westward from Falmouth through the barred zone into the Atlantic and through the Mediterranean Sea to Greece.³⁸ The barred zone was subsequently

³⁷ Garner, Vol. I, p. 337.

³⁸ Garner, Vol. I, p. 337.

extended on three occasions, in March 1917, November 1917 and January 1918. As a result of these extensions, the Mediterranean safety lane was closed, in addition to the waters around the Azores and Cape Verde Islands, the waters between the Madeira and Azores and a portion of the Arctic Ocean (barring access to the northern Russian ports).³⁹ Within these zones, “all sea traffic was to be forthwith opposed by means of mines and submarines.”⁴⁰ One American passenger vessel per week was permitted to use the Falmouth safety lane and such vessels were required to carry special markings and be highly illuminated at night.⁴¹

The German submarine campaign was credited with sinking 11,135,000 tons of allied and neutral merchant vessels (more than 25% of the world’s total tonnage), out of a total of 12,742,000 tons sunk during the war.⁴² Thus, submarines were responsible for more than 87% of the damage caused to allied and neutral merchant vessels, which is all the more remarkable in light of the fact that at no time during the entire war did Germany have more than 140 submarines in active service, and that no more than one-third of those boats would have been operating at any given time.⁴³ Allied public opinion came to label the German campaign of unrestricted submarine warfare in World War I as “piracy” and “piratical acts.”⁴⁴ Although not technically acts of piracy (as defined by international law),⁴⁵ these terms “grew into general usage as the pejorative characterization of the policy of unrestricted submarine warfare.”⁴⁶ As a result, there were intensive efforts in the two decades after the First World War to abolish—or at least significantly curtail—the use of submarines.⁴⁷ Map 6 depicts the areas where German U-Boats were particularly active against Allied shipping in 1917.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² G.R. Lindsey, “Tactical Anti-Submarine Warfare: The Past and the Future,” in *Adelphi Paper 122, Power at Sea: The New Environment* (1976), p. 30.

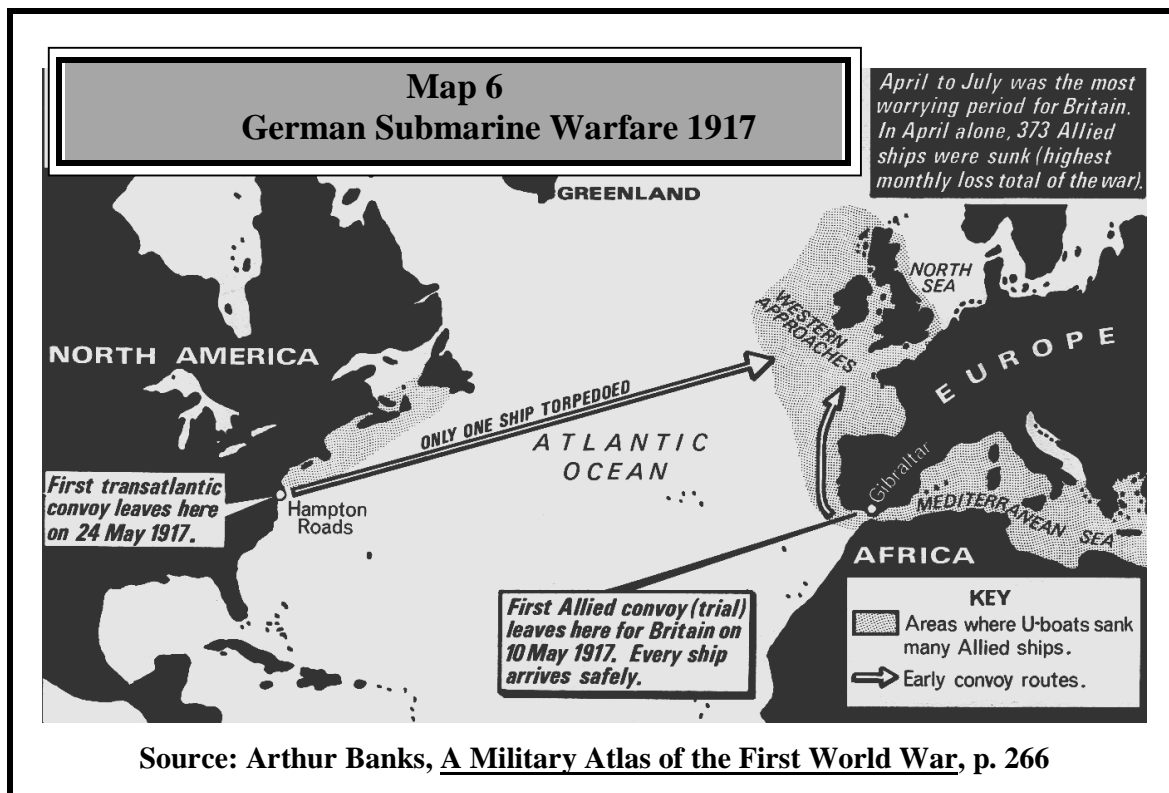
⁴³ O’Connell Influence, p. 47.

⁴⁴ L.F.E. Goldie, Commentary on the 1937 Nyon Agreements, in Ronzitti, pp. 489-502, at p. 492.

⁴⁵ On the law of piracy, see Alfred P. Rubin, *The Law of Piracy*, 2006.

⁴⁶ L.F.E. Goldie, Commentary on the 1937 Nyon Agreements, in Ronzitti, pp. 489-502, at p. 492.

⁴⁷ The United Kingdom, as the world’s leading naval power, fought particularly hard to outlaw the use of the submarine in warfare. See Busuttil, pp. 123-130.



By the conclusion of World War I, it was clear significant changes had occurred with respect to the traditional methods of conducting naval warfare, specifically with respect to the law of blockade. In fact, this change was evident from the outset of the war on the basis of the widespread use of “war zones.” As an editorial in the *American Journal of International Law* noted in 1915:

[A] striking feature of the present war is the absence of blockade formally declared and applied in the way that doctrine has been previously recognized, namely, by the actual patrol of the enemy’s coasts and waters with a sufficient number of cruisers to prevent ingress and egress. In its place “military areas” or “war zones,” depending for their effectiveness upon submarine mines and torpedo boats, have been established not only within the enemy’s waters, but upon the high seas.⁴⁸

Moreover, the risks posed to neutral shipping by these changes had a significant impact on the “penalty” imposed on neutrals by the belligerents. This point is illustrated by the fact that under the traditional law of blockade, a vessel that breached the blockade was subject to

⁴⁸ Editorial Comment, “Mines, Submarines and War Zones—The Absence of Blockade,” 9 *AJIL* (No. 2, April 1915), pp. 461-471, p. 461.

confiscation after condemnation by a prize court.⁴⁹ With the establishment of war zones, however, a vessel entering such a zone faced the risk imposed by mines or being sunk on sight by a belligerent warship.⁵⁰

III. The Spanish Civil War⁵¹

The Spanish Civil War commenced as an “insurrection” led by General Francisco Franco against the established Republican government on 14 July 1936. Almost immediately, Spain was physically divided between the Republican government⁵² and Franco’s National forces.⁵³ The issue of whether or not the parties to the conflict could exercise belligerent rights on the high seas was the major legal controversy of the war,⁵⁴ and this problem was compounded by the fact that several European States provided arms to one side or the other. In interfering with neutral shipping, both parties to the conflict justified their actions on the flow of arms intended for the opposing side.

A. Interference with Merchant Shipping

The major naval powers denied belligerent rights to the parties and subsequently the parties commenced a multi-pronged campaign of interfering with merchant shipping both on the high seas and in Spanish territorial seas.⁵⁵ The first type of interference involved visitation and search of foreign vessels, including forced deviation of ships into Spanish ports for inspection and confiscation of cargo.⁵⁶ This campaign of interference on the high seas was

⁴⁹ On the law of prize, see Politakis, pp. 526-642.

⁵⁰ This issue is elaborated upon in Chapter 7 of the current work.

⁵¹ In general, see Padelford International Law and Diplomacy and Politakis, pp. 54-56.

⁵² The government controlled about two-thirds of the country, including the southern, eastern and northern coastline of Spain. Willard C. Frank, Jr., “Multinational Naval Cooperation in the Spanish Civil War, 1936,” 47 *NWCR*, No. 2 (Spring 1994), pp. 72-101, map at p. 75.

⁵³ By late July 1936, Franco’s forces controlled the western and north central parts of the country and isolated pockets of territory around Cádiz, Algeciras, Cordoba, Grenada, Seville, most of the Balearic Islands, including Mallorca and Spanish Morocco, with the exception of Tangier, which remained in government hands. *Ibid.*

⁵⁴ O’Connell Influence, pp. 115-122. See also Fenrick, p. 99.

⁵⁵ Padelford International Law and Diplomacy, pp. 26-28. See also Padelford Spanish Civil War and Norman J. Padelford, “Foreign Shipping During the Spanish Civil War,” 32 *AJIL* (No. 2, April 1938), pp. 264-279.

branded as a form of “piracy” and several States placed their merchant vessels under armed protection on the high seas adjacent to the Spanish territorial sea.⁵⁷ Eventually, the Nationalist forces, with assistance from the Italian Navy, began attacking without warning ships on the high seas that were *en route* to Republican ports.⁵⁸

Second, a campaign of submarine warfare ensued, with Italian and German submarines assisting Franco’s Nationalist forces.⁵⁹ Both foreign merchant vessels and warships were targeted⁶⁰ and at least one vessel, the American S.S. *Excambion*, was actually visited and released on the high seas by a Republican submarine.⁶¹ It is worth noting that all of these attacks came within months of the signing of the 1936 London Protocol (also known as the London *Procès-Verbal*) governing the conduct of submarine warfare, and which included both Germany and Italy (but *not* Spain) among its signatories.⁶²

The third form of interference with foreign shipping took the form of declaring “war zones” or “blockades.” On 9 August 1936, Republican Spain declared the following areas to be “zones of war” and “subject to blockade”: Spanish Morocco, the Canary Islands, Ifni and Rio de Oro, followed two days later by a similar declaration with respect to the coasts of Huelva, Cádiz, Lugo, Corunna, Pontevedra and the Balearic Islands.⁶³ Before the war was concluded, the Spanish Republican government ultimately proclaimed a war zone around all Spanish ports.⁶⁴ General Franco’s National government announced its intention of halting the flow of arms and *matériel* through the port of Barcelona on 17 November 1936, noticing that:

The National Government, being resolved to prevent this traffic with every means of war at its disposal will even go so far, if this were necessary, to destroy that port. Therefore, it warns all foreign ships anchored in that harbor of the desirability of abandoning it in

⁵⁶ Padelford International Law and Diplomacy, p. 26. See also *ibid.*, Appendix XV-1, pp. 663-667, listing more than one hundred *reported* incidents of foreign vessels being accosted by one of the parties.

⁵⁷ Padelford International Law and Diplomacy, p. 27.

⁵⁸ Fenrick, p. 99.

⁵⁹ Willard C. Frank, Jr., “Naval Operations in the Spanish Civil War, 1936-1939,” 37 *NWCR* (No. 1, January-February 1984), pp. 24-55, at pp. 33-37, 55.

⁶⁰ Padelford International Law and Diplomacy, Appendix XV-3, pp. 673-674, lists sixteen *reported* incidents of foreign vessels being either sunk or fired upon by submarines.

⁶¹ Padelford International Law and Diplomacy, Appendix XV-3, pp. 673-674.

⁶² This treaty is discussed in Chapter 3 *ad passim* and Chapter 7, section VI.

⁶³ Padelford Spanish Civil War, pp. 226-227.

⁶⁴ Politakis, p. 54.

a very short time to avoid the consequences of damage which, unintentionally, might be caused to them on the occasion of the military action referred to of which no further warning will be given.⁶⁵

In addition to these declared war zones, the parties also sowed mines in Spanish territorial seas and the adjacent high seas, the fourth form of interference with foreign shipping.⁶⁶ In September 1936, the Spanish Republican government sowed mines in the Mediterranean Sea and the Bay of Biscay.⁶⁷ The Nationalist forces relied on assistance from German submarines to sow mines in Spanish waters.⁶⁸ These mining efforts proved relatively fruitless, with the Republican mines destroying or damaging only three vessels inside the three-mile territorial sea and damaging one vessel on the high seas,⁶⁹ while Nationalist mines damaged five merchant vessels in Spanish territorial waters, having no impact on the supply of Soviet *matériel* to the Republican forces, which the mines were intended to reduce.⁷⁰

A final form of interference with neutral shipping concerned aerial bombardment of foreign merchant and naval vessels.⁷¹ These aerial attacks were made without warning and without any effort being made to visit and search the vessel in question either at sea or following a diversion to port.⁷² Britain, France, Germany and Italy all ordered their warships in the vicinity to fire upon any aircraft bombing their respective merchant vessels outside the three-mile limit.⁷³

⁶⁵ Padelford Spanish Civil War, pp. 231-232. See also Politakis, pp. 54-55 and footnote 35 therein. It is interesting to note that the stated goal of the Nationalists was not the destruction of neutral vessels *per se*, but rather the destruction of the port of Barcelona itself.

⁶⁶ Willard C. Frank, Jr., "Multinational Naval Cooperation in the Spanish Civil War, 1936," 47 *NWCR*, No. 2, (Spring 1994), pp. 72-101, at p. 83; Busuttil, p. 33.

⁶⁷ Padelford International Law and Diplomacy, pp. 28-29.

⁶⁸ Willard C. Frank, Jr., "Naval Operations in the Spanish Civil War, 1936-1939," 37 *NWCR* (No. 1, January-February 1984), pp. 24-55, at p. 41.

⁶⁹ Padelford International Law and Diplomacy, p. 29.

⁷⁰ Willard C. Frank, Jr., "Naval Operations in the Spanish Civil War, 1936-1939," 37 *NWCR* (No. 1, January-February 1984), pp. 24-55, at p. 41.

⁷¹ Padelford International Law and Diplomacy, p. 31. See also *ibid.*, Appendix XV-2, pp. 667-673, listing more than one hundred seventy-five *reported* incidents of foreign vessels being bombed by one of the parties.

⁷² Padelford International Law and Diplomacy, p. 31

⁷³ *Ibid.*

B. Non-Intervention System and 1937 Nyon Agreement

Britain, France, Germany and Italy established an international non-intervention system in September 1936 in response to this interference.⁷⁴ As part of this scheme, which functioned until it was abandoned in July 1938, these four major European powers concluded two agreements on 12 June 1937 for protecting their ships and providing for consultation in the event of future attacks.⁷⁵ These agreements, which were undertaken between the four western powers, on the one hand, and each of the Spanish parties acting separately, on the other hand, collapsed in the wake of the failure of the western powers to agree on what course of action should be taken after the German cruiser *Leipzig* was torpedoed and because the Spanish Republican government eventually rejected the guarantee proposals.⁷⁶

In light of the increased aerial attacks in the summer of 1937, coupled with the continuing threat from submarines, an international conference was convened in Nyon in September 1937. The 1937 Nyon Agreement⁷⁷ and the Agreement Supplementary to the Nyon Agreement,⁷⁸ established a scheme which has been characterised by Fenrick as a “reverse exclusion zone.”⁷⁹ The 1937 Nyon Agreement and 1937 Nyon Supplementary Agreement were designed to protect “all merchant ships not belonging to either of the conflicting Spanish parties,”⁸⁰ and specifically referred to the submarine attacks as acts of piracy.⁸¹ The 1937 Nyon Agreement contains several provisions. First, any submarine that attacks a merchant vessel contrary to the 1930 London Naval Treaty or the 1936 London London Protocol was to be attacked.⁸² Second, any submarine encountered in the vicinity

⁷⁴ Ibid., pp. 53-120.

⁷⁵ Ibid., pp. 32-33; see also L.F.E. Goldie, Commentary on the 1937 Nyon Agreements, in Ronzitti, pp. 489-502, at pp. 491-492.

⁷⁶ Padelford International Law and Diplomacy, pp. 32-33.

⁷⁷ 1937 Nyon Agreement.

⁷⁸ 1937 Nyon Supplementary Agreement.

⁷⁹ Fenrick, p. 99.

⁸⁰ 1937 Nyon Agreement Article I; 1937 Nyon Supplementary Agreement Article II.

⁸¹ See L.F.E. Goldie, Commentary on the 1937 Nyon Agreements, in Ronzitti, pp. 489-502, at pp. 492-493, 495-498 for a thorough discussion of whether this label was accurate or appropriate. The League of Nations subsequently adopted a resolution characterizing these attacks as being “repugnant to the conscience of the civilized nations.” See Padelford International Law and Diplomacy, Appendix XI, pp. 629-630.

where a neutral merchant ship had recently been attacked contrary to the London rules would “give valid reasons for the belief that the submarine was guilty of the attack” thereby justifying the targeting of the submarine.⁸³ Third, in order to facilitate this arrangement, the parties divided the Mediterranean Sea into patrol zones.⁸⁴ Fourth, to avoid “friendly fire,” the parties agreed not to send their own submarines into the Mediterranean Sea without prior notification *intra partes* or in specially reserved exercise areas in that sea pursuant to an annex.⁸⁵ Fifth, the parties agreed to advise their merchant shipping to follow certain shipping routes in the Mediterranean Sea.⁸⁶ Moreover, in the Supplementary Agreement, the parties agreed to open fire on any aircraft committing an attack on merchant shipping and to intervene in any attack committed against such merchant vessels by surface ships.⁸⁷

Thus, the western naval powers established an International Naval Patrol designed to protect all non-Spanish merchant vessels in the Mediterranean from unlawful attacks, primarily by submarines. On 2 February 1938, the British, French and Italian governments jointly decided that the warships of the International Naval Patrol should be authorised to attack (and destroy if possible) *any* submerged submarine encountered in their respective zones.⁸⁸ Thus, by 3 February 1938, the entire western Mediterranean Sea was a vast anti-submarine exclusion zone, although the International Naval Patrol engaged no submarines after that date.⁸⁹ Of course, given the balance of naval power in the Mediterranean Sea at that time, no nation could challenge the combined naval power of the British, French and Italian navies.

⁸² 1937 Nyon Agreement, Article II.

⁸³ Ibid., Article III.

⁸⁴ Ibid., Article IV.

⁸⁵ Ibid., Article V. Neither Schindler and Toman nor Ronzitti reproduce the annexes to the 1937 Nyon Agreement. However, Appendix IX of Padelford International Law and Diplomacy contains this annex.

⁸⁶ 1937 Nyon Agreement Article VI. These traffic routes are set forth in Annex II to the 1937 Nyon Agreement. Appendix IX of Padelford International Law and Diplomacy contains this annex, which includes a map designating the agreed upon routes.

⁸⁷ 1937 Nyon Supplementary Agreement Article III.

⁸⁸ Politakis, p. 56 and footnote 39 cited therein.

⁸⁹ Ibid., p. 56.

IV. World War II

A. The War in the Atlantic

It has been argued that the Second World War was merely the final chapter of the First World War, and the naval tactics employed by the belligerents in the Atlantic certainly proves this point.⁹⁰ Almost immediately upon the outbreak of hostilities, Great Britain resumed economic warfare on the seas against Germany, using many of the same tactics employed during the First World War. For example, shortly after the war started, the Admiralty armed its merchant vessels, placed many of them under convoy, required them to announce sightings of submarines and on 1 October 1939, announced that all British merchant vessels had been ordered to ram German U-Boats if possible.⁹¹ Moreover, as was done in World War I, Britain and France announced on 27 November and 28 November 1939, respectively, a long distance blockade of German ports and the ports of any territory occupied by Germany, based on belligerent reprisals.⁹²

On 24 December 1939, the British Admiralty also noticed its intent to begin laying mines in the North Sea off the east coast of England and Scotland, on the grounds that the Germans laid automatic moored mines in that area outside British territorial waters without providing adequate notice.⁹³ This minefield, known as the East Coast Mine Barrage, is depicted in Map 7.

Moreover, on 8 May 1940, the Royal Navy established a small exclusion zone in the Skaggeurak for part of the war and within this zone all ships were to be sunk on sight during the night.⁹⁴ In July 1940, the British Admiralty proposed the establishment of a war zone off the coasts of northern Europe and northwest Africa up to a width of 300 nautical miles.⁹⁵ Although a proposal to sink neutral ships entering this zone was rejected by the British

⁹⁰ In general, see *ibid.*, pp. 57-64.

⁹¹ *Dönitz Judgement* p. 558.

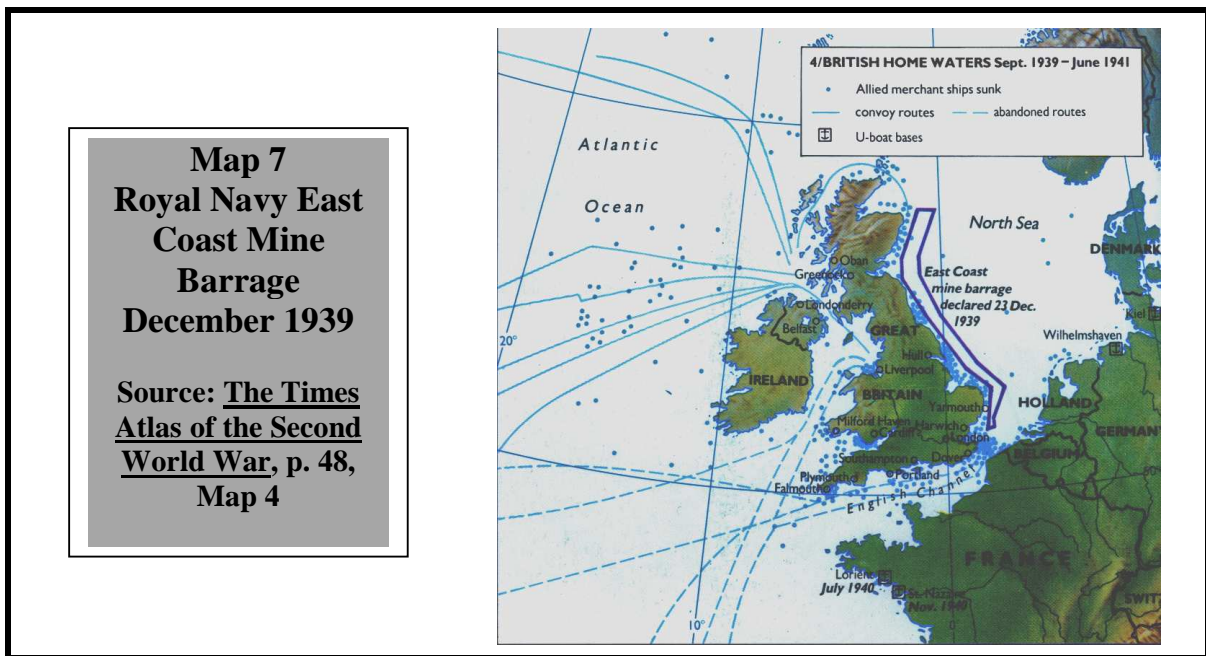
⁹² Hackworth, VII *Digest of International Law*, 138-140. For the U.S. position on these long distance blockades, see Hackworth, VII *Digest of International Law*, pp. 140-141; 1939 *ILS*, pp. 20-24. See also Frits Kalshoven, *Belligerent Reprisals* (1971), pp. 115-160; Tucker, pp. 312-315; Goldie, pp. 180-181. See also Note on Belligerent Reprisals, Chapter 6.

⁹³ Hackworth, VI *Digest of International Law*, p. 510. On mine warfare in World War II generally, see Busuttil, pp. 34-37; Politakis, pp. 188-189.

⁹⁴ *Dönitz Judgement*, p. 559. See also Mallison, pp. 86-87.

⁹⁵ Politakis, pp. 59-60.

Government, the war cabinet did agree that any ship in this area that was not certified (“navicerted”) would be liable to seizure.⁹⁶



The United States took two important steps during 1939 as a result of the increased danger to shipping in the Atlantic, in order to minimise the possibility of U.S. involvement and mindful of the events that occurred during World War I. First, on 4 November 1939, President Roosevelt declared a large area of the Eastern Atlantic Ocean to be a combat area.⁹⁷ All U.S. citizens, ships and aircraft were prohibited from entering this area, as the President made clear in a press release issued at the same time that he signed the proclamation:

From now on, no American ships may go to belligerent ports, British, French and German, in Europe or Africa as far south as the Canary Islands. This is laid down in the law and there is no discretion in the matter.⁹⁸

⁹⁶ Ibid., pp. 59-60. This area covered approximately 120,000 square nautical miles. See Dönitz Trial, p. 336.

⁹⁷ Presidential Proclamation No. 2376, 4 November 1939, 4 Federal Register 4495 (7 November 1939), reprinted in 34 AJIL (Supplement, No. 1, January 1940), pp. 58-59.

⁹⁸ Statement by the President, 4 November 1939, State Department Press Release No. 573, reprinted in 34 AJIL (Supplement, No. 1, January 1940), p. 60. The law referred to is the Neutrality Act of 1939, which is also reprinted in *ibid.*, pp. 44- 55. Section 3 of the Neutrality Act specifically authorised the President to establish such combat areas.

This declaration was “readily propagated by the Germans as a tacit consent to the practice of free-fire zones,” and has been cited as a contributing factor in their decision to engage in unrestricted submarine warfare.⁹⁹

Second, a number of States in the Western Hemisphere adopted the Declaration of Panama on 3 October 1939, establishing a neutrality zone around the western hemisphere, excluding Canada.¹⁰⁰ This zone was defined by straight baselines extending roughly 300 miles out to sea.¹⁰¹ Pursuant to detailed regulations issued by the Inter-American Neutrality Committee in April 1940, the belligerents were prohibited from “any hostile, detention, capture or pursuit, the discharge of projectiles, the placing of mines of any kind, or any operation of war” in the zone.¹⁰² Although this neutrality zone eventually became effective, it did not have a “sound basis in traditional law” and has been “universally rejected by the analysis of the law of war.”¹⁰³ Moreover, although the creation of the neutrality zone certainly interfered with belligerent rights on the high seas, none of the belligerents vigorously protested its establishment, largely on political grounds.¹⁰⁴ The most striking example of a challenge to this zone came with the *Graf Spee* incident off the coast of Uruguay in December 1939.¹⁰⁵

In late 1939 and into early 1940 the German Navy took several steps in response to these Allied acts. First, by October 1939, the German U-Boat command was ordered to attack all armed enemy merchant vessels without warning and on sight.¹⁰⁶ Second, on 24 November 1939, the Germans issued a warning to neutral shipping that the safety of neutral vessels in the waters around the British Isles and the French coast could no longer be guaranteed as a result of the engagements occurring between German U-Boats and armed Allied merchant

⁹⁹ Politakis, p. 58 and footnote 45 cited therein.

¹⁰⁰ 4 *AJIL* (Supplement No. 1, January 1940), pp. 17-20. See also Inter-American Neutrality Committee, Recommendation on the Extension of Territorial Waters, 8 August 1941, 36 *AJIL* (Supplement No. 1, January 1942), pp. 17-22; and O’Connell Influence, p. 162.

¹⁰¹ O’Connell Influence, p. 162.

¹⁰² *Ibid.*, p. 163.

¹⁰³ *Ibid.*, p. 164.

¹⁰⁴ The British were largely complacent out of recognition of that country’s reliance on the support of the United States, while Germany feared antagonizing the Americans. Fenrick, p. 101; O’Connell Influence, pp. 162-164.

¹⁰⁵ See Introduction, footnote 4.

¹⁰⁶ *Dönitz Judgement*, pp. 557-558. See also Politakis, p. 57.

vessels.¹⁰⁷ Third, on 1 January 1940, based on German intelligence that the Greek government was aware that Greek shipping companies were chartered by England, Hitler ordered the German U-Boat command to attack all Greek merchant vessels in a zone around the United Kingdom (that was contiguous with the 1939 U.S. Combat Area) and all merchant vessels in the Bristol Channel.¹⁰⁸ Five days later, further orders extended unrestricted submarine warfare in a defined area of the North Sea, including the waters Northeast of Scotland, the Orkneys and the Shetlands.¹⁰⁹ On 18 January 1940, U-Boats were authorised to sink without warning all ships (excluding U.S., Italian, Japanese and Soviet vessels) “in those waters near the enemy coast in which the use of mines can be pretended.”¹¹⁰ Early on in the submarine campaign, the German Navy was under orders to comply with international law concerning rescue of shipwrecked individuals, as far as militarily possible. In 1942, however, following the sinking of the *Laconia* and American air attacks on submarines attempting to assist the shipwrecked, Admiral Dönitz issued an order to the effect that:

The rescue of members of the crew of a ship sunk is not to be attempted. Rescue is contradictory to the most primitive demands of warfare, which are the annihilation of enemy ships and crews.¹¹¹

By May 1940, neutral shipping was excluded from an area extending 60 to 100 miles off the French and British coasts and only passenger vessels and merchant ships of those neutral states considered friendly to Germany were permitted to enter these waters.¹¹² The Germans declared an extensive operational area (which coincided with the 1939 U.S. Combat Area) on 17 August 1940, which was notified to all neutral maritime states except the United States in light of that country’s neutrality legislation.¹¹³

¹⁰⁷ Dönitz Judgement, p. 558.

¹⁰⁸ Ibid.; Nürnberg Proceedings, Vol. XIV, pp. 82-83 (Räder Testimony); Nürnberg Proceedings, Vol. V, pp. 275-276; Räder Documents 53, 54, *ibid.*, Vol. XLI, pp. 29-31; Great Britain Documents 225 and 226, *ibid.*, Vol. XXXIV, pp. 162-63, 196-197, respectively; *ibid.*, Vol. XVIII, pp. 405-406.

¹⁰⁹ Dönitz Judgement, p. 558; Politakis, p. 58.

¹¹⁰ Dönitz Judgement, p. 558.

¹¹¹ Dönitz Trial, p. 348. This order is widely known as the “*Laconia* order.” Notwithstanding this order, Admiral Dönitz was acquitted of charges that he ordered the deliberately killing of shipwrecked survivors, on the grounds that the *Laconia* order and War Order 154 (which applied to the small number of submarines operating off the coast of Great Britain) were “undoubtedly ambiguous.” See Dönitz Judgement, p. 559; Dönitz Trial, p. 348.

¹¹² Politakis, p. 58. The vessels of Italy, Japan, Spain and the Soviet Union were the exceptions.

¹¹³ Hackworth, VI Digest of International Law, p. 485.

In the sea area surrounding the British Isles constant war action is consequently from now on to be expected which makes it impossible for merchant ships to pass through this area without running serious risks. The entire area around the British Isles has therefore become a combat zone. Every ship which sails in this area exposes itself to destruction not only by mines but also by other combat means. Therefore, the German Government once more urgently warns against entering this endangered area.¹¹⁴

The total area subject to the German operational area amounted to some 795,000 square miles.¹¹⁵

For the remainder of the war in the Atlantic, these zones remained intact with two important expansions. First, following the U.S. entry into the war in December 1941, the Germans expanded the zone announced in August 1940 to include most of the Atlantic Ocean and up to the East Coast of the U.S. In broadcasting this expansion, the Germans stated that:

Every ship entering this zone after June 26, 1942, will expose itself to destruction. ... The German Government, therefore, warns all ships against navigating in this danger zone...¹¹⁶

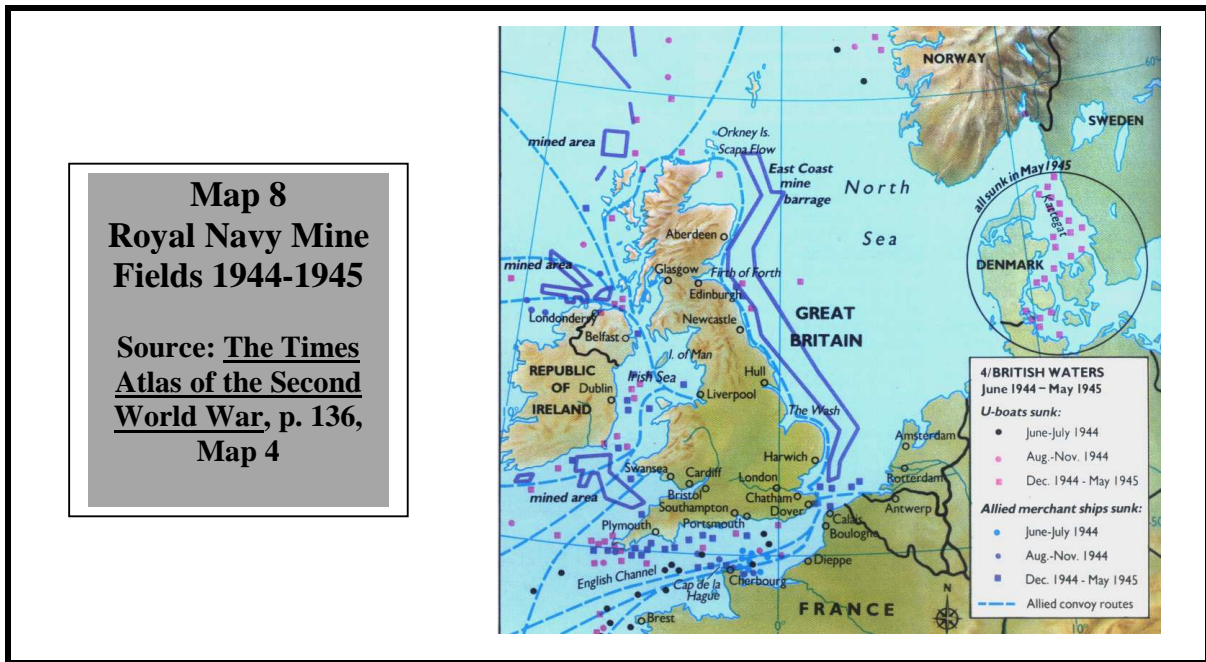
Second, on 15 February 1944, the British Admiralty declared an additional area “dangerous” to shipping. This area included virtually the entire Bay of Biscay and blocked the southern end of St. George’s Channel between Ireland and Wales. Any vessel entering this area without the express authority of the British Admiralty did so at her own peril.¹¹⁷ Map 8 shows the full extent of naval minefields in British waters during the final year of World War II.

¹¹⁴ Ibid., pp. 485-486. See also Dönitz Trial, pp. 328-329.

¹¹⁵ Dönitz Trial, p. 331. The source refers to 600,000 square nautical miles, which is the equivalent to 794,572.815 square miles.

¹¹⁶ Berlin radio broadcast recorded by Columbia Broadcasting Company, New York Times, 14 June 1942, reprinted in ILD, 1941, p. 158 and ILD, 1943, pp. 62-63.

¹¹⁷ ILD, 1943, p. 63.



B. The War in the Pacific

With respect to the war in the Pacific, the United States Navy waged “an extremely successful unrestricted anti-shipping campaign against Japanese sea communications.”¹¹⁸ Following the attack on Pearl Harbor, the United States declared an exclusion zone covering the entire Pacific Ocean and all non-allied shipping was attacked.¹¹⁹ Although the Pacific Ocean encompasses 69,000,000 square miles and stretches from the Arctic Circle to Antarctica,¹²⁰ Goldie has pointed out the obvious, namely that:

An announcement of indiscriminate sinking by submarines in such a vast area may not, it is suggested, reasonably be regarded as the enforcement of a maritime exclusion zone, except by a naval service many times larger than the enormous force that the United States Navy deployed there.¹²¹

As a result, despite the announcement by the U.S. Government that the entire Pacific Ocean was an exclusion zone, the “areas of actual attack tended to be where concentrations of

¹¹⁸ Fenrick, p. 101.

¹¹⁹ *Dönitz Document 100*. According to Fenrick, a limited amount of sea traffic to and from the Soviet Union, which was neutral in the Pacific war until August 1945, was excluded from attack. Fenrick, p. 101.

¹²⁰ Goldie, p. 185.

¹²¹ *Ibid.*, pp. 185-186.

Japanese shipping were to be found and where the submarines were ordered.”¹²² It was argued before the Nürnberg Tribunal that the area actively patrolled by the U.S. Navy in the Pacific Ocean was approximately 30 million square miles.¹²³ Moreover, very little non-neutral shipping occurred in these waters while the war in the Pacific was being fought.

At the trial of German Admiral Dönitz before the IMT, the defence introduced written interrogatories of U.S. Fleet Admiral Chester M. Nimitz regarding the scope of U.S. naval operations in this zone.¹²⁴ According to Fleet Admiral Nimitz, Admiral Harold R. Stark, the U.S. Chief of Naval Operations, ordered unrestricted submarine warfare against Japan on 7 December 1941.¹²⁵ With the exception of allied merchantmen, hospital ships and other vessels under “safe conduct” voyages for humanitarian purposes, submarines attacked all merchant vessels without warning.¹²⁶ Like many allied merchant vessels in the Atlantic, Japanese merchantmen were usually armed and, given the opportunity to do so, attacked U.S. submarines by ramming, gunfire or depth charges, and it quickly became apparent to U.S. officials that Japanese merchant vessels were reporting U.S. submarine sightings to Japanese warships.¹²⁷ Fleet Admiral Nimitz also stated that in general, U.S. submariners did not rescue enemy survivors if “undue additional hazard to the submarine resulted or the submarine would thereby be prevented from accomplishing its further mission,” although on many occasions rubber boats and/or provisions were provided.¹²⁸

The United States also waged an extensive mine warfare campaign against the Japanese throughout the Pacific Ocean and a number of Asian coastlines and ports were mined.¹²⁹ Among these mining operations was “Operation Starvation,” which, as its name suggests, was designed to push the Japanese “to the brink of starvation and capitulation” through the mining of Japanese ports and harbours.¹³⁰

¹²² Ibid., p. 186.

¹²³ *Dönitz Trial*, pp. 336-337; *Dönitz Document* 100. See also Politakis, p. 60 and footnote 52 cited therein.

¹²⁴ *Dönitz Document* 100.

¹²⁵ Ibid., p. 109.

¹²⁶ Ibid., p. 109.

¹²⁷ Ibid., p. 110.

¹²⁸ Ibid., p. 110.

¹²⁹ Busuttil, p. 36.

¹³⁰ Ibid., p. 36; Politakis, pp. 190-192.

It should also be noted, for the sake of completeness concerning the establishment of zones, that a few days after the attack on Pearl Harbor, President Roosevelt established several “naval defensive sea areas” along the U.S. coasts, similar to those imposed by President Wilson in 1917.¹³¹

V. The Korean War¹³²

Since neither North Korea nor China had any significant naval capabilities, NEZs as such were not employed during the Korean War. Rather, the defining aspect of the naval component of that conflict was the use of a close blockade, “a method of economic warfare considered obsolete because it was essentially unpractised during the two World Wars.”¹³³ The 1909 London Declaration, which laid down rules to be applied by the International Prize Court envisioned by the 1907 Hague Convention XII, contains 21 articles governing the law of blockade.¹³⁴

On 4 July 1950, the United States imposed a blockade off the Korean coast, broadcasting to all shipping in the Pacific Ocean that:

The President of the United States, in keeping with the United Nations Security Council’s request for support to the Republic of Korea in repelling the Northern Korean invaders and restoring peace in Korea, has ordered a naval blockade of the Korean coast.¹³⁵

¹³¹ See Executive Order, 11 December 1941, “Establishing Defensive Sea Areas at Portland, Maine; Portsmouth, New Hampshire; Boston, Massachusetts; Narragansett Bay; San Diego, California; San Francisco, California; Columbia River Entrance, and Strait of Juan de Fuca and Puget Sound,” reprinted in ILD, 1941, pp. 83-90.

¹³² The standard work on the naval aspects of the Korean War is Cagle and Manson.

¹³³ Fenrick Developments, p. 63.

¹³⁴ 1909 London Declaration. The 1909 London Declaration was rejected by the House of Lords and was not ratified by any of the 10 signatories. The rules were recognised by several belligerent States during World War I, however. See Introductory Note, Schindler and Toman #70, p. 843. While the law of blockades is discussed below in Chapter 7, section IV, there are four basic requirements for a blockade to be legal: (1) it must be effective, that is, it must be maintained by a force sufficient to prevent access to the blockaded coastline; (2) it may only be imposed against enemy ports or coasts; (3) it must be applied impartially against the vessels of all nations; and (4) it must be both declared and notified.

¹³⁵ Cagle and Manson, p. 281. The specific limits of this blockade, 39°-35′ North on the West coast of the Korean peninsula and 41°-51′ North on the East coast of the Korean peninsula, were established to keep all sea forces clear of Soviet and Chinese territory. Moreover, the blockaded area specifically excluded the port city of Rashin, which was under lease to the Soviet Union. Ibid.

Admiral Forrest P. Sherman, then U.S. Chief of Naval Operations, stated that all *warships*, except those of North Korea, not under the command of the United Nations, would be permitted to enter North Korean ports, while all *other* types of ships were barred.¹³⁶ Although both the Soviet Union and China denounced the blockade, and refused to acknowledge its legality, both States observed it.¹³⁷

In September 1950, the U.N. naval forces began enforcing a restriction on fishing by North Korean vessels,¹³⁸ notwithstanding the fact that fish was the main staple of the Korean diet¹³⁹ and that the 1907 Hague Convention XI prohibited the capture as prizes of war of coastal fishing vessels.¹⁴⁰ In less than one year, 213 North Korean fishing vessels were destroyed, 147 were damaged and nine were captured.¹⁴¹ Although many of the “fishing vessels” were actually engaged in mine laying in the blockaded waters,¹⁴² and hence were legitimate military objects, Fenrick’s conclusion regarding this aspect of the naval war is worthy of note:

To the extent that the anti-fishing campaign was conducted to destroy the fishing industry and impose additional logistical burdens on the enemy, it would appear to have been a military failure which merely increased the total suffering of the civilian population.¹⁴³

Naval mine warfare played a limited role in the Korean War, unlike the situation that had existed in the Second World War in the Pacific.¹⁴⁴

¹³⁶ Ibid., p. 281.

¹³⁷ Ibid.

¹³⁸ U.N. SCOR Supp. (June-August 1950), p. 50, U.N. Doc. S/1580 (1950), reprinted in Whiteman, Volume X Digest of International Law, pp. 866-867; Cagle and Manson, pp. 281-283, 296-297.

¹³⁹ Cagle and Manson, p. 296.

¹⁴⁰ 1907 Hague Convention XI, Article 3.

¹⁴¹ Cagle and Manson, p. 321.

¹⁴² Ibid., p. 296.

¹⁴³ Fenrick Developments, p. 68. Such anti-fishing campaigns are unlawful pursuant to the 1907 Hague Convention XI, Article 3.

¹⁴⁴ Busuttil, pp. 37-38.; Politakis, pp. 193-195.

VI. The Vietnam War

During the Vietnam War, there were two naval operations, Operation Market Time and the Yankee and Dixie Stations Carrier Operations, which do not meet the definition of NEZs as used in the present work, but which nevertheless merit discussion. The United States and South Vietnam also mined the entrances to North Vietnamese ports from 11 May 1972 until U.S. forces left Vietnam nine months later.

A. Operation Market Time¹⁴⁵

On 27 April 1965, the Republic of Vietnam promulgated a Decree on Sea Surveillance,¹⁴⁶ which closely mirrored the terms of the 1958 Geneva Conventions on the Law of the Sea.¹⁴⁷ Pursuant to this decree, the three-mile breadth of the South Vietnamese territorial sea was declared a “defensive sea area,” and any vessel transiting this water, which was prejudicial to the peace, order or security of the Republic of Vietnam was not considered innocent. Ships that were not engaged in innocent passage were subject to visit and search and possibly arrest and disposition.¹⁴⁸ Five categories of cargo were specifically listed as being suspect, including weapons, ammunition, explosives, certain chemical products, and medical supplies and foodstuffs of communist-bloc nations.¹⁴⁹

In the contiguous zone extending up to twelve miles from the baseline from which the South Vietnamese territorial seas were measured, additional conditions were placed on transiting vessels. Vessels transiting this contiguous zone were subjected to the control of South Vietnam with respect to customs, fiscal, immigration and sanitary regulations. Vessels suspected of infringing such regulations were subject to visit and search “and may be subject to arrest and disposition, as provided by the law of the Republic of Vietnam in conformity with accepted principles of international law.”¹⁵⁰

¹⁴⁵ In general, see O’Connell Contemporary Naval Operations, pp. 30-33.

¹⁴⁶ Vietnam Decree on Sea Surveillance, 27 April 1965, 4 ILM, pp. 461-462 (1965).

¹⁴⁷ O’Connell Contemporary Naval Operations, p. 31.

¹⁴⁸ Vietnam Decree on Sea Surveillance, 27 April 1965, 4 ILM, pp. 461-462 (1965), para. I, p. 461.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, p. 462.

Vessels suspected of infringing the terms of the decree were subject to hot pursuit on the high seas as provided for by international law.¹⁵¹ The Republic of Vietnam acknowledged in the decree that it had “requested and obtained the assistance” of the U.S. Navy in carrying out the enforcement of the security and defence measures set forth in the decree.¹⁵²

B. Yankee and Dixie Stations Carrier Operations

Beginning in 1965, the U.S. Navy began launching carrier-based air attacks on North Vietnam from operational areas, known as the Yankee and Dixie Stations, on the high seas in the Gulf of Tonkin. Although these operations were initially conceptualised to fill the gap created by the lack of secure air bases in the Republic of Vietnam, and notwithstanding the fact that North Vietnam was unable to conduct effective operations against the carriers, the U.S. claimed sanctuary status for these areas.¹⁵³ Under this theory, the high seas could be used to mount offensive attacks against the mainland, but that retaliation against the sea-based platforms was unacceptable. O’Connell rejects this approach:

It seems to be implied that the high seas is a sanctuary in limited operations, from which offensive action can be mounted without any right in the coastal State to retaliate against the launching vessels. International law in this case would seem to be used to rationalize and justify a course of action which was not likely to meet serious challenge in the counsels of nations. It is by no means certain that the argument could be advanced with the same cogency in the case of the Mediterranean.¹⁵⁴

Fenrick, however, takes a slightly different view, arguing that an assessment of whether or not the sanctuary approach is accepted depends on further examples of State acquiescence in cases where the coastal State clearly has the means to strike back at the launching vessels.¹⁵⁵

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Fenrick Developments, p. 89. Fenrick goes on to note that it is also possible that North Vietnam did not desire to expand the geographical scope of the conflict by attempting to launch attacks against the U.S. carriers. Ibid.

¹⁵⁴ O’Connell Contemporary Naval Operations, pp. 35-36.

¹⁵⁵ Fenrick Developments, p. 89.

C. The Mining of North Vietnamese Ports

The vast majority of North Vietnam's arms and military supplies were imported by sea and the major port of entry was Haiphong.¹⁵⁶ When the Easter offensive commenced on 30 March 1972, it was estimated that North Vietnam had adequate ammunition and supplies to last approximately four months, although about 40 merchant vessels called on North Vietnamese ports monthly.¹⁵⁷ On 8 May 1972, after the fifth week of this campaign, the Nixon administration announced that effective 11 May 1972, South Vietnamese and American naval forces would begin mining the entrances to North Vietnamese ports as a form of collective self-defence.¹⁵⁸ In a nationally-televised address, President Nixon announced that:

All entrances to North Vietnamese ports will be mined to prevent access to these ports and North Vietnamese naval operations from these ports. United States forces have been directed to take appropriate measures within the internal and claimed territorial waters of North Vietnam to interdict the delivery of any supplies.¹⁵⁹

U.S. naval forces began immediately mining the internal waters and claimed territorial waters leading to North Vietnamese ports.¹⁶⁰ This blockade remained in effect for nine months until U.S. forces withdrew from Vietnam. No foreign merchant vessels were sunk by the minefields and although five merchantmen got underway within the three-day waiting period, 27 other vessels were blocked in Haiphong Harbour by the minefields until the blockade was lifted.¹⁶¹ Neither South Vietnam nor the United States formally declared these actions to be a blockade, relying instead on collective self-defence. Nevertheless, according to Fenrick, these operations meet the classic criteria for a close blockade.¹⁶²

¹⁵⁶ Ibid., p. 83.

¹⁵⁷ Ulrik Luckow, "Victory over Ignorance and Fear: The U.S. Minelaying Attack on North Vietnam," 35 NWCR, (January–February 1982), pp. 17-27 at pp. 17-18, 24; Busuttil, pp. 38-40; Politakis, pp. 195-198.

¹⁵⁸ See speech of President Nixon, 8 May 1972, 66 Department of State Bulletin 747-750 (29 May 1972) and letter from the U.S. Representative to the UN to the President of the Security Council, 66 Department of State Bulletin 750-751 (29 May 1972).

¹⁵⁹ Ibid., p. 749.

¹⁶⁰ Fenrick Developments, p. 85; 66 Department of State Bulletin 751 (29 May 1972).

¹⁶¹ Fenrick Developments, p. 85.

¹⁶² Ibid., pp. 85-86.

VII. The Arab-Israeli Conflicts¹⁶³

The Arab-Israeli conflicts between 1948 and 1979 included a relatively limited naval component. The most important aspect of this naval activity concerned economic warfare waged from the sea, including the closure of the Suez Canal and the blockade measures in the Gulf of Aqaba and the Straits of Tiran and Bab-al-Mandeb.¹⁶⁴ These economic measures continued to apply more or less consistently throughout the period from 1948 through 1979, notwithstanding various periods of armistice or suspension of hostilities on the grounds that the Egyptians considered a state of war to exist vis-à-vis Israel during that entire period.¹⁶⁵

With respect to the Suez Canal, the Egyptian authorities issued a military order for the inspection of all vessels in the ports of Alexandria, Port Said and Suez immediately after Israel declared its independence.¹⁶⁶ Shortly thereafter, a prize court was established and all ships transiting the canal were inspected with goods destined for or exported from Israel seized.¹⁶⁷ From its establishment through 1977, this prize court rendered 581 prize decisions.¹⁶⁸ The Security Council condemned Egypt's actions in 1951, finding that in light of the fact that an armistice had been in effect for more than two and a half years, Egypt could not rely on a state of belligerency to justify the right of visit, search and seizure.¹⁶⁹

The Egyptians also hindered freedom of navigation in the Gulf of Aqaba and the Straits of Tiran from 1948-1956, when the Israelis gained control over the chokepoint to the Gulf of Aqaba following the 1956 Suez Crisis. Shortly thereafter, United Nations peacekeeping forces (UNEF), stationed at Sharm-el-Sheikh, controlled these waters until being expelled in 1967. Egypt again controlled the chokepoint and a blockade was in effect from 23 May 1967 until Israeli forces recaptured Sharm-el-Sheikh on the third day of the Six Days War. From 7 June 1967 onwards, the Straits of Tiran were open to international shipping, a situation later reflected in the 1979 peace treaty between Egypt and Israel.¹⁷⁰

¹⁶³ In general see *ibid.*, pp. 92-109 and Politakis, pp. 70-75.

¹⁶⁴ Mines were also sown in the Suez Canal and its environs. See Busuttil, p. 38; Politakis, p. 199.

¹⁶⁵ Fenrick Developments, p. 100.

¹⁶⁶ *Ibid.*, p. 99.

¹⁶⁷ *Ibid.*, p. 99.

¹⁶⁸ Politakis, p. 71.

¹⁶⁹ UN Security Council Resolution 95, UN Doc. S/2322 (1 September 1951).

During the Yom Kippur War of 1973, the Strait of Bab-al-Mandeb, connecting the Red Sea with the Gulf of Aden, Egyptian naval forces imposed a long distance blockade with the goal of impeding traffic to Eilat.¹⁷¹ This blockade was in effect until mid-December 1973, and resulted in some 12 vessels being blocked at Eilat and a further 11 vessels destined for Eilat being forced to return to Bab-al-Mandeb.¹⁷² The legality of this blockade, being some 1200 miles below the Strait of Tiran, is debatable, in part because the Egyptians apparently lacked the confidence in their ability to maintain a totally effective blockade.¹⁷³

VIII. The Indo-Pakistani Wars of 1965 and 1971¹⁷⁴

India and Pakistan fought two short wars over the disputed province of Kashmir in 1965 and 1971, and although these conflicts were fought primarily on land and in the air, both had naval components. The 1965 war consisted of two main periods of engagement: a Pakistani armoured thrust into Indian territory in the Rann of Kutch in spring 1965 that was designed to lure the Indian Army away from northern India and Kashmir and to gauge the U.S. response;¹⁷⁵ and a lengthier conflict that ran from August through December 1965, and which included naval action, when Pakistani warships shelled the Indian coastal city of Dwarka.¹⁷⁶ According to a retired Indian Navy Vice Admiral, the Indian Navy was ordered not to take aggressive action against the Pakistani naval forces because New Delhi wanted to confine the conflict to land and in the air.¹⁷⁷

¹⁷⁰ Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Article V, para. 2, 18 ILM (1979), pp. 362-393, p. 365. See also Politakis, pp. 73-74.

¹⁷¹ Sally V. Mallison and W. Thomas Mallison, Jr., "A Survey of the International Law of Naval Blockade," 102 USNIP, pp. 44-53 (February 1976), p. 51.

¹⁷² Politakis, pp. 74-75; O'Connell Influence, p. 101.

¹⁷³ O'Connell Influence, pp. 101-103; Fenrick Developments, p. 104.

¹⁷⁴ In general, see R. Kaoul, "The Indo-Pakistani War and the Changing Balance of Power in the Indian Ocean," 99 USNIP (1973), pp. 172 *et seq.*; O'Connell Influence, pp. 129-130; Politakis, pp. 68-69.

¹⁷⁵ Gulab Hiranandani, "The Indian End of the Telescope: India and its Navy," LV NWCR (No. 2, Spring 2002), pp. 61-72, at p. 63.

¹⁷⁶ *Ibid.*, p. 64.

¹⁷⁷ *Ibid.* Nevertheless, Vice Admiral Hiranandani wrote that the Indian Navy launched "a large number of attacks against underwater contacts suspected to be the submarine that the United States had given Pakistan in 1964," although without success. *Ibid.*

The naval component of the 1971 Indo-Pakistani War was short but intense, with the Indian Navy establishing complete domination of the sea due to its quantitative (ten to one) and qualitative (one aircraft carrier and several missile boats) superiority over its Pakistani counterpart.¹⁷⁸ The Indian Navy was divided into two forces, the Eastern Naval Command, which operated in the Bay of Bengal and blockaded East Pakistan, and the Western Naval Command, which operated in the Arabian Sea and was principally responsible for destroying naval targets and military facilities in the Port of Karachi and its environs.¹⁷⁹ The Indian Navy launched attacks in the Karachi area, during which Pakistan suffered several losses and at least three neutral vessels were hit.¹⁸⁰

The Indian Government announced a blockade of East Pakistan on 4 December 1971, covering a 180-nautical mile range from a point situated between the Malta and Passur Rivers eastward to the Burma East Pakistan border.¹⁸¹ Several Indian warships, including the aircraft carrier *Vikrant* enforced the blockade, which was relatively effective. Six merchantmen and several smaller ships were captured, others were sunk for failing to surrender and only one or two ships were believed to have run the blockade.¹⁸² Due to the short duration of the conflict, no prize courts were ever established. In addition, although ten Pakistani-flagged merchant ships were captured on the high seas by Indian ships operating in the western front, Pakistan did not interfere with Indian merchant shipping during the war.¹⁸³

¹⁷⁸ Politakis, p. 68.

¹⁷⁹ Ibid. The Pakistani Navy mined the entrance to Chittagong in East Pakistan and unsuccessfully attempted to lay mines to block the Bay of Bengal, in an effort to bottle up the Indian Navy. Busuttil, p. 38.

¹⁸⁰ Politakis, p. 69.

¹⁸¹ Both Pakistan and India noticed schedules of contraband goods during the war. See "Belligerent Interference with Neutral Commerce," 66 *AJIL* (1972), pp. 386-387. O'Connell notes that "no blockade was formally gazetted, and the belligerent operations were generally conducted close inshore, where the majority of shipping casualties occurred." O'Connell Influence, p. 130. Nevertheless, a Liberian-registered ship, the *Venus Challenger*, was sunk 26.5 miles offshore. Ibid., p. 129.

¹⁸² Sally V. Mallison and W. Thomas Mallison, Jr., "A Survey of the International Law of Naval Blockade," 102 *USNIP* (February 1976), pp. 44-53, p. 49; Politakis, pp. 68-69.

¹⁸³ Politakis, p. 69.

IX. The 1982 Falkland Islands War

A. Background and Introduction

Title to the Falkland Islands has been in dispute for centuries, with Britain's claim dating to 1833 on the basis of prescription and Argentina's claim dating to 1816, as successor to the Spanish claim of sovereignty.¹⁸⁴ With the exception of the two-month period when Argentina controlled the Falklands during the 1982 war, the islands have been administered continuously by Great Britain. The two main islands, East and West Falkland, lie 400 miles east of Argentina and cover approximately 4300 square miles and there are about 1800 inhabitants, 1000 of whom live in the capitol, Stanley. South Georgia Island and the South Sandwich Islands, which lie 780 miles and 1180 miles respectively east of the Falkland Islands, and both of which are virtually unpopulated, are also administered by Great Britain.

The Falklands War,¹⁸⁵ which began when Argentine forces invaded the Falkland Islands on 1-2 April 1982, has been described by Fenrick as a "freak of history."¹⁸⁶ Notwithstanding this assessment, there were four features of the Falklands War that make that conflict particularly important from the point of view of military history. Namely, the Falklands War involved:

- The first use of modern cruise missiles against the warships of a major navy;
- The first use of nuclear-powered submarines in combat;
- The first known use of Vertical/Short Take-Off and Landing (V/STOL) aircraft in combat; and

¹⁸⁴ Argentina's claim was arguably broken in 1831, when the Americans ousted the Argentines and declared the Falklands free of all government. The Argentines subsequently returned and attempted to re-establish control, but were thwarted by the arrival of a superior British naval force, which arrived in 1833. Fenrick Developments, p. 111.

¹⁸⁵ There is a relatively rich literature on the naval aspects of the Falklands War. See, for example, Freedman; Gavshon and Rice; Woodward; R.P. Barston and Patricia W. Birnie, "The Falklands Islands/Isas Malvinas Conflict: A Question of Zones," 7 Marine Policy (No. 1, January 1983), pp. 14-24; James Cable, "The Falklands Conflict," 108 USNIP (No. 9, September 1982), pp. 71-76. Fenrick Developments, pp. 110-141; and Politakis, pp. 75-89 (and footnote 89 therein containing additional resources). With respect to the war in general, see Max Hastings and Simon Jenkins, The Battle for the Falklands (1983); Middlebrook; Sunday Times Insight Team, War in the Falklands (1982); Monroe Leigh, "The Falklands/Malvinas Crisis," 76 ASIL Proceedings (1982), pp. 267-284; L.C. Green, "The Falklands, the Law and the War," 38 Yearbook of World Affairs (1984) p. 89; and Morison, pp. 119-124.

¹⁸⁶ Fenrick Developments, p. 112.

- The first time since World War II that sustained air attacks were conducted against naval forces.¹⁸⁷

To this list must be added four additional important issues for the law of naval warfare:

- The extensive use of exclusion zones,
- The rules of engagement in effect throughout the war;
- The sinking of the Argentine cruiser *Belgrano* outside of such a zone; and
- The legality of the use of naval cruise missiles.¹⁸⁸

After briefly discussing the Falklands War in general, the focus of the present discussion will be on the first three legal issues, with a detailed discussion of the various zones and rules of engagement in effect. Because there is significant overlap between the use of NEZs and the rules of engagement, these topics will be considered together whenever possible.¹⁸⁹

Notwithstanding slight overlaps, the Falklands War may be conveniently divided into three phases: the Argentine invasion and initial British reaction (1-29 April 1982); the naval war (29 April-21 May 1982); and the British invasion and recapture of the Falklands (21 May-14 June 1982). The first phase of the war consisted of the Argentine invasion of the Falklands and the surrender of the islands within a few hours of the invasion. Within three days of the invasion, the British secured a Security Council Resolution calling for the immediate withdrawal of Argentine forces,¹⁹⁰ the United Kingdom issued an order requisitioning merchant ships, and a naval task force, "Operation Corporate," departed Portsmouth for the South Atlantic. During this period the Argentines consolidated their positions and brought in reinforcements, while the British fleet steamed southward and efforts were underway to re-fit merchant vessels for military cargo purposes.¹⁹¹ The first exclusion zone was announced by the British on 7 April, with effect from 11 April (local time)¹⁹², a date

¹⁸⁷ U.S. Navy, "Lessons of the Falklands: Summary Report," (1983), p. 23, cited in Fenrick Falklands, at p. 30, footnote 3.

¹⁸⁸ Fenrick Falklands, p. 36. The use of naval cruise missiles is beyond the scope of the present work. See *ibid.*, p. 49, footnotes 68-70; O'Connell Contemporary Naval Operations, pp. 61-67; Busuttil, pp. 187-207; Pocar.

¹⁸⁹ See Introduction, Note on Rules of Engagement.

¹⁹⁰ UN Doc. S/RES/502 (1982).

¹⁹¹ It should be noted that the South Georgia Islands were re-taken by the British on 25 April 1982. See UN Doc. S/14944 and S/15002 (1982), reprinted in "United Kingdom Materials on International Law 1982," 53 *British YBIL* (1983), p. 541 and Middlebrook, pp. 103-113.

¹⁹² The zone was to take effect on 12 April 1982 at 0400 GMT (Zulu). To avoid confusion, all dates and

undoubtedly selected in anticipation of the arrival of the first Royal Navy submarine, which arrived near the Falklands the following day, 12 April.¹⁹³ On 15 April 1982, the Argentine Navy announced that it had mined the waters off Port Stanley.¹⁹⁴

The second phase of the war was characterised by naval warfare, including extensive air attacks on the Royal Navy by the Argentine Air Force. The Royal Navy task force arrived off the coast of the Falkland Islands on 29 April 1982 and on the same day Argentina declared a 200-nautical mile zone around the islands, effective the same day.¹⁹⁵ Britain followed suit the next day, declaring a total exclusion zone around the islands. On 1 May, British air strikes began, including a long-range attack from an Ascension Island-based Vulcan bomber, which bombed the airfields at Port Stanley and Goose Green. At about the same time the *San Luis*, an Argentine submarine, fired an unknown number of torpedoes at several British ships, and then escaped. The next day the naval war escalated as the *General Belgrano* became the first warship to be sunk by submarine in the post-World War II era. During the first three weeks in May, the Royal Navy suffered loss or damage to six frigates or destroyers, all hit with either air-launched Exocet missiles or bombs, while the Argentines lost several vessels, including a cutter, intelligence-gathering trawler, tugboat and a transport ship. In addition, both sides suffered the loss of several aircraft.

The British landing and recapture of the Falkland and South Georgia Islands marked the third phase of the campaign, which commenced with the landing of 2500 British marines and soldiers at various locations near Port San Carlos, East Falkland Island at 0340 hours on 21 May 1982.¹⁹⁶ Over the course of the next four days following the commencement of the British landings, the Argentine Air Force launched an all-out attempt to destroy the Royal Navy fleet, with five more British ships being struck by bombs and one hit by an Exocet. By the end of May the British forces had recaptured Goose Green, Darwin and several other locations. In the final week of the campaign, 7-14 June 1982, three more Royal Navy vessels were struck, two LSTs off-loading troops at Bluff Cove and one guided missile destroyer, which was hit by a land-based Exocet. On 11-12 June and again on 13-14 June Royal

times used in this section refer to local time, unless noted.

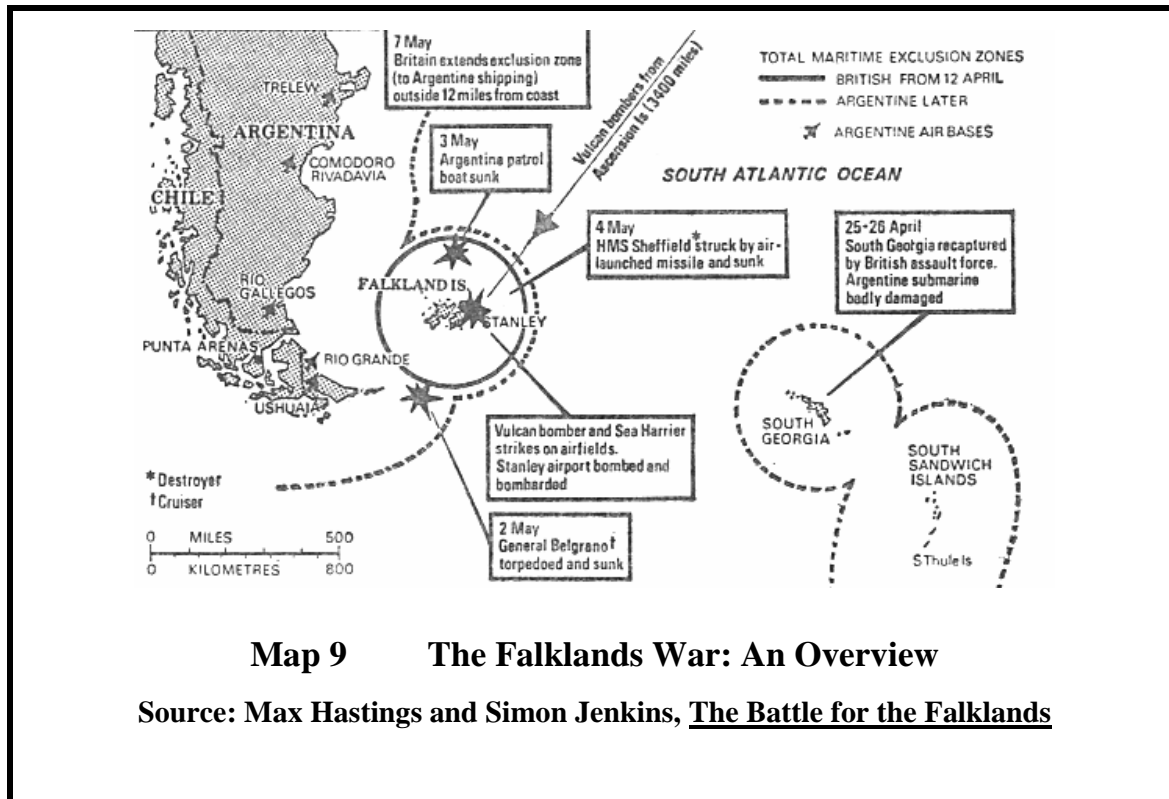
¹⁹³ Fenrick Falklands, p. 32.

¹⁹⁴ Busuttil, pp. 40-41.

¹⁹⁵ HMS *Glasgow* and HMS *Coventry* crossed the 200-nautical mile TEZ surrounding the Falklands on 30 April at 2130 hours, followed one hour later by HMS *Hermes*, the flagship of Admiral Woodward. Middlebrook, p. 125.

¹⁹⁶ See map, Middlebrook, p. 209.

Marines and British Army forces attacked Argentine positions in Port Stanley and Argentine forces on the Falkland Islands formally surrendered at 0859 hours on 14 June 1982. Diplomatic and other relations were not normalised until February 1990, however.¹⁹⁷ Map 9 presents an overview of the Falklands War with the main exclusion zones delineated.



B. Naval Exclusion Zones in the Falklands War¹⁹⁸

Given the short duration of the Falklands War, the tit-for-tat announcements of ever expanding exclusion zones, with Argentina responding to the British announcement of zones with zones of their own, was remarkable. As Fenrick notes, “The rationale for these zones is difficult to determine; presumably they were intended to provide a visible manifestation of both sides’ conscious efforts to limit the scope of the conflict.”¹⁹⁹ Nevertheless, throughout

¹⁹⁷ UN Doc. A/45/136 and S/21159 (1990), p. 2, para. 3.

¹⁹⁸ In addition to the operational exclusion zones, the British Government also put into effect as of 10 May a Terminal Control Area 100 nautical miles around the Wideawake Airfield on Ascension Island, which was the long-distance staging ground for much of the air and naval operations for the Falklands conflict. This policy called for prior notification of all flights to Ascension Island and all overflights. See Politakis, p. 77.

the ten-week war, seven zones would be established, in addition to a hospital ship zone and a zone established by Britain around the islands after the conflict was over.

1. British Maritime Exclusion Zone announced 7 April 1982

On 7 April 1982, as the ships of Operation Corporate were steaming towards the South Atlantic, the British Government announced that a 200 nautical-mile maritime exclusion zone (“MEZ”) was to be established around the Falkland Islands as of 12 April.²⁰⁰ The British Government informed the Security Council of the establishment of the MEZ on 9 April 1982,²⁰¹ describing the MEZ as follows:

From 0400 Greenwich Mean Time on Monday 12 April 1982, a maritime exclusion zone will be established around the Falkland Islands. The outer limit of this zone is a circle of 200 nautical mile radius from 51° 40’S, 59° 30’W, which is approximately the centre of the Falkland Islands. From the time indicated, any Argentine warships and Argentine naval auxiliaries found within this zone will be treated as hostile and are liable to be attacked by British forces. This measure is without prejudice to the right of the United Kingdom to take whatever additional measures may be needed in exercise of its right of self-defence, under Article 51 of the United Nations Charter.

The MEZ was directed solely at Argentine naval vessels and did not apply to Argentine merchant vessels or aircraft, including military aircraft.

Argentina responded to this announced zone by declaring it a blockade, with the consequence that it was illegal as an act of aggression pursuant to Article 3(c) of General Assembly Resolution 3314 (XXIX) of 14 December 1974.²⁰² Britain denied that this act constituted a blockade, on the grounds that the measures fell short of the concept as understood under international law, that such a claim was irrelevant since the territory

¹⁹⁹ Fenrick, p. 109. See also the text of the letter written by Col. G.I.A.D. Draper to the editor of *The Times*, cited in Fenrick, p. 109, footnote 65, referring to a suggestion advanced in Parliament (and subsequently adopted) to create a 200-nautical mile zone. (“This is a rather curious proposal. In time of armed conflict at sea, such a limit would restrict action by the Royal Navy to an extent not required by international law. In time of normality a 200-mile limit will be difficult to justify because such a claim for a territorial sea is not yet accepted in international law.”)

²⁰⁰ Fenrick, pp. 111-112; Fenrick *Falklands*, p. 38.

²⁰¹ UN Doc. S/14963 (1982), reprinted in “United Kingdom Materials on International Law 1982,” 53 *British YBIL* (1983), p. 539.

²⁰² Congressional Record, 3 May 1982, S 4431, cited in Fenrick *Falklands*, p. 38, footnote 34. Fenrick calls the Argentine interpretation a “conscientious misreading of the aggression definition.” *Ibid.*

enclosed by the zone was British, and on the grounds that Argentina had been the first State to use force in the conflict.²⁰³

At this point, the British rules of engagement did not allow British forces to attack an Argentine vessel prior to entering the MEZ, unless British forces were themselves attacked, in which case they were permitted to respond in self-defence using “minimum force.”²⁰⁴ These rules would change slightly with the announcement of the “Defensive Bubble Zone” again shortly before the British fleet entered the Total Exclusion Zone, when Admiral Woodward’s forces would be permitted “open fire on any combat ship or aircraft in that Zone identified as Argentinian,” once the Royal Navy fleet was inside the zone.²⁰⁵

2. Argentine Maritime Zone announced 8 April 1982

On the day after Great Britain announced the MEZ, Argentina responded by declaring a 200 nautical mile maritime zone (“MZ”) around the Falkland Islands, Georgia Islands and Argentine coast. Due to the inclusion of the Argentine coast, and the points from which this zone were drawn, it was slightly larger than the British MEZ, extending roughly 60 miles further off the coast of the Falkland Islands.²⁰⁶ Argentina warned England that within this entire theatre of operations, military action in self-defence could be taken as necessary.²⁰⁷

3. British “Defensive Bubble” Zone announced 23 April 1982

Approximately one week before the Royal Navy task force arrived off the Falkland Islands, the British Government established (on 23 April 1982) what have been termed “Defensive Bubble Zones” or a *cordon sanitaire*, around the ships, naval auxiliaries and military aircraft making up the task force.²⁰⁸ In informing the Security Council of this action the following day, the Permanent Representative of the U.K. to the U.N. wrote:

Her Majesty’s Government now wishes to make clear that any approach on the part of Argentine warships, including submarines,

²⁰³ UN Doc. S/14964 (1982), reprinted in “United Kingdom Materials on International Law 1982,” 53 British YBIL (1983), pp. 539-540.

²⁰⁴ Woodward, pp. 100-101.

²⁰⁵ *Ibid.*, 126.

²⁰⁶ *Ibid.*, p. 128 and map, pp. xxii-xxiii.

²⁰⁷ Fenrick Falklands, p. 40.

²⁰⁸ Fenrick, pp. 110; Fenrick Falklands, p. 38. See also S.F. Gilchrist, “The *Cordon Sanitaire*: Is It Useful? Is It Practical?” 35 NWCR (1982), p. 60.

naval auxiliaries, or military aircraft which could amount to a threat to interfere with the mission of the British forces in the South Atlantic, will encounter the appropriate response. All Argentine aircraft including civil aircraft engaging in surveillance of these British forces will be regarded as hostile and are liable to be dealt with accordingly.²⁰⁹

This “Defensive Bubble Zone” differed from the MEZ in that it set no geographic limits and because it specifically included civilian aircraft engaged in tracking the British fleet.²¹⁰

4. British Total Exclusion Zone announced 28 April 1982

Upon the arrival of the British fleet in the waters off the Falklands Island, Great Britain again revised its zone policy, announcing a Total Exclusion Zone (“TEZ”) effective 30 April 1982. The precise boundaries of the TEZ were the same as those for the MEZ announced on 8 April. However, as from 1100 GMT on 30 April 1982:

[T]he exclusion zone will apply not only to Argentine warships and Argentine naval auxiliaries but also to any other ship, whether naval or merchant vessel, which is operating in support of the illegal occupation of the Falkland Islands by Argentine forces. The exclusion zone will also apply to any aircraft, whether military or civil, which is operating in support of the illegal occupation. Any ship and any aircraft, whether military or civil, which is found within this zone without due authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by the British forces.²¹¹

²⁰⁹ UN Doc. S/14997 (1982), reprinted in “United Kingdom Materials on International Law 1982,” 53 British YBIL (1983), pp. 540-541.

²¹⁰ This reference to civilian aircraft engaged in reconnaissance probably came in response to a request of Admiral Woodward, the Falklands Battle Group Commander. In his memoirs, Admiral Woodward describes how a Boeing 707 in Argentine Air Force regalia, began tracking the fleet on 21 April 1982. After several encounters with this aircraft, including the scrambling of Harriers, Admiral Woodward contacted Fleet Headquarters concerning the 707, which he referred to as “the Burglar”:

It seemed to me that this sort of thing could not be allowed to continue, so I ‘tweaked’ Fleet Headquarters in Northwood to leak information that we now had instructions to shoot the Burglar down in the hope that this might put him off. Actually, I went further than that and I asked for permission *to* shoot him down. And, slightly to my surprise, I got it. With a couple of qualifications that—a) he came within a certain specific range limit, and b) we had positive identification that he was, indeed, the Burglar.

See Woodward, pp. 101-102. Shortly thereafter, there was a very close call with a civilian Brazilian airliner. See *ibid.*, p. 103.

²¹¹ UN Doc. S/15006 (1982), reprinted in “United Kingdom Materials on International Law 1982,” 53 British YBIL (1983), p. 542. The final sentence of this announcement reflects a fundamental misstatement or misunderstanding of the law, in that it disregards the principle of distinction and hints

Simultaneously, Britain announced that Port Stanley airfield was closed (notwithstanding the fact that the airfield was controlled by Argentine forces) and that any aircraft on the ground in the Falkland Islands were to be regarded as “present in support of the illegal occupation” and also liable to attack.²¹² Moreover, as with the announcements of the other zones, the British authorities specifically stated that this action was without prejudice to their right to take any further self-defence measures necessary pursuant to Article 51 of the U.N. Charter.²¹³

In defending the use of the TEZ, the British Foreign Secretary, Mr. Francis Pym, stated that “the Falkland Islands is a British possession and we intend to enforce a total exclusion zone.”²¹⁴

5. Argentine Strengthened Maritime Zone announced 29 April 1982

On 29 April 1982, apparently in response to the announcement of the British TEZ the preceding day, Argentina strengthened its position with respect to the Maritime Zone it had announced on 8 April 1982. Argentina asserted that all waters within its Maritime Zone were Argentine and that all British vessels, whether naval or merchant, and all British aircraft entering the zone would be subject to attack.²¹⁵

6. British Policy Statement announced 7 May 1982

In line with their previous statements that they reserved the right to take additional steps in self-defence, the British Ministry of Defence released a press statement on 7 May 1982 warning Argentina that:

[A]ny Argentine warship or military aircraft which are found more than 12 nautical miles from the Argentine coast will be regarded as hostile and are liable to be dealt with accordingly.²¹⁶

at the establishment of a “free-fire” zone, which would be unlawful.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ House of Commons Debates, Vol. 22, cols. 1055-1056, 29 April 1982, reprinted in “United Kingdom Materials on International Law 1982,” 53 British YBIL (1983), p. 543.

²¹⁵ Fenrick, pp. 112; Fenrick Falklands, p. 40.

²¹⁶ Ministry of Defence press statement, 7 May 1982, reprinted in “United Kingdom Materials on International Law 1982,” 53 British YBIL (1983), p. 549.

It is important to note that although this policy greatly expanded the geographic area of the TEZ, it was also limited to *warships* or *military* aircraft. Thus, in effect there were two overlapping British exclusion zones operating simultaneously. Any Argentine naval vessel or military aircraft travelling more than 12 miles from the Argentine coast would be subject to attack, as would any vessel or aircraft—military or civilian, Argentine or neutral—which was in the TEZ and “operating in support of the illegal occupation of the Falkland Islands by the Argentine forces.”

7. Argentine South Atlantic War Zone announced 11 May 1982

Quite predictably, in light of their previous responses to the announcement of British zones, the Argentine authorities declared the entire South Atlantic to be a war zone on 11 May 1982. Pursuant to this declaration, any British vessel found therein would be subject to immediate attack.²¹⁷

8. “Red Cross Box”

A final point worthy of note was the use of the so-called “Red Cross Box” during the Falklands War.²¹⁸ At the suggestion of Great Britain, the two belligerents established a neutral zone approximately 20 nautical miles north of the Falkland Islands, which came to be known as the “Red Cross Box.” Within this zone, the British hospital ship *Uganda* was able to receive and treat the wounded and the parties were able to exchange wounded personnel.²¹⁹

9. British Maritime Protection Zone announced 22 July 1982

Great Britain lifted the TEZ on 22 July 1982, although Port Stanley Harbour and airfield, together with the three-mile territorial sea around the Falklands remained in effect after that date.²²⁰ Simultaneously, in order to minimise the risk of misunderstandings or inadvertent clashes, the British Government asked the Argentine Government to ensure that no Argentine warships or military aircraft enter a zone 150 miles around the islands where they would pose a threat to British forces.²²¹ Argentine civil aircraft and shipping were also

²¹⁷ Fenrick, pp. 112; Fenrick Falklands, p. 40.

²¹⁸ See U.K. Manual, para. 13.114-13.114.1. See also San Remo Manual, para. 160.

²¹⁹ See S. Junod, Protection of the Victims of Armed Conflict: Falkland/Malvinas Islands (1982) (1984), p. 26, cited in Fenrick Falklands, p. 36, footnote 23A.

²²⁰ House of Commons Debates, Vol. 28, Written Answers, col. 235, 22 July 1982, reprinted in “United Kingdom Materials on International Law 1982,” 53 British YBIL (1983), p. 556.

requested to avoid this zone and other British dependencies in the South Atlantic unless the British authorities granted prior approval.²²² The British lifted this Maritime Protection Zone in February 1990.²²³

C. The Sinking of the Argentine cruiser *General Belgrano*²²⁴

In his memoirs, Admiral Woodward describes an exercise that he participated in with the USS *Coral Sea* in the Arabian Sea shortly before the Falklands War. He likened the *Coral Sea* battle group to a circular exclusion zone, with the carrier at the centre. One of the lessons that he learned from this exercise was

[T]hat if an enemy is skirting his way around you along the edge of an exclusion zone, there is no way that you should allow him to go on doing that. He must not be able to choose where and when he is going to come at you, just because he is a few miles outside of the zone.²²⁵

If Woodward was aware fully of the events of 2 May 1982, as HMS *Conqueror* began tracking the Argentine cruiser *General Belgrano* 225 miles southwest of the Falkland Islands,²²⁶ this lesson must have been on his mind. Map 10 depicts the movement of Argentinian Naval Forces from 29 April through 2 May 1982, when the *Belgrano* was sunk.

Conqueror had been supporting the South Georgia operation until 28 April, when she was diverted westward to a patrol area between Isla de los Estados and the Burdwood Bank, a large shallow area of water south of the Falklands,²²⁷ most of which lay within the TEZ. The

²²¹ Ibid.

²²² Ibid.

²²³ UN Doc. A/45/136 and S/21159 (1990), p. 2, para. 4.

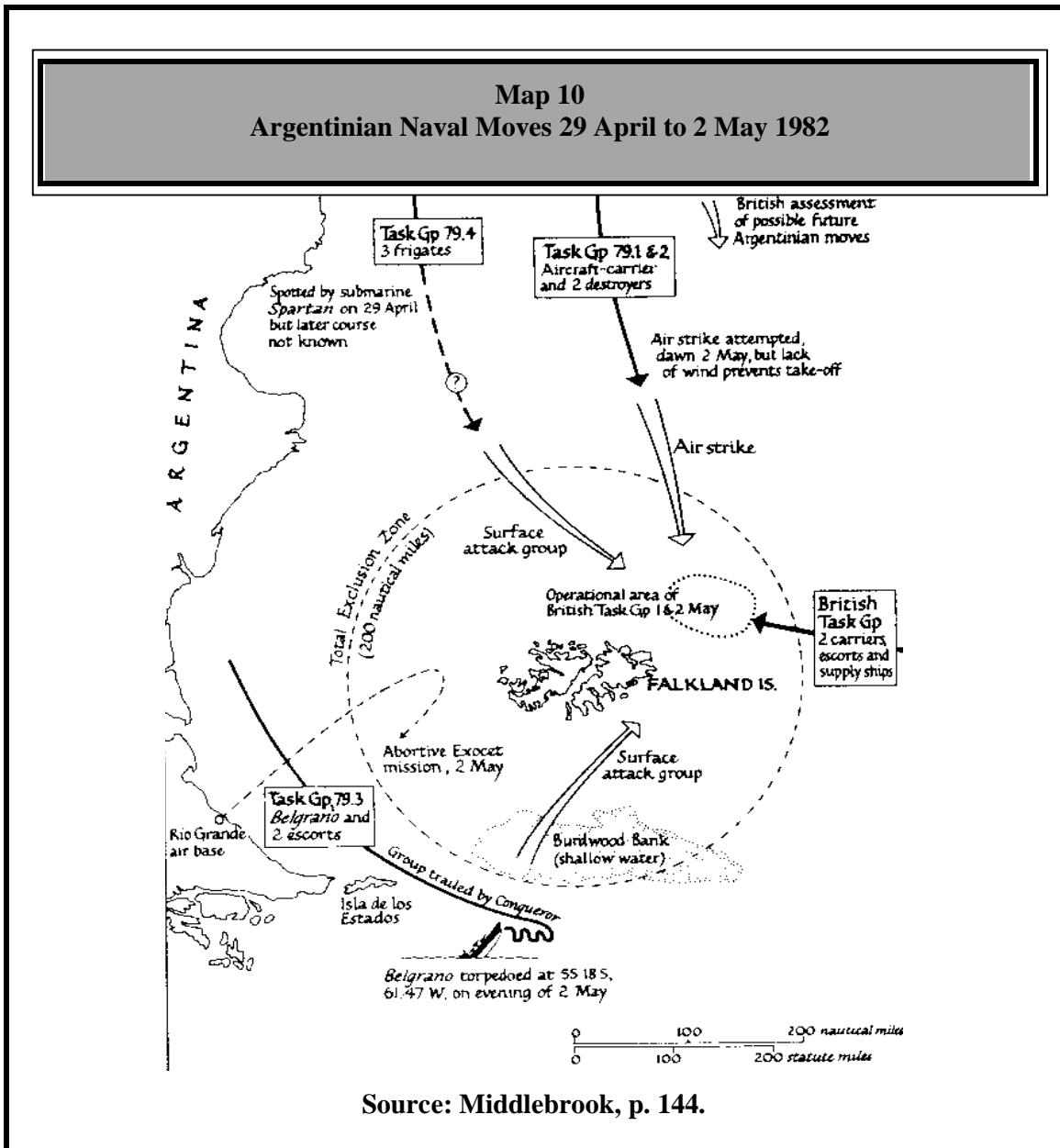
²²⁴ See Gavshon and Rice and Woodward, pp. 146-163, for details of this incident.

²²⁵ Woodward, p. 67.

²²⁶ Although Woodward may not have been fully informed as to the *minutiae* of the *Belgrano*'s sinking at the time, his memoirs describe *Conqueror*'s pursuit and sinking of the Argentine cruiser with some precision. Woodward, pp. 149-163.

²²⁷ Woodward, at p. 151, describes Burdwood Bank, which sits on the edge of the South American continental shelf, as follows:

It runs over 200 miles from east to west, passing some hundred miles to the south of East Falkland, at which point it is about 60 miles across, north to south. Further south, the Atlantic is more than 2 miles deep, but around the Falkland Islands and inshore to the continent, the sea-bed slopes up to the continental shelf, giving a general depth of about three hundred feet. On the Bank, however, the bottom rises to shallows just one hundred fifty feet below the



British were aware that the *Belgrano* and her two Exocet-equipped destroyer escorts were operating in this area and *Conqueror's* skipper, Commander Christopher Wreford-Brown's orders, in accordance with the rules of engagement, were that he was authorised to attack if the Argentine ships were in the TEZ.²²⁸ Wreford-Brown first encountered *Belgrano* and her escorts shortly after dawn on 1 May.²²⁹

surface. These shoals are quite well charted, but they can be a lethal place for a submarine trying to stay with a cruiser making more than twenty-five knots through the water.

The bulk of Woodward's task force was in an operating area immediately east of East Falkland Island and just inside the TEZ.²³⁰ The Argentine carrier, *Veinticinco de Mayo* and her escorts, was located northwest of the Falkland Islands and approximately 150 miles outside the TEZ. The *Veinticinco de Mayo* attempted to launch aircraft against the British task force at dawn on 2 May, but had been prevented from doing so due to the lack of wind. Admiral Woodward feared that the Argentines were preparing a pincer attack on his task force, a plan that might have worked given the distances involved and the 15 hours of darkness in the South Atlantic winter. Referring to the two Argentine surface groups, Woodward writes:

The aircraft of the one, and the Exocet-carrying destroyers of the other, could both get in close to us very quickly in the present calm weather. The long southern nights gave them fifteen hours of darkness, and between now and first light there was till over six hours, during which either *Belgrano* or *Veinticinco de Mayo*, or both, could have moved comfortably within range for a decisive battle which would give them, tactically, all the advantages.²³¹

Admiral Woodward determined that one—if not both—of the major Argentine ships had to be taken out.²³² The only problem was that the two submarines tracking the *Veinticinco de Mayo*, HMS *Spartan* and HMS *Superb*, were not in contact with the Argentine carrier. The British commander had only three weapon systems that were capable of sinking the heavily-armoured *Belgrano*: thousand-pound bombs dropped by aircraft or the *Conqueror*'s Mark 8 or Tigerfish torpedoes. Due to the anti-aircraft capabilities of *Belgrano*'s escorts, and the fact that Wreford-Brown was trailing *Belgrano*, Woodward's choice was clear.²³³ Only one problem remained: the *Belgrano* was skirting along the edge of the TEZ, zigging and zagging but apparently careful not to enter the zone, and until she did so, *Conqueror* was impotent to act against her under the rules of engagement in force at the time. The British task force commander made a decision:

²²⁸ Woodward, p. 158.

²²⁹ Middlebrook, p. 148.

²³⁰ See map, Woodward, pp. xxii-xxiii.

²³¹ Woodward, p. 149.

²³² Ibid.

²³³ Ibid., p. 151.

My conclusion: I cannot let that cruiser even stay where she is, regardless of her present course or speed. Whether she is inside or outside the TEZ is irrelevant. She will have to go.²³⁴

Woodward then set about getting the rules of engagement altered so as to order Commander Wreford-Brown to attack the *Belgrano*.²³⁵ With Prime Minister Thatcher presiding, the War Cabinet changed the rules of engagement to permit *Conqueror* to attack the *Belgrano* whether she was inside the TEZ or not.²³⁶

Early on 2 May, the *Belgrano* turned westward making 13 knots aimlessly zigging and zagging, with *Conqueror* trailing her. In the afternoon, Wreford-Brown received his new orders and prepared his attack. Having determined that the Mark 8 torpedo would be the weapon of choice, Wreford-Brown was required to close within a mile of the target. Wreford-Brown described the attack as follows:

It was tedious rather than operationally difficult. ... I think the escorts were mainly thinking of a threat from the north, while we were to the south. We fired three Mark 8s at 1857 Zulu, at a range of 1400 yards. The object was never to hit with all three but to fire a spread to cover any inaccuracies in the fire-control solution. We heard the weapons run and then heard two torpedo hits; we'd got two out of three. We were still at periscope depth. I think I saw an orange fireball in line with the mainmast—just aft of the centre of the target—and shortly after the second explosion I thought I saw a spout of water, smoke and debris from the back end.²³⁷

The *Belgrano* was abandoned thirty minutes after the attack and sank fifteen minutes later, taking 368 of her 1042-man crew with her.²³⁸ At the time she sank, the *Belgrano* was situated at 55° 27' S, 61° 25' W, and was approximately 36 nautical miles outside and to the southwest of the TEZ.²³⁹ Thus was sealed the fate of the *General Belgrano*, a ship built in the U.S. in the mid-1930s as the Brooklyn Class light cruiser USS *Phoenix*, a ship that had survived the

²³⁴ Ibid.d, p. 152.

²³⁵ Ibid., pp. 153-156.

²³⁶ House of Commons Debates, Vol. 33, Written Answers, col. 104, 29 November 1982, reprinted in "United Kingdom Materials on International Law 1982," 53 *British YBIL* (1983), p. 558; Woodward, pp. 156-158.

²³⁷ Middlebrook, p. 149; see also Woodward, pp. 159-161.

²³⁸ Middlebrook, p. 150.

²³⁹ House of Commons Debates, Vol. 33, Written Answers, col. 414, 6 December 1982, reprinted in "United Kingdom Materials on International Law 1982," 53 *British YBIL* (1983), p. 558; Politakis, p. 79. See also map, Middlebrook, p. 144.

attack on Pearl Harbor and had gone on to serve throughout World War II in the Pacific.²⁴⁰ From an operational point of view, the sinking of the *Belgrano* greatly improved the tactical situation for the British, not only because it eliminated that ship from the Argentine fleet, but also because it caused the Argentine Navy to remain in port for the duration of the war.²⁴¹

In the wake of the sinking of the *Belgrano*, John Nott, the British Secretary of State for Defence, stated that the TEZ was “not relevant”²⁴² to the sinking and that the establishment of the Defensive Bubble Zone provided ample warning to the Argentines to keep their naval forces away from the British fleet.²⁴³ Moreover, Mr. Nott noted that:

The *General Belgrano* was in a heavily armed group of warships. The cruiser and two destroyers had been closing on elements of our task force. At the time that she was engaged, the *General Belgrano* and a group of British warships could have been within striking distance of each other in a matter of some five to six hours, converging from a distance of some 200 nautical miles.²⁴⁴

Finally, the Secretary of State for Defence asserted that in light of the attacks against the Royal Navy on the previous day,²⁴⁵ and given the possible presence of an Argentine submarine in the area, there was “every reason to believe that the *General Belgrano* group was manoeuvring to a position from which to attack our ships.”²⁴⁶ Consequently, HMS *Conqueror* sunk the *Belgrano* for self-defence of the British fleet.

²⁴⁰ Woodward, p. 148.

²⁴¹ Ibid., p. 164 (“What no one knew then was that Christopher Wreford-Brown’s old Mark 8 torpedoes, appropriately as old in design as the *Belgrano* herself, had sent the navy of Argentina home for good. ... [W]e had made the Argentinians send out their fleet and a single sinking by a British SSN had then defeated it. We would never see any of their big warships again.”)

²⁴² Woodward would agree with this statement. “The speed and direction of an enemy ship can be irrelevant, because both can *change* quickly. What counts is his position, his capability and what I believe to be his intention. Ibid., p. 156.

²⁴³ House of Commons Debates, Vol. 23, col. 1030, 13 May 1982, reprinted in “United Kingdom Materials on International Law 1982,” 53 *British YBIL* (1983), pp. 549-550. (“The *General Belgrano* was attacked under the terms of our warning to the Argentines some 10 days previously that any Argentine naval vessel or military aircraft which could amount to a threat to interfere with the mission of British forces in the South Atlantic would encounter the appropriate response.”)

²⁴⁴ Ibid., p. 550.

²⁴⁵ On 1 May, bomb splinters damaged both HMS Glamorgan and HMS Arrow during an Argentine air raid. Simultaneously, the British were unaware of the precise location of the Argentine submarine *San Luis*, which had fired several torpedoes. See Morison, p. 121.

²⁴⁶ Morison, p. 121.

The sinking of the *Belgrano* continued to be a periodic subject of debate in Parliament for the remainder of 1982. On 29 November 1982, the Minister of State for the Armed Forces expanded on the reasons previously given for the sinking of the *Belgrano*, adding that:

There were indications on 2 May that the carrier *25 de Mayo* and her escorts would approach the task force from the north, while the *General Belgrano* and her escorts were attempting to complete a pincer movement from the south. Concerned that HMS *Conqueror* might lose the *General Belgrano* as she ran over the shallow water of the Burdwood Bank, the task force commander sought and obtained a change in the rules of engagement to allow an attack outside the 200-mile exclusion zone but within the general principle set out in our warning of 23 April. Throughout 2 May, the cruiser and her escorts had made many changes of course.²⁴⁷

D. Concluding Remarks on the Falklands War

The total cost of this war, in terms of lives lost and equipment destroyed is staggering, given the relatively limited scale of the war.²⁴⁸ The British lost 255 men killed, including three Falkland Island civilians, with 777 wounded; the figures for Argentina are less precise, with reports ranging from 652 men dead or missing to 746 dead, with 1105 soldiers and an unknown number of personnel from the other branches wounded. British registries count 12,978 men taken as prisoner of war during the conflict. With respect to material, Britain suffered the sinking of seven vessels and 34 helicopters and fixed-wing aircraft, while Argentina lost virtually all the military weapons and equipment taken to the Falklands, as well as the *General Belgrano* and several other ships and at least 100 helicopters and fixed-wing aircraft. In terms of finances, the war cost Great Britain alone more than \$3.2 billion, including replacement costs of equipment, ships and aircraft lost.²⁴⁹

Notwithstanding the extensive use of NEZs, however, the only neutral vessel attacked during the course of the war was a tanker, the *Hercules*, a Liberian-flagged vessel owned by

²⁴⁷ House of Commons Debates, Vol. 33, Written Answers, col. 104, 29 November 1982, reprinted in “United Kingdom Materials on International Law 1982,” 53 *British YBIL* (1983), p. 558. See also the statement of Prime Minister Thatcher on 16 December 1982 (“The *General Belgrano* and her escorts had made many changes of course during 2 May. It is not possible to give meaningful mean courses for them or for the British warships. The precise courses being steered at any particular moment were incidental to the indications we possessed of the threat to the task force.”) House of Commons Debates, Vol. 34, Written Answers, col. 201, 16 December 1982, reprinted in “United Kingdom Materials on International Law 1982,” 53 *British YBIL* (1983), pp. 558-559.

²⁴⁸ The following statistics are taken from Middlebrook, pp. 382-385 and Fenrick Falklands, p. 33.

²⁴⁹ Fenrick calculates this cost as being “approximately \$2,000,000 for every man, woman and child on the islands. Fenrick Falklands, p. 33.

an Israeli company controlled by Americans.²⁵⁰ This was due, at least partially to the fact that the South Atlantic contains few sea-lanes for international trade, thus relatively few merchant vessels ply the waters that were the subject of the various exclusion zones employed during the war. The *Hercules* was steaming on a northerly course some 450 nautical miles north of the Falklands and approximately 550 nautical miles from Argentina, in a passage unrelated to the conflict, when it was bombed on 8 June 1982 by Argentine aircraft, including C-130s and a jet aircraft. At least two bombing runs were conducted and the bombs were pushed out of the cargo door of the aircraft.²⁵¹ At the time of this attack, the *Hercules* was “in international waters, well outside the ‘exclusion zones’ declared by the warring parties.”²⁵²

X. The Iran-Iraq War²⁵³

Unlike the Falklands War, the Iran-Iraq War of the 1980s occurred in one of the world’s most important—and densest—shipping lanes in the world.²⁵⁴ The Iran-Iraq War, also known as “The Tanker War,” commenced in September 1980 and during the course of the eight-year war, it is estimated that 500 merchant vessels were attacked, with the loss of more than 200 merchant seamen.²⁵⁵ Although there is evidence that mines may have been laid

²⁵⁰ According to Middlebrook, “The *Hercules*, at 220,000 was the Argentinians’ biggest ‘success’ of the war; her tonnage was more than four times greater than the combined tonnage of all the British and Argentinian ships sunk in the war!” Middlebrook, p. 312.

²⁵¹ *Amerada Hess*; Morison, p. 124; Fenrick, p. 112. According to Goldie, there were “three successive air strikes by Argentine aircraft using bombs and air-to-surface missiles.” Goldie Targeting, p. 15; Goldie, p. 174.

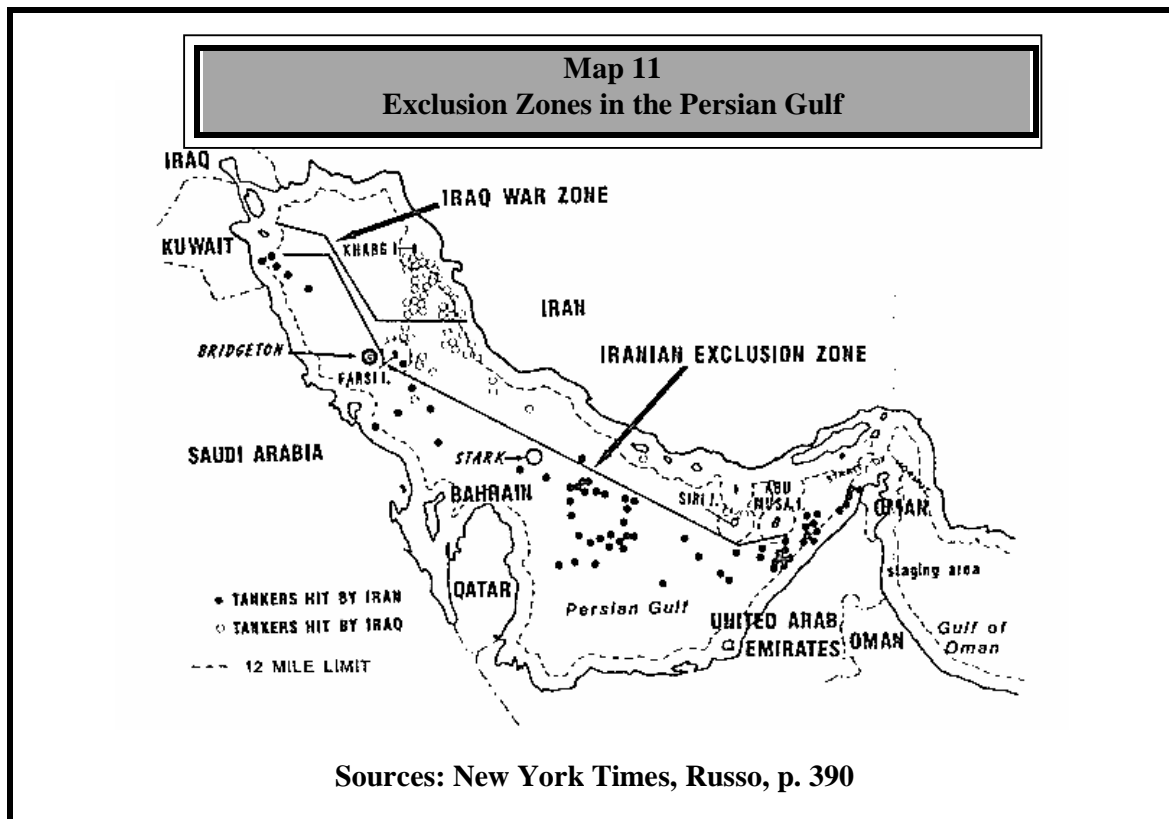
²⁵² *Amerada Hess*, p. 820. Goldie notes that this conclusion of the court is incorrect in that at the time of her sinking, *Hercules* was within Argentina’s South Atlantic War Zone. Nevertheless, Goldie points out that this zone itself was unlawful since it failed to meet the tests of reasonableness, proportionality, clarity of definition and self-defence. Goldie Targeting, pp. 15-16.

²⁵³ See Walker Tanker War; De Guttry and Ronzitti (and in particular, pp. 133-138); Politakis, pp. 89-119; Fenrick, pp. 116-122; Ross Leckow, “The Iran-Iraq Conflict in the Gulf: The Law of War Zones,” 37 *ICLQ* (Part 3, July 1988), pp. 629-644; David L. Peace, “Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf (Part I),” 82 *ASIL Proceedings* (1988), pp. 146-154; Frank L. Wiswall, “Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf (Part II),” 82 *ASIL Proceedings* (1988), pp. 594-613.

²⁵⁴ The Persian Gulf is about 460 nautical miles long and its maximum width is only 160 nautical miles. The only waterway connecting the Persian Gulf to the open sea, the Straits of Hormuz, is slightly longer than 100 nautical miles and some 21 nautical miles wide at its narrowest point. Fenrick, p. 117. Through these narrow waterways pass a significant amount of the world’s oil supply.

²⁵⁵ Politakis estimates that some 30 million tons of shipping was damaged during the war. Politakis, p. 89.

early in the war, by 1987, mines became an increasing threat to shipping during this war.²⁵⁶ Map 11 depicts the exclusion zones established during this war.



A. Iranian Maritime Coastal Defence Area

Iraq's only port was closed during the war and Iran's primary concerns were with stopping trade to Iraq via neutral ports, and Kuwaiti ports specifically, and publicity. Shortly after the commencement of the war, Iran announced a Maritime Coastal Defence Area, in which the Iranian Navy directed that all ships destined for Iraqi waters were required to follow a specified route.²⁵⁷ Although Iran did not specifically state that ships that strayed from this route would be subject to attack, Iran specifically stated that it would accept no responsibility for vessels that strayed from this route.²⁵⁸ However, on the same day that this

²⁵⁶ Busuttil, pp. 41-42; Politakis, pp. 205-213.

²⁵⁷ NOTAM No. 17/59, 22 September 1980, reprinted in De Guttry and Ronzitti, p. 37. See also NOTAM No. 18/59 1 October 1980; NOTAM No. 20/59, 1 November 1980; NOTAM No. 22/59, 16 November 1980; and NOTAM No. 23/59, 27 January 1981, reprinted in *ibid.*, pp. 37-38.

²⁵⁸ NOTAM No. 17/59, 22 September 1980, reprinted in De Guttry and Ronzitti, p. 37.

zone was announced, Tehran Radio Domestic Service broadcast the text of a communique of the Iranian Joint Staff, which said, in part:

Bearing in mind the violations of the Iraqi armed forces, all waterways near the Iranian shores are hereby declared war zones. Iran will not allow any merchant ship to carry cargo into Iraqi ports.²⁵⁹

At any rate, Iran did not attack any merchant ships in the Persian Gulf until May 1984,²⁶⁰ and this declared zone did not vary significantly during the course of the conflict.²⁶¹ Politakis has characterised this zone as “more a defensive sea area roughly coterminous with Iran’s territorial sea limits (although at points reaching out as far as 40 miles from the coast).²⁶² Iraq, however, characterised Iranian waters north of 29-30° (which includes part of the Iranian Maritime Coastal Defence Area) as a “prohibited war zone” and threatened to attack all tankers docking at Iran’s Kharg Island as from 7 October 1980.²⁶³

B. Iraqi Kharg Island Exclusion Zone

Nearly two years would elapse before Iraq formally declared, in August 1982, an exclusion zone around Kharg Island.²⁶⁴ In February 1984, Iraqi officials began speaking of a “blockade” around Kharg Island and warned that they would attack any ship found in the zone.²⁶⁵ In late February and early March 1984, Iraq intensified its attacks on ships in this

²⁵⁹ Communique No. 17 of the Joint Staff of the Armed Forces of the Islamic Republic of Iran, broadcast on Tehran Radio Domestic Service in Persian on 22 September 1980 at 1608 hours GMT, reprinted in De Guttry and Ronzitti, p. 133. The differences in terminology and tone between this communique and NOTAM can probably be explained by the fact that the communique was intended for Iranian domestic consumption only, as reflected by the fact that it was broadcast over the Domestic Service of Radio Tehran.

²⁶⁰ Politakis, p. 91.

²⁶¹ Fenrick, p. 118.

²⁶² Politakis, p. 91.

²⁶³ U.S. Defense Mapping Agency and Hydrographic Center, Special Warning No. 50, 7 October 1980, reprinted in De Guttry and Ronzitti, p. 134; Fenrick, p. 118; Politakis, p. 91.

²⁶⁴ U.S. Defense Mapping Agency and Hydrographic Center, Special Warning No. 62, 16 August 1982, reprinted in De Guttry and Ronzitti, p. 136; Fenrick, p. 118; Politakis, pp. 91-92. Paragraph 2 of Special Warning No. 62 sets forth the area in which it is *believed* that the Iraqis set up this zone. The precise boundaries of this zone remain unclear. See Politakis, pp. 91-92 and footnote 126 therein.

²⁶⁵ Fenrick, p. 118; Politakis, p. 93.

zone in and around Kharg Island.²⁶⁶ However, in light of these Iraqi attacks in this zone, one scholar has argued that was more of “free-fire zone” than a blockade:

Inasmuch as Iraqi attacks occurred inside its ‘war zones,’ they could not have been justified by the traditional law of maritime blockade, since blockade cannot be enforced by unrestricted aircraft attacks on merchant vessels; nor could they have been justified by the new concept of the ‘exclusion zone,’ since such a concept does not validate attacks on sight on neutral merchant vessels.²⁶⁷

Over time, however, the limits of this zone, as imprecise as they were, became increasingly irrelevant, as Iraqi attacks began occurring with greater frequency at distances outside of the zone. As Politakis notes:

[I]n the climax of the Gulf War (August 1986-July 1988), war zones seemed to venture on the verge of legal irrelevancy. Belligerent practices substituted the entire Gulf for the relatively modest prohibited zones of the early stages of the conflict. Tankers were now being aimed at, surprisingly, by air-launched missiles or by fast boats, and sea lanes were being freely mined, virtually throughout the 500-mile-long Persian Gulf.²⁶⁸

These indiscriminate attacks led the U.S. to begin re-flagging Kuwaiti tankers in May 1987, followed by escorting such tankers in convoys in July 1987, which seems to have led to an escalation of mining in the Gulf.²⁶⁹ Shortly thereafter, a coalition including several European States was established. By the end of 1987, there were some 48 naval vessels and mines countermeasures vessels from seven States in the Persian Gulf and 18 other naval vessels in the Arabian Sea, making this the largest naval build-up in the Gulf region since World War II.²⁷⁰

C. U.S. “Defensive Sea Bubble Zones”

The re-flagging and escorting operations did not signal the commencement of U.S. naval operations in the Persian Gulf, as U.S. naval forces have long operated in these waters.

²⁶⁶ Politakis, pp. 93-94 and footnote 134 therein. Politakis notes that some 90% of Iranian oil exports pass through the terminal at Kharg Island.

²⁶⁷ A. Gioia, “Iraq: Commentary,” in De Guttry and Ronzitti, pp. 57-81, at p. 80.

²⁶⁸ Politakis, p. 102.

²⁶⁹ Walker Tanker War, pp. 60, 62.

²⁷⁰ Ibid., p. 103.

However, due to the increased threats to U.S. naval vessels patrolling in the area as a result of the escalation of naval combat during 1984, the U.S. adopted the approach taken by the British in the Falklands War: the use of “Defensive Sea Bubble Zones” around U.S. naval vessels. On 20 and 21 January 1984, the U.S. issued notices to aviators and mariners, respectively, concerning the U.S. defence posture with respect to its naval forces operating in international waters within the Persian Gulf, Strait of Hormuz, Gulf of Oman and North Arabian Sea.²⁷¹

The Notice to Mariners (“NOTAM”) requested all surface and subsurface ships to avoid closing within five nautical miles of U.S. naval forces in these waters without previously identifying themselves.²⁷² Any vessel violating this request “and/or whose intentions are unclear to such forces may be held at risk by U.S. defence measures.”²⁷³ The notice specifically provided that these measures were also in effect when U.S. naval forces were exercising the right of transit passage through the Strait of Hormuz or when in innocent passage through foreign territorial waters when operating in such waters with the consent of the coastal State.²⁷⁴

The Notice to Airmen (“NOTAR”) requested aircraft at less than 2000 feet altitude and not cleared for approach to or departure from a regional airport to avoid approaching closer than five nautical miles from U.S. naval forces operating in the area.²⁷⁵ Aircraft approaching closer than five nautical miles to U.S. naval forces were requested to establish and maintain radio contact with U.S. naval forces on a specified radio frequency, and failure to do so could result in the U.S. forces taking self-defence measures.²⁷⁶

In May 1987, two Iraqi air-launched Exocet missiles struck the USS *Stark*, causing deaths and injuries and resulting in serious damage to the ship.²⁷⁷ As a result, the U.S.

²⁷¹ See Marian Nash Leich, “Contemporary Practice of the United States Relating to International Law,” 78 *AJIL* (No. 4, October 1984), pp. 884-885, footnote 2, which contains the full text of the Notice to Mariners, U.S. State Department File No. P84 0110-0487.

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ *Ibid.* See also Politakis, pp. 107-108 and footnote 172 therein concerning passage rights.

²⁷⁵ Marian Nash Leich, “Contemporary Practice of the United States Relating to International Law,” 78 *AJIL* (No. 4, October 1984), p. 884, footnote 1.

²⁷⁶ *Ibid.*

²⁷⁷ See Walker Tanker War, p. 60 and footnote 338 therein for citations to additional references concerning this attack.

strengthened its rules of engagement and revised the notices concerning the “sea bubbles.” The first revision to the notices came in July 1987, when references to distance and altitude in the NOTAR were deleted and the following warning was inserted: “Illumination of a U.S. naval vessel with a weapons fire control radar could result in immediate U.S. defensive reaction.”²⁷⁸ These notices were subsequently revised in September 1987, when the references to distance and altitude were once again in the text.²⁷⁹ Notwithstanding the NOTAR, however, the USS *Vincennes* fired two surface-to-air missiles at an Iranian civilian airliner on 3 July 1987, killing 290 civilians.²⁸⁰

XI. Desert Storm/Desert Shield: The Gulf War²⁸¹

Iraq invaded Kuwait on 2 August 1990 and naval forces of the coalition established to oust Saddam Hussein’s army played an important role in maritime interdiction in the waters surrounding the Arabian Peninsula, the Persian Gulf, the Gulf of Oman and the Red Sea. Four days after the invasion, the Security Council adopted Resolution 661, prohibiting, *inter alia*, the importation of any commodities or products originating in Iraq or Kuwait and prohibited all financial transactions with those two States, excluding the funds for medical supplies and food products for humanitarian purposes.²⁸² On 25 August 1990, the Security Council, in Resolution 665, called upon all Member States to:

Use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping aid down in Resolution 661 (1990).²⁸³

Maritime interdiction operations were established in order to give effect to these and subsequent Security Council resolutions.

²⁷⁸ Ibid., p. 61.

²⁷⁹ See *ibid.*, pp. 61-62, for the text, which is also reprinted in De Guttry and Ronzitti, pp. 141-142. See also 28 *ILM* (1989), p. 942, for a copy of the warning that U.S. naval vessels were supposed to transmit upon encountering unidentified aircraft.

²⁸⁰ Politakis, pp. 108-199.

²⁸¹ In general, see Dalton.

²⁸² UN Doc. S/RES/661 (1990), paras. 3-4.

²⁸³ UN Doc. S/RES/665 (1990), para. 1.

This was the first time that the U.N. authorised military action without establishing a U.N. command and control structure and consequently, the naval forces in the region were acting under the U.N. “umbrella,” but not under the U.N. flag.²⁸⁴ As a result of this arrangement, each State contributing to the maritime interdiction operations retained operational control of its naval forces and was permitted to develop its own rules of engagement.²⁸⁵

Rather than assigning permanent zones of responsibility to the national naval forces operating in the Persian Gulf, patrol boxes were established by geographical co-ordinates. The coalition naval forces met monthly and vessels were rotated among the patrol boxes in order to demonstrate unity and to maximise co-ordination and effectiveness.²⁸⁶ Some of the patrol boxes were located in international waters, but overlapped with the Iranian Maritime Coastal Defence Area, which was still in force during the Gulf War.²⁸⁷

With respect to actual interdiction, most vessels were intercepted on the high seas, aided by the fact that modern surveillance methods meant that vessels could be intercepted before they entered the Iraqi or Kuwaiti territorial seas.²⁸⁸ The territorial seas of other littoral States in the Persian Gulf were used for interdiction only with the permission of the coastal States, whose degree of co-operation with the coalition navies varied.²⁸⁹

Limited mining operations were conducted both by Iraq (off the coast of Kuwait to deter an amphibious invasion of occupied Kuwait) and by the U.S. Navy (to keep Iraqi naval forces from leaving Iraqi ports).²⁹⁰

XII. “Anti-Terror” Zones

Shortly after 11 September 2001, the United States issued a “special warning” to international shipping and aviation that U.S. Forces are operating “at a heightened state of

²⁸⁴ Dalton, p. 46. Dalton asserts that this was due to the insistence of the U.S., which did not want its naval forces under the strategic control of the Security Council or Military Staff Committee. Ibid.

²⁸⁵ Ibid., pp. 46-47.

²⁸⁶ Ibid., p. 49.

²⁸⁷ Ibid., pp. 52-53.

²⁸⁸ Ibid., pp. 52-53.

²⁸⁹ Ibid., p. 52.

²⁹⁰ Busuttil, p. 43; Politakis, pp. 213-214.

readiness and taking additional defensive precautions against terrorist and other potential threats” and as a result all “aircraft, surface vessels and subsurface vessels approaching U.S. Forces” are required to maintain radio contact with such U.S. Forces.²⁹¹ This warning also indicated that the intention of U.S. Forces is not to impede or interfere with freedom of navigation, but also made clear that U.S. Forces will “exercise appropriate measures in self-defence if warranted by the circumstances.”²⁹² Although this warning reflects a cautious approach to force protection, it is an open question whether zones may be employed for other purposes in the “Global War on Terror.”²⁹³ To date, no such exclusion zones have been established,²⁹⁴ although maritime interdiction operations have been undertaken in the sea areas surrounding the Arabian Peninsula, apparently without protest or condemnation.²⁹⁵

XIII. The On-Going War in Iraq

As a result of terrorist attacks against the Al Basra Oil Terminal (“ABOT”) and a coalition warship in the vicinity of the Khawr Al’Amaya Oil Terminal (“KAAOT”), both in Iraqi waters, the U.S. Navy Maritime Liaison Office in Bahrain issued an advisory that an exclusion zone had been established in Iraqi waters within 2,000 metres of the ABOT and KAAOT, while also temporarily suspending the right of innocent passage in those waters.²⁹⁶ These exclusion zones were still in effect as of early 2007.²⁹⁷

²⁹¹ Heintschel von Heinegg Legal Issues, pp. 160-161, footnote 35.

²⁹² Ibid., pp. 160-161, footnote 35.

²⁹³ Heintschel von Heinegg Legal Issues, p. 161.

²⁹⁴ Heintschel von Heinegg posits one (and in his opinion the only) hypothetical situation where the establishment of a NEZ could meet the requirements of immediacy, necessity and proportionality in the context of the war on terror: if a group of transnational terrorists were to obtain a submarine capable of firing intermediate range missiles and intelligence indicated that they were about to launch such missiles from a given area of the sea. Under such circumstances, the right of self-defence would permit the threatened State to establish an underwater exclusion zone in the area. Heintschel von Heinegg Legal Issues, pp. 161-162.

²⁹⁵ Heintschel von Heinegg Legal Issues, p. 162.

²⁹⁶ U.S. Navy Maritime Liaison Office, Bahrain, MARLO Advisory, 06-04, dated 1 May 2004, available at <http://www.marinelog.com/DOCS/NEWSMMIV/MMIVMay03.html>.

²⁹⁷ See U.S. Naval Forces CENTCOM/Commander, U.S. 5th Fleet Public Affairs Office Press Release #005-07, “CTF 158 Holds First Boarding Officer Training Conference,” 8 January 2007, available at: <http://www.cusnc.navy.mil/articles/2007/005.html>, which refers to the on-going mission of the U.S. Navy’s Task Force 158 as being to gauge the pulse of what’s going on around the exclusion zones surrounding the oil terminals.” This press release includes photos of U.S. naval personnel boarding small fishing vessels in the vicinity of ABOT and KAAOT.

XIV. Conclusion

The following chapter includes a discussion on the role of customary international law on the development of NEZs. The historical examples of zones described in this chapter provide a wealth of material demonstrating state practice with respect to NEZs. It is clear from the historical accounts that NEZs as employed in the Falklands and Iran-Iraq Wars did not develop in a vacuum. Rather, this method of naval warfare evolved over time, and although it may appear that each historical example is unique, in fact each zone was influenced by the state practice in prior conflicts.

At this stage, a few comments may be made concerning the common themes that have emerged from these historical examples. These commonalities are significant in the development of the modern law relating to NEZs. During both World War I and World War II, unrestricted submarine warfare was waged across wide areas of the Atlantic and Pacific Oceans. There was little or no effort made to comply with the principle of distinction, primarily because of the global nature of these conflicts, the tactics used by merchantmen in convoying and because there was so little “neutral” shipping. In effect, these areas were “free-fire zones” and although these campaigns violated the customary and conventional law of the age, they contributed to the notion that exclusion zones were a valid form of naval warfare.

What distinguishes the fighting in the World Wars from more modern armed conflicts at sea, however, is the incorporation of the entire range of international humanitarian law principles governing armed conflict into the ROE for NEZs. In short, modern NEZs are not “free-fire zones” and there is widespread recognition among major naval powers that the law governing such zones is identical to the law outside the zone. This trend away from “free-fire zones” reflects a fundamental change in the concept of exclusion zones and has served to legitimize zones as a unique method of naval warfare. The following chapters will develop further this theme, demonstrating both that NEZs are a *sui generis* method of naval warfare and that there is a body of law applicable to such zones notwithstanding the fact that they may lack a distinct juridical status.

If history is a guide, naval exclusion zones will play a role in any future conflict involving hostilities at sea. Based on the history of warfare during the 20th century, this will almost certainly be the situation in any conflict that is primarily conducted at sea and will probably be true with respect to conflicts that are primarily ground or air conflicts, but which have a small naval component as well. For example, during the 1999 NATO campaign

against the Federal Republic of Yugoslavia, General Wesley K. Clark was concerned about Russian assistance to the Serbs by way of naval vessels transiting the Dardenelles and entering the Mediterranean. Consequently, he directed Admiral James Ellis, dual-hatted as the Commander-in-Chief of U.S. Naval Forces Europe and Commander-in-Chief of Allied Forces Southern Europe, to be prepared to implement a naval exclusion zone to prevent the Russian Navy from supplying the Serbs.²⁹⁸ Although the most likely outcome of such a plan, had one been implemented, would be more akin to a blockade than a NEZ, it is nevertheless significant that General Clark used the term “naval exclusion zone” with respect to this option. This clearly signifies that senior military commanders have adopted the use of this term and that it may come to be more widely used in future campaigns, even in those such as Operation Allied Force, which was primarily an air campaign.

Having explored how States have established and utilised NEZs, the following chapter sets forth the legal requirements for the establishment of NEZs and lays the groundwork for the chapters that follow.

²⁹⁸ Wesley K. Clark, Waging Modern War, (New York 2001), p. 226.

Chapter 3

The Legal Requirements of Naval Exclusion Zones

“Whether it is termed ‘limited naval blockade,’ ‘quarantine-interdiction,’ some kind of ‘operational area,’ or given another label, one should be slow to condemn as illegal such limited measures especially when they are used to maintain world public order. This is particularly true where the principal alternatives may be the use of much more coercion including weapons of mass destruction.”¹

I. Introduction

This chapter explores the legality of establishing NEZs, using the framework set forth in Article 38 of the Statute of the International Court of Justice, which sets forth the following sources of international law:²

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognised by civilised nations;
4. Subject to the provisions of Article 59,³ judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Each of these sources will be examined in turn and the focus of the analysis will be on whether or not these sources support the establishment of NEZs.

II. Treaties

While no treaty specifically permits the establishment of naval exclusion zones, it is equally true that no treaty prohibits them either. This is not surprising in light of the fact that “the laws of naval warfare have repeatedly escaped the nib of drafters” and thus it “merits no

¹ Mallison, p. 95.

² Although Article 38 of the ICJ Statute is phrased in terms of the function of the ICJ, it is generally recognised as a complete statement of the sources of international law. Brownlie, p. 5 and footnote 4 therein.

³ This article provides that decisions of the ICJ are binding only between the parties in respect of the particular case.

amazement that the concept of war zones is omni-absent from conventional texts.”⁴ The following brief survey of conventions governing naval warfare thus touches upon issues bearing some relevance to the subject matter, although none are directly on point.

The “Preliminary Provision” of the 1909 London Declaration⁵ indicates that the rules set forth in that convention “correspond in substance with the generally recognized principles of international law.”⁶ As will be discussed in Chapters 5 and 7, several provisions of the 1909 London Declaration, such as those concerning blockade⁷ and the law of prize⁸ are useful to the discussion of the establishment of NEZs, although their relevance is limited for a number of reasons. There was no discussion of exclusion zones or related concepts during the diplomatic conference that produced the 1930 London Naval Treaty.⁹ The 1936 London Protocol (which supplanted the 1930 London Naval Treaty) concerned submarine warfare and places a premium on humanitarian concerns.¹⁰ Although there is some dispute as to the continuing validity of the 1936 London Protocol notwithstanding the fact that it remains in force, the International Military Tribunal at Nuremberg placed considerable emphasis on its provisions in dealing with Admirals Karl Dönitz and Erich Räder, as discussed below.

Turning briefly to treaties governing peaceful uses of the high seas, Article 2 of the 1958 High Seas Convention and Article 87 of the 1982 LOS Convention provide that freedom of the seas include the freedoms of navigation and overflight. These provisions also specifically indicate, however, that these treaties are subject to other applicable rules of international law, which “leaves the backdoor open” with respect to the legality of NEZs.¹¹ This reference to other applicable rules includes general principles, such as the *lex specialis* principle, as well as specific substantive rules, including belligerent rights that would

⁴ Politakis, pp. 122-123. Politakis writes, “contemplation on the subject ... resembles blind man’s bluff.” Ibid., p. 122.

⁵ 1909 London Declaration, Articles 1-21.

⁶ Ibid., Preliminary Provision.

⁷ Ibid., Chapter I, Articles 1-21.

⁸ In particular, *ibid.*, Chapter III (Unneutral Service), Articles 45-47 and Chapter IV (Destruction of Neutral Prizes), Articles 48-54.

⁹ Fenrick, p. 99.

¹⁰ “Its significance rests in the hierarchy of values that the Protocol announces, in making the safety of innocent people a prime consideration, and constraining the operational necessities to bow before such an imperative of humanitarian concern.” Politakis, p. 128.

¹¹ Pocar, pp. 221-222.

otherwise infringe upon the freedom of the seas, like visit and search. On the basis of the *Dönitz* Judgement (discussed below), Fenrick concludes that the “invocation of exclusion zones directed against enemy merchant shipping in a general war in certain circumstances” is among the belligerent rights constituting the *lex specialis* that prevails over the *lex generalis* of freedom of the seas.¹²

Of course, the United Nations Charter, as a treaty, also plays an important role in determining the legality of the establishment of NEZs, although it is applicable only to those zones established after World War II. Article 2(4) of the Charter prohibits the threat or use of force against the territorial integrity or political independence of any State, although Article 51 of the Charter specifically preserves the rights of States to use armed force in self-defence.¹³ As discussed in Chapter 6, any exercise of the right of self-defence must still be consistent with the principles of military necessity and proportionality. The General Assembly’s Definition of Aggression¹⁴ is silent as to the issue of NEZs,¹⁵ and is of limited value because it is not binding as a matter of law (other than perhaps being evidence of custom).

Based on this analysis, the law of naval warfare as reflected by the relevant treaties provides neither a legal basis for, nor a prohibition of, the establishment and use of NEZs, provided that the NEZ otherwise complies with the requirements of the Charter of the United Nations.

III. Custom

International custom, as a source of law under Article 38 of the ICJ Statute, requires State practice¹⁶ and *opinio juris*. Of the traditional sources of international law, custom is the most important source of the law governing NEZs. The scale and scope of the recently

¹² Fenrick, pp. 114-115.

¹³ The use of force is also permitted if taken pursuant to a Chapter VII authorisation by the U.N. Security Council or as part of an enforcement action within a regional arrangement undertaken in accordance with Article 53.

¹⁴ UN Doc. A/9631 (14 December 1974) (General Assembly Definition of Aggression Resolution).

¹⁵ This resolution does categorise blockades as being acts of aggression. Nevertheless, NEZs are typically more limited than blockades and are usually established on the high seas, although NEZs certainly have the potential to cause great loss of life and to shipping.

¹⁶ Brownlie identifies three elements of State practice: duration, uniformity or consistency of the practice, and the generality of the practice. Brownlie, pp. 7-8.

published ICRC Customary IHL Study demonstrates the difficulties of identifying rules of customary international law and it is perhaps telling that the editors of that monumental work chose to avoid dealing with the customary rules applicable exclusively to naval warfare.¹⁷ With respect to NEZs, custom is by far the most important source of international law. As the preceding makes clear, there are many important examples of State practice relating to NEZs. Moreover, the military manuals of the world's leading maritime powers—while not sources of international law in and of themselves—contain discussions of NEZs and provide strong indicia of the *opinio juris* of these States. For this reason, the discussion below draws heavily on a number of provisions from these military manuals.

Of course, the law applicable in NEZs necessarily overlaps with other areas of customary international law, given the environment in which naval warfare is conducted. There is no doubt that customary international law recognises freedom of navigation, but what about a customary right to establish NEZs? While States supporting such a customary rule rely on the principles of self-defence, *lex specialis* and freedom of the seas in establishing operational zones, neutrals rely on the latter principle in arguing that such zones interfere with their freedom of navigation.¹⁸ Consequently, because the notion of freedom of navigation supports both sides of the argument, due regard must be given to the rights of neutrals to pursue legitimate use of the sea in determining whether zones are lawful or not.¹⁹

As is clear from the Chapter 2, zones of various types were used extensively during both World War I and World War II. As will be discussed in section VI., *infra*, commentators generally took the view that the zones established in the First World War had no basis in customary international law, but were divided as to whether custom could support the establishment of similar zones in the Second World War. With the exception of the Falklands and Iran-Iraq Wars, the post-World War II practice of establishing exclusion zones during naval conflict is not extensive, primarily because there have been relatively few conflicts at sea during this period and the few conflicts that have occurred have been relatively limited in scope.²⁰ Certainly those States that have established NEZs have, during the course of the

¹⁷ In declining to do so, however, they explicitly referred to the fact that the San Remo Manual presents a “major restatement” of the “customary law applicable to naval warfare.” See ICRC Customary IHL Study, Vol. 1, Introduction, p. XXX.

¹⁸ Regarding this conundrum in the context of weapons testing that involves closing off areas of the high seas, see Brownlie, p. 225, footnote 13 and the sources cited therein.

¹⁹ San Remo Manual, para. 106(c).

²⁰ There are, of course, significant differences between the impacts on commercial shipping as a result of the zones employed in the Falklands War and the Iran-Iraq War. This is primarily the result of the fact

establishment of those zones, expressed the opinion that their course of action was legally justified, typically relying on the right of self-defence.²¹

As noted in the Introduction, military manuals, although not binding on courts or tribunals, may be evidence of customary international law, and may be particularly important in determining *opinio juris*.²² Consequently, although military manuals are not, technically speaking, sources of the law, they are nevertheless important for the present analysis. This is particularly the case with respect to military manuals of the major sea-going powers, since the establishment and use of NEZs specially affect the interests of those States.²³ As the ICJ recognised in the *North Sea Continental Shelf Cases*, special attention should be paid to the practice of those States which are most affected by an emerging rule. In determining whether this practice evidences a new rule of custom, the fact that this State practice is “both extensive and virtually uniform”²⁴ would be probative of the issue, notwithstanding the fact that a majority of the world’s States have not pronounced on the issue on the issue of NEZs.²⁵

A survey of publicly available military manuals (and particularly those of maritime powers) supports the proposition that customary international law permits the establishment of naval exclusion zones, although all of the manuals indicate that the right to establish NEZs is qualified.

that the waters around the Falklands are far from major sea lanes of communication, while the Iran-Iraq War was fought in one of the world’s busiest shipping areas.

²¹ See, for example, UN Doc. S/14963 (1982) (reprinted in “United Kingdom Materials on International Law 1982,” 53 *British YBIL* (1983), p. 539) the statement of the British Government to the Security Council on 9 April 1982 concerning the establishment of the maritime exclusion zone in the Falklands War. In that document, the British Government asserted that the MEZ was established in conformity with Article 51 of the UN Charter. The British Government noted that the MEZ “falls short of the concept of blockade as understood in international law.” See UN Doc. S/14964 (1982), (reprinted in “United Kingdom Materials on International Law 1982,” 53 *British YBIL* (1983), pp. 539-540). The British Government also justified the establishment of the MEZ on the grounds of its “inherent right of self-defence” without reference to Article 51 of the UN Charter. See, for example, UN Doc. S/14988 (1982) (reprinted in “United Kingdom Materials on International Law 1982,” 53 *British YBIL* (1983), p. 540). It does not appear that the British Government asserted a customary right to establish NEZs during the Falklands War.

²² See Introduction, Note on Military Manuals and Restatements.

²³ In the context of determining whether innovative treaty provisions had become binding as customary international law, the ICJ has placed particular importance on the State practice of States whose interests are “specially affected.” See, for example, *North Sea Continental Shelf Cases*, para. 74.

²⁴ *Ibid.*

²⁵ Of course, silence may denote either tacit agreement with the rule in question or may be indicative of a lack of interest in the issue presented.

The 1995 U.S. Navy Commander's Handbook distinguishes between "belligerent control of the immediate area of naval operations" and exclusion or war zones.²⁶ This publication cites Tucker for support of the notion that the NEZs of World Wars I and II were based on the right of reprisal against alleged unlawful acts of the enemy and were used "to justify the exercise of control over, or capture and destruction of, neutral vessels not otherwise permitted by rules of naval warfare."²⁷ Notwithstanding that this statement acknowledges that such zones were used to justify acts "not otherwise permitted," the 1995 U.S. Navy Commander's Handbook supports in principle the establishment of NEZs:

Exclusion or war zones established by belligerents in the context of limited warfare that has characterized post-World War II belligerency at sea, have been justified, at least in part, as reasonable, albeit coercive, measures to contain the geographic area of the conflict or to keep neutral shipping at a safe distance from actual or potential hostilities. To the extent that such zones serve to warn neutral vessels and aircraft away from belligerent activities and thereby reduce their exposure to collateral damage and incidental injury, and to the extent that they do not unreasonably interfere with legitimate neutral commerce, they are undoubtedly lawful.²⁸

Given its extensive use of exclusion zones in the Falklands War, the U.K. Manual is particularly instructive. It is somewhat surprising, therefore, that the U.K. Manual makes scant reference to its own practice with respect to NEZs—and then in the chapter on air, rather than naval, operations.²⁹ With respect to naval warfare, the U.K. Manual adopts the approach taken by the San Remo Manual and describes NEZs under the general heading,

²⁶ 1995 U.S. Navy Commander's Handbook, para. 7.9, p. 395. Regarding the notion of "belligerent control of the immediate area of naval operations," see *ibid.*, paras. 7.8 and 7.8.1, pp. 394-395. The right of belligerents to control neutral vessels and aircraft in the immediate vicinity of naval operations is a customary right. See San Remo Manual, para. 108, Explanation, para. 108.1; and Tucker, pp. 299-300.

²⁷ 1995 U.S. Navy Commander's Handbook, para. 7.9, p. 395, citing to Tucker, pp. 301-17. See also Tucker, pp. 301-302 (and footnote 44 therein), in which Tucker takes the view that although the belligerents relied on reprisals to establish zones during the early part of World War II, by the close of that war, justifying such zones on the basis of reprisals was not necessary and took on a rather "perfunctory character." Regarding British reprisals during the naval conflict in the early years of World War II, see Kalshoven, Belligerent Reprisals (1971), pp. 115-160. See also the Note on Belligerent Reprisals, in Chapter 6.

²⁸ 1995 U.S. Navy Commander's Handbook, para. 7.9, p. 395. Regarding the qualifier concerning unreasonable interference with legitimate neutral commerce, see Chapter 5.

²⁹ In the chapter on air operations, the U.K. Manual has a sub-section on "war zones restrictions" (paragraphs 12.58-12.12.58.2), and in footnote 76 of that discussion, reference is made to British practice in the Falklands War and the TEZ. The U.K. Manual states, "The zone was imposed in exercise of the right to self-defence recognised by Art. 51 of the UN Charter."

“Security Zones.”³⁰ According to the U.K. Manual, zones may be established either as a defensive measure or as a means of restricting the geographical extent of the area of armed conflict, although the manual specifically notes that belligerents establishing zones remain duty-bound to respect the “legitimate uses of defined areas of the sea.”³¹ Under the general rubric of security zones, the U.K. Manual specifically refers to “maritime exclusion zones” and “total exclusion zones,” providing that both types are “legitimate means of exercising the rights of self-defence and other rights enjoyed under international law.”³² Such zones, which are an “exceptional measure” are subject to certain limitations, which are drawn directly from the San Remo Manual.³³

Other manuals also draw heavily on the San Remo Manual, with the Canadian Manual virtually adopting *verbatim* the language of that manual concerning exclusion zones.³⁴ Similarly, the Australian Manual basically tracks the San Remo formulation, but sets forth three “operational advantages” in declaring NEZs.³⁵ These advantages are: a likely reduction in the number of vessels entering the area, facilitating rapid identification of vessels that do enter the zone; simplification of the issuance and interpretation of ROE; and limitation of the geographical spread of the conflict.³⁶

The German Manual utilises the term, “maritime exclusion zone” and defines such zones as “a distinct area of the sea and the airspace above in which a party to the conflict exercises extensive rights of control and prohibits access to ships and aircraft.”³⁷ Moreover, a distinction is made between static and movable zones.³⁸ Adopting the approach taken by the

³⁰ U.K. Manual, paras. 13.77-13.80.

³¹ Ibid., para. 13.77. This provision is adopted from San Remo Manual, para. 105. At the same time, the U.K. Manual specifically acknowledges the “customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations.” U.K. Manual, para. 13.80, citing to San Remo Manual, para. 108.

³² U.K. Manual, para. 13.77.1.

³³ U.K. Manual, para. 13.78. These limitations are drawn from San Remo Manual, para. 106 and are set forth in section VI, *infra*.

³⁴ Canadian Manual, paras. 852-855. The San Remo Manual formulation is set forth in section VI, *infra*.

³⁵ Australian Manual, paras. 8.15-8.18.

³⁶ Ibid., para. 8.18.

³⁷ German Manual, para. 1048.

³⁸ Ibid. Static zones are three-dimensional areas designated by discrete co-ordinates, whereas movable zones comprise the three-dimensional area around naval units, with the area of the zone moving as the naval unit moves. Ibid. Movable zones are also known as “defence bubbles.” Ibid., para. 1048.3.

San Remo Manual, the commentary to the German Manual indicates that the establishment of NEZs is “not yet a method of naval warfare generally accepted by international law,” but NEZs were included in the manual “as a contribution to the progressive development of international law.”³⁹ Like the other manuals, the German Manual sets forth certain conditions that must be met if the zone is to be legal.⁴⁰

The Interim New Zealand Manual states that “a dogmatic statement that exclusion zones are legally acceptable or unacceptable would be inaccurate.”⁴¹ Rather, this Manual proposes a case-by-case approach, even setting forth questions to be posed in assessing the legality of the proposed zone.⁴²

1. What is the purpose of the zone?
2. Who or what is excluded from the zone?
3. What is the sanction imposed on vessels or aircraft entering the zone without its permission?
4. Where is the zone located?
5. How large an area does the zone occupy?
6. For how long is the zone established?
7. To what extent are neutral States and their shipping affected by compliance with the requirements of the State establishing the zone?⁴³

The Interim New Zealand Manual goes on to state that zones that are established for a brief period of time, in relatively limited areas of the sea and which are located away from established shipping routes are more likely to be considered legal than those of longer duration over wider areas of the oceans and which encompass shipping routes.⁴⁴ This manual also stresses that the decision to establish an exclusion zone must be made at the “government level,” precluding naval commanders from ordering the establishment of such zones.⁴⁵

³⁹ Ibid., para. 1049.1.

⁴⁰ Ibid., paras. 1049-1050.

⁴¹ Interim New Zealand Manual, para. 705.4.

⁴² These questions are discussed in greater detail in the Conclusion. The Interim New Zealand is silent as to the weight to be afforded to each of these issues, rendering it impossible to determine which factors are the most relevant to determining the legality of a particular zone.

⁴³ Interim New Zealand Manual, para. 705.4.

⁴⁴ Ibid., para. 705.4, footnote 6 therein.

⁴⁵ Ibid.

Given that it is nearly 40 years old, the Soviet Manual, does not discuss NEZs in great detail, although it is worth noting that a relatively neutral tone is taken with respect to the NEZs established in both the First and Second World Wars.⁴⁶ The Soviet Union took a more critical approach to naval zones in the second half of the 20th Century, describing a number of naval actions as illegal,” including the U.S. blockade of the Korean Peninsula, British and French naval operations in the eastern Mediterranean and Red Seas during the Suez Crisis, and U.S. declarations of waters to a distance of 100 miles from the Vietnamese coast to be a combat area.⁴⁷ It should also be noted that during the Falklands War, the Soviet Union protested (but apparently observed) the establishment of the British TEZ, but not the Argentine MZ.⁴⁸

Based on the above survey, the fact that most of the manuals refer to a customary right to establish NEZs, and that none of the manuals specifically oppose the creation of exclusion zones, it appears that customary international law supports the establishment of such zones, provided that certain criteria are met.⁴⁹ Exclusion zones present special and obvious challenges for neutral merchant vessels exercising freedom of navigation. For this reason, special attention should be given to those provisions that relate specifically to notification of the zone for the safety of all mariners and neutral merchant shipping.

The general rule, of course, is that the establishment of such a zone does not relieve the proclaiming belligerent of the obligation to refrain from attacking vessels and aircraft that are not otherwise lawful targets⁵⁰ and the same body of law applies both inside and outside the

⁴⁶ The Soviet Manual does not criticise any of the belligerent zones established in World War I and with respect to World War II, it mentions only the U.S. “patrol zone” established in the April 1941 in the North Atlantic and the U.S. “special submarine zones” in the Pacific Ocean. This manual is completely silent as to German war zones in World War II in the section of the manual dealing with theatres of combat for naval warfare. See Soviet Manual, pp. 417-419.

⁴⁷ Soviet Manual, pp. 418-419.

⁴⁸ See Walker Tanker War, p. 465, footnote 556 and the sources cited therein. See also Goldie, pp. 173-174, 181 (noting that the Soviet Union was the only State to protest the British TEZ); Howard S. Levie, “The Falklands Crisis and the Law of War,” in Alberto R. Coll and Anthony C. Arends, eds., The Falklands War: Lessons for Strategy, Diplomacy and International Law, (1985) p. 64 at p. 66.

⁴⁹ There have been modern instances, however, where States have protested the establishment of NEZs, such as the position taken by the Soviet Union in protesting the TEZ established around the Falkland Islands by the United Kingdom on 28 April 1982 (although they did not protest the Argentine MZ announced earlier that month). See Walker Tanker War, p. 465, footnote 556 and the sources cited therein.

⁵⁰ 1995 U.S. Navy Commander’s Handbook, para. 7.9; U.K. Manual, para. 13.77; Canadian Manual, para. 852(2); ICRC Model Manual, para. 1711.1; San Remo Manual, paras. 105-108.

zone.⁵¹ The Canadian Manual specifies that the practical effect of NEZs is to “warn shipping that hostilities are taking place and that there is a greater risk if entry into the zone occurs.”⁵²

The customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations is not affected by either the law of blockade or the law of NEZs.⁵³ The U.S. Navy Commander’s Handbook describes the right of a belligerent to exercise control over neutral vessels and aircraft within the immediate area of naval operations as:

[A] limited and transient claim ... based on a belligerent’s right to attack and destroy its enemy, its right to defend itself without suffering from neutral interference, and its right to ensure the security of its forces.⁵⁴

Similarly, the establishment of a zone does not preclude naval operations from being conducted *outside* of the zone.⁵⁵

A. Public Declarations and Notifications of the Exclusion Zone

The San Remo Manual and those military manuals specifically addressing NEZs require States establishing such zones to publicly declare and notify the international community that a zone has been established.⁵⁶ The declaration must include the commencement date and duration of the zone, the location and extent of the zone and any specific restrictions imposed.⁵⁷ The commentary to the German Manual states:

A grace period sufficient for all interested vessels and aircraft to leave the area covered by a proclamation is as essential for a zone’s

⁵¹ U.K. Manual, para. 13.78(a); Canadian Manual, para. 853(1)(a); San Remo Manual, paras. 105-106(a).

⁵² Canadian Manual, para. 853(1)(a). See also ICRC Model Manual, para. 1711.2 (“a limited exclusion zone can be useful to indicate a danger area to neutral shipping”).

⁵³ U.K. Manual, para. 13.80; ICRC Model Manual, para. 1711; San Remo Manual, para. 108. See also 1995 U.S. Navy Commander’s Handbook, paras. 7.8, 7.8.1; Interim New Zealand Manual, para. 704; Tucker, pp. 300-301.

⁵⁴ 1995 U.S. Navy Commander’s Handbook, para. 7.8, footnote 144.

⁵⁵ Canadian Manual, para. 855; Interim New Zealand Manual, para. 705(5).

⁵⁶ U.K. Manual, paras. 13.77.1, 13.78(d); Canadian Manual, para. 853.1(e); German Manual, para. 1049; ICRC Model Manual, para. 1711.2. The German Manual also specifies that if the NEZ is divided into sub-zones, the notification requirement includes an obligation to “define the extent of restrictions and the boundaries of each individual sub-zone.” Ibid. See also San Remo Manual, para. 106(e). The notification should be made via diplomatic channels and through the appropriate international organisations, including the IMO and the ICAO. San Remo Manual, Explanation, para. 106.6.

⁵⁷ San Remo Manual, para. 106(e).

legality as the official notification of its commencement, duration, location and extent, and the restrictions imposed.⁵⁸

No other manual includes this requirement, although as a practical matter, it seems entirely reasonable. There is no requirement that the establishing State declare the enforcement measures that it intends to apply within the NEZ, although the drafters of the San Remo Manual discussed this issue.⁵⁹

B. Due Regard for the Rights of Neutrals to Legitimate Uses of the Seas

In the event that a belligerent opts to establish an NEZ, due regard must be given to the “rights of neutral States to legitimate uses of the seas,”⁶⁰ including the right to fish and to use submarine cables and pipelines.⁶¹

C. Safe Passage Through Exclusion Zones under Certain Circumstances

The State establishing the zone must ensure safe passage through the zone in two situations: (1) where the “geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;”⁶² and (2) when normal navigation routes are affected,” except when it is not possible to do so due to military requirements.⁶³ It follows from this requirement that the geographic and temporal scope of the NEZ must be considered in conjunction with the restrictive and enforcement measures and the self-defence rights of the establishing belligerent. As the commentary to the San Remo Manual states:

Zones located in isolated areas far from normal shipping routes, such as those used in the Falklands, are less likely to raise objections than zones on major shipping routes such as those in the Persian Arabian Gulf. Zones occupying relatively small areas or

⁵⁸ German Manual, paras. 1049, 1049.4.

⁵⁹ San Remo Manual, Explanation, para. 106.3. Proponents of the idea that enforcement measures be declared argued that such publication would enhance the “legitimacy of the zonal concept.” Ibid. Opponents argued that States would not accept any obligation to declare such enforcement measures, since to do so would be akin to publishing its rules of engagement. Ibid.

⁶⁰ U.K. Manual, para. 13.77; San Remo Manual, paras. 105, 106(c).

⁶¹ San Remo Manual, Explanation, para. 106.4.

⁶² U.K. Manual, para. 13.78(c)(1); Canadian Manual, para. 853.1(d)(1); San Remo Manual, para. 106(d)(i).

⁶³ U.K. Manual, para. 13.78(c)(2); Canadian Manual, para. 853.1(d)(2); San Remo Manual, para. 106(d)(ii).

established for relatively brief periods are more likely than the converse to be considered acceptable.⁶⁴

This provision is designed to ensure that the inconveniences and risks faced by neutral merchant vessels is minimised. To this end, any measures taken by neutrals to comply with the requirements of a belligerent vis-à-vis NEZs must not be construed as a harmful act to the opposing belligerent.⁶⁵ This rule must be construed narrowly and is limited to those measures that are essential for safe passage through the zone. For example, the San Remo Manual indicates that to require neutral merchant vessels to travel through the zone under convoy of belligerent warships would be impermissible since that could be considered by the opposing belligerent as an act of resistance to visit and search, rendering the neutral merchant vessels liable to attack on sight.⁶⁶

IV. General Principles

Paragraph 1(c) of Article 38 of the ICJ Statute essentially refers to evidentiary, procedural and interpretative rules.⁶⁷ Applying this conception of “general principles,” the right to establish NEZs is clearly *not* a general principle of law. Brownlie, however, also refers to “general principles of *international law*,”⁶⁸ which he argues may refer to:

[R]ules of customary law, to general principles of law as in Article 38(1)(c), or to logical propositions resulting from judicial reasoning on the basis of existing pieces of international law and analogies.⁶⁹

⁶⁴ San Remo Manual, Explanation, para. 106.2. With respect to the Falklands War, the commentary states that the 200-mile zone established by Argentina around the islands was “probably adequate,” while its declaration that the entire South Atlantic was a war zone was “disproportionate to its defence requirements and would affect shipping unconnected with the conflict.” Ibid. See also German Manual, para. 1049.2.

⁶⁵ U.K. Manual, para. 13.79; Canadian Manual, para. 854; San Remo Manual, para. 107, Explanation, para. 107.1.

⁶⁶ San Remo Manual, Explanation, para. 107.2.

⁶⁷ Brownlie asserts that “the most frequent and successful use of domestic law analogies has been in the field of evidence, procedure, and jurisdictional questions.” Brownlie, p. 18. See also *ibid.*, p. 16: “What has happened is that international tribunals have employed elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process.”

⁶⁸ *Ibid.*, p. 18 (*emphasis added*).

⁶⁹ *Ibid.*

Although Brownlie concedes that the principles underlying examples of general principles may be traced to state practice, “they are primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer *directly* connected with state practice.”⁷⁰ Brownlie goes on to set forth several examples of general principles of international law, including freedom of navigation, which is a general principle applicable both in time of peace and during armed conflict at sea.⁷¹

Some writers take the notion that freedom of the seas is a general principle of international law even further, asserting that freedom of the seas is a peremptory norm or *jus cogens*.⁷² Among the commentators taking this view are Fitzmaurice⁷³ and Frowein.⁷⁴ Thus, freedom of the seas may be considered as a general principle (if not *jus cogens*), and as noted above in the context of the customary nature of freedom of the seas, this principle can cut both ways with respect to the legality of establishing NEZs. Guggenheim, for example, takes the position that zones are contrary to the principle of freedom of the seas,⁷⁵ while others argue that it is the principle of freedom of the seas that underlies the right of belligerents to establish such zones.⁷⁶

V. Judicial Decisions

By the terms of Article 38 of the ICJ statute, judicial decisions are subsidiary means of determining international law, a characterisation that should not be exaggerated, since a “coherent body of jurisprudence will naturally have important consequences for the law.”⁷⁷

⁷⁰ Ibid., pp. 18-19.

⁷¹ See *Corfu Channel Case*, p. 30; and *Military And Paramilitary Activities*, para. 214.

⁷² See Vienna Convention on the Law of Treaties Article 53 (“[A] peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”) See also Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, 1997).

⁷³ Fitzmaurice reaches this conclusion on the grounds that the sea is *res communis*. This position was set forth in Fitzmaurice’s capacity as Special *Rapporteur* for the Vienna Convention on the Law of Treaties. See Third Report on the Law of Treaties, UN Doc. A/CN.4/115.

⁷⁴ Jochen Abr. Frowein, “*Jus Cogens*,” *Encyclopedia of Public International Law*, R. Bernhardt (ed.), Instalment 7 (1984), p. 329.

⁷⁵ II Guggenheim, *Traité de Droit international public* (Geneva, 1954), p. 348.

⁷⁶ See, for example, the arguments set forth by Pocar, pp. 221-222.

⁷⁷ Brownlie, p. 19.

There is only one international judicial decision addressing the issue of NEZs directly: that portion of the Judgement of the IMT dealing with Admiral Karl Dönitz and his alleged role in the German unrestricted submarine warfare campaign in World War II.⁷⁸ There are a few other cases, including those concerning the tactics employed by the German Navy in the First and Second World Wars and the ICJ *Corfu Channel, Military and Paramilitary Activities* and *Oil Platforms* cases, that deal with issues relating to the present topic and these cases will be briefly discussed.

Under the IMT Indictment, Admiral Karl Dönitz was charged with three counts, namely, being a member of the common plan or conspiracy to commit crimes against peace, war crimes and crimes against humanity; crimes against peace; and war crimes.⁷⁹ Dönitz was charged with waging unrestricted submarine warfare contrary to the 1936 London Protocol.⁸⁰ Dönitz was convicted of two counts, crimes against peace and war crimes, the latter conviction being the important one for the present purposes, and sentenced to ten years' imprisonment.

In his defence, Dönitz asserted that at all times the German Navy operated in conformity with its obligations under international law, specifically including the 1936 London Protocol.⁸¹ He testified that at the commencement of the war, the German Prize Ordinance, based on the 1936 London Protocol, governed German submarine operations. Pursuant to these regulations, he had ordered his submarines to attack all merchant vessels in convoy, those merchant vessels that refused to stop or those merchant vessels that used their radio upon sighting a submarine.⁸² He also successfully demonstrated that by October 1939, British merchant vessels were being armed and convoyed under armed escort, were radioing information concerning the locations of German submarines, and were attacking such boats

⁷⁸ Nürnberg Proceedings, Vol. XXII, pp. 556-561 ("Dönitz Judgement") (the full text of the entire IMT Judgement is also printed in *ibid.*, Volume I). Admiral Erich Räder faced the same charges as Dönitz (at least through the period up to the Räder's reassignment as Admiral Inspector of the Navy on 30 January 1943), but with respect to the issue of NEZs, the tribunal adopted the same findings that it made with respect to Dönitz. Thus, that portion of the Judgement relating to Räder (*ibid.*, Volume XXII, pp. 561-563) does not add anything particularly helpful to the present analysis.

⁷⁹ Indictment, Trial of the Major War Criminals Before the International Military Tribunal, Volume I, pp. 27-79.

⁸⁰ *Dönitz Judgement*, p. 557.

⁸¹ *Ibid.*

⁸² *Ibid.*

on sight.⁸³ These factors all made it extremely difficult for the German submarine forces to comply with the 1936 London Protocol.⁸⁴ Moreover, the fact that the Royal Navy had issued orders to sink all vessels in the Skagerrak and that the U.S. Navy pursued unrestricted submarine warfare in the Pacific were also established by the defence, in the form of written interrogatories from U.S. Admiral Chester Nimitz.⁸⁵ On the basis of these findings, Dönitz was acquitted by the IMT of the charges relating to unrestricted submarine warfare.⁸⁶ The judges were of the view that the general practice of the belligerents in incorporating merchant vessels into the war effort provided sufficient grounds for acquitting Dönitz and although they clearly had an opportunity to do so, the judges avoided the issue of determining whether the 1936 London Protocol was compatible with the sinking of neutral merchant vessels used in a manner that was “functionally indistinguishable from the use of belligerent merchant shipping.”⁸⁷

However, the IMT went on to convict Dönitz of sinking neutral merchant vessels in the “operational zones.”⁸⁸ The operative paragraph of the IMT Judgement states:

[T]he proclamation of operational zones and the sinking of neutral merchant vessels which enter those zones presents a different question. This practice was employed in the war of 1914-1918 by Germany and adopted in retaliation by Great Britain. The Washington Conference of 1922, the London Naval Agreement of 1930 and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in that war. Yet the Protocol made no exception for operational zones. The order of Dönitz to sink neutral ships without warning when found within these zones was, in the opinion of the Tribunal, therefore a violation of the Protocol.⁸⁹

As noted by Fenrick: “This portion of the judgement appears to accept the legitimacy of exclusion zones for belligerent merchant vessels under certain circumstances but to prohibit such zones when they affect neutral merchant vessels.”⁹⁰ Because the 1936 London Protocol

⁸³ Ibid., p. 558.

⁸⁴ Busuttil, p. 160.

⁸⁵ *Dönitz Judgement*, p. 559 and *Dönitz Document* 100.

⁸⁶ *Dönitz Judgement*, p. 559.

⁸⁷ Fenrick, p. 102.

⁸⁸ *Dönitz Judgement*, pp. 558-559.

⁸⁹ Ibid., p. 558.

⁹⁰ Fenrick, p. 104. Fenrick goes on to criticise part of this decision. See *ibid.*, pp. 104-105. (In

does not explicitly refer to exclusion zones, and thus does not distinguish between ships inside or outside of such zones, one commentator has described the reasoning of the Tribunal as “faulty,” insofar as it found all attacks on neutral ships within exclusion zones to be a violation of the Protocol.⁹¹

During the course of the proceedings, Flottenrichter Kranzbühler, counsel for Dönitz, was asked by the IMT President if the legality of operational zones—like blockades—depended at least in part on their effectiveness, that is, the power of the declaring State to enforce such zones.⁹² Kranzbühler argued that:

In contrast to the blockade zone in a classical sense where full effect is necessary, the operational zone only provides for practical endangering through continuous combat actions.⁹³

As the following exchange demonstrates, Dönitz put up a defence that once such zones were declared, the ability of the belligerent to control events in that zone—particularly if the operational zone consisted of mines—was uncertain:

THE PRESIDENT: Do you mean, then, that you are basing the power of the state to declare a certain zone as an operational zone not upon the power of the state to enforce its orders in that zone, but upon the possibility of danger in that zone?

FLOTTENRICHTER KRANZBÜHLER: Yes.

THE PRESIDENT: You say it depends on the possibility of danger in the zone?

FLOTTENRICHTER KRANZBÜHLER: I would not say the possibility of danger, Mr. President, but the probability of danger, and the impossibility for the belligerent to protect neutral shipping against this danger.

distinguishing between neutral and belligerent merchant vessels, the IMT “ignores the fact that in a general war many neutral vessels will be engaged in transporting cargoes in support of one belligerent’s war effort and will, therefore, be functionally indistinguishable from belligerent merchant vessels.” Ibid., p. 104.)

⁹¹ Busuttil, p. 162. See also Mallison, pp. 81-84, in which he is also critical of this aspect of the IMT Judgement. See also Telford Taylor, *The Anatomy of the Nuremberg Trials*, pp. 592-594 concerning the drafting of this portion of the IMT Judgement.

⁹² *Dönitz Trial*, pp. 332-334.

⁹³ Ibid., pp. 332-333.

THE PRESIDENT: May I ask you what other legal basis there is for the theory you are putting forward, other than the adoption of the blockade?

FLOTTENRICHTER KRANZBÜHLER: I am referring as a legal basis especially to the practice of the first World War, and the statements made by experts after the first World War, and also to the generally recognized rules about mined areas. The mined areas actually in this war proved to be operational zones where every means of sea warfare was used to sink without warning.⁹⁴

The IMT judges did not accept this line of argument, leading Mallison to conclude:

The questions, therefore, appear to indicate full judicial agreement with the prosecution claim that the legal requirements of enforcement or control could not be met by a “paper order” and submarine enforcement.⁹⁵

Similarly, Fenrick has written:

The Tribunal apparently considered that the right to declare an exclusion zone should depend upon the power to enforce the zone or make it effective. It appears to have concluded that, as with traditional blockades, exclusion zones must be enforced by surface warships rather than by submarines alone. It was not persuaded by Kranzbühler’s argument that all that was necessary for a legitimate zone was a declaration plus the probability of danger to neutral shipping from any form of attack together with the impossibility for operational reasons of the belligerent declaring the zone to protect neutral shipping in the zone.⁹⁶

In conclusion, the *Dönitz* Judgement may be read to mean “maritime exclusion zones are probably not illegal if measures taken there either serve purely defensive purposes or are directed solely at enemy military objectives.”⁹⁷ Such zones, like naval blockades, must meet the test of effectiveness⁹⁸ and as Fenrick notes, the decision “appears to accept exclusion

⁹⁴ Ibid., pp. 333-334. Of this colloquy, Mallison writes, “Unfortunately, Kranzbühler did not respond to the express statements in the questions and demonstrate their juridical inadequacy.” Mallison, p. 84.

⁹⁵ Mallison, pp. 83-84. Historically, blockades lacking sufficient naval power to ensure legal effectiveness were said to be established under a “paper order” (or known simply as a “paper blockade”) and hence the reference to “paper order.” See Hall, pp. 198-199.

⁹⁶ Fenrick, pp. 104-105, citing to *Dönitz* Trial, pp. 332-334. Fenrick also cites to the 4th edition of Colombos, who wrote that “any declaration of war zones by a belligerent is unlawful unless supported by naval forces sufficient to ensure the effective control of his regulations within the declared area of belligerent operations.” C.J. Colombos, *The International Law of the Sea*, 4th rev. ed., London, 1961, p. 466, cited in Fenrick, p. 107.

⁹⁷ German Manual, para. 1049.

⁹⁸ Several military manuals support this proposition. See, for example, German Manual, para. 1049.

zones enforced by a sink-on-sight policy directed against belligerent merchant shipping incorporated into the enemy war effort.”⁹⁹

Although Dönitz and Räder were the only two individuals brought to trial for sinking merchant vessels without warning in zones, several other cases must be noted, including the *Llandovery Castle*,¹⁰⁰ *Dover Castle*,¹⁰¹ *Peleus*,¹⁰² *Moehle*¹⁰³ and *Von Ruckteschell*¹⁰⁴ cases. The *Llandovery Castle* and *Dover Castle* were both British hospital ships torpedoed by German submarines during the First World War. In the *Dover Castle* case, the commander of the German submarine *U.C. 67*, Karl Neumann, admitted sinking the hospital ship, but relied upon the defence that he was following the orders of the German Admiralty Staff. Based on the facts as found by the court, the accused was acquitted based on this defence.¹⁰⁵ In the *Llandovery Castle* case, Lieutenants Dithmar and Boldt the first and second officers of German submarine *U-Boat 82* were convicted, despite their defence of superior orders, of firing on lifeboats carrying survivors of the *Llandovery Castle* following her torpedoing by the German submarine, resulting in an unknown number of fatalities.¹⁰⁶ These cases may be

⁹⁹ Fenrick, pp. 107-108.

¹⁰⁰ *Judgement in Cases of Lieutenants Dithmar and Boldt*, German Reichsgericht, 16 July 1921, reprinted in 16 *AJIL* (Supplement, No. 4, October 1922), pp. 708-722 (“*Llandovery Castle Judgement*”); see also Hackworth, VI *Digest of International Law*, pp. 462-463. The *Llandovery Castle* and the *Dover Castle* cases were part of the post-World War I Leipzig War Crimes Trials.

¹⁰¹ *Judgement in Case of Commander Karl Neumann*, German Reichsgericht, 4 June 1921, reprinted in 16 *AJIL* (Supplement, No. 4, October 1922), pp. 704-708 (“*Dover Castle Judgement*”); see also Hackworth, VI *Digest of International Law*, p. 463.

¹⁰² *In re Eck and Others (The Peleus)*, British Military Court, Hamburg, 17-20 October 1945, reported in 1 LRTWC Case No. 1, pp. 1-21 and 13 Annual Digest and Reports of Public International Law Cases, 1946, Case no. 108, pp. 248-250.

¹⁰³ *Trial of Karl-Heinz Moehle*, British Military Court, Hamburg, 15-16 October 1945, reported in 9 LRTWC, Case No. 54, pp. 75-81 and 13 Annual Digest and Reports of Public International Law Cases, 1946, Case No. 107, pp. 246-247.

¹⁰⁴ *Trial of Helmuth von Ruckteschell*, British Military Court, Hamburg, 5-21 May 1947, reported in 9 LRTWC, Case No. 55, pp. 82-90 and 13 Annual Digest and Reports of Public International Law Cases, 1946, Case no. 108, pp. 247-248.

¹⁰⁵ The court found that this defence was valid in light of the fact that the German Government had concluded that allied military hospital ships were being operated in violation of the 1907 Hague Convention X and that these conclusions had been communicated to the allied powers. The Germans then imposed restrictions on hospital ship transit and warned that any vessels violating these restrictions would be subject to a sink on sight policy. See *Dover Castle Judgement*, pp. 706-707 and Hackworth, VI *Digest of International Law*, pp. 460-463.

¹⁰⁶ The captain of *U-Boat 82*, First-Lieutenant Patzig, could not be located after the war. The superior orders defence of Lieutenants Dithmar and Boldt was rejected on the grounds that “killing defenceless people in life-boats could be nothing less else but a breach of the law.” *Llandovery Castle Judgement*, p. 722.

distinguished on the grounds that the survivors of the attack on the *Llandoverly Castle* had been intentionally targeted following the sinking of that vessel, whereas the *Dover Castle* suffered only six casualties, all the result of the initial torpedo attack.

In addition to the case of Admiral Dönitz before the Nürnberg Tribunal, the “*Laconia Order*”¹⁰⁷ was the subject of three World War II cases (*The Peleus*, *Moehle* and *Von Ruckteschell*) that involved attacks upon survivors following the sinking of merchant vessels. *The Peleus* and *Moehle* cases involved submarine commanders who ordered deck gunners to fire on survivors clinging to pieces of wreckage from the sunken ships, while the *Von Ruckteschell* case involved a German surface raider. In the latter case, the commander of the surface raider, Helmuth von Ruckteschell, was charged with committing a variety of offences against allied merchant vessels, including firing on the targeted vessel even after that ship had signaled her surrender, failing to make provision for the safety of survivors despite having the capacity to do so, and firing at survivors in lifeboats.

Based on his analysis of these cases, Fenrick concluded that:

Unless a deliberate effort is made to massacre survivors, it appears that individual unit commanders are unlikely to expose themselves to war crimes charges if they attack merchant ships without warning in exclusion zones in compliance with superior orders.¹⁰⁸

The International Military Tribunal for the Far East (the “Tokyo Tribunal”) dealt with Japanese submarine activities in only a cursory way, although some detail was devoted to the killing of survivors of the *Jean Nicolet*, an armed U.S. merchantman.¹⁰⁹

The ICJ has never ruled on the legality of exclusion zones, although the *Corfu Channel*, *Military And Paramilitary Activities* and *Oil Platforms* cases dealt with issues concerning the use of naval mines and their effect on shipping. In the *Corfu Channel* and *Military and Paramilitary Activities* cases, the ICJ held that states have an obligation to notify vessels of the existence and danger of minefields during times of peace while reaffirming the duty to do so during armed conflict, in accordance with the 1907 Hague Convention VIII.¹¹⁰

¹⁰⁷ See Chapter 2, Section IV.A.

¹⁰⁸ Fenrick, p. 107. The author also expresses the view that criminal liability in cases involving attacks on merchant vessels in NEZs (excluding situations where survivors are subsequently attacked) should only attach to senior commanders, such as Dönitz or Räder and that “it might be more appropriate to consider actions occurring in exclusion zones, other than breaches of explicit and generally accepted treaty law, perhaps giving rise to state responsibility but not forming the basis of war crimes charges.” Ibid.

¹⁰⁹ See Mallison, pp. 142-143.

¹¹⁰ See Busuttil, pp. 54-54. See also *ibid.*, p. 54, where the author writes with respect to the *Corfu Channel*

In the *Oil Platforms* case, the ICJ dealt with events arising from the Tanker War of the 1980s, and specifically Iranian attacks on the *Sea Isle City*, a Kuwaiti tanker re-flagged to the U.S., which was hit by a missile near Kuwait Harbour and the *USS Samuel B. Roberts*, which hit a naval mine in international waters while returning from an escort mission. In response to these attacks, and relying on the doctrine of self-defence, U.S. armed forces attacked offshore Iranian oil platforms and other complexes from which the U.S. claimed Iran had launched the attacks on the *Sea Isle City* and the *USS Samuel B. Roberts*.

The United States Second Circuit Court of Appeals, in the *Amerada Hess* case concerning the sinking of *Hercules* by Argentina, held that “it is beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation violates international law.”¹¹¹

VI. Writings of Publicists

As with judicial decisions, the writing of publicists¹¹² is a subsidiary means of determining the law, pursuant to the terms of Article 38 of the ICJ Statute. This category includes ILC draft articles and other reports written for the ILC, reports prepared by other expert groups, including the Institute of International Law and restatements, whether authored by single or multiple *rapporteurs* and such sources are at least as authoritative as those written by single authors.¹¹³

Unlike more general areas of international law, or even the sub-category of international humanitarian law, the law of naval conflict poses particular problems when it comes to reliance upon “the teachings of the most highly qualified publicists of the various nations.”¹¹⁴ A comprehensive survey of the literature on the law of naval warfare by Busuttil revealed some startling figures. His review led to the conclusion that writers from only 27 States—predominately from North America and Europe—have written on this subject.¹¹⁵

case that, “The Court evidently believed in 1949 that Hague Convention VIII remained in effect and had not been eroded away by State practice during the two World Wars.”

¹¹¹ *Amerada Hess*, p. 424.

¹¹² See Politakis, pp. 135-145, for a detailed analysis of doctrinal writings concerning the legality of war zones.

¹¹³ Brownlie, p. 24.

¹¹⁴ In general, see Busuttil, pp. 8-10.

¹¹⁵ *Ibid.*, p. 9, footnotes 66-72.

While it may not seem prudent to base conclusions on such a small sample, especially from a relatively heterogeneous pool, however, Busuttil is quick to point out that:

[I]t is some comfort that these publicists have often been intimately involved in the development of their national legal policies with regard to naval warfare and so have a kind of “double measure” of credibility.¹¹⁶

Moreover, these writers tend to come from the nations that have the largest and most significant naval forces.¹¹⁷

There are two primary 20th century restatements of the law of naval warfare, the 1913 Oxford Manual and the 1995 San Remo Manual, and this analysis begins with these documents. Delegates at the Second International Peace Conference in The Hague determined that the Third Conference should include discussions on regulations for the conduct of naval warfare, and as a result, the Institute of International Law prepared the 1913 Oxford Manual.¹¹⁸ This manual does not deal specifically with NEZs, since the concept of such zones was not as developed as it would become shortly thereafter.¹¹⁹ Article 50 of the 1913 Oxford Manual, however, refers to “rights of the belligerent in the zone of operations,” and it is clear from the text of this article that it refers to the immediate vicinity of naval operations.¹²⁰ Within this zone, the belligerent could restrict enemy vessels and preclude them from the performance of certain tasks, such as communication with enemy warships.¹²¹ Enemy ships found to be in violation of this provision could be forcibly driven from the zone and would be liable to capture if it was confirmed that the merchant vessel had communicated information concerning the conduct of hostilities to enemy warships.¹²²

¹¹⁶ Ibid., p. 9.

¹¹⁷ This also raises the issue of whether they are acting as advocates for their particular military forces, rather than simply being subjective commentators on the law. See *ibid.*

¹¹⁸ 1913 Oxford Manual. The Third International Peace Conference was never held due to the outbreak of World War I. See also Verri, pp. 329-341.

¹¹⁹ Verri, p. 331, who states that the 1913 Oxford Manual “does deal with the barred zones (or war zones) which will figure prominently in the First World War.” Verri makes this comment without specifying precisely which article of the manual he is referring to, although it is likely that he is referring to Article 50.

¹²⁰ 1913 Oxford Manual, Art. 50 (“the zone corresponding to the actual sphere of his operations”). See Politakis, p. 125 and footnotes 209 and 210 therein, to the effect that this phrase reflects the drafters’ intention to limit the applicability of this provision to the area of active hostilities. In his commentary to the 1913 Oxford Manual, Verri is of the view that Article 50 represents a “new norm.”

¹²¹ 1913 Oxford Manual, Art. 50.

¹²² *Ibid.* Politakis is of the view that this provision did not qualitatively alter the traditional law of prize:

The San Remo Manual addresses the issue of zones and in the preliminary remarks to the commentary it is noted that the participants in the drafting of the manual were split as to the lawfulness of such zones, with some participants taking the view that zones were unlawful.¹²³ The majority of the participants, however, took the view that “the existence of such zones was a reality and that it was desirable to develop guidelines for them.”¹²⁴ The San Remo Manual starts with the proposition that belligerents are not absolved of their obligations under international humanitarian law by establishing zones that might adversely affect the legitimate uses of the sea contained in such zones.¹²⁵ The experts noted that such zones should be considered as an “exceptional measure” and concluded that setting forth detailed criteria for such zones would be a progressive development of the law.¹²⁶ These factors include:

- the applicability of the same body of law both inside and outside the zone;¹²⁷
- the applicability of strict adherence to military necessity and the principle of proportionality concerning the extent, location and duration of the zone;¹²⁸
- ensuring due regard to the rights of neutrals to enjoy legitimate uses of the sea;¹²⁹
- provisions for the safe passage of neutral vessels and aircraft under certain circumstances;¹³⁰ and
- public declarations and notifications concerning the commencement, duration, location and extent of the zone, as well as the restrictions imposed within the zone.¹³¹

“True though it was that merchantmen would be kept clear by warning, or even by force, and eventually would be liable to capture owing to their geographic proximity to enemy warships and not because of their cargo or destination, this implied, however, a variation in context rather than in means.” Politakis, p. 125.

¹²³ San Remo Manual, p. 181.

¹²⁴ Ibid.

¹²⁵ Ibid., para. 105, Explanation, para. 105.1.

¹²⁶ Ibid., para. 106, Explanation, para. 106.1.

¹²⁷ Ibid., para. 106(a).

¹²⁸ Ibid., para. 106(b).

¹²⁹ Ibid., para. 106(c).

¹³⁰ Ibid., para. 106(d).

¹³¹ Ibid., para. 106(e).

The fact that the experts who participated in the drafting of the San Remo Manual articulated detailed criteria concerning the operation of such zones clearly indicates that they concluded that it was legal to establish exclusion zones.

The Helsinki Principles also indicate that “Special Zones” are lawful, subject to a number of provisos:

Subject to Principle 5.29 and without prejudice to the rights of commanders in the zone of immediate naval operations, the establishment by a belligerent of special zones does not confer upon that belligerent rights in relation to neutral shipping which it would not otherwise possess. In particular, the establishment of a special zone cannot confer upon a belligerent the right to attack neutral shipping merely on account of its presence in the zone. However, a belligerent may, as an exceptional measure, declare zones where neutral shipping would be particularly exposed to risks caused by the hostilities. The extent, location and duration must be made public and may not go beyond what is required by military necessity, regard being paid to the principle of proportionality. Due regard shall also be given to the rights of all States to legitimate uses of the seas. Where such a zone significantly impedes free and safe access to the ports of a neutral State and the use of normal navigation routes, measures to facilitate safe passage shall be taken.¹³²

Although the San Remo Manual and the Helsinki Principles support the notion that at the end of the 20th Century, the establishment of NEZs was lawful (subject to certain important caveats) the views of commentators earlier in the century were often to the contrary. Because modern exclusion zones had their roots in the zones connected with unrestricted submarine warfare, and given the criticisms of this type of warfare from the international law community, it is not surprising that many writers in the first half of the 20th Century disapproved of the notion of exclusion zones. The remainder of this chapter traces the development of legal thought concerning exclusion zones during the 20th Century, following a more or less chronological approach.

With respect to commentators—whether from the academy or the armed services—it is difficult to develop an overall framework for analysing the various positions, for several reasons. First, the historical examples of zones, the focus of many international legal writers, are of only limited assistance to an area of the law that has developed in more recent conflicts.

¹³² Helsinki Principles, para. 3.3. Paragraph 5.2.9. relates the right of transit passage through international straits, the right of archipelagic sea lanes passage and the right of innocent passage through the territorial sea or archipelagic waters of belligerents.

Second, the views of some writers have changed over time, with some who were sceptical of the notion of zones as developed during the World Wars taking a less hostile view in subsequent conflicts. Third, many writers recognise the difficulties and hazards in commenting upon the legality of zones *in abstracto*, without the benefit of addressing zones on a case-by-case basis. As a result, writers who tend to address the legality of zones often reach conclusions that might be considered tentative or halting. Fourth, many writers analyse NEZs from particular viewpoints, such as the law of reprisals. For these reasons, the following discussion generally follows a chronological approach, with deviations when necessary to retain topical discussions or where the ideas of commentators are cross-fertilised, such as when a particular zone draws the attention of numerous authors. There has been no overall attempt to categorise the positions taken between those who generally oppose zones and those who tend to support the concept.

At the outset, however, the views of a prominent writer on naval warfare, Goldie, should be noted, since in many respects his views help frame the debates that follow.

Because, for so long maritime States have stressed, as fundamental to their survival, the freedom of the high seas, belligerents' claims to enforce maritime exclusion zones must be carefully balanced against the traditional and basal doctrine and the interests interpreting it. Assertions that the power to create such zones has emerged into customary international law demand rigorous criteria for justifying their promulgation by warring States. Indeed, a case-by-case approach is required. On the other hand, it should be observed that the creation of such zones has arisen, in part, from the development and deployment of new weapons, from the evolution of new tactics, and from the emergence of economic warfare as an important, indeed essential, weapon. Thus, they have been resorted to for the purposes of both combat and logistical strategies.¹³³

Notwithstanding the fact that Goldie seems to gloss over the fact that economic warfare has always been an important aspect of naval strategy (and thus might not be characterised properly as “emerging”), his analytical approach is sound.¹³⁴ His emphasis on the importance of weapons systems and tactics cannot be emphasised enough.

In the wake of World War I, the commentators addressed specific steps taken vis-à-vis the various zones established by the parties to that conflict. For example, Garner forcefully

¹³³ Goldie, p. 177.

¹³⁴ This statement is also a bit odd in light of his discussion concerning the impact of modern economic infrastructure on the law of blockade, in which he points out how many States today are less dependent on maritime commerce due to increasing road and rail lines of communication. *Ibid.*, p. 178.

argued that belligerents had neither a right to close portions of the high seas to navigation nor to mine the high seas in such a way as to expose neutral ships to the danger of destruction.¹³⁵ Garner succinctly described the state of the customary law of naval warfare at the end of the First World War as follows:

Unquestionably the naval forces of a belligerent have a right to engage the enemy and prey upon his commerce anywhere on the high seas. In a certain sense, therefore, the outbreak of war between two or more maritime powers automatically converts that portion of the high seas which becomes a sphere of immediate military operations into a war zone, and belligerents may formally proclaim such waters to be a theatre of hostilities. ... Neutral vessels venturing into such waters are, therefore, exposed to destruction in the same way that a non-combatant individual is who in land warfare strays into the lines which embrace the theatre of military operations. ... But the waters embraced within such zones remain, as before, a portion of the high seas, and a belligerent probably has no greater rights of search, capture, or destruction in respect to enemy or neutral vessels therein than he has outside the area. *In short, belligerents have no right to appropriate any portion of the high seas and close them to navigation of neutral vessels, and it is very doubtful whether they may lawfully plant mines in them in such a way as to expose neutral ships to the danger of destruction while peacefully navigating the waters thereof.*¹³⁶

Similarly, in 1921, Hall wrote that claims by the belligerents to “control portions of the high seas” may only be justified by “genuine necessity and for long as that necessity continues.”¹³⁷ Hall also agreed with Garner that international law did not support the notion that a belligerent could “cover wide areas of sea within which submarine mines may be sown without notification, or as a substitute for the recognised rules of blockade by threatening to sink at sight any vessel which comes within the area.”¹³⁸

With respect to the German war zone declaration of 31 January 1917, Garner has described it as being “so flagrantly contrary to the laws of maritime warfare that nothing can be said in defence of it.”¹³⁹ Likewise, concerning this German war zone and the one

¹³⁵ Garner, Vol. I, pp. 352-353.

¹³⁶ Ibid. (footnote omitted; *emphasis added*).

¹³⁷ Hall, pp. 246-247.

¹³⁸ Ibid., p. 247.

¹³⁹ Garner, Vol. I, p. 354.

announced on 17 August 1940, Tucker has written, “these belligerent measures cannot be regarded as conforming to the customary requirements laid down for lawful blockades.”¹⁴⁰ Tucker acknowledged that this conclusion might not necessarily mean that exclusion zones were lawful under different grounds,¹⁴¹ thus acknowledging that State practice might support the adoption of such zones. Even then, however, Tucker argues that belligerents may not preclude innocent neutral traffic from using the seas within such zones and that the declaring State must indicate routes through the zone that neutral traffic may transit with a “reasonable assurance of safety.”¹⁴² However, his analysis led him to conclude that

[I]t does not appear possible to assert that—apart from reprisals—belligerents have at present the right to restrict the movement of neutral vessels within vast tracts of the open seas merely by proclaiming that these areas have been rendered dangerous—in one form or another—to neutral shipping. Hence, despite belligerent practices in two wars the establishment of war zones forms a lawful measure only when taken in response to the persistent misconduct of an enemy.¹⁴³

Tucker wrote that unless one is prepared to admit that a belligerent right to attack all enemy merchant shipping without regard to the safety of passengers and crew exists, the proclamation of war zones involves certain legal problems relating to enemy shipping. Nevertheless, he wrote:

¹⁴⁰ Tucker, p. 298. Although he argued that the British “long distance blockades” were lawful as reprisals, Colombos agreed that the August 1940 German declaration of a “total blockade” violated the customary law of blockade since the German Navy lacked the resources to “bar access to such a vast area, which was, moreover, controlled by the overwhelmingly superior British fleet.” Colombos, p. 746. Ronzitti concludes that in the pre-Charter era, “war zones” enforced against neutrals were illegal. Natalino Ronzitti, “The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for its Revision” in Ronzitti, p. 10.

¹⁴¹ Tucker, p. 298. Castrén shared the view that exclusion zones as utilised in both world wars violated the customary rules of naval blockade. He went further than Tucker, however, arguing that the establishment of NEZs was also impermissible as an act of reprisal. E. Castrén, The Present Law of War and Neutrality, 314-316.

¹⁴² Tucker, p. 305.

¹⁴³ Ibid. See also O’Connell Influence, p. 167:

The war zone proclaimed around the British Isles in 1940 was a resurrection of that of the First World War, but now another international law justification was offered on 18 January 1940. It was argued that mining in the interests of blockade is legal; mines destroy belligerent and neutral shipping indiscriminately; the war zone was an area within which mining would be legal; what difference was there between destruction by torpedo and mine? The argument paid scant attention to Hague Convention VIII of 1907 Relative to the Laying of Automatic Contact Mines, which may be hopelessly vague but does embody a general notion that minefields must be notified to neutrals and not intended only to interrupt commercial traffic.

It should be pointed out that in considering the legal issues raised by the belligerent establishment of war zones, most writers have emphasised only the effect of such zones on neutral—though not enemy—merchant vessels despite the fact that the zones have operated equally against both.¹⁴⁴

Stone wrote that “between the belligerents *inter se* this belligerent assertion of extended control raises no problems.”¹⁴⁵ Consequently, the lawfulness of zones as they pertain to merchant vessels of the belligerents is beyond question, assuming that the zone is otherwise enforced by lawful means.¹⁴⁶

Tucker concludes by arguing that the creation of zones is a “thinly veiled endeavour to replace the traditional law [of blockade] through the instrument of reprisals” and that the law as it stood in the mid-1950s was in need of reform.¹⁴⁷ Nevertheless, he saw reason to maintain the belief that the “element of danger associated with an effective blockade would still have to be understood in terms of a liability of seizure—not to destruction upon entrance into the forbidden area.”¹⁴⁸ Consequently, he argued that the establishment of NEZs was lawful only when taken in response to the “persistent misconduct of an enemy” and only when the belligerent indicated routes through which neutral shipping could pass unmolested.¹⁴⁹

Goldie disagrees with the approach taken by Stone to the extent that he relies upon the notion of comparing the German and Allied policies simply because they were both based on belligerent reprisals.¹⁵⁰ To Goldie, the fact that both Britain and Germany invoked belligerent

¹⁴⁴ Tucker, p. 299, note 39.

¹⁴⁵ Julius Stone, *Legal Controls on International Conflict* (1959), p. 572.

¹⁴⁶ See Lauterpacht, *Oppenheim’s International Law*, Vol. 2 (7th ed., 1952), p. 682.

¹⁴⁷ Tucker, p. 316. Stone shared the view that the reliance on reprisals in establishing zones affected the “long term transformation of the traditional laws of blockade.” Julius Stone, *Legal Controls on International Conflict* (1959), p. 508.

¹⁴⁸ Tucker, p. 317.

¹⁴⁹ *Ibid.*, p. 305. With respect to the final point, the drafters of the San Remo Manual take a similar approach at para. 106(d), and Explanation, para. 106.5.

¹⁵⁰ Goldie, pp. 177-178. To be fair to Tucker, however, it should be pointed out that he argued that the long distance blockades employed by Great Britain in both World Wars were “very different in character” than the German zones used in those wars not only because they were more effective in cutting off neutral commerce, but for the “far more important reason that they were applied without unlawfully endangering neutral lives.” Tucker, p. 305, footnote 55. Whiteman cites to a German writer, Sohler, who argued in 1956 that operational zones must be considered “customary law measures of naval warfare” and that the German operational zone in World War II was justified as a reprisal measure. See Whiteman, Volume X, *Digest of International Law*, p. 609, citing to Sohler, *U-Bootkrieg und Völkerrecht, Marine Rundschau*, Supp. 1 (September 1956), p. 63.

reprisals as justification for their respective positions concerning long distance blockade and unrestricted submarine warfare does not mean that these tactics should be treated similarly from the juridical perspective.¹⁵¹ Goldie describes the Allied long distance blockade policy as being an “effective persisting holding logistical strategy,” while the German unrestricted submarine policy was based on a “raiding logistical strategy.”¹⁵² In his view, the “raiding logistical strategy” is so unlike the “persisting holding logistical strategy” involved in maintaining a long distance blockade that it would be “absurd to invoke arguments and evidences justifying the latter to validate the former.”¹⁵³

Goldie similarly rejected the approach taken by Lauterpacht in 1952. Lauterpacht had written that measures:

[R]egularly and uniformly repeated in successive wars in the form of reprisals and aiming at the economic isolation of the opposing belligerent must be regarded as a development of the latent principle of the law of blockade, namely, that the belligerent who possesses the effective command of the sea is entitled to deprive his opponent of the use thereof for the purpose either of navigation by his own vessels or conveying on neutral vessels such goods as are destined to or originate from him.¹⁵⁴

Goldie considers Lauterpacht’s view overly permissive and seems to argue that it could lead to a “Panglossian position” that would allow the “commander of the sea [to] dictate, merely by virtue of his power, what the law allows.”¹⁵⁵ At the same time, Goldie has rejected other positions that he describes as being overly restrictive, and in particular, he has criticised Leckow, who in the context of the Iran-Iraq War focused his attention on the “reasonableness” of zones.¹⁵⁶ Goldie claims that “reasonableness” cannot be considered “without a necessary spelling out of the meaning of the word in terms of strategies and goals, and in terms of means and methods relative to those strategies and goals.”¹⁵⁷

¹⁵¹ Goldie, pp. 177-178.

¹⁵² Ibid.

¹⁵³ Ibid., p. 178.

¹⁵⁴ Hersch Lauterpacht, Oppenheim’s International Law (7th ed., 1952), Volume 2, pp. 796-797.

¹⁵⁵ Goldie, p. 184.

¹⁵⁶ Ross Leckow, “The Iran-Iraq Conflict in the Gulf: The Law of War Zones,” 37 ICLQ (July 1988), pp. 629-644, pp. 635-636.

¹⁵⁷ Goldie, p. 187.

Nevertheless, writing in 1991, Goldie's analysis of State practice led him to conclude that although the "controversial long-distance blockading, prohibited maritime zones or logistical strategies may not yet appear to have received the unqualified, universal endorsement of legality," they were moving in that direction:

[S]ubject to the test of proportionality and reasonableness, and especially when created for purposes of maintaining a persisting logistical strategy supported by an adequate ratio of force to time and space, they may appear to be moving conditionally into the light of recognition as customary international law.¹⁵⁸

Schwarzenberger, on the other hand, took a sceptical view of the legality of NEZs,¹⁵⁹ but acknowledged that customary international law had undergone a change primarily as the result of the breakdown of the notions of neutrality and private trade and the emergence of the concept of total warfare at sea.¹⁶⁰ Consequently, he accepted begrudgingly the legality of zones as a consequence of these developments.¹⁶¹

Writing in the mid-1960s, Mallison distinguished between general and limited war at sea and concluded that exclusion zones (or in his parlance, "operational areas") were both legal and good policy in both types of armed conflict.¹⁶² Mallison viewed NEZs as modern versions of naval blockades,¹⁶³ which clearly enjoy customary status, provided certain requirements were met. In the context of general war, he supports exclusion zones with sink-on-sight policies directed against both belligerent and neutral shipping when such shipping is incorporated into the belligerent war effort and stated that "it appears that the continued legality of this method of warfare is assured in general war."¹⁶⁴ He rests this conclusion on his analysis of submarine warfare during the First and Second World Wars that demonstrated that

¹⁵⁸ Goldie, p. 184.

¹⁵⁹ Schwarzenberger, Vol. II, p. 433 ("A rich variety of terms—war zones, operational zones, barred areas, areas dangerous to shipping, long-distance blockade and total blockade—serve to give a semi-technical character and spurious legality to these additional inroads on the traditional law of sea warfare.")

¹⁶⁰ Schwarzenberger, Vol. II, pp. 652-653.

¹⁶¹ *Ibid.*, p. 653.

¹⁶² Mallison also considered it relevant that the "inter-war period produced no international agreement specifically designed to outlaw submarine operational areas." Mallison, p. 74. Although Mallison's study is limited to submarine operational areas, there is no reason to conclude that his views would be different in the context of zones in which only surface vessels (or a combination of surface vessels and submarines) were used to enforce the zone.

¹⁶³ *Ibid.*, p. 88.

¹⁶⁴ *Ibid.*, pp. 91-93.

the use of submarine operational areas was not disproportionate to their military efficiency.¹⁶⁵ Moreover, he contends that to assert that this method of conducting war at sea is unlawful would not be a “realistic way of promoting human values.”¹⁶⁶ Mallison comes to the same conclusions in the context of limited war at sea.¹⁶⁷

At least with respect to the Falklands War, Levie shares Mallison’s perspective that the establishment of zones in that conflict had the effect of limiting the scope of the naval conflict. For example, he concludes that the British Maritime Exclusion Zone had the effect of being “nothing more than a gratuitous warning to Argentine naval vessels,” since enemy and merchant vessels were not barred from the exclusion zone, which only applied to enemy naval vessels.¹⁶⁸

O’Connell took a more restrained view than Mallison, at least with respect to limited armed conflict at sea. In his view, the establishment of operational zones on the high seas—if lawful at all—are permitted “only for the purpose of belligerent operations among the protagonists and not for the purpose of molesting neutrals.”¹⁶⁹ O’Connell then takes a critical position of the justification for declaring such zones:

The problem, of course, is one of positive identification, and the only purpose in declaring a war zone is to circumvent the difficulties of identification by supposing all contacts to be hostile, and to bridge the gap between hostile intent and hostile act, which is otherwise probably insurmountable, by supposing them to be assailants against whom the right of self-defence is exercisable. If operational zones are not an easy method of escape from that problem, speculation about their future availability may as well be abandoned.¹⁷⁰

Writing after the Falklands War, however, O’Connell further articulated his position:

¹⁶⁵ Ibid., p. 93.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid., p. 95. See quotation at note 1 *supra*.

¹⁶⁸ Howard S. Levie, “The Falklands Crisis and the Law of War,” in Alberto R. Coll and Anthony C. Arends, eds., *The Falklands War: Lessons for Strategy, Diplomacy and International Law*, (1985) p. 64, p. 65. See also *ibid.*, p. 76 (noting that the Falklands was a limited war, fought for limited ends and with limited means and that the adversaries restricted their operations. Levie argues that had it been conducted otherwise, “the war would have been much more violent and destructive.”)

¹⁶⁹ O’Connell *Influence*, p. 167.

¹⁷⁰ Ibid.

Provided that publicity is given to the creation of an exclusion zone, and neutral shipping is not put unduly at risk, self-defence can conceivably justify a proclamation that contacts within a zone will be treated as hostile. Such an argument is more plausible in the case of submerged contacts than in the case of surface contacts because the problem of positive identification is acute in the former instance but hardly ever arises in the latter because of the available technologies of surveillance.¹⁷¹

With respect to so-called “bubble zones,” O’Connell seems open to the idea that such zones could be justified as a means of self-defence and based on the precedent of the Spanish Civil War.¹⁷² In O’Connell’s view, these “moving war zones” would be noticed to mariners and diplomats and would be structured as a “moving circle centred on the task force and extending to the effective weapon range of likely submarine opposition.”¹⁷³ He acknowledges that maritime States would be hesitant to notice the movements of their naval assets, but that without such information, submerged submarines on innocent passage may find themselves inadvertently within such zones and subject to attack.¹⁷⁴ On balance, however, O’Connell seems to support such self-defence measures and states that in permitting the creation of such zones, “the law appears to be sufficiently malleable to give naval staffs a certain freedom of manoeuvre in their planning.”¹⁷⁵

Heintschel von Heinegg considers “defence bubbles” to be “generally recognized as [being] in accordance with international law.”¹⁷⁶ It is difficult to determine the permissible extent of such zones *in abstracto* and the circumstances of each case, including the threat level and the location of the ships concerned, play important roles in making that determination.¹⁷⁷ Based on the attack on the *USS Cole*, such zones may be increasingly common for warships making port calls. As Heintschel von Heinegg notes, the threat posed

¹⁷¹ O’Connell *Law of the Sea*, pp. 1110-1111.

¹⁷² O’Connell *Influence*, p. 168. O’Connell wrote this in 1975, but would have undoubtedly added reference to the “Defensive Sea Bubble” zones employed by the Royal Navy in the Falklands War and the U.S. Navy during the Iran-Iraq War.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Heintschel von Heinegg *Legal Issues*, p. 160. See also 1995 U.S. Navy Commander’s Handbook, para. 2.4.4.

¹⁷⁷ Heintschel von Heinegg *Legal Issues*, p. 160.

by terrorist activities is “obvious but will vary according to the region of operation and to the general security environment.”¹⁷⁸

Writing in the mid-1980s, Fenrick distinguished NEZs from other methods of naval warfare:

Exclusion zones are different from the more traditional blockade zones because in blockade zones the primary risk is that of capture, while in exclusion zones it is, frequently, the risk of attack on sight; they are also different from more recent devices such as the *cordon sanitaire*, which is intended to be used primarily in a period of tension prior to the commencement of hostilities.¹⁷⁹

Fenrick also expresses the opinion that the NEZ as a method of naval warfare is likely to endure: “On the basis of the history of the use of exclusion zones, it is reasonable to conclude that such zones will be used in some future conflicts.”¹⁸⁰

In his opinion, an assessment of the legal aspects of the use of exclusion zones depends upon an assessment of the current validity and meaning of the London Protocol on submarine warfare.¹⁸¹ Because this treaty appears to have either fallen into *desuetude* or has been broadly interpreted, it is likely to be ignored in future conflicts since many belligerents will view compliance with the treaty to be to their disadvantage.¹⁸² In order to retain the humanitarian value of the treaty, it will be important to interpret the term “merchant vessel” as *excluding* “all belligerent and neutral vessels that are incorporated in the belligerent war effort.”¹⁸³

Fenrick argues that the key question is not whether the proclamation of the zone is unlawful, but rather what is legally permissible in the zone, once it is established. Thus, he argues that it would be desirable to develop legal standards to be applied in NEZs, based on

¹⁷⁸ Ibid. Heintschel von Heinegg also noted that unless the threat posed in such circumstances is “overwhelming and leaving no choice of deliberations,” the creation of such zones will require the consent of the respective coastal State if the warships are deployed in the internal waters or territorial sea of that State. Ibid. Moreover, in certain restrictive areas, such as the Straits of Malacca, however, defensive bubbles would prove problematic due to their moving nature, the huge number of merchant vessels transiting those straits (50,000 ships annually) and the presence of numerous small islands and other geographic features.

¹⁷⁹ Fenrick, p. 92.

¹⁸⁰ Ibid., p. 122.

¹⁸¹ Ibid., p. 123.

¹⁸² Ibid., p. 123 and footnotes 108-109 therein.

¹⁸³ Ibid., p. 123.

two assumptions. First, it is likely that such zones will be used in future conflicts. Second, he assumes:

[T]hat exclusion zones in which a sink-at-sight policy is enforced are not illegal per se because warships, naval auxiliaries, and ships incorporated into the belligerent war effort may be so targeted.¹⁸⁴

Fenrick envisages generally agreed standards that would not vary from conflict to conflict or differ depending on whether the conflict was limited or of a more general nature. He acknowledges, however, that the facts of a given conflict may mean that different types of zones may be permitted: “If merchant ships trading with belligerents are incorporated into the belligerent war effort, more stringent exclusion zones would be acceptable than if they were not so incorporated.”¹⁸⁵ Fenrick then goes on to set forth the following standards that he would advocate including in a regime covering NEZs:¹⁸⁶

- Belligerents should publicly declare (with sufficient time for vessels and aircraft to leave the zone) the existence, location and duration of the zone, indicating precisely what is to be excluded, the sanctions to be imposed on vessels and aircraft entering the zone without permission;
- The zone must be effective, in the sense that ships or aircraft entering the zone face a “significant probability” of encountering submarines, ships or aircraft of the declaring belligerent’s armed forces;
- All militarily practicable steps should be taken to minimise sanctions, such as seizure rather than destruction;
- All militarily practicable efforts should be made to ensure both proper target identification and that only military objectives are attacked; and
- There must be a “proportional and demonstrable nexus” between the NEZ and the self-defence requirements of the declaring State.

Several other factors are also relevant in determining whether the NEZ is acceptable, including the size, location, duration and purpose of the zone.¹⁸⁷

¹⁸⁴ Ibid., p. 124.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid., pp. 124-125.

¹⁸⁷ Ibid., p. 125. These factors are particularly important. For example, as noted above, a zone that is isolated from major shipping routes is more likely to be acceptable than one that is located among important sea lines of communication. Similarly, if the purpose of the zone is to limit the conflict to a confined geographic area, the belligerent declaring the zone is more likely to find its zone meeting acceptance.

Another leading commentator on armed conflict at sea, Heintschel von Heinegg, has written:

There is general agreement that the “war zones” established by the belligerents of the two World Wars were and remain illegal. No zone, whatever its denomination or alleged purpose, does relieve the proclaiming belligerent of the obligation under the law of naval warfare to refrain from attacking vessels and aircraft which do not constitute legitimate military objectives. In other words, a zone amounting to a “free-fire-zone” has no basis in the existing law. Considerations of military necessity—e.g., from a submariner’s point of view—do not justify a conclusion to the contrary.¹⁸⁸

He also goes on to write, “most of the doubts surrounding the employment of submarines during armed conflict have now been settled” and that merchant vessels (whether enemy or neutral) are exempt from attack only if they are innocently employed in their normal role.¹⁸⁹

Heintschel von Heinegg argues that those States that have characterised exclusions zones as lawful have taken a “rather cautious approach” and he has identified the following *indicia* as being common to the military manuals of these States:

- The establishment of such a zone does not relieve the proclaiming belligerent of the obligation under the law of armed conflict to refrain from attacking vessels and aircraft which do not constitute lawful targets;
- The zone may not unreasonably interfere with neutral commerce; and
- The geographical area covered, the duration, and the measures taken within the zone should not exceed what is strictly required by military necessity and the principle of proportionality.¹⁹⁰

He concludes that all States that have recognised the legality of NEZs have also indicated that such zones constitute an exceptional measure.¹⁹¹ If all of these conditions are met, the zone in question conforms to the law of naval armed conflict as set forth in both the San Remo Manual and the Helsinki Principles.¹⁹²

¹⁸⁸ Heintschel von Heinegg Legal Issues, pp. 162-163 (footnotes omitted).

¹⁸⁹ Ibid., p. 163, footnote 41.

¹⁹⁰ Ibid., p. 166.

¹⁹¹ Ibid.

¹⁹² Ibid., citing to San Remo Manual, para. 105 *et seq.*, and Helsinki Principles, para. 3.3.

Notwithstanding these criteria, Heintschel von Heinegg questions the ends to which NEZs are established; that is, what object and purpose is an exclusion zone to serve.¹⁹³ He points out that the 1995 U.S. Navy Commander's Handbook sets forth two objects of purposes: to contain the geographic area of the conflict or to keep neutral shipping at a safe distance from the actual or potential armed conflict.¹⁹⁴ Heintschel von Heinegg persuasively argues that:

[I]f not designed to contain or restrict the area of naval operations and if not a—legitimate—use of (naval) warfare, an exclusion zone may either serve the protection of neutral navigation and aviation or it may imply that a belligerent, in a given area, will extensively exercise the control rights already conferred on it by the law of naval warfare and of maritime neutrality. Then, however, the zone will rather resemble a geographical restriction of belligerent rights of control—the establishment of the zone would merely indicate that in sea areas not covered by the zone the belligerent may refrain from exercising these rights.¹⁹⁵

If the zone meets the criteria identified in the preceding paragraph and serves the purposes above, then in Heintschel von Heinegg's view, "there can be no doubt about the legality of exclusion zones."¹⁹⁶

With respect to the British TEZ established in the Falklands, Heintschel von Heinegg concludes "the British TEZ may not serve as a legal precedent for the —alleged—legality of exclusion zones as a method of naval warfare."¹⁹⁷ His view of the language used by the United Kingdom in establishing the TEZ "clearly indicates that the British were prepared to attack any vessel or aircraft encountered within the TEZ,"¹⁹⁸ and that as a result the British were "establishing and enforcing a 'free-fire-zone,'"¹⁹⁹ which is clearly prohibited.²⁰⁰ Based

¹⁹³ Heintschel von Heinegg Legal Issues, p. 166.

¹⁹⁴ 1995 U.S. Navy Commander's Handbook, para. 7.9; Heintschel von Heinegg states that the German Navy Commander's Handbook takes a similar approach. See Heintschel von Heinegg Legal Issues, pp. 166-167.

¹⁹⁵ Ibid., p. 167 (footnote omitted).

¹⁹⁶ Ibid., p. 167.

¹⁹⁷ Ibid., p. 165.

¹⁹⁸ Ibid., p. 164.

¹⁹⁹ Heintschel von Heinegg San Remo, p. 144.

²⁰⁰ Heintschel von Heinegg expresses astonishment that Fenrick could characterize the TEZ as a "reasonable temporary appropriation of a limited area of the sea." Heintschel von Heinegg Legal Issues, p. 164, at footnote 45.

on the fact that the *Belgrano* was sunk outside the TEZ, Heintschel von Heinegg takes the position that the TEZ was misunderstood as being a geographical restriction, as described in the preceding paragraph, although that may have been the original intention when the TEZ was established.²⁰¹ He uses this example to make the valid point that a “belligerent making use of the exclusion zone device ought to be as clear as possible as regards his intentions.”²⁰²

Noting that it was possible that the British forces were “not allowed to target any contact in the TEZ—at least not with prior authorisation from the highest political level,” Heintschel von Heinegg has another explanation for the TEZ—one that would comply with international law:

[T]he U.K. was either lucky that its naval units were not forced to really enforce the TEZ *vis-à-vis* neutral vessels and aircraft or, what is more likely, the proclamation of the TEZ was nothing but a most effective ruse of war because it obviously induced the Argentine forces to avoid the area.²⁰³

This view finds some support in the fact that when the British announced the Maritime Exclusion Zone, the British fleet was still at considerable distance from the Falklands. Moreover, at the same time, the British played upon the unfounded Argentine fear that the Royal Navy submarine HMS *Superb* was on station near the Falklands, when in fact it was at Holy Loch, Scotland.²⁰⁴

By contrast, Goldie advances the position that the Argentine declaration of the South Atlantic War Zone was clearly unlawful, since it was unreasonable, disproportionate, lacked clarity and otherwise failed to meet the narrow scope of self-defence.²⁰⁵ According to Goldie, the Argentine South Atlantic War Zone

[C]learly failed to provide for an adequate ratio of power to space and time, and amounted to little more than an excuse for

²⁰¹ Ibid., p. 167, at footnote 58. The fact that the *Belgrano* was sunk outside the TEZ proved controversial to some writers. Even the *Belgrano's* Captain, however, has acknowledged that regardless of its location, the *Belgrano*, as a belligerent warship was a legitimate target for the Royal Navy, since it constituted a threat. *The Times (London)*, 1 May 1992, cited in L.C. Green, Comment No. 8, in Roberston Bochumer Schriften, p. 101, footnote 1.

²⁰² Heintschel von Heinegg Legal Issues, p. 167, at footnote 58.

²⁰³ Ibid., p. 165; see also Heintschel von Heinegg San Remo, p. 144. On ruses and perfidy in naval warfare, see Politakis, pp. 268-341.

²⁰⁴ Goldie Targeting, p. 13. Goldie concludes that these steps had the effect of a ruse of war. Ibid.

²⁰⁵ Ibid., pp. 15-16.

conducting indiscriminate attacks on neutral shipping, rather than formulating an effective logistical persisting, holding strategy, which could be integrated in a sea-keeping assertion of naval power utilized for rational ends.²⁰⁶

This view seems entirely reasonable, and is shared by the few writers who devote attention to it in their analysis.²⁰⁷

Turning to the Iran-Iraq War, Heintschel von Heinegg notes that in contrast to the Falklands War, both belligerents in the Iran-Iraq War enforced their exclusion zones by attacking neutral tankers.²⁰⁸ He concludes that this practice demonstrates that both Iran and Iraq viewed their zones as “free-fire-zones” and as such, they were unlawful since the attacks were not directed exclusively against legitimate military objectives.²⁰⁹ He does acknowledge, however, that the attacks on tankers may not be so clear-cut *if* their “contribution to the war-sustaining effort” is included in the calculus and that both Iran and Iraq were able to wage war against each other for eight years because oil revenue allowed the belligerents to purchase weapons abroad.²¹⁰

Relying on neutral protests to the announcement of the British TEZ in the Falklands and the international community’s reaction to Iraq’s designation of a fifty-mile war zone around Kharg Island (and subsequent attack on neutral shipping), Michael Bothe concludes that there is no customary right to establish NEZs.²¹¹ He thus urges restrictions on their use in any treaty dealing with armed conflict at sea:

It has thus to be concluded that so-called exclusion zones have not become a new element of the positive law of neutrality in naval warfare. Practice shows, however, a certain inclination of States to establish zones from which they want to bar all traffic. These

²⁰⁶ Ibid., p. 16.

²⁰⁷ For example, Fenrick notes that this zone “probably would contravene the principles of the *Dönitz* judgement because of the possibility that British merchant vessels engaged in normal passage completely unconnected with the conflict could be found in the zone.” Fenrick, p. 113. Fenrick also takes the position, however, that within the three Argentine-noticed exclusion zones, attacks on British merchant vessels found within such zones would not run afoul of the *Dönitz* Judgement on the grounds that any such vessels in the area “were in fact incorporated in the British effort.” Ibid., pp. 112-113.

²⁰⁸ Heintschel von Heinegg Legal Issues, p. 165.

²⁰⁹ Ibid., p. 165.

²¹⁰ Ibid., p. 165, footnote 49.

²¹¹ Bothe, p. 401. See also *ibid.*, p. 399 (“If a belligerent State enforces a blockade just by attacking from a distance (which was the case during the Gulf War), this amounts to the establishment of an exclusion zone which ... is unlawful.”)

tendencies must be viewed very critically and must be carefully restricted in any future codification.²¹²

Many commentators have argued that the zones established by Iraq were unreasonable and thus illegal. For example, Fenrick generally found the establishment of the Iraqi “war zone” lawful on the basis that the tankers were incorporated into Iran’s war efforts, but he concedes that “Iraqi practices in using exclusion zones touches the outer limits of legal acceptability and may well overstep the boundary.”²¹³ Similarly, Leckow,²¹⁴ Jenkins²¹⁵ and Gioa²¹⁶ criticised the Iraqi Kharg Island zone as being unreasonable and lacking legal justification in that they demonstrated no respect for neutral shipping and could not be legitimately characterised as reprisals. Naval mines played an important role in the exclusion zones established in the Iran-Iraq War, and Robert D. Powers, Jr., writing in the early 1960s, had expressed the view that naval mines would play an important role in establishing and enforcing NEZs in the future.²¹⁷ Powers argued that war zones “directed against neutral shipping were illegal ... and that any restrictions of neutrals be reasonable so as to preserve the freedom of the high seas.”²¹⁸

Politakis expresses caution about any attempt to offer a “single, perhaps oversimplified, aphorism regarding the legality or illegality of war zones.”²¹⁹ Although he acknowledges that “in the post-1945 era the world has experienced numerous international naval conflicts in most of which states declared and enforced blockade measures and war zones of varying extent, nature and scope,” he argues that only a few writers have cited these historical precedents to claim that a rule of customary international law has emerged.²²⁰ Why

²¹² Ibid., p. 401.

²¹³ Fenrick, p. 121.

²¹⁴ Ross Leckow, “The Iran-Iraq Conflict in the Gulf: The Law of War Zones,” 37 *ICLQ* (July 1988), pp. 629-644, p. 637.

²¹⁵ Maxwell Jenkins, “Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals,” 8 *Boston College International and Comparative Law Review* (1985), pp. 517-549, Jenkins, p. 535.

²¹⁶ A. Gioa, “Iraq: Commentary,” in De Guttry and Ronzitti, pp. 57, 64, 72-76.

²¹⁷ Robert D. Powers, Jr., “International Law and Open-Ocean Mining,” 15 *JAG Journal* (No. 4, June 1961), pp. 55-71 (“War zones will probably be established in future wars, and enforced by all types of mines.” Ibid., p. 71).

²¹⁸ Ibid.

²¹⁹ Politakis, p. 157.

²²⁰ Ibid., p. 157.

is this the case? According to Politakis, it is because of an “insurmountable difficulty, that is to say, all one has is a set of very varied practices, and at best scanty hints of *opinio juris*.”²²¹ He concludes, “no custom could emanate from a practice which has been consistently justified purely on grounds of belligerent reprisals.”²²²

As one might expect given the wide diversity of viewpoints among international legal scholars, the views of “publicists” range from writers who generally conclude that NEZs may be legally established and/or that they can serve important roles in limiting armed conflict at sea, such as Mallison, O’Connell and Fenrick, to those who are of the view that there is no customary rule permitting the establishment of NEZs, such as Bothe, Castrén and Politakis. Other writers, such as Tucker and Schwarzenberger, seem to accept that NEZs may be a necessary evil of modern armed conflict at sea, but that their legality has resulted from questionable practices.

VII. Other Maritime Zones

Certain States have also declared other types of peacetime zones which merit brief discussion. Zones which are declared during times of armed conflict, such as so-called “Neutralised Zones” or “Special Hospital Zones” will be discussed below, in the context of the armed conflicts in which such zones were declared.

A. Security (or Defence) Zones

Several coastal States have declared security (or defence) zones beyond their territorial seas, in which they purport to prohibit or regulate peacetime navigation by warships and military aircraft. At least 19 States which have asserted such claims, which typically range in breadth from 18-24 nautical miles.²²³ Such zones have no basis in international law, in the absence of armed conflict, on the grounds that the law of the sea regime does not recognise the right of coastal States to establish zones restricting freedom of the high seas beyond the

²²¹ Ibid., pp. 157-158.

²²² Ibid., p. 158.

²²³ However, Syria claims a 41-mile security zone and North Korea claims a 50-mile zone. 1995 U.S. Navy Commander’s Handbook, Table A1-11, p. 108. See also *ibid.*, paras. 1.5.4, 2.4.4.

territorial seas, with the exception of resource-related activities or other regulatory activities explicitly set forth in the 1982 LOS Convention.²²⁴

B. Nuclear Free Zones²²⁵

There are three international nuclear free zones, each of which potentially impacts naval operations.²²⁶ Such treaties do not violate the law of the sea regime, provided that freedom of navigation and overflight of the high seas are respected.²²⁷

C. Safety Zones

Littoral States may establish safety zones for the protection of artificial islands, installations and structures located in their internal waters, archipelagic waters, territorial seas, EEZs and on their continental shelves. When such zones are in the EEZ or on the continental shelf beyond the territorial sea, such zones must not extend beyond 500 meters from the outer edges of the artificial island, installation or structure, unless a generally accepted international standard permits otherwise.²²⁸ Safety zones must not interfere with internationally recognised navigational sea lanes and all ships must respect these zones and comply with internationally-accepted navigation standards in the vicinity of artificial islands, installations, structures and safety zones.²²⁹

VIII. Conclusion

A survey of the primary sources of international law as set forth in Article 38 of the ICJ Statute reveals the following. There is no treaty specifically prohibiting the establishment

²²⁴ Ibid.

²²⁵ See also Lowe July 1986, pp. 181-182.

²²⁶ 1967 Treaty of Tlateloco; 1985 Treaty of Rarotonga; and 1996 Treaty of Pelindaba.

²²⁷ See 1995 U.S. Navy Commander's Handbook, para. 2.4.6. and the footnotes cited therein. The United States Senate, in ratifying the two protocols to the Treaty of Tlateloco made such ratification subject to an understanding that the Treaty and protocols did not affect the rights of the States Parties regarding freedom of navigation or the rights to "grant or deny transport and transit privileges to their own or other vessels or aircraft regardless of cargo or armaments." See United States Arms Control and Disarmament Agency, Arms Control and Disarmament Agreements: Texts and Histories of the Negotiations, 1990, p. 66.

²²⁸ 1958 Continental Shelf Convention, Articles 5; 1982 LOS Convention Article 60.

²²⁹ 1982 LOS Convention, Article 60(6).

of NEZs, provided that the State imposing the NEZ can legally justify the zone as a measure undertaken in self-defence. With respect to customary international law, the practice of States—and particularly the major maritime nations—generally supports the notion that NEZs may be lawfully established again with the proviso that certain conditions are fulfilled, a conclusion that also bears scrutiny when taking the scarce jurisprudence on the subject into consideration. Although the views of commentators are split on the issue of the legality of NEZs, it must be kept in mind that their opinions are a subsidiary—and not a primary—source of determining the law.

Chapter 4

The Modern Law of the Sea Regime and Naval Warfare

“It is the law of the sea which dictates the practicalities of this deployment of seapower, related to areas of its exercise and the modes of its exercise.”¹

“The legal classifications (‘regimes’) of ocean and airspace areas directly affect naval operations by determining the degree of control that a coastal nation may exercise over the conduct of foreign merchant ships, warships, and aircraft operating within these areas.”²

I. Introduction

For several centuries, international law regarded the oceans as both belonging to all States and to none. Since Grotius elaborated upon the principle of *mare liberum* in 1609, it has been the fundamental tenet applicable throughout the seas. Over time, however, littoral States began asserting sovereign claims to ever-increasing bands of sea adjacent to their coastlines. The history of the law of the sea, therefore, is a struggle between the conflicting interests of coastal States seeking to control areas of the sea contiguous to their shorelines on the one hand, and States seeking to maximise freedom of the seas for navigational and commercial purposes on the other.³

Traditionally, naval conflicts have ranged globally, as the strategies employed by Lord Nelson and both the Royal Navy and the United States Navy in the First and Second World Wars clearly demonstrate.⁴ These global naval strategies often clashed with the claims of neutrals to unimpeded access to sea lines of communication. For example, the zones established during the Second World War imposed considerable operational difficulties on the rights of neutrals. Neutral claims have also been affected in other ways, as the “Altmark incident” demonstrates.⁵

¹ O’Connell Influence, p. 189.

² 1995 U.S. Navy Commander’s Handbook, p. 3.

³ Robertson, p. 3.

⁴ See Introduction at footnotes 3 and 4 for specific examples.

⁵ The *Altmark*, a German tender that had accompanied the *Graf Spee* on her final voyage, was returning to Germany from the South Atlantic carrying approximately 300 British merchant sailors who had been

This chapter focuses on how the evolution of the law of the sea has impacted on belligerent claims to control the seas during war and other periods of armed conflict at sea. Attempts to codify the law of the sea in the latter half of the 20th century culminated in the 1982 LOS Convention,⁶ which has been characterised as a “new constitution for the oceans.”⁷ This study begins with an overview of the modern law of the sea regime, since the 1982 LOS Convention delineates areas of the oceans and permits littoral States to claim waters that impact on the ability of navies to operate. Moreover, the number of coastal States has increased from 60 in 1945 to 151 in 1997, enlarging the potential claims that effectively carve up of the world’s seas.⁸ As a result of these maritime claims, about 50,000,000 square miles of the world’s oceans and seas are governed by some form of coastal sovereignty.⁹ This equals an area covering more than 27% of the world’s oceans and seas and is larger than the

picked up from ships sunk by the *Graf Spee*. On 16 February 1940, while in the neutral waters of Norway, she was investigated by Norwegian patrol vessels, who allowed the ship to continue after determining that there was no legal justification to arrest the ship. Shortly thereafter, a British plane spotted the ship and the Royal Navy requested permission from the Norwegian authorities to search the *Altmark* in order to determine if she was carrying British prisoners. After the Norwegians refused this request, the Royal Navy intercepted the *Altmark* in the territorial waters of Norway, which was neutral and forced her to ground, before she was boarded. The British successfully overwhelmed the *Altmark*’s crew and released the British merchantmen. Although this was clearly a breach of Norway’s rights as a neutral, the Norwegian vessels escorting the *Altmark* protested, but did not intervene. In support of its actions, Britain argued that the *Altmark* was not engaged in “mere passage,” but was rather using Norwegian waters as a base of operations and that the *Altmark*, which had been in Norwegian waters for 48 hours, had violated the 24-hour rule of Article 12 of the 1907 Hague Convention XIII. On the *Altmark* incident, see C. H. M. Waldock, “The Release of the *Altmark*’s Prisoners,” 1947 *British YBIL* (Vol. 24), pp. 216-238; O’Connell Influence, pp. 40-44; Brunson MacChesney, “The *Altmark* Incident and Modern Warfare—‘Innocent Passage’ in Wartime and the Right of Belligerents to Use Force to Redress Neutrality Violations,” 52 *Northwestern Univ. Law Review* 320 (July-August 1957). See also 1939 *ILS*, pp. 14-16; Dietrich Schindler, Commentary on 1907 Hague Convention XIII, in Ronzitti, pp. 211-222 at pp. 216-217; Arne W. Dahl, “Humanitarian Law Applicable to Armed Conflict at Sea,” Comment No. 2 in Robertson Bochumer Schriften, pp. 71-73.

⁶ UN Doc. A/CONF.62/122 (1982), reprinted in 21 *ILM* 1261 (1982). The treaty entered into force on 16 November 1994, pursuant to Article 308 of the treaty. As of 18 September 2000, there were 133 States parties to the 1982 LOS Convention. In addition, the EC is a party to the treaty. The current listing of States parties may be found at <http://www.un.org/Depts/Los/>.

⁷ Robertson, p. 1. Virtually all States have accepted the substantive provisions of the treaty as customary law, binding them even in the absence of the treaty. Those articles governing deep seabed mining, see 1982 LOS Convention Part XI and the 1994 Agreement Relating to the Implementation of Part XI are not reflective of customary international law. *Restatement (Third) of the Law: The Foreign Relations Law of the United States*, Vol. 2, p. 5 (“Restatement”). See also Rudolf Bernhardt, “Custom and Treaty in the Law of the Sea,” 205 *RdC* (1987 [V]) 247-330, p. 257.

⁸ See Table 1, *infra*.

⁹ Churchill and Lowe, p. 178, Table 1. The source refers to 37,745,000 square nautical miles, which is equivalent to 49,985,251.528 square miles. Information on national maritime claims is obtainable from the United Nations Division for Ocean Affairs and Law of the Sea at: <<http://www.un.org/Depts/los/index.htm>> and regional figures, broken down into zones subject to national claims are summarised at: <http://www.un.org/Depts/los/HP99/MJ_claims_summary.htm>.

Atlantic Ocean.¹⁰ With the advent of the Exclusive Economic Zones regime under the 1982 LOS Convention, an even larger area of the world's seas fall under some form of limited State sovereignty. Admiral of the Fleet of the Soviet Union S.G. Gorshkov calculated (at the time the 1982 LOS Convention was being negotiated) that if all coastal States claimed a 200 nautical mile territorial sea, approximately 54-58 million square miles of ocean—of a total of about 139 million square miles—would be subject to coastal State sovereignty.¹¹ Although a 12-mile limit was put on the breadth of the territorial sea, a State may claim a 200-mile EEZ under the terms of the 1982 LOS Convention and most States have done so. According to the Fisheries Centre of the University of British Columbia, after taking into account all claims asserted by States over the world's oceans, the high seas constitute some 85 million square miles.¹² Thus, Admiral Gorshkov's prediction has become reality: States have claimed more than 40% of the world's oceans.

Moreover, one should not under-estimate the scope of international shipping in the modern world and the tremendous rise in the commercial uses of the sea lanes of communication when compared with a century ago:

The value of U.S. imports and exports in 2002 was a thousand times what it was in 1900. Roughly 80 percent by volume of that portion of all international trade travels the sea lanes of the world, and some 90 percent of that portion is transported in cargo containers. Nearly nine million containers arrive annually in the 301 American ports of entry.¹³

Of course, coupled with the rise in commercial shipping, the significant changes in the size and types of modern merchant vessels that ply the world's oceans play a central role in how such vessels are dealt with by military warships and aircraft. The Note on Modern Merchant Vessels in Chapter 7 expands upon this issue.

¹⁰ The Atlantic Ocean covers approximately 31,800,000 square miles.

¹¹ S.G. Gorshkov, "Navies in War and in Peace," 100 *USNIP* (No. 11, November 1974), pp. 55-67, p. 58. The source indicates that if all coastal States claimed a 200 nautical mile territorial sea, approximately 140-150 million square kilometres of ocean—of a total of about 360 million square kilometres—would be subject to coastal State sovereignty. These figures have been converted to square miles for the sake of consistency. According to Admiral Gorshkov, such expansive claims would result in, *inter alia*, the Mediterranean Sea being "completely divided up." *Ibid*.

¹² See <http://www.searoundsus.org>. The source refers to 218,671,468 square kilometers, which is the equivalent to 84,429,187.121 square miles.

¹³ Roger W. Barnett, "Technology and Naval Blockade: Past Impact and Future Prospects," 58 *NWCR*, p. 87 (No. 3, Summer 2005), p. 89.

Because it defines the legal regime in the environment in which naval forces operate, the 1982 LOS Convention sets the parameters for the exercise of naval power. Moreover, several aspects of the law of the sea regime under the 1982 LOS Convention have made significant encroachments into the traditional high seas. The following analysis focuses on the law of the sea regime as it relates to freedom of navigation and operational issues for warships and naval aircraft and how the new divisions of the ocean impact on the ability of belligerents to establish and use NEZs. In order to place the 1982 LOS Convention regime in proper perspective, and because many of its provisions reflect custom, it is necessary to survey briefly the customary law of the sea, which applied at the time many of the zones described in the first chapter were established. The contributions of the 1958 and 1960 United Nations Conferences on the Law of the Sea to the development of the law will then be briefly analysed, before fully discussing the 1982 LOS Convention rules affecting freedom of navigation.

II. Customary Law of the Sea and Naval Operations

Although Roman law had accepted the notion of freedom of the seas,¹⁴ this doctrine fell into gradual decline in direct proportion to the rise of city-states, principalities and eventually nation States in Europe as a result of the disintegration of the Holy Roman Empire.¹⁵ These new States quickly began asserting exclusive rights of navigation, with the boldest such claim being those asserted by Spain and Portugal under the 1494 Treaty of Tordesillas. With this treaty, the Iberian States codified the Papal Bull of Pope Alexander VI splitting the then-known oceans of the world between these two maritime powers.¹⁶ Other seafaring powers, such as England, vacillated between policies that maximised freedom of navigation and policies that maximised national claims over the oceans. Thus, during the reign of the Plantagenet and Stuart monarchies, England laid extensive maritime claims, whereas Elizabeth actively opposed the maritime claims of Venice, Portugal and Spain.¹⁷

¹⁴ Jessup, p. 3.

¹⁵ Robertson, p. 3.

¹⁶ Colombos, p. 49.

¹⁷ Fulton, p. 338.

In the early 17th century, a debate concerning *mare liberum* and *mare clausum* ensued. Grotius played a significant role in this debate, arguing in favour of freedom of navigation.¹⁸ Nevertheless, Grotius recognised that certain limited areas of the sea might be subject to control from the adjacent coastal State.¹⁹

The doctrine of a territorial sea was further refined during the 17th and 18th centuries as the result of two parallel developments. First, the law of neutrality played an important role in the development of the custom of a territorial sea, since prize courts routinely held that prizes captured within the range of neutral coastal artillery must be returned to their lawful owner.²⁰ Second, the ability of the littoral State effectively to exercise control over the adjacent sea was a direct function of the effective range of coastal artillery, approximately three miles. As Fulton succinctly put it:

[T]he maritime dominion of a State ended where its power of asserting continuous possession ended. The belt of sea along the coast which could be commanded and controlled by artillery on shore thus came to be regarded as the territorial sea belonging to the contiguous State. Beyond the range of guns on shore the sea was common.²¹

The principle of a three-mile territorial sea thus came to be known as the “cannon-shot rule,” a term attributed to the Dutch legal scholar Cornelius van Bynkershoek.²² As one scholar has noted:

The cannon-shot rule, as understood in the seventeenth and eighteenth centuries, was meant to guard neutral states against being drawn into the quarrels of warring Powers by discouraging warlike actions, such as the taking of prizes, within neutral harbors, and within a zone circumscribed by the actual range of cannons stationed on neutral shores.²³

Notwithstanding subsequent refinements in the range of coastal artillery, by the end of the 18th century, there was general acceptance for a three-mile band of territorial sea²⁴ adjacent

¹⁸ Grotius initially set forth his views in his 1609 tome *Mare Liberum*. He subsequently developed this theme in his 1625 masterpiece, *On the Law of War and Peace*.

¹⁹ Robertson, p. 4.

²⁰ Fulton, pp. 557-558.

²¹ Fulton, p. 549.

²² Robertson, p. 4. See also Walker, pp. 213-222.

²³ Kent, pp. 537-538.

²⁴ The term “territorial waters” was generally used to describe this belt of the sea until the 1930 League of

to the coastal State and this principle remained largely intact until the end of the Second World War.²⁵ The Scandinavian States constituted the one notable regional exception to this general rule. By 1672, Denmark, a major maritime power that once made extensive claims throughout the North Sea for historical reasons,²⁶ had declared a defensive maritime belt adjacent to her shoreline. The breadth of this belt was set at one Scandinavian league, which was four nautical miles as compared to the standard league of three nautical miles.²⁷ The other Nordic States followed suit after attaining their independence and the Scandinavian States maintained the four-mile rule until the 1958 Geneva Conference on the Law of the Sea.

Contemporaneously with the acceptance of the three-mile breadth of the territorial sea, littoral States began asserting a greater degree of sovereignty over their territorial sea, leading one prominent commentator to conclude that by the early 20th century it was beyond dispute that “the territorial sea is subject to sovereignty.”²⁸ Thus, under customary international law, the sovereignty that coastal States may exercise over their territorial sea is identical to that which they possess with respect to their land territory and internal waters with one important exception: the right of innocent passage.²⁹

It was perhaps inevitable that, having developed a custom with respect to the territorial sea, certain coastal States would begin asserting sovereignty over ever increasing bands of the sea, generally out to twelve nautical miles from shore.³⁰ Such claims, known as “hovering acts,” typically took the form of extending jurisdiction with respect to the enforcement of excise and customs laws and regulations, although certain South American States also included fiscal, revenue, and security provisions.³¹ The lack of uniformity in state practice regarding both the permissible scope and breadth of jurisdiction over such contiguous zones,

Nations Conference on the Codification of International Law, when the delegates agreed to use the term “territorial sea.” See Robertson, p. 44, footnote 21.

²⁵ Robertson, p. 5.

²⁶ In the 17th century, Denmark claimed the waters between Norway, Iceland and Greenland as *dominium maris*, a claim that was not abandoned until the 18th century. Kent, p. 538.

²⁷ Walker, p. 224.

²⁸ O’Connell Law of the Sea, pp. 157, 165.

²⁹ Jessup, p. 120. For a full discussion of innocent passage, including limits on the right of innocent passage, see Slonim, and the discussion in the appendix at pp. 246-249.

³⁰ Robertson lists Great Britain, the United States, Russia, France, Belgium, Italy, Spain and the Scandinavian States as having made such claims. Robertson, p. 6. See also Jessup, pp. 80-92.

³¹ Robertson, p. 6; Jessup, p. 91.

combined with the objections of many maritime powers, has led one commentator to conclude that such zones were not customary international law, prior to the 1958 Territorial Sea Convention.³² Similarly, although many States advanced claims either to the exclusive rights to exploit fishery resources beyond their territorial sea or to regulate such exploration, no customary right to exclusive economic rights to the resources of the high seas existed.³³

Thus, by 1945, customary international law divided the oceans into three distinct categories: 1) internal waters; 2) the territorial sea; and 3) the high seas, broadly defined as the remainder of the oceans. All States were permitted freedom of the high seas, including, *inter alia*, freedom of navigation, resource exploitation, scientific research, and (during times of armed conflict at sea) the right of belligerents to conduct hostilities.³⁴ Thus, compared with the current state of the law of the sea, with coastal States able to exert some form of sovereignty over vast stretches of the world's seas, the customary law of the sea at the end of the Second World War permitted such States to make relatively limited claims. Nevertheless, even these "limited" claims still caused considerable problems for naval planners and operators.³⁵

III. Post-World War II Developments

The precipitating factor that caused this customary law of the sea to unravel was the U.S. claim to exercise jurisdiction and control over the natural resources of the seabed and subsoil of the U.S. continental shelf.³⁶ In asserting this claim, President Truman stressed that the right to "free and unimpeded navigation" on the high seas of the waters above the continental shelf was in no way affected by this claim.³⁷ The most important effect that this assertion of jurisdiction had was not on freedom of navigation, but rather the effect that this "unilateral claim by the then-pre-eminent maritime power and one of the leading exponents of

³² Robertson, p. 6.

³³ Ibid.; Jessup, p. 20.

³⁴ Robertson, p. 7.

³⁵ See Chapter 5, the discussion on the *Altmark* above at note 5, and other incidents impacting neutral-belligerent relations occurring in World War II, for example.

³⁶ Presidential Proclamation 2667, 28 September 1945. 10 Fed.Reg. 12303 (1945); 40 AJIL (Supplement, 1946) p. 47. The ICJ Judgment in the *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. Reports 116 (Merits), also played a role in the developments that followed in this respect.

³⁷ Presidential Proclamation 2667, 28 September 1945. 10 Fed.Reg. 12303 (1945); 40 AJIL (Supplement, 1946) p. 47.

the freedom of the high seas”³⁸ would have on other coastal States. In the wake of this presidential proclamation, many States extended their territorial sea claims to six or twelve miles,³⁹ or in the case of a few States, to 200 nautical miles.⁴⁰

By 1951, the variance in the breadth of such claims prompted the General Assembly to recommend that the International Law Commission (“ILC”) begin work on a treaty governing the territorial sea. Seven years later, the First United Nations (or Geneva) Conference on the Law of the Sea (“UNCLOS I”) convened with the goal of establishing the breadth of the territorial sea, on the basis of a draft treaty prepared by the ILC at its eighth session in 1956.⁴¹

A. UNCLOS I⁴²

The 1958 Geneva Conference on the Law of the Sea produced four treaties, only three of which are relevant for purposes of the present work:⁴³ the 1958 High Seas Convention, the 1958 Territorial Sea Convention, and the 1958 Continental Shelf Convention. With respect to the 1958 High Seas Convention, that treaty defined the high seas as being “all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”⁴⁴ Article 2 of the treaty forbids States to purport to subject any part of the high seas to sovereignty and guarantees, *inter alia*, freedom of navigation⁴⁵ and freedom to fly over the high seas.⁴⁶

Pursuant to the 1958 Territorial Sea Convention, coastal States may establish zones contiguous to their territorial sea for the purposes of preventing infringement of customs,

³⁸ Robertson, p. 7.

³⁹ 28 Department of State Bulletin, pp. 486-487.

⁴⁰ Including Argentina, Benin, Brazil, Congo, Ecuador, El Salvador, Liberia, Nicaragua, Panama, Peru, Sierra Leone, Somalia and Uruguay. Rose, p. 73, note 23; Robertson, p. 7.

⁴¹ 2 YB of the I.L.C. 12 [1956] (A/CN.4/97).

⁴² For a discussion of the UNCLOS I negotiations, with passing reference to the impact of the 1958 treaties on naval warfare, see Carl M. Franklin, The Law of the Sea: Some Recent Developments (With Particular Reference to the United Nations Conference of 1958), 53 US NWC International Law Studies 1959-1960.

⁴³ The Convention on Fishing and Conservation of the Living Resources of the High Seas, which entered into force 20 March 1966 (559 UNTS 285, TIAS 5969, 17 UST 138) is the other treaty concluded at the 1958 Geneva Conference.

⁴⁴ Article 1.

⁴⁵ Article 2(1).

⁴⁶ Article 2(4).

fiscal, immigration or sanitary regulations within the territory or territorial sea of the littoral State.⁴⁷ Notwithstanding this agreement, there was widespread disagreement concerning the exclusive right to control fishing in the contiguous zone.⁴⁸

Under Article 24(2) of the treaty, the coastal State may claim a contiguous zone not to extend greater than 12 miles from the baseline from which the breadth of the territorial sea is measured. However, the States Parties were unable to define the breadth of the territorial sea, one of the primary reasons why the Geneva Conference was convened. Thus, although a contiguous zone could be claimed up to twelve miles from the baseline, the extent of the territorial sea within that twelve-mile band was intentionally left unclear.

Although the delegates failed to specify the breadth of the territorial sea, the 1958 Territorial Sea Convention was successful with respect to codifying the right of innocent passage through the territorial sea.⁴⁹ Although this right existed for commercial ships under customary law,⁵⁰ the right of innocent passage for warships was not clear. In the *North Atlantic Coast Fisheries Arbitration*, Elihu Root declared that “Warships may not pass without consent into [the territorial sea] zone, because they threaten.”⁵¹ The International Court of Justice (“ICJ”) held in the *Corfu Channel Case* that warships had the right to innocent passage through the territorial seas of international straits, although the court specifically reserved the question whether the right existed in other territorial waters.⁵² The commentators in the first half of the 20th century were divided on the issue of innocent passage for warships, with Jessup writing, “the sound rule seems to be that [warships] should not enjoy an absolute right to pass through a State’s territorial waters any more than an army

⁴⁷ Article 24.

⁴⁸ Robertson, p. 8.

⁴⁹ 1958 Territorial Sea Convention, Section III (Articles 14-23).

⁵⁰ Jessup, p. 120.

⁵¹ 11 Proceedings, *North Atlantic Coast Fisheries Arbitration* 2007 (1912). This is ironic since Root was a former U.S. Assistant Secretary of State and the U.S. has recently been the most steadfast defender of rights of passage for warships. The U.S. position regarding innocent passage for warships changed 180 degrees between 1930 Hague Codification Conference on the Law of the Sea, where the U.S. was one of only four States that denied the right of innocent passage, and the drafting of the 1958 Territorial Sea Convention, at which time the U.S. supported the right of innocent passage during times of peace. The end of isolationist sentiments in the U.S. in the 1930s contributed to this shift, as did the U.S. Navy’s experience in the Second World War. During the isolationist era, the U.S. was concerned about the presence of foreign warships in U.S. waters, but after 1945, the U.S. Navy was particularly interested in maintaining a robust and flexible approach to innocent passage through the territorial seas of other States. See Slonim, pp. 116-118 and the sources cited therein.

⁵² *Corfu Channel Case (United Kingdom v. Albania)*, 1949 I.C.J. Reports 4, p. 30. (Merits).

may cross the land territory.”⁵³ Other scholars took a contrary view, arguing that warships enjoy a customary right of innocent passage through the territorial sea.⁵⁴

Despite the advances made by the 1958 treaty in codifying the law of the sea, the failure of the Geneva Conference to reach agreement on the breadth of the territorial sea and on the extent of fishing rights in the contiguous zone—the two most important items on the conference agenda—prompted the General Assembly to vote overwhelmingly to convene a second United Nations Conference on the Law of the Sea, UNCLOS II.

B. UNCLOS II

The Second United Nations Conference on the Law of the Sea was assembled in 1960 with the goal of resolving the breadth of the territorial sea. This conference also failed following the rejection of a compromise proposal put forward by the U.S. and Canada for a six-mile territorial sea with an adjacent six-mile exclusive fishery zone and following this failure, States began abandoning the concept of a three-mile territorial sea,⁵⁵ as Table 1 indicates.

As shown in Table 1, the three-mile territorial sea was accepted by a wide majority of the world’s coastal States in 1945. Over the course of the next three decades, however, the number of coastal States nearly doubled as a result of decolonisation. This process had two important components. First, a growing number of littoral States began asserting claims to wider territorial seas. Thus, by 1965, a majority of States was claiming territorial seas of between four and eleven nautical miles, and in 1974, shortly after the commencement of the Third United Conference on the Law of the Sea, 74 States were claiming territorial seas of at least twelve miles. Second, many of these newly independent States sought to extend exclusive jurisdiction over the resources of the sea to ever increasing distances.

The erosion of support for the customary three-mile territorial sea and the desire of many new coastal States to secure exclusive control over the resources of the sea adjacent to their territorial seas were among the principal reasons for convening yet another international conference on the law of the sea.

⁵³ Jessup, p. 120. See also Hall, International Law, 7th ed., 1917 (Higgins, ed.), p. 163; and Oppenheim’s International Law, 8th ed., 1955 (Lauterpacht, ed.), Vol. 1, pp. 494, 853.

⁵⁴ See, for example, 1 Hyde, International Law, 2nd ed., 1945, p. 516; 1 Moore Digest of International Law, 1906, pp. 700-701; and 1 Westlake, International Law, 2nd ed., 1910, p. 196.

⁵⁵ Robertson, pp. 9-10.

Table 1 Expansion of Territorial Sea Claims

National Claims	1945	1958	1965	1974	1979	1983	1994	1997*
3 NM**	46	45	32	28	23	25	5	4
4-11 NM	12	19	24	14	7	5	5	4
12 NM	2	9	26	54	76	79	119	122
12+ NM	0	2	3	20	25	30	17	15
Number of Coastal States	60	75	85	116	131	139	146	151

Source: 1995 U.S. Navy Commander's Handbook, Table A1-6, p. 100.

* Excludes information on the territorial sea claims of Bosnia-Herzegovina, Eritrea, Georgia and the Federal Republic of Yugoslavia (Serbia and Montenegro).

**NM – Nautical Miles

C. UNCLOS III

The Third United Nations Conference on the Law of the Sea, UNCLOS III, began in 1973 and during the course of the nine years that elapsed before the 1982 LOS Convention was signed on 10 December 1982, the entire law of the sea was re-examined. Reflecting the breadth of the issues dealt with at UNCLOS III, the treaty contains 320 articles and nine annexes (containing 125 additional articles).⁵⁶ Many of the provisions of the 1982 LOS Convention duplicate similar provisions in the four 1958 treaties and other provisions codify customary law. Nevertheless, the treaty comprehensively deals with legal divisions of the oceans and airspace above and the relations, activities and interests of States relating to the use of the world's seas. The Appendix explains the legal divisions of the oceans and airspace above the oceans under the 1982 LOS Convention.

IV. The Status of the 1982 LOS Convention During Armed Conflict

Professor Oxman has written that, "To the extent one continues to divide public international law into the two classic categories—the laws of war and the laws of peace—the Convention on the Law of the Sea would doubtlessly fall into the latter category."⁵⁷ Or, as

⁵⁶ There are several excellent treatises on the 1982 LOS Convention, including Churchill and Lowe.

Professor Lowe has noted, “Neither the 1958 nor the 1982 Law of the Sea Conventions make any provision for their continuation, modification, or abrogation in time of war or armed conflict.”⁵⁸ Although the 1982 LOS Convention does not govern armed conflict at sea, it does contain several provisions that are applicable to naval operations. For example, Article 301 sets forth a general requirement that States refrain from maritime activities that are inconsistent with the U.N. Charter and especially from any threat or use of force.⁵⁹

It is of little significance that the 1982 LOS Convention is not regarded as among the treaties or law governing the conduct of hostilities, however. This follows from the fact that declarations of war have become historical anachronisms,⁶⁰ a fact which calls into question whether any legal consequences follow from describing a particular conflict as a “war.”⁶¹ Historically, war was a legal condition between States and the legal distinction between war and peace was so great that once war was declared between States the law of war governed their relationship until peace was restored.⁶² As noted by Greenwood, prior to World War II, war had four main consequences under international law:

1. The laws of war became applicable to govern the conduct of hostilities between the parties;
2. The non-hostile relations of the parties, such as the application of treaties between them, were affected;
3. Relations between the belligerents and other States became subject to the laws of neutrality; and

⁵⁷ Oxman, p. 811. However, as Professor Christopher J. Greenwood has pointed out, it is no longer certain whether the concept of war continues to exist under international law in light of the UN Charter. See Greenwood Concept of War, pp. 33-34, 56-59 and the sources cited therein. See also Elihu Lauterpacht, “The Legal Irrelevance of the ‘State of War,’” 62 Proceedings of the ASIL (1968), pp. 58-83.

⁵⁸ Lowe July 1988, p. 289.

⁵⁹ 1982 LOS Convention, Article 301. For an analysis of the peaceful purposes provisions of the 1982 LOS Convention, see Boleslaw A. Boczek, “Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea,” 20 Ocean Development and International Law, pp. 359-389 (No. 4, 1989)

⁶⁰ There have been no formal declarations of war since World War II. Greenwood Concept of War, p. 33.

⁶¹ Ibid., p. 58. See also Australian Manual, para. 7.2, citing to Greenwood Concept of War, in support of the notion that “the international legal character of war has ceased to have any real effect.”

⁶² Greenwood Concept of War, p. 34. See also H.H.G. Post, “Some Curiosities in the Sources of the Law of Armed Conflict Conceived in a General International Law Perspective,” 25 Netherlands YBIL 83, p. 90.

4. The creation of a state of war acquired added significance in relation to a belligerent's obligations to the international community as a whole.⁶³

All four of these consequences will be discussed in the present work. The second point, however, is relevant with respect to the effect of the 1982 LOS Convention on naval warfare.

Unlike the effect of armed conflict on treaties between the belligerents, the outbreak of war does not result in the suspension of treaties between belligerent and neutral States. Traditionally, one of the most important legal consequences of a state of war was the automatic termination or suspension of treaty obligations between the belligerents,⁶⁴ although armed conflict falling short of war did not have the same result.⁶⁵ One commentator has written, "The legal effect of the outbreak of hostilities between parties to a treaty is still uncertain, and the only comprehensive treatment of the subject is now out of date."⁶⁶ However, the characterisation of a conflict as war has "no special *legal* significance in relation to the termination or suspension of treaties."⁶⁷ Since the designation of an armed conflict as war signifies conflict on a large scale, it would follow, *ipso facto*, that armed conflict which does not rise to the level of intensity associated with war would likewise have no legal effect with respect to terminating or suspending treaty obligations.

Moreover, it appears to be settled that during times of armed conflict, treaties "creating special regimes or fixing boundaries will continue in force, although their practical application may be affected by military operations."⁶⁸ The 1982 LOS Convention certainly establishes a regime, and, insofar as it delineates areas of the world's oceans, it may be compared to treaties fixing boundaries. Lowe has written that there is "widespread

⁶³ Greenwood Concept of War, pp. 46-47.

⁶⁴ In general, see Delbrück, pp. 310-315; McNair, pp. 695-728; and Lauterpacht, Oppenheim's International Law, Vol. 2 (7th ed., 1952), para. 99.

⁶⁵ Greenwood Concept of War, pp. 48-49.

⁶⁶ Aust, p. 243. The outdated text that the author refers to is McNair. See also Oppenheim Vol. 1, p. 1310, para. 655.

⁶⁷ Greenwood Concept of War, p. 49. See also Aust, p. 243. Moreover, the Vienna Convention on the Law of Treaties does not deal specifically with the outbreak of hostilities, other than stating in Article 73 that, "The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty ... from the outbreak of hostilities." Since 2005, the International Law Commission has been working on a project entitled, "Effects of Armed Conflicts on Treaties."

⁶⁸ Aust, p. 244; Delbrück, p. 312; McNair, pp. 704-715.

agreement” for the proposition that those rules concerning the delimitation of maritime zones “should remain unaffected by the outbreak of war.”⁶⁹

Nevertheless, in the event that the parties to the treaty intended it to apply only during times of peace, or if the maintenance of peace is essential to the effectiveness of the treaty, suspension of the treaty during periods of war or lesser forms of hostility may still be warranted.⁷⁰ Neither of these conditions applies during episodes of armed conflict at sea. That is, there is no indication that the 1982 LOS Convention was intended to apply only during periods of peace. In fact, it may be inferred from the numerous provisions outlining navigational rights for warships that its provisions were intended to apply during both times of peace and during periods of armed conflict, including war (in the event that concept still has any meaning).

With respect to the second situation in which treaty obligations may be suspended, the 1982 LOS Convention does not, and cannot, require the maintenance of peace in order to be effective. The 1982 LOS Convention is nearly universal in its acceptance and most of its provisions reflect custom. Moreover, by its nature, it governs a significant portion of the world’s surface, and affects the majority of the world’s States. For belligerents to suspend its terms during armed conflict would lead to an unconscionable result.

Finally, one of the primary purposes of international humanitarian law is the protection of the individual during armed conflict. Pursuant to Article 60(5) of the Vienna Convention on the Law of Treaties, termination or suspension of the operation of a treaty as a consequence of its breach by another party is not permissible with respect to treaties of a humanitarian character relating to the protection of individuals.⁷¹

Based on the above analysis, the provisions of the 1982 LOS Convention apply both during peace and during periods of armed conflict. In the words of Professor Oxman:

[I]t would be contradictory to conclude that the maritime powers that strove so long, hard and successfully to preserve maximum freedom for military activities at sea in times of peace envisaged that the new regimes of the law of the sea entailed significant

⁶⁹ Lowe July 1988, p. 296.

⁷⁰ Greenwood Concept of War, p. 49, citing to resolution of the Institut de Droit International, adopted at the Helsinki session, 1985. See also Vienna Convention on the Law of Treaties, UN Doc. A/Conf. 39/27 (1969), reprinted in 63 *AJIL* 875 (1969), 8 *ILM* 679 (1969), Article 62.

⁷¹ Vienna Convention on the Law of Treaties, Article 60(5). See also Lowe July 1988, p. 289.

restrictions on their freedom of operation in times of armed conflict.⁷²

At the same time, the comments of Professor Green should be kept in mind. In noting that it is “impossible to ignore” the 1982 LOS Convention, “it must be constantly remembered that this Convention was drafted with peacetime use of the seas in mind with little or no attention paid to the issue of belligerent activities or rights.”⁷³

V. Regions of Naval Operations During Armed Conflict

The modern law of the sea regime classifies the world’s waters into several categories:

[S]overeign waters (i.e., internal waters, territorial sea, and archipelagic waters), international straits and archipelagic sea-lanes (distinguishing between transit and archipelagic sea-lanes transit and innocent passage), the EEZ and continental shelf, and the high seas and seabed beyond national jurisdiction.⁷⁴

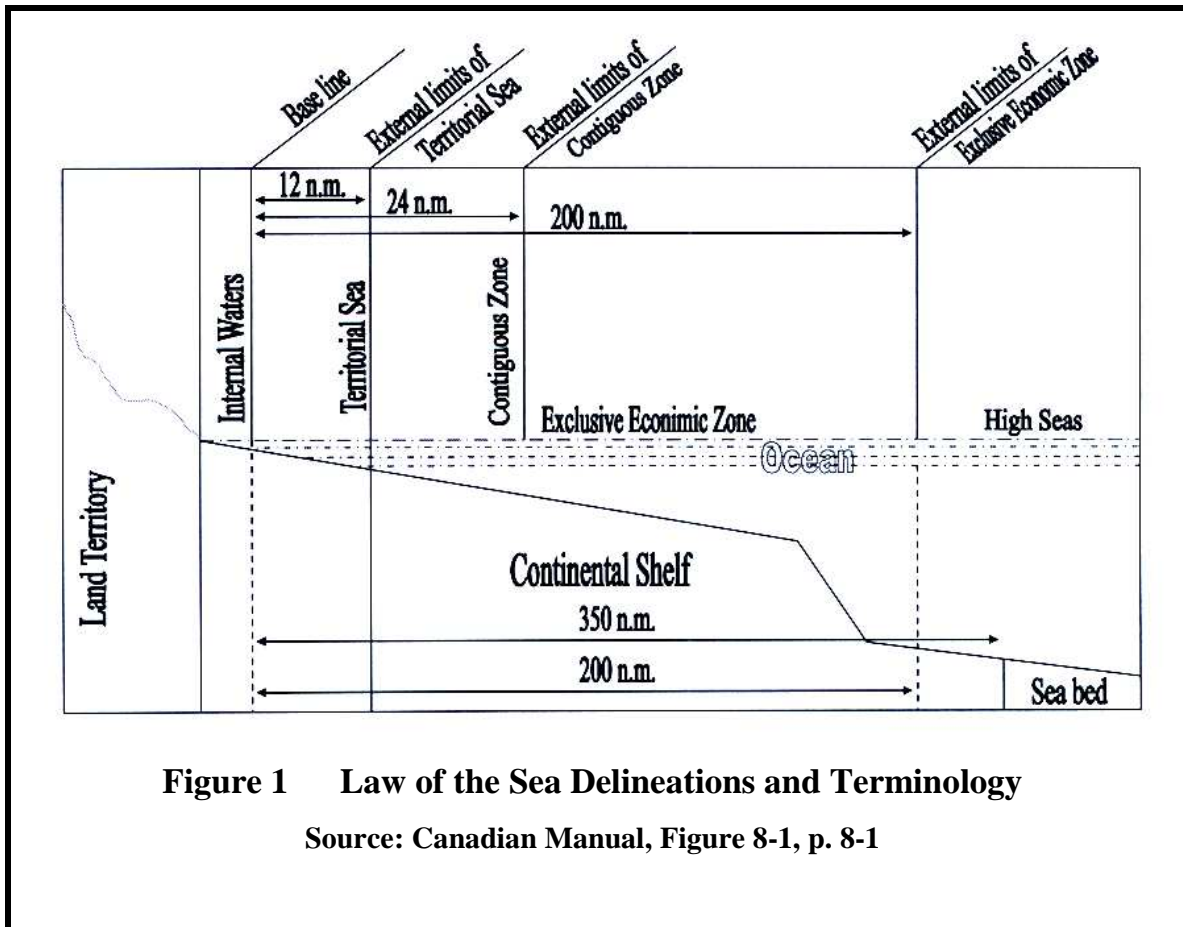
The permissible scope of naval operations in each of these areas is described below⁷⁵ and Figure 1 will be of assistance in understanding these divisions.

⁷² Oxman, p. 812.

⁷³ L.C. Green, Comment No. 8, in Robertson Bochumer Schriften, p. 99.

⁷⁴ J. Ashley Roach, “The Law of Naval Warfare at the Turn of Two Centuries,” 94 *AJIL* 64 (No. 1, January 2000), p. 68 (footnote omitted).

⁷⁵ There is a vast literature on the impact of the 1982 LOS Convention on naval warfare. See, for example, Francioni; Francesco Francioni, *Peacetime Use of Force, Military Activities, and the New Law of the Sea*, 18 *Cornell International Law Journal*, 203-226 (No. 2, Summer 1985); David L. Larson, *Security Issues and the Law of the Sea: A General Framework*, 15 *Ocean Development & International Law*, pp. 99-146 (No. 2, 1985); Vaughan A. Lowe, *The Impact of the Law of the Sea on Naval Warfare*, 14 *Syracuse Journal of International Law & Commerce*, pp. 657-698 (No. 4, 1988); Lowe July 1986; Lowe July 1988; R.W.G. de Murlalt, *The Military Aspects of the UN Law of the Sea Convention*, 32 *Netherlands International Law Review*, pp. 78-99 (No. 1, 1985); and Oxman. See also Part Two of John Norton Moore and Robert F. Turner (eds.), *Readings in International Law from the US Naval War College Review 1978-1994*, 68 U.S. NWC International Law Studies, which contains sixteen chapters on law of the oceans and seapower.



A. Territory and Waters of the Belligerent Parties

It is well-settled that naval warfare may be conducted in and on the territory, internal waters, territorial sea, EEZ, continental shelf, archipelagic waters (where applicable), and in the airspace over these land and sea areas of the belligerent parties.⁷⁶ Such acts of warfare include both actual armed attack on persons and objects, and means of economic warfare at sea including, *inter alia*, visiting and searching; ordering a vessel to take a specific course; capture of ships; requisitioning of cargo; confiscating or bringing a vessel into port; and blockade.⁷⁷ Thus, with respect to the internal and territorial waters of the belligerents, these are legitimate areas for belligerent operations.

⁷⁶ 1995 U.S. Navy Commander's Handbook, para. 8.2.1; U.K. Manual, para. 13.6; Soviet Manual, pp. 417-419; Canadian Manual, para. 804.1; German Manual, paras. 1010, 1013; Interim New Zealand Manual, para. 703.1; San Remo Manual, para. 10(a).

⁷⁷ German Manual, para. 1014.

B. Internal Waters, Territorial Sea and Archipelagic Waters of Neutrals

Belligerents must respect the sovereign rights of neutral States⁷⁸ and therefore, naval warfare must not be conducted in the internal waters, territorial seas and archipelagic waters of neutral States or in the airspace above such territory.⁷⁹ Pursuant to Article 2 of the 1982 LOS Convention, subject to the right of innocent passage for foreign ships, the territorial sea is under the authority of the coastal State. As Professor Lowe has noted, “From this it follows that the coastal State has complete control over the use of the territorial sea for the deployment of weapons systems and other military devices.”⁸⁰ The expansion of the permissible breadth of the territorial sea to 12 nautical miles has had no effect on the legal regime of neutrality as such.⁸¹ However, it has had a significant practical effect on naval armed conflict in that it has removed 3,000,000 square miles of ocean from the area in which belligerent forces may conduct offensive combat operations.⁸²

Belligerent forces are prohibited from using neutral waters as a sanctuary or base of operations against enemy forces or on persons or objects located outside neutral waters or territory and other prohibited acts of war within neutral waters and territory include, *inter alia*, attack on or capture of persons or objects; laying of mines; or the visit, search, diversion or capture of vessels.⁸³

In general, passage through or entrance to neutral waters by belligerent warships and auxiliary vessels may be restricted or prohibited, provided that such restrictions or

⁷⁸ 1907 Hague Convention XIII, Article 1. See also U.K. Manual, paras. 13.8-13.9; Canadian Manual, para. 806; German Manual, para. 1118. Although the 1907 Hague Convention XIII is not universally ratified, and several important maritime States (including the United Kingdom) are not parties, most of its provisions are declaratory of international law. Dietrich Schindler, Commentary on Hague Convention XIII, in Ronzitti, pp. 211-222 at pp. 215, 221. For a succinct summary of the traditional scope of the rights and duties of neutral States pursuant to the 1907 Hague Convention XIII, see Robertson, pp. 13-15. The law of neutrality is discussed in Chapter 5.

⁷⁹ 1907 Hague Convention XIII, Article 2. See also 1995 U.S. Navy Commander’s Handbook, paras. 7.3.3-7.3.7; U.K. Manual, para. 13.8; Canadian Manual, para. 806; German Manual, para. 1119; Interim New Zealand Manual, paras. 703.1, 706.1 and San Remo Manual, paras. 15-18.

⁸⁰ Lowe July 1986, p. 173. For a general discussion of military issues related to innocent passage, see *ibid.*, pp. 173-176.

⁸¹ 1995 U.S. Navy Commander’s Handbook, para. 7.3.4.1 and Robertson, pp. 16-17.

⁸² 1995 U.S. Navy Commander’s Handbook, para. 7.3.4.1.

⁸³ 1907 Hague Convention XIII, Articles 2, 5; 1995 U.S. Navy Commander’s Handbook, para. 7.3.4; U.K. Manual, para. 13.9; Canadian Manual, para. 807; German Manual para. 1120; Interim New Zealand Manual, paras. 706.1-706.2; San Remo Manual, paras. 16-17.

prohibitions are non-discriminatory,⁸⁴ and that the territorial sea does not lead to an international strait.⁸⁵ Nevertheless, without jeopardising its neutrality, and consistent with the duty of impartiality, a neutral State may permit belligerent States to undertake certain acts. These acts include passage through the territorial sea and archipelagic waters (if applicable);⁸⁶ replenishment by belligerent warships or auxiliaries of food, water and fuel sufficient to reach a port in its own territory;⁸⁷ and any repairs necessary to make the belligerent warship or auxiliary vessel seaworthy.⁸⁸ The duration of passage through the territorial sea or presence for replenishment or repair must not exceed 24 hours, unless “unavoidable on account of damage or of the stress of weather.”⁸⁹ While the ban on actual combat in neutral waters remains good law, the “24-hour rule” has not been taken seriously by either belligerents or neutrals that have engaged in extensive armed conflict at sea since 1945, thus calling into question whether this rule has fallen into *desuetude*—at least when considering the practice of the major naval powers.⁹⁰

⁸⁴ 1995 U.S. Navy Commander’s Handbook, para. 7.3.4; Canadian Manual, para. 808; Interim New Zealand Manual, para. 706.5; San Remo Manual, para. 19.

⁸⁵ 1958 Territorial Sea Convention, Article 13; 1982 LOS Convention Articles 25(3) and 45(2); 1995 U.S. Navy Commander’s Handbook, para. 7.3.4; Robertson, p. 18.

⁸⁶ 1995 U.S. Navy Commander’s Handbook, para. 7.3.4; Canadian Manual, para. 809(a); San Remo Manual, para. 20(a).

⁸⁷ 1995 U.S. Navy Commander’s Handbook, paras. 7.3.2.2, 7.3.4; Canadian Manual, para. 809(b); San Remo Manual, para. 20(b).

⁸⁸ 1995 U.S. Navy Commander’s Handbook, paras. 7.3.2.2, 7.3.4; Canadian Manual, para. 809(c); San Remo Manual, para. 20(c). The determination of whether repairs are necessary to make the vessel seaworthy rests with the neutral State. In addition, any repairs to the belligerent warship must not restore or increase the fighting capacity of such ships.

⁸⁹ 1907 Hague Convention XIII, Articles 12-13; 1995 U.S. Navy Commander’s Handbook, para. 7.3.2.1; Canadian Manual, para. 810; San Remo Manual, para. 21.

⁹⁰ Although the 1995 U.S. Navy Commander’s Handbook (at para. 7.3.2.1.), the Canadian Manual (at para. 810.1), the German Manual (at para. 1127) and the San Remo Manual (at para. 21), reiterate the 24-hour rule, the practice of the United States and the United Kingdom during both the Vietnam War and the Falklands War, seem to run contrary to the spirit—if not the actual obligations—of the 1907 Hague Convention XIII, Articles 12-13. The U.K. Manual clearly takes the view that this rule is “no longer applicable in view of modern State practice.” U.K. Manual, para. 13.4. See also Steven Haines, “The United Kingdom’s Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared,” 36 *Israel YB on Human Rights* (2006), pp. 89-118, at pp. 103-104. But see Heintschel von Heinegg San Remo, at pp. 141-142 (“despite allegations to the contrary, the 24-hours rule also belongs to those *essentialia neutralitatis*”). Schindler considers the rule to be customary international law. Dietrich Schindler, Commentary to Hague Convention XIII, in Ronzitti, pp. 211-222 at p. 218.

Neutral States have a duty to ensure that belligerents do not violate the regime of neutral waters.⁹¹ In the event the neutral State fails in this duty, the opposing belligerent must so notify the neutral State, providing a reasonable time for the neutral State to correct the violation. If this fails, and the violation constitutes an immediate threat to the opposing belligerent, then that belligerent may use such force as is necessary to respond to the threat that the violation poses, in the absence of any alternative.⁹²

Belligerent military and auxiliary aircraft may not enter neutral airspace and should they do so, the neutral State may take action to require the aircraft to land on its territory and intern the air crew for the duration of the armed conflict.⁹³

C. Operations in Archipelagic Waters Outside Archipelagic Sea Lanes⁹⁴

The issue of archipelagic waters outside archipelagic sea-lanes are particularly problematic, although as Ronzitti has noted, State practice is almost non-existent regarding the status of such waters,⁹⁵ as reflected in the 1995 U.S. Navy Commander's Handbook:

The balance of neutral and belligerent rights and duties with respect to neutral waters is, however, at its most unsettled in the context of archipelagic waters.

Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations.⁹⁶

⁹¹ 1995 U.S. Navy Commander's Handbook, para. 7.3; U.K. Manual, para. 13.8; Canadian Manual, para. 811; German Manual, para. 1109; San Remo Manual, paras. 15 and 22.

⁹² 1995 U.S. Navy Commander's Handbook, para. 7.3; Canadian Manual, para. 811.2; German Manual, para. 1109; San Remo Manual, para. 22.

⁹³ San Remo Manual, para. 18. The neutral State may attack the aircraft (unless it is a medical transport aircraft) in the event the order to land is disobeyed. See also 1995 U.S. Navy Commander's Handbook, paras. 7.3, 7.3.7.1; U.K. Manual, para. 12.17; German Manual, paras. 1149-1155.

⁹⁴ Robertson has identified several potential issues with respect to armed conflicts in archipelagic waters in the future. Robertson, p. 32. See also Rauch, pp. 32-33.

⁹⁵ Ronzitti, Comment No. 16, in Robertson *Bochumer Schriften*, pp. 132-133 ("the status of neutral Archipelagic Waters in time of war is destined to remain for the time being a moot point, since State practice on the matter is almost not existent and it is still to be ascertained whether belligerents would be ready to accept the equation between archipelagic waters and neutral waters"). Shearer argues that the concept of archipelagic is a *sui generis* regime and thus further characteristics of such waters remain to be developed "in accordance with the classic processes of customary law creation." Shearer, Comment No. 17, in *ibid.*, p. 135.

⁹⁶ 1995 U.S. Navy Commander's Handbook, para. 7.3.6, see also *ibid.*, para. 2.3.4.2; San Remo Manual, paras. 16-17. Compare 1907 Hague Convention XIII, Articles 1, 2 and 5.

Operations in archipelagic waters thus pose particularly difficult legal and logistical issues both for belligerent naval forces and for neutral archipelagic States which must ensure that the inviolability of its neutral waters are respected.⁹⁷ The legal character of archipelagic waters is “essentially identical to that of the territorial sea”⁹⁸ and the San Remo Manual provides that subject to the provisions of the archipelagic sea lanes passage, “the archipelagic waters of neutral States should be equated to the territorial sea.”⁹⁹ Therein lays the difficulties in terms of naval operations, since as Professor Shearer notes:

This is a very difficult problem, because the temptation for one belligerent to take unlawful sanctuary in archipelagic waters and for the other to launch an attack there will be very great. Not only are the sea lanes in question extensive—in some cases very large indeed—a number of archipelagic States are poor and have little or no capability to enforce neutrality laws.¹⁰⁰

Given the strategic importance of certain archipelagic waters (such as those of Indonesia), Greenwood has questioned whether:

[T]he use by belligerent warships of archipelagic waters outside archipelagic sea lanes (or, if no sea lanes have been declared, outside established international shipping routes) should *always* be regarded as an attempt to use neutral waters as a base, or cloak for hostile operations?”¹⁰¹

There are also logistical and financial considerations that confront naval powers when operating in these waters. From this point of view, it is worth considering the following example that the closing of the Indonesian archipelago to transiting naval forces could have on the U.S. Navy. Assume that a six-ship conventionally-powered carrier battle group were steaming from Yokosuka, Japan, to Bahrain and that these vessels were prevented from transiting the Indonesian archipelago and Straits of Malacca, forcing them to detour around Australia. The U.S. government has estimated that this detour would add 5,800 nautical miles to the journey, requiring an extra 15 days of transit time. The extra fuel costs associated with

⁹⁷ 1995 U.S. Navy Commander’s Handbook, para. 7.3.6; San Remo Manual, para. 22; 1907 Hague Convention XIII, Article 25. With respect to innocent passage through archipelagic waters outside archipelagic sea lanes, see 1995 U.S. Navy Commander’s Handbook, para. 2.3.4.2.

⁹⁸ Robertson Bochumer Schriften, p. 46.

⁹⁹ San Remo Manual, para. 15 and Explanation, para. 15.2.

¹⁰⁰ I.A. Shearer, Comment No. 17 in Robertson Bochumer Schriften, p. 135.

¹⁰¹ Christopher Greenwood, Comment No. 9 in Robertson Bochumer Schriften, p. 107 (*emphasis added*).

this detour would amount to more than \$3 million.¹⁰² Moreover, requiring such a detour during armed conflict would be more dangerous in that such a route would be predictable to enemy forces.

Finally, with respect to archipelagic waters it should be pointed out that several major Pacific naval battles of the Second World War, including the Battle of the Coral Sea, the Battle of the Java Sea and the Battle for Leyte Gulf, occurred in waters that would be characterised as archipelagic waters under the 1982 LOS Convention.¹⁰³ Consequently, it is difficult to imagine how a modern conflict at sea could be waged in certain areas of Southeast Asia without infringing the prohibition on naval operations within neutral archipelagic waters. For example, it is not inconceivable that a naval conflict could erupt between India and China in the future. If either the Philippines or Indonesia were to remain neutral in such a future naval conflict, it is possible that the regime of neutral archipelagic waters with respect to those States would not survive, given the strategic sea lanes in which those States are located.¹⁰⁴

D. International Straits, Archipelagic Sea Lanes, Man-Made Canals¹⁰⁵

Transit passage through international straits and archipelagic sea lanes passage through archipelagic waters are similar from a legal point of view.¹⁰⁶ Belligerent warships, military aircraft and auxiliary ships and aircraft may exercise the right of transit passage through, under and over neutral international straits and archipelagic sea lanes passage during periods of armed conflict.¹⁰⁷ Neither transit passage through international straits nor innocent

¹⁰² This figure is in 1994 dollars. U.S. Defense Department, "National Security and the Law of the Sea," (GPO: Washington, DC, 1994), p. 10.

¹⁰³ The Solomon Islands, Papua New Guinea, the Philippines and Indonesia, for example, have declared archipelagic status pursuant to Part IV of the 1982 LOS Convention. See 1995 U.S. Navy Commander's Handbook, p.105, Table A1-9; see also Churchill and Lowe, p. 122.

¹⁰⁴ Alternatively, the burdens imposed on the neutral State may increase the likelihood that the archipelagic State is drawn into the conflict. Robertson, p. 35.

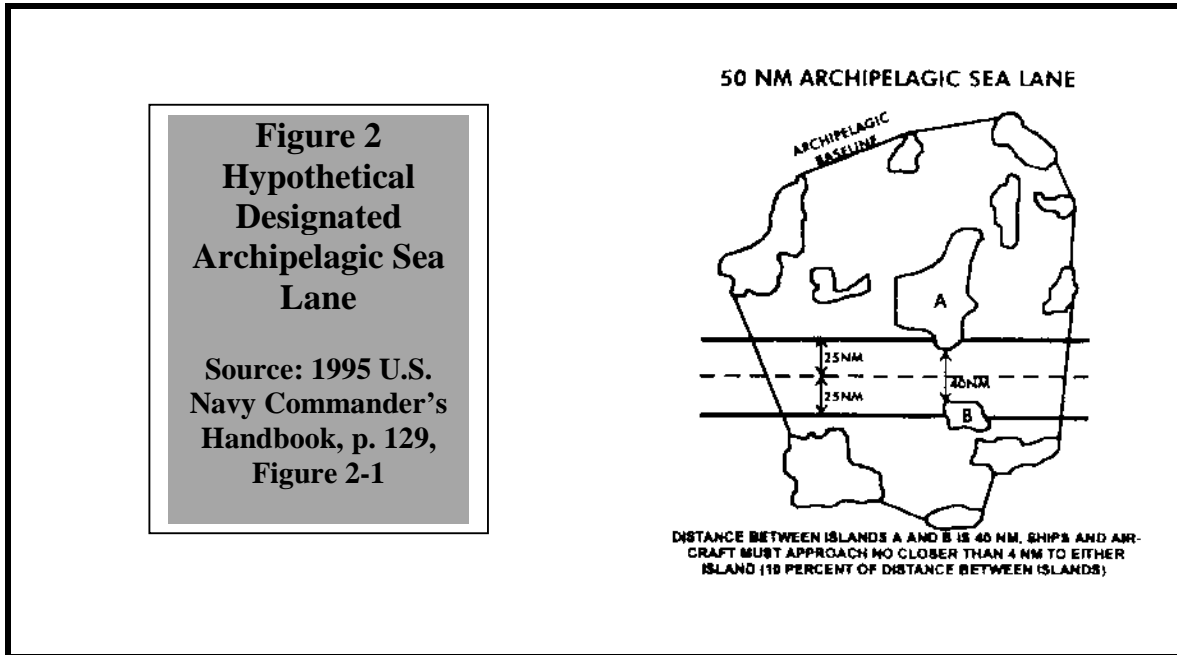
¹⁰⁵ For an excellent overview, see Heintschel von Heinegg; Lewis M. Alexander, "International Straits," in Law of Naval Operations, pp. 91-108.

¹⁰⁶ Robertson, p. 34. However, from an operational point of view, there are significant differences between operating in international straits, which tend to be relatively small areas of water and operating in archipelagic waters, which tend to cover vast areas of the sea. See *ibid.* See also Robertson *Bochumer Schriften*, pp. 17, 49-51.

¹⁰⁷ U.S. Commander's Handbook, paras. 2.3.4.1, 7.3.5; U.K. Manual, paras. 13.10-13.20; Canadian Manual, paras. 812, 816-818; German Manual, para. 1126; San Remo Manual, paras. 23, 27 and 31;

passage through archipelagic waters by a belligerent warship, military aircraft or auxiliary vessel or aircraft jeopardises the neutrality of either a State bordering the international strait or the archipelagic State concerned.¹⁰⁸

Vessels exercising archipelagic sea lanes passage must not deviate more than 25 nautical miles from either side of the axis lines designating the sea lanes and must approach no closer than 10 percent of the distance between the nearest islands.¹⁰⁹ Figure 2 depicts a hypothetical designated archipelagic sea lane.



Notwithstanding the apparent proscriptions of hostile actions in waters through which archipelagic sea lanes passage may be exercised, Professor Oxman has written that the breadth of permissible passage was partially the result of military considerations:

These broad sea lanes were designed, *inter alia*, with a view to accommodating the needs of military task forces traversing such extended and exposed routes to employ evasive tactics and to

Robertson, pp. 21-22, 33; Heintschel von Heinegg, p. 266. Heintschel von Heinegg asserts that Article 38 reflects customary international law, although he acknowledges that not all States would concur. See *ibid.*, and footnote 32 therein. Similarly, the vessels of neutral States, including military vessels and aircraft, may exercise the passage rights provided under international law through, under and over belligerent international straits and archipelagic waters. See San Remo Manual, paras. 26 and 32.

¹⁰⁸ 1995 U.S. Navy Commander's Handbook, para. 2.3.2.1; U.K. Manual, paras. 13.11, 13.12; Canadian Manual, paras. 813-814; San Remo Manual, paras. 24-25. Military aircraft and auxiliary aircraft may not exercise the right of innocent passage through international straits. See also 1982 LOS Convention Article 17.

¹⁰⁹ 1982 LOS Convention, Article 53(5). Thus, the sea lane is actually 50 nautical miles wide.

disperse broad defensive screens of ships, helicopters and fixed-wing aircraft around the heart of the task force. Both the transiting State and the archipelagic State have an interest in avoiding the creation of a tempting target.¹¹⁰

With respect to transit and archipelagic sea lanes passage for warships,¹¹¹ there is no requirement that such passage be innocent.¹¹² Nor is there a specific requirement (similar to Article 20 of the 1982 LOS Convention with respect to innocent passage) requiring submarines to surface when exercising transit passage.¹¹³ However, neutral States may not “suspend, hamper or otherwise impede” the right of transit passage or the right of archipelagic sea lanes passage.¹¹⁴ In addition, “the right of non-suspendable innocent passage ascribed to certain international straits by international law may not be suspended in time of armed conflict.”¹¹⁵

Belligerent forces in transit passage or archipelagic sea lanes passage must undertake such passage without undue delay and must refrain from the threat or use of force against the neutral littoral or archipelagic State.¹¹⁶ Moreover, the transiting warship must comply with the generally accepted regulations, procedures and practices regarding navigational safety.¹¹⁷

¹¹⁰ Oxman, pp. 860-861

¹¹¹ The U.S. Government position is that transit passage reflects customary international law. See 1995 U.S. Navy Commander’s Handbook, para. 7.3.5. For a general discussion of military issues related to transit passage through international straits, see Lowe July 1986, pp. 177-178.

¹¹² 1982 LOS Convention, Article 38(2). Green questions whether “a belligerent warship can ever be said merely to be engaged in simple navigation.” He takes a broad view in this respect, noting, “Whenever it is at sea during a conflict it is, potentially at least, engaged in hostile operations, even if this is merely to enable it to get from one part of the combat area to another or to depart the combat area entirely.” L.C. Green, Comment No. 8, in Robertson Bochumer Schriften, p. 101. See also *ibid.*, pp. 101-102.

¹¹³ Regarding archipelagic sea lanes passage for military vessels and aircraft in general, see Oxman, pp. 858- 861 and Lowe July 1986, p. 177, in which Lowe sets forth the argument that the text of 1982 LOS Convention Article 39(1)(c) supports the position that submarines may exercise transit passage while submerged, a view shared by John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 *AJIL* p. 77 (January 1980), p. 95; Horace B. Robertson, Jr., “Passage Through Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea,” 20 *Virginia JIL* p. 801, pp. 843-846; and Robertson, pp. 20-21; See also Rauch, pp. 45-46 and William T. Burke, “Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text,” 52 *Washington Law Review*, 193 (1977).

¹¹⁴ 1995 U.S. Navy Commander’s Handbook, para. 7.3.5.; U.K. Manual, para. 13.16; Canadian Manual, para. 817.1; 1982 LOS Convention, Article 44; San Remo Manual, para. 29; Regarding the transit passage regime as it relates to warships and military aircraft, see Oxman, pp. 856-858.

¹¹⁵ U.K. Manual, para. 13.20.; Canadian Manual, para. 820.3; San Remo Manual, para. 33.

¹¹⁶ 1982 LOS Convention, Article 39(1); 1995 U.S. Navy Commander’s Handbook, para. 7.3.5.; U.K. Manual, para. 13.17.; Canadian Manual, para. 818.1; San Remo Manual, para. 30.

Hostile actions by belligerent naval forces are prohibited in neutral waters constituting an international strait and those waters in which the right of archipelagic sea lanes passage may be exercised.¹¹⁸ Belligerent forces exercising transit passage through international straits and archipelagic sea lanes may engage in activities that are incident to their normal mode of continuous and expeditious passage:

Belligerent forces in transit may ... take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerent forces may not use neutral straits as a place of sanctuary nor as a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters.¹¹⁹

During the course of such passage, belligerent forces must refrain from conducting offensive operations against enemy forces or using the neutral waters as a sanctuary or base of operations.¹²⁰

However, there are no such restrictions on the conduct of hostilities “in and over international straits completely overlapped by the territorial seas of the **parties** to an international armed conflict.”¹²¹ Heintschel von Heinegg, a leading expert on armed conflict at sea, has written that:

[A]t first glance there seem to exist no restrictions on the conduct of hostilities in and over international straits completely overlapped by the parties to an international armed conflict. Indeed, subject to the applicable maritime *jus in bello*, enemy vessels and aircraft in such straits may be attacked, and enemy and neutral merchant vessels may be visited, stopped and captured.”¹²²

¹¹⁷ 1982 LOS Convention, Articles 39(2), 42.

¹¹⁸ 1995 U.S. Navy Commander’s Handbook, paras. 7.3.5, 7.3.6; Canadian Manual, para. 818; San Remo Manual, paras. 15-17 and 30.

¹¹⁹ 1995 U.S. Navy Commander’s Handbook, para. 7.3.5 (footnotes omitted), see also *ibid.*, p. 379, para. 7.3.6. regarding transit through archipelagic sea lanes; U.K. Manual, para. 13.18.; Canadian Manual, para. 819. See also 1982 LOS Convention, Article 53(3); San Remo Manual, para. 30. The phrase “normal mode,” permits submarines to exercise the right of archipelagic sea lanes passage while submerged.

¹²⁰ 1995 U.S. Navy Commander’s Handbook, paras. 7.3.5, 7.3.6.; U.K. Manual, para. 13.20; Canadian Manual, para. 819.1; San Remo Manual, para. 30. The commentary on the provisions of the San Remo Manual dealing with transit passage by belligerents through international straits or archipelagic waters states that this was one of the “most seriously debated provisions” during the drafting process. San Remo Manual, para. 30 and Explanation, pp. 106-107.

¹²¹ Heintschel von Heinegg, p. 264 (**emphasis added**). See also Rauch, pp. 40-44; Robertson, p. 41.

¹²² Heintschel von Heinegg, pp. 264-265; see also Rauch, p. 44, Bothe, p. 403.

Article 35(c) of the 1982 LOS Convention provides for an exception to the transit passage regime for certain international straits “in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.” The Turkish Straits (Dardanelles and Bosphorus) are under such a special regime pursuant to the 1936 Montreux Convention, which is beyond the scope of the present work, but which limits the number and types of warships that may use the Turkish Straits, both in peace and during armed conflict. Under the terms of the Montreux Convention during periods of armed conflict when Turkey is not one of the belligerents, transit passage is guaranteed for neutral vessels. However, transit passage of belligerent warships is prohibited, except in exceptional circumstances specified in the Convention.¹²³ In the event Turkey is a party to the conflict, that State has complete discretion as to transit passage for vessels of other belligerents.¹²⁴

Other States have advanced claims that certain international straits fall within the ambit of 1982 LOS Convention Article 35(c), but such claims seem to have been unsuccessful, with the exception of the Strait of Magellan.¹²⁵

Man-made canals used for international navigation, such as the Panama Canal, Suez Canal and Kiel Canal, fall outside the definition of international straits and are generally governed by specific treaties that provide details regarding passage of both neutrals and belligerents.¹²⁶ For example, with respect to the Panama Canal, the relevant treaty provides that “in time of peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality.”¹²⁷ Other canals have been closed or have had limitations established during armed conflicts. For example, the United Kingdom closed the Suez Canal to convoy shipping during both the First and Second World Wars.

E. The High Seas, including Exclusive Economic Zones

The high seas and EEZs were discussed *supra* in Chapter 1, section II.

¹²³ Robertson, p. 22; 1995 U.S. Navy Commander’s Handbook, para. 7.3.5.

¹²⁴ Robertson, p. 22; Heintschel von Heinegg, p. 264.

¹²⁵ Robertson, p. 22; 1995 U.S. Navy Commander’s Handbook, para. 2.3.3.1, footnote 36; Heintschel von Heinegg, pp. 275-279. Rauch takes the view that only the Turkish Straits are covered by Article 35(c). Rauch, p. 53.

¹²⁶ See, for example, the 1977 Panama Canal Treaty and the 1995 U.S. Navy Commander’s Handbook, para. 2.3.3.1, footnote 36, for the relevant excerpts from the treaties governing passage through the international canals cited.

¹²⁷ 1977 Panama Canal Neutrality Treaty, Article II. See also 1977 Panama Canal Neutrality Protocol.

F. The Seabed

The issue of military uses of the seabed during periods of armed conflict merits brief mention. Although ships and aircraft, including warships and military aircraft, enjoy freedom of navigation on and over the high seas, belligerent States conducting such military operations on the high seas should avoid disrupting the exercise by neutral States of the rights of exploration and exploitation of the resources of the seabed, ocean floor and subsoil thereof.¹²⁸ Moreover, care should be exercised by belligerent States to avoid damaging the submarine cables and pipelines laid on the seabed that do not exclusively serve the belligerents.¹²⁹

As a legal concept, the international seabed is that part of the seabed that is “beyond the limits of national jurisdiction,”¹³⁰ i.e., seaward of the continental shelf of the coastal State as defined in the 1982 LOS Convention, except in the rare instance of an isolated uninhabitable rock.¹³¹ Thus, the international seabed begins at furthest seaward point that is 200 nautical miles from the baseline or the outer edge of the continental margin.¹³² Consequently, since the area covered by the international seabed lies entirely beneath the waters of the high seas, there is nothing in the 1982 LOS Convention regarding the seabed that significantly impacts upon naval operations on the high seas.¹³³

The 1971 Seabed Arms Control Treaty,¹³⁴ prohibits the emplacement of nuclear weapons or other weapons of mass destruction¹³⁵ on the seabed and ocean floor beyond 12 miles from the baseline from which the territorial sea is measured, pursuant to the 1958

¹²⁸ U.K. Manual, para. 13.22; Canadian Manual, para. 823; San Remo Manual, para. 36.

¹²⁹ U.K. Manual, para. 13.23; Canadian Manual, para. 824; San Remo Manual, para. 37.

¹³⁰ 1982 LOS Convention, Article 1(1)(1).

¹³¹ Such rocks possess neither a continental shelf nor an EEZ, per 1982 LOS Convention Article 121. See also Oxman, pp. 832-835; and Tullio Treves, “Military Installations, Structures and Devices on the Seabed,” 74 *AJIL*, (No. 4 October 1980), pp. 808-857, and Rex J. Zedalis, “Military Installations, Structures and Devices on the Continental Shelf: A Response,” 75 *AJIL*, (No. 4 October 1981), pp. 926-933 and Tullio Treves, “A Reply,” 75 *AJIL*, (No. 4 October 1981), pp. 933-935.

¹³² 1982 LOS Convention, Article 76.

¹³³ Oxman, pp. 833, 835; Robertson, pp. 35-36.

¹³⁴ Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof, 11 February 1971, TIAS 7337, 23 UST 701.

¹³⁵ No arms control treaty defines “weapons of mass destruction.”

Territorial Sea Convention.¹³⁶ This treaty also prohibits construction of structures, launching installations or other facilities specifically designed for testing, storing or the use of such weapons.¹³⁷ Thus, although this treaty prohibits the use of nuclear mines that are attached to the seabed, ocean floor or subsoil thereof, it does not proscribe the use of naval nuclear weapons, such as nuclear-armed depth charges or torpedoes, so long as such weapons are not implanted or emplaced on the seabed. Similarly, a submarine resting on the ocean floor would not be prohibited from launching nuclear-armed ballistic missiles, on the grounds that such submarines are not affixed to the ocean floor.

G. Conclusion

In conclusion, the law of the sea regime provides for a detailed division of the world's oceans into zones and therefore effectively partitions area in which naval forces may operate and conduct hostilities. Although the 1982 LOS Convention is primarily designed for conditions of peace, the treaty remains operable during time of armed conflict. Belligerent naval forces may conduct hostile operations in, on and above the territory, internal waters, territorial seas, EEZs and continental shelves of other belligerent States. With respect to the territory of neutral States, the belligerents must (with minor exceptions) refrain from hostile actions and attacks. The problem presented by "neutral waters" is that the extent of such waters in terms of belligerent naval operations is unsettled.

Although the rights of neutrals are the topic of discussion in the following chapter, a few conclusions regarding neutral rights relating to neutral waters and ports may be stated at this point. While the bulk of the modern law governing the rights and duties of neutrals vis-à-vis belligerents in the context of naval warfare are based on customary international law and treaties that have codified those customary rules, such as 1907 Hague Convention XIII, the law of the sea regime and state practice have necessitated modernisation of certain rules. Modern military manuals and the San Remo Manual have summarised these rules as follows:

- Within and over neutral waters, hostile actions (to include launching attacks, laying mines, visit, search, diversion or capture) by belligerent forces are not allowed.¹³⁸

¹³⁶ 1971 Seabed Arms Control Treaty, Articles 1 and 2.

¹³⁷ *Ibid.*, Article 1(1).

¹³⁸ 1995 U.S. Navy Commander's Handbook, para. 7.3; U.K. Manual, paras. 13.8.-13.9; Canadian Manual, paras. 806.1-806.2, 810.2; German Manual, paras. 1118, 1120; San Remo Manual, paras. 15-16.

- Belligerent forces may not use neutral waters as a sanctuary or base for conducting military operations.¹³⁹
- All ships, including warships, may exercise the right of innocent passage, which must be continuous and expeditious, through the territorial waters of all States.¹⁴⁰
- Belligerent vessels may exercise the right of innocent passage through neutral international straits and archipelagic waters.¹⁴¹
- On a non-discriminatory basis, a neutral State may impose conditions, restrictions (such as the employment of local pilots) or even prohibitions on the entry to, or passage through, its neutral waters by belligerent warships and auxiliary vessels,¹⁴² except that:
 - Neutral States may *not* suspend, hamper or otherwise impede the right of transit passage nor the right of archipelagic sea-lanes passage;¹⁴³ and
- On a non-discriminatory basis, a neutral State may close its ports and roadsteads to belligerents to belligerent warships and auxiliaries,¹⁴⁴ and certain limitations exist concerning permissible actions within such ports and roadsteads:
 - Belligerent warships are forbidden to remain in neutral ports for longer than 24 hours unless unable to depart due to weather or unseaworthiness.¹⁴⁵
 - Belligerent vessels or auxiliaries may take on food, water and sufficient fuel to reach a port in its own territory.¹⁴⁶

¹³⁹ 1995 U.S. Navy Commander's Handbook, para. 7.3.4; Canadian Manual, para. 807; German Manual, para. 1119; San Remo Manual, para. 17.

¹⁴⁰ 1995 U.S. Navy Commander's Handbook, paras. 2.3.2.1-2.3.2.4; U.K. Manual, para. 13.8; German Manual, para. 1126; Australian Manual, paras. 2.25-2.29; San Remo Manual, paras. 19-21. See also Appendix, section IV.B.

¹⁴¹ 1995 U.S. Navy Commander's Handbook, paras. 2.3.3.1-2.3.3.2; U.K. Manual, para. 13.11; Canadian Manual, para. 820; German Manual, para. 1126; San Remo Manual, paras 15, 24, 31-32.

¹⁴² 1995 U.S. Navy Commander's Handbook, paras. 7.3.2, 7.3.4; Canadian Manual, paras. 808, 809(a); German Manual, paras. 1136-1137; Australian Manual, para. 10.8; San Remo Manual, paras. 19, 20(a).

¹⁴³ 1995 U.S. Navy Commander's Handbook, para. 7.3.6; U.K. Manual, para. 13.16; Canadian Manual, para. 817; San Remo Manual, para. 29.

¹⁴⁴ 1995 U.S. Navy Commander's Handbook, para. 7.3.2 (specifically noting that neutrals are not required to close their ports and roadsteads to belligerents); Canadian Manual, para. 809; German Manual, para. 1137; Australian Manual, paras. 10.8-10.11; San Remo Manual, para. 20.

¹⁴⁵ 1995 U.S. Navy Commander's Handbook, para. 7.3.2.1; Canadian Manual, para. 810.1; German Manual, para. 1127; Australian Manual, para. 10.9; San Remo Manual, para. 21. The 24-hour rule does not apply to passage through international straits and archipelagic sea-lanes passage.

- Belligerent vessels and auxiliaries may undertake repairs to make them seaworthy if the neutral State finds such repairs necessary, although such repairs may *not* restore or increase their fighting strength.¹⁴⁷
- Belligerent vessels in transit passage through, under and over a neutral international strait or in archipelagic sea-lanes passage through, over and under neutral archipelagic waters must proceed without delay, and while such vessels may take defensive measures during transit passage, they are precluded from conducting offensive operations against enemy forces or using such neutral waters as a place of sanctuary nor as a base of operations.¹⁴⁸
- Belligerent military (and auxiliary) aircraft may not enter neutral airspace and the neutral State has a duty to use all means at its disposal require the aircraft to land within its territory, after which time the aircraft and its crew shall be interned. Aircraft (other than medical aircraft) that fail to follow instructions to land are liable to be attacked by the neutral State.¹⁴⁹

In the EEZs and on the continental shelves of neutral States, the parties to the armed conflict may conduct military operations, but must respect the rights of neutrals with respect to exploration and exploitation of marine resources. As a result, and taking practical matters into consideration, including the presence of vessels engaged in such exploration and exploitation of marine resources, EEZs may be “no go” areas in terms of belligerent naval operations, depending on the location. On the other hand, there is no blanket prohibition on the establishment of NEZs in EEZs of neutral States.

On the high seas, the belligerent parties must refrain from prejudicing the rights of neutrals to explore and exploit the resources of the seabed and must not damage submarine cables or pipelines unless such cables or pipelines exclusively serve other belligerents, but may otherwise engage in naval operations.

¹⁴⁶ 1995 U.S. Navy Commander’s Handbook, para. 7.3.2.2; Canadian Manual, para. 809.1(b); German Manual, paras. 1130-1131; Australian Manual, 10.10; San Remo Manual, para. 20(b).

¹⁴⁷ 1995 U.S. Navy Commander’s Handbook, para. 7.3.2.2; Canadian Manual, para. 809.1(c); German Manual, paras. 1128-1129; Australian Manual, para. 10.10; San Remo Manual, para. 20(c).

¹⁴⁸ 1995 U.S. Navy Commander’s Handbook, para. 7.3.6; U.K. Manual, para. 13.18; Canadian Manual, paras. 818-819; San Remo Manual, para. 30.

¹⁴⁹ San Remo Manual, para. 18. See also 1995 U.S. Navy Commander’s Handbook, para. 7.3.7; U.K. Manual, paras. 12.17, 12.17.1; German Manual, paras. 1149-1155.

Chapter 5

Neutrals and Naval Warfare

“The law of neutrality ... was not made ... from the top-down by scholars and commentators, but rather from the bottom-up by statesmen, generals, admirals and traders. It was a fact of life first, and an institution of law only later.”¹

“No state, since 1945, has ever considered itself bound by the law of neutrality in the case of a state of war recognized by parties to a conflict.”²

I. Introduction

The effects of exclusion zones obviously do not fall entirely upon the warships and merchantmen of the belligerents; the establishment of such zones also affects neutral States and their interests. This chapter examines how belligerents have historically impacted upon neutral States and interfered with their rights, particularly concerning commercial uses of the seas and freedom of navigation. One of the distinguishing characteristics of naval warfare is the extent to which belligerents may interfere with neutral commerce, and this factor has played a very important role in the development of the permissible scope of activities in which belligerents may lawfully engage upon the high seas.

Neutral States have always had to acquiesce in the needs of belligerents in certain circumstances and the challenge posed is how to balance the rights of neutral States to trade freely while allowing belligerents to control such trade so that neutral States do not assist or re-supply opposing belligerent forces. This balancing act lies at the heart of the system permitting belligerents to exercise visit and search so as to prevent the shipment of war goods to enemy forces by neutral merchant vessels.

After briefly exploring the current state of neutrality under the U.N. Charter, this chapter turns to the nature of neutrality as that concept relates to a number of issues, including interference with neutral shipping, such as visit, search, diversion and capture.³ The law

¹ Neff, p. 7.

² Schindler, p. 375.

³ Although slightly dated, Tucker remains the most authoritative source on the law of neutrality as it relates to naval warfare. Neff sets forth a comprehensive history of neutrality from its medieval roots to the present.

governing the targeting of neutral merchant ships in general is discussed in Chapter 6, while the law governing blockade is discussed in Chapter 7.

II. Neutrality: Pre-Charter History

A. Pre-20th Century

The notion that neutrality could be a legal concept was alien to medieval just war theorists on the grounds that to be neutral in a conflict between the forces of good and evil was immoral. By the late 16th and early 17th Centuries, however, leading jurists began expanding upon the concept of neutrality, in response to the emerging reality that “a war could be just on both sides when considered from the human standpoint, even if not from the divine one.”⁴ Thus Gentili, in his 1598 treatise On the Law of War, and Grotius, in his 1625 On the Law of War and Peace, both addressed neutrality. The law of neutrality—which applied only when war erupted between sovereign States—had a “fixed and uncontested place within the law of nations”⁵ until the adoption of the Charter of the United Nations.

In terms of rights, the neutral had an inherent natural law right to trade with any belligerent, on the ground that the neutral was not in a state of war. For the same reason, belligerents were not entitled to direct combat actions against neutrals. From these principles, several “rules” developed.⁶ First, while belligerents were entitled to capture the property of their enemies on the high seas, the property of neutrals was inviolable. Second, since belligerents could not attack the property of neutrals—including the vessels of neutral states—a belligerent was prohibited from attacking neutral vessels even when such vessels were carrying enemy property. Third, in the event that a belligerent captured a neutral vessel that was carrying enemy property, the capturing belligerent was required to pay the neutral carrier any freight that was due.⁷ Thus, the character of the cargo played the crucial role in

⁴ Neff, p. 9.

⁵ Schindler, p. 367.

⁶ These principles are reflected in the *Consolato del Mare*, a document initially relating to maritime trading in Spain in the 13th Century, which was subsequently accepted by the leading European maritime powers.

⁷ The *Consolato* contained rules governing a variety of situations. For example, the belligerent State could remove the enemy property from the neutral vessel on the high seas, or if the vessel was mainly (or exclusively) carrying enemy goods, the belligerent could require the neutral vessel to proceed to port for the purpose of unloading the goods. If the neutral vessel master refused, the belligerent was entitled to sink the ship, once the belligerent took measures to protect the crew of the merchantman.

determining whether cargo at sea could be subject to capture. Enemy cargo⁸ would always be subject to capture—whether carried on board enemy or neutral vessels, but if the enemy property were captured from a neutral vessel, then freight would be owed. Neutral cargo would never be the subject of lawful capture.⁹

These determinations were often fraught with practical difficulties. For example, how was the character of the property captured at sea to be determined? The rule developed that it was the nationality of the consignee of the goods, rather than of the title-holder that was the determining factor in whether the goods were neutral or enemy property. Of course, this is virtually impossible to determine without recourse to examining the ship's papers. This led to the development of the right of belligerents to visit and search neutral vessels on the high seas to determine whether the cargo is subject to capture.¹⁰ Resistance to visit and search could result in the ship being sunk (after the crew was placed out of harm's way). Partially to alleviate this rather draconian approach, the leading maritime powers of the age, England and France, developed rules concerning prize¹¹ and legal institutions known as prize courts to ensure that the rights of interested parties were enforced.¹² Under this regime, rather than capturing cargo or sinking the vessel on the high seas, the belligerent captors were required to put crews aboard neutral vessels and escort such vessels into belligerent ports where prize courts were sitting.

⁸ Particular problems arose with respect to what came to be known as contraband—arms, ammunition and other materiel necessary for conducting war.

⁹ In the mid-16th Century, France—and then England—adopted a policy known as “infection,” by which a neutral vessel would lose that status if it was carrying any enemy cargo, resulting in all cargo being considered to be enemy property.

¹⁰ Only if the ship's papers provided a cause for suspicion, could the ship's holds be searched.

¹¹ These rules were subsequently codified in Articles 21 through 23 of 1907 Hague Convention XIII, and may be summarised as follows. Prize vessels may only be brought into neutral ports due to “unseaworthiness, stress of weather, or want of fuel or provisions” and must depart as soon as the circumstances justifying its entry into port have ended. 1907 Hague Convention XIII, Article 21. Any prize brought into a neutral port for any other reason must be released by the neutral power. In the event that the prize vessel does not so depart following an order to do so by the authorities of the neutral State, the prize and its crew shall be released and the prize crew shall be detained. *Ibid.* Although the treaty permits neutrals to allow belligerents to send prizes to neutral ports for sequestration pending decisions by prize courts, this provision is controversial and found little use by any States during the two World Wars of the 20th Century. *Ibid.*, Article 23; see also Dietrich Schindler, *Commentary on 1907 Hague Convention XIII*, in Ronzitti, pp. 211-222 at p. 219 and the sources cited in footnote 16 therein.

¹² Neff argues that prize courts served two primary functions: “to compile an official inventory of captured goods, to ensure that the government received its full share of any booty,” and to provide “important protections to neutrals against arbitrary and oppressive conduct by zealous belligerents on the high seas.” Neff, p. 25.

It should be stressed that, although neutrals were afforded certain legal protections, this was not the result of a clearly developed concept of the rights of neutrals. Rather, this situation reflected two parallel developments. First, the “rights” of neutrals to engage in trade was based on the natural law and not on a positive law guaranteeing neutral trading. Second, the constraints imposed on belligerents vis-à-vis neutrals were based on the laws of war limiting attacks to those States actively engaged in hostilities and not against third parties.¹³ Moreover, notwithstanding the apparent simplicity of the general rules governing neutrality during the medieval era, one commentator has written that the reality was quite different:

[I]t is fairer to say that the so-called “rights” of neutrals consisted of the freedom to exercise any of their general natural-law rights that lay beyond the reach of the rights of belligerents. This meant that the whole law of neutrality was seen, fundamentally, from the standpoint of the belligerents. It was belligerents, not neutrals, who had rights properly speaking under the laws of war. Neutrals simply had whatever freedom of action was “left over” (so to speak) when the prerogatives of belligerents came to a halt.¹⁴

Unlike the situation with respect to the “rights” of neutrals (which did not derive from the status of the neutral State *per se*), medieval European jurists embraced the notion that neutrals had two duties: to abstain from hostilities and to remain impartial as between the belligerents. This is not to suggest, however, that these concepts were easy to apply in practice. On the contrary, the application of these neutral duties “was beset with conceptual difficulties, uncertainties, fine distinctions and unanswered questions.”¹⁵ Nevertheless, these twin duties, as formulated by the end of the 17th Century, remain a core component of the concept of neutrality from that period to the present.

In part because the law of neutrality developed rather sporadically based on State practice, the self-help measures of belligerent reprisals and necessity played an important role in this process, if only because the neutral vessel was often the target of the act of reprisal. For example, Neff cites to the controversial 16th Century “infection” policy¹⁶ as an example of

¹³ Grotius, p. 783.

¹⁴ Neff, p. 11.

¹⁵ Neff, p. 14.

¹⁶ This policy had two results: first, a neutral ship would be treated as a belligerent merchantman and would thus forfeit its neutral status, if it was carrying any cargo owned by the enemy; second, as a result, all cargo would be treated as enemy cargo, regardless of actual ownership, due to the “infection.” Neff, p. 16. See also Heintschel von Heinegg *Bochumer Schriften*, p. 4.

how reprisals influenced the law of neutrality and affected the rights of neutrals.¹⁷ The principle of necessity in the context of neutrality often arose where one belligerent relied on this principle to interdict *all* trading between neutral and enemy States. Unlike the situation with respect to belligerent reprisals, there is no requirement of a prior unlawful act for a State to exercise the right of necessity. Rather, the State seeking to exercise that right must be facing an emergency that can only be resolved by infringing upon the legitimate rights of another State. Like reprisals, however, acts of necessity are governed by the principle of proportionality. Necessity has been characterised as “a sort of juridical ‘wild card’ which allows a State to ‘trump’ the normal rights of other States in times of desperation—and wartime contains many such occasions.”¹⁸

B. Developments in the Law of Neutrality: 1900-1945

Prior to the outbreak of the First World War, it was a classical rule of international law that in the event war broke out, a State had the free choice to enter the conflict as a belligerent or to remain outside the war, in which case it would be bound by the law of neutrality. Hague Convention XIII of 1907 changed the situation to the extent that it substituted the concept of strict neutrality for the “intermediate forms of benevolent neutrality” that had been practised in earlier periods.¹⁹

The intense efforts to codify the laws of war at the turn of the 20th Century included the laws governing naval warfare in general and the law of neutrality in particular, as demonstrated by the 1907 Hague Convention XI, the 1907 Hague Convention XIII and the 1909 London Declaration. Although many of these codified rules are more precise than their customary counter-parts, the treaty rules all reflect customary principles. Moreover, while the 1907 Hague Convention XIII deals with the rights and duties of neutrals and belligerents in neutral ports and neutral waters only,²⁰ the 1909 London Declaration contains provisions that relate to belligerent actions with respect to neutral vessels on the high seas, and sets forth

¹⁷ Neff, p. 16.

¹⁸ Ibid., p. 17.

¹⁹ Schindler, p. 371.

²⁰ Two regional treaties, the 1928 Havana Convention and the 1938 Nordic Rules of Neutrality, contain specific provisions on the rights and duties of belligerents in neutral waters and ports covered by those conventions.

detailed rules on several topics, including blockade,²¹ contraband,²² “unneutral service,”²³ and enemy character.²⁴

1. Rights of Neutrals

Article 1 of the 1907 Hague Convention XIII sets forth the basic principle that belligerents are required to respect the rights of neutrals in neutral waters and on neutral territory and to abstain from any act that would constitute a violation of neutrality.²⁵ Article 2 prohibits belligerent warships from acts of hostility, including capture²⁶ and the exercise of the right of search, in the territorial waters of a neutral State. Belligerents are prohibited from using neutral ports and waters as a base of naval operations against their adversaries²⁷ and may not establish prize courts on neutral territory or on vessels in neutral waters.²⁸ Although neutral States are prohibited from supplying—either directly or indirectly—a belligerent State with any war materiel,²⁹ Article 7 of the 1907 Hague Convention XIII specifically permits a neutral to allow the export or transit of military equipment and supplies to belligerent States. Read together, these provisions permit individuals or companies in neutral States to supply belligerents, even though the neutral State itself is precluded from providing military goods.

²¹ Chapter I, Articles 1-21.

²² Chapter II, Articles 22-44.

²³ Chapter III, Articles 45-47.

²⁴ Chapter VI, Articles 57-60.

²⁵ Article 26, 1907 Hague Convention XIII, provides that a State does not lose its neutral status by exercising any of its neutral rights against a belligerent.

²⁶ In the event that a ship is captured in the territorial waters of a neutral State, Article 3, 1907 Hague Convention XIII, requires the neutral State to release the prize and its crew (interning the prize crew) if the prize is still within its jurisdiction. If the prize is no longer under the jurisdiction of the neutral State, the captor State must liberate the prize and crew on the demand of the neutral State.

²⁷ 1907 Hague Convention XIII, Article 5. This article specifically precludes the establishment of any systems for communicating with belligerent forces on land or at sea.

²⁸ *Ibid.*, Article 4.

²⁹ *Ibid.*, Article 6.

2. Duties of Neutrals

The duties of abstention, prevention and impartiality were incorporated into the 1907 Hague Convention XIII, and many of these provisions remain in force today.³⁰ As noted above, neutrals must abstain from supplying military goods to belligerents and must also use the means at their disposal to prevent the “fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace.”³¹ Article 9 of the treaty requires the neutral state to impartially apply to belligerents whatever conditions, restrictions, or prohibitions made by that State with respect to the admission into its waters or ports of belligerent warships or their prizes.³²

A neutral State does not lose that status simply because the warships or prizes of belligerent States pass through the neutral’s territorial waters,³³ and a rather elaborate system of rules governs this aspect of the law of neutrality.³⁴ Thus, belligerent warships may not remain in the ports, roadsteads or territorial waters of neutral States for more than 24 hours unless otherwise provided for in the 1907 Hague Convention XIII.³⁵ In the event that a warship has suffered damage or during periods of inclement weather, the belligerent warship may extend its stay in the neutral port, roadstead or territorial waters until such time as the damages are repaired or the weather improves.³⁶ In the absence of national legislation to the

³⁰ The concluding section of Chapter 4 contains the citations to many of the relevant provisions of the military manuals of the leading maritime nations and of the San Remo Manual relating to these rules. See also German Manual, paras. 1118-1148.

³¹ 1907 Hague Convention XIII, Article 8.

³² In the event that one belligerent has failed to follow the orders or regulations imposed by a neutral State, or has violated the neutrality of that State, the neutral may forbid the warships of that belligerent from entering its ports or roadsteads. 1907 Hague Convention XIII, Article 9.

³³ 1907 Hague Convention XIII, Article 10. Schindler argues that although this rule is “uncontested,” its limits are controversial. In support of this position, he cites to the *Altmark* incident of February 1940. See Dietrich Schindler, Commentary on 1907 Hague Convention XIII in Ronzitti, pp. 211-222 at pp. 216-217.

³⁴ 1907 Hague Convention XIII, Article 24 establishes the regime for violation of these provisions and permits the neutral State to detain the warship and crew.

³⁵ 1907 Hague Convention XIII, Article 12. This article specifically allows for a neutral power to adopt special provisions to the contrary in its domestic legislation. See also Article 13, which requires the neutral State to inform the belligerent warship of the requirement to depart within 24 hours once the neutral State becomes aware of the outbreak of hostilities. See Chapter 4, section V.B., for a discussion concerning the continuing viability of the 24-hour rule.

³⁶ 1907 Hague Convention XIII, Article 14. The second clause of this provision exempts “warships devoted exclusively to religious, scientific, or philanthropic purposes.” It is far from clear what types of warships would fall within this exemption, however. Article 17 limits the repairs to those which are

contrary, no more than three belligerent warships may remain simultaneously in the ports, roadsteads or territorial waters of the neutral State,³⁷ and when warships belonging to both belligerents are simultaneously present in a neutral port, a period of not more than 24 hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other belligerent.³⁸ Moreover, a belligerent warship may not leave a neutral port or roadstead until 24 hours after the departure of a merchant vessel under the flag of its adversary.³⁹

Article 25 of the 1907 Hague Convention XIII imposes a duty of prevention on neutral States and requires a neutral power to employ the means at its disposal to prevent belligerent States from violating its neutrality and one of the thorniest problems concerning the law of neutrality concerns the potential action that one belligerent could take against another when the neutral State violated its duties of impartiality and prevention. Assuming that the neutral State took the steps required by Article 25, is it responsible for the ineffectiveness of its measures?⁴⁰ Difficulties can also arise when a neutral State has failed to use the means at its disposal to prevent a belligerent from using its waters unlawfully, such as when a belligerent uses neutral waters as cover or when it violates the 24-hour rule.

The San Remo Manual takes a cautious approach in outlining the actions that are required in this situation. There is an obligation on neutral States to “take the measures necessary to terminate” a violation by a belligerent that occurs in the neutral waters of that State.⁴¹ If the neutral State fails to terminate the violation, by one belligerent, the opposing

“absolutely necessary” to render the vessel seaworthy and specifically precludes any repairs that would add to the fighting capacity of the warship. The local authorities of the neutral power may determine which repairs meet this requirement. 1907 Hague Convention XIII, Article 17. Similarly, Article 18 prohibits the belligerent warship from replenishing or increasing its war supplies or arms, or from re-crewing while in neutral ports, roadsteads or territorial waters.

³⁷ 1907 Hague Convention XIII, Article 15.

³⁸ 1907 Hague Convention XIII, Article 16. The order of departure is determined by the date of arrival, unless the first ship to arrive is “so circumstanced that an extension of its stay is permissible” (presumably on account of the need for repair under Article 17 or to refuel under Article 19).

³⁹ 1907 Hague Convention XIII, Article 16. Articles 19 and 20 govern the provisioning and refuelling of belligerent warships.

⁴⁰ According to Schindler, “A belligerent in such case is not allowed to take hostile measures against an enemy making unlawful use of neutral waters unless it becomes the victim of an armed attack originating in neutral territory or in neutral waters (Article 51 of the Charter).” Dietrich Schindler, *Commentary to Hague Convention XIII*, in Ronzitti, pp. 211-222 at pp. 218; see also Schindler, pp. 382-383.

⁴¹ San Remo Manual, para. 22. See also 1995 U.S. Navy Commander’s Handbook, para. 7.3; Canadian Manual, paras. 811.1-811.2.

belligerent should notify the neutral State and give the authorities of that State reasonable time to terminate the violation.⁴² If that fails and the violation “constitutes a serious and immediate threat to the security of the opposing belligerent,” that belligerent may then “in the absence of any feasible and timely alternative, use such force as is strictly necessary to the threat posed by the violation.”⁴³

In the process that led to the drafting of the San Remo Manual, Robertson took a more direct approach:

Should a neutral State be unwilling or unable to enforce its neutral obligations with respect to hostile military activities by belligerent naval forces within its neutral waters, the opposing belligerent may use such force as is necessary within such neutral waters to protect its own forces and to terminate the violation of neutral waters.⁴⁴

Thus, while there is no doubt that if a neutral state permits belligerents to violate the law, the opposing belligerent may use force against that enemy even if in neutral waters, commentators have disagreed about the legal basis for such action. For example, Tucker and Heintschel von Heinegg present the traditional argument that when a neutral State fails to meet its obligations to prevent one belligerent from unlawfully using its territorial waters, the offended belligerent may employ force against the offending belligerent forces on the grounds that such use of force is an act of reprisal against the neutral State that failed in its duty.⁴⁵ Reflecting the fact that Article 51 of the United Nations Charter has affected the right of reprisal, Greenwood argues that the concept of necessity, rather than reprisal, is a better way of justifying belligerent action against an enemy who violated neutral waters.⁴⁶

III. Neutrality in the Era of the United Nations Charter

The 1920 League of Nations Covenant imposed some limitations on the rights of States to resort to the use of force vis-à-vis other members of the League.⁴⁷ Prior to the 1928 Kellogg-Briand Pact, however, States were generally free to conduct war as a means of

⁴² San Remo Manual, para. 22. See also Canadian Manual, paras. 811.1-811.2.

⁴³ Ibid.

⁴⁴ Robertson *Bochumer Schriften*, pp. 65-66.

⁴⁵ Tucker, pp. 218-224; Heintschel von Heinegg, Comment No. 10, in Robertson *Bochumer Schriften*, pp. 112-115. See also the Note on Belligerent Reprisals, Chapter 6.

⁴⁶ Greenwood, Comment No. 9, in Robertson *Bochumer Schriften*, p. 108.

⁴⁷ See, for example, 1920 League of Nations Covenant, Articles 10-12.

furthering national policies, and under customary international law, all States had “the option to refrain from participation in an armed conflict by declaring or otherwise assuming neutral status.”⁴⁸ To a certain extent, the U.N. Charter has modified this aspect of customary international law and the threshold issue concerning the continuing viability of the law of neutrality therefore concerns the effect that the U.N. Charter has had on this body of law. Tucker has written, “[T]he rules regulating the behaviour of neutrals and belligerents remain strictly dependent for their operation upon the existence of a state of war.”⁴⁹ Some authors, such as Schindler, take the view that the U.N. Charter has fundamentally altered the law of neutrality:

Article 2(4) has the consequence that States, in case of an armed conflict between other States, can no longer choose freely between neutrality and belligerency. Their choice is limited by the Charter.⁵⁰

Schindler goes on to note that Article 51 of the Charter has had an even greater impact on the law of neutrality, arguing that as a result of this provision:

The dualism neutrality-belligerency has ... been abolished. States not wishing to take part in the armed conflict on the victim's side are no longer obliged to apply the law of neutrality. Benevolent neutrality or non-belligerency have become legally admitted attitudes. Neutrality has become purely optional. State practice since 1945 shows that States have in fact assumed a great variety of intermediate positions regarding armed conflict between other States.⁵¹

Other writers, however, including Greenwood, take the opinion that neutrality in the era of the Charter remains an option in light of State practice:

[T]here have been numerous cases in which States have elected to be treated as neutrals and have thus voluntarily subjected their relations with the combatant states to the law of neutrality. Except when the Security Council has authoritatively identified the aggressor in a conflict and adopted measures against that State, there appears to be no reason why a State which does not wish to

⁴⁸ 1995 U.S. Navy Commander's Handbook, para. 7.2 (footnote omitted).

⁴⁹ Tucker, pp. 199-200. See also Greenwood Concept of War, p. 50 *et seq.* (“It is in the operation of the law of neutrality that the most important legal consequences may flow from the decision that a particular conflict constitutes a war.” *Ibid.*, p. 50.)

⁵⁰ Schindler, p. 371.

⁵¹ *Ibid.*, p. 373.

become involved in the hostilities should not choose the status of neutrality with the rights and duties which that implies.⁵²

Notwithstanding these changes in the *jus ad bello*, Greenwood maintains the view that the law of neutrality, like the rest of the law of armed conflict, applies to any international armed conflict, whether or not there is a formal state of war.⁵³

IV. Conclusion

Historically, there have been tensions between the rights of neutrals and belligerents during periods of armed conflict at sea and the law has developed and codified the rights and duties of both neutrals and belligerents when operating in a maritime environment. A number of tactics, including visit and search, capture or diversion, have been developed to ensure that neutrals do not aid one side to the conflict at the expense of the other. Nevertheless, each of these concepts impedes upon the rights of neutrals to use the seas without interference. Most neutral merchant vessels undoubtedly consider these belligerent means to be costly both in terms of delay (to include delay as the result of re-routing) and in excess fuel and labour costs. As seen from the perspective of the belligerent, however, these tactics are necessary—if time-consuming and labour intensive—evils designed to ensure that an opponent is denied access to the goods and logistical support necessary to carry out the war. Moreover, while the neutral merchant captain undoubtedly considers any of these tactics to pose major inconvenience and obstacles in completing his journey, many naval commanders probably do not think the law goes far enough in permitting them to engage such vessels on the high seas, notwithstanding the lack of resources to fulfil this mission properly.

Neutrals have the inviolable right to engage in commerce, but have the reciprocal duties to remain impartial as to the belligerents, to abstain from trading with them and to prevent their sovereign territory from being used by any of the belligerents. They must also permit belligerents to exercise their rights, including visit and search. Belligerents have the right to insist that neutrals fulfil their duties, while respecting the legitimate rights of neutral States to engage in commerce without unreasonable restrictions. Thus, neutral merchant

⁵² Greenwood Concept of War, pp. 51-52 (citation omitted). See also *ibid* at p. 54 (“The law of neutrality is brought into operation by the acts of neutral States, not the belligerents. While a declaration of war may lead other States to proclaim themselves neutral, it does not, as it used to, oblige them to chose between neutrality and belligerency.”) See also 1995 U.S. Navy Commander’s Handbook, paras. 7.2 and 7.2.1.

⁵³ Greenwood, Comment No. 9, in Robertson Bochumer Schriften, p. 107.

vessels must be left unhindered to engage in trade, subject to certain qualifications. They must not resist visit and search; they must avoid hauling contraband to belligerent States; they should avoid sailing under convoy of belligerent warships or military aircraft; and they should respect lawfully established and notified blockades. Roach has succinctly summarised the reciprocal rights and duties of neutrals and belligerents in a helpful table, which are set forth in Table 2.⁵⁴

Table 2 Reciprocal Rights and Duties of Neutrals and Belligerents

	Neutrals	Belligerents
Rights	Inviolability Commerce	Insist on: <ul style="list-style-type: none"> • Impartiality • Abstention • Prevention Enforcement rights
Duties	Impartiality Abstention Prevention Acquiescence	Respect neutral inviolability and commerce

Sources: J. Ashley Roach, Comment No. 15, in Robertson Bochumer Schriften, p. 132, adapted and reprinted in 1995 U.S. Navy Commander's Handbook, p. 400, Table A7-1.

⁵⁴ See also Schindler, pp. 377-381.

Chapter 6

Legal Principles Governing Naval Warfare and Targeting

“Nations adhere to the law of armed conflict not only because they are legally obliged to do so but for the very practical reason that it is in their best interest to be governed by consistent and mutually acceptable rules of conduct. The law of armed conflict is effective to the extent that it is obeyed. Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance, observance, and enforcement continues to be the norm.”¹

I. Introduction

International humanitarian law seeks to prevent unnecessary suffering and destruction by regulating and mitigating the effects of hostilities by setting forth minimum standards of protection to combatants, non-combatants and property. There are no explicit treaty provisions that provide that the general principles of international humanitarian law applicable to land warfare extend to cover warfare in the marine environment, and as Fenrick has cautioned, “[O]ne cannot attempt to indicate the current state of the law of naval warfare by relying exclusively on the explication of treaty texts.”² Nevertheless, it is beyond doubt that certain customary principles apply to all forms of armed conflict.³ Perhaps the most important such principle is the notion that in any armed conflict, the parties are limited in their choices of the methods and means of warfare.⁴ This chapter explores the basic principles relevant to the law of naval warfare.⁵

¹ 1995 U.S. Navy Commander’s Handbook, para. 6.1 (footnotes omitted).

² Fenrick Bochumer Schriften, p. 2.

³ See Michael Bothe, Commentary on the 1977 Geneva Protocol I, in Ronzitti, pp. 760-767; Fenrick Bochumer Schriften, pp. 23-27; and German Manual, para. 1017.2 concerning the applicability to naval warfare of the principles enshrined in the 1977 Additional Protocol I.

⁴ See, for example, 1907 Hague Regulations, Article 22; 1977 Additional Protocol I, Article 35(1); 1995 U.S. Navy Commander’s Handbook, para. 8.1; U.K. Manual, paras. 13.2, 13.3, 13.24; Canadian Manual, para. German Manual, paras. 401, 1017, 1017.3; Interim New Zealand Manual, para. 707.1; ICRC Model Manual, para. 1701; San Remo Manual, para. 38.

⁵ As they relate to naval warfare, these principles are succinctly set out in Fenrick Bochumer Schriften.

II. Principle of Distinction

Another core value of international humanitarian law is the protection of civilians and non-combatants, which is reflected in the principle of distinction (sometimes referred to as the principle of identification). Belligerents at all times are required to make distinctions between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives.⁶ The category of protected persons includes the wounded, shipwrecked, captured and anyone else who is *hors de combat* and no such persons may be the subject of an attack.⁷ With respect to objects, military objectives are limited to those objects which:

[B]y their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.⁸

All other objects are civilian objects and are not to be targeted, since only military objectives may be the subject of a lawful attack.⁹ In addition to any specific prohibitions on the means and methods of armed conflict, it is forbidden to undertake any acts that are indiscriminate in that they are not, or cannot be directed against a specific military objective or which have effects that cannot be limited as the law requires.¹⁰ Means or methods that are “of a nature” to

⁶ 1907 Hague Regulations, Articles 25, 27(1); 1977 Additional Protocol I, Articles 48, 49(3); *Nuclear Weapons Advisory Opinion*, paras. 78-79; 1995 U.S. Navy Commander’s Handbook, paras. 5.3, 8.1, 11.1-11.8; U.K. Manual, paras. 2.5-2.5.3, 13.25-13.31; Canadian Manual, paras. 204.1, 403, 411; German Manual, paras. 401, 451, 1017; Interim New Zealand Manual, para. 205; ICRC Model Manual, paras 1104-1107, 1701; San Remo Manual, para. 39.

⁷ 1977 Additional Protocol I, Articles 50, 51(2), 51(3); 1995 U.S. Navy Commander’s Handbook, paras. 5.3, 8.1, 11.1-11.8; U.K. Manual, para. 9.17; Canadian Manual, paras. 306, 309-316, 403, 404, 406, 408; German Manual, paras. 502, 601, 603, 704, 1017, 1017.4.

⁸ 1977 Additional Protocol I, Article 52(2); 1995 U.S. Navy Commander’s Handbook, paras. 8.1-8.1.2; U.K. Manual, para. 13.26; Canadian Manual, paras. 403, 404, 406-407; German Manual, paras. 441-443, 446, 1017, 1017.6; Interim New Zealand Manual, para. 714.1; ICRC Model Manual, paras. 1104, 1701(b); San Remo Manual, para. 40.

⁹ 1977 Additional Protocol I, Articles 52-56; 1995 U.S. Navy Commander’s Handbook, paras. 8.1-8.1.2; U.K. Manual, para. 13.27; Canadian Manual, paras. 404, 411; German Manual, paras. 404, 441, 451, 454-455; Australian Manual, para. 8.5, Interim New Zealand Manual, para. 714.1; ICRC Model Manual, para. 1701(b); San Remo Manual, para. 41.

¹⁰ 1995 U.S. Navy Commander’s Handbook, para. 9.1.2; U.K. Manual, paras. 6.1, 13.28; Canadian Manual, paras. 416.1, 509, 827; Interim New Zealand Manual, para. 707.4; German Manual, paras. 404, 454-456; ICRC Model Manual, paras. 1108, 1701(c); San Remo Manual, para. 42. This requirement is based on Articles 51(4) and 51(5) of the 1977 Additional Protocol I, although that provision applies only to land warfare pursuant to Article 49(3) of the treaty.

cause superfluous injury or unnecessary suffering are similarly prohibited,¹¹ as are orders that there should be no survivors.¹²

III. Principle of Proportionality

The principle of proportionality requires “that the losses resulting from a military action should not be excessive in relation to the expected military advantage.”¹³ This principle balances the potentially conflicting concepts of military necessity (discussed below) and the humanitarianism reflected in the law of armed conflict. The 1977 Additional Protocol I is the first convention to set forth this principle with any degree of specificity and the relevant articles of this treaty prohibit attacks that may be expected to “cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage expected.”¹⁴

Applying the proportionality principle in practice—particularly the term “concrete and direct”—can be difficult,¹⁵ as can be adjudicating cases involving the principle.¹⁶ The U.K. Manual defines “concrete and direct” to mean that:

[T]he advantage to be gained is identifiable and quantifiable and one that flows directly from the attack, not some pious hope that it might improve the military situation in the long term. In this sense

¹¹ 1977 Additional Protocol I, Article 35(2); 1995 U.S. Navy Commander’s Handbook, para. 9.1.1; U.K. Manual, paras. 6.1, 13.28; Canadian Manual, paras. 502-503, 506; German Manual, paras. 401-402; Interim New Zealand Manual, para. 707.2; San Remo Manual, para. 42.

¹² 1907 Hague Regulations, Article 23(d); 1913 Oxford Manual, Article 17.3; 1977 Additional Protocol II, Article 40; *Von Ruckteschell*, p. 83; ICRC Model Manual, para. 1701(d); San Remo Manual, para. 43; Mallison, pp. 133-134.

¹³ U.K. Manual, para. 2.6. See also *ibid.*, paras. 2.6.1-2.8.2, 5.33-5.33.5; Canadian Manual, paras. 204.4-204.6; German Manual, para. 509; Australian Manual, paras. 7.9-7.10, 8.3. In the paragraph of the U.S. Standing ROE governing self-defence, the proportionality principle is defined as “the requirement that the use of force be in all circumstances limited in intensity, duration and scope to that which is reasonably required to counter the attack or threat and to ensure the continued safety of U.S. forces.” 1995 U.S. Navy Commander’s Handbook, Annex A4-3, pp. 277-285, para. 5d.

¹⁴ 1977 Additional Protocol I, Articles 51(5)(b), 57(2)(a)(iii), 57(2)(b).

¹⁵ See, for example, the hypothetical situations described in the Canadian Manual, para. 204.6 and U.K. Manual, paras. 2.7-2.7.3, 5.33.4. See also 1995 U.S. Navy Commander’s Handbook, para. 5.2, footnote 7; ICRC Additional Protocols Commentary, para. 1979.

¹⁶ See, for example, *Galić* Judgement, paras. 33-62, and especially para. 58, where the Trial Chamber adopts an objective approach to evaluating whether the proportionality principle is upheld.

it is like the term “definite” used in the definition of military objects.¹⁷

A number of sources indicate that this phrase refers to the advantage to be gained from the “specific military operation of which the attack is a part taken as a whole and not from the isolated or particular parts of the operation.”¹⁸

IV. Military Necessity

Closely related to the principles of distinction and proportionality is the concept of military necessity.¹⁹ Military necessity permits the use of that force which is required to accomplish a lawful purpose, and as such, it is complementary to the principle of proportionality, which prohibits the use of force that is not essential for achieving a legitimate military purpose.²⁰ In the *Hostages Case*, the U.S. military tribunal explained military necessity as follows:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. It general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable to armed conflicts of war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.²¹

¹⁷ U.K. Manual, para. 5.33.3.

¹⁸ 1995 U.S. Navy Commander’s Handbook, para. 5.2, footnote 7, citing to Bothe, Partsch and Solf, New Rules for Victims of Armed Conflict, p. 311. This position reflects the interpretations stated by a number of States in ratifying the 1977 Additional Protocol I. See German Manual, para. 509.8, footnote 7; Canadian Manual, para. 415. See also ICRC Additional Protocols Commentary, paras. 2208, 2219.

¹⁹ See 1863 Lieber Code, Article 14; U.K. Manual, paras. 2.1-2.3; Canadian Manual, paras. 202.1-202.4; German Manual, paras. 131-132; Australian Manual, para. 8.3; Interim New Zealand Manual, para. 202.

²⁰ In the paragraph of the U.S. Standing ROE governing self-defence, the necessity principle is defined as “the requirement that a use of force be in response to a hostile act or demonstration of hostile intent.” 1995 U.S. Navy Commander’s Handbook, Annex A4-3, pp. 277-285, para. 5d.

²¹ *The Hostages Case*, p. 66.

Military necessity is not a justification for disregarding the laws of armed conflict, and tribunals have rejected the defence that military necessity can somehow justify departing from well-established legal prohibitions protecting core values.²² There are, however, other rules of international humanitarian law protecting less important values that are subject to the requirements of military necessity,²³ or which may be modified or even disregarded if required by military necessity.²⁴ The modern view is that military necessity is inherent in the law of armed conflict in the sense that military necessity has been considered in formulating the relevant rules. Thus, military necessity is an important principle that should not be ignored when examining the legality or practicality of establishing NEZs.

V. Attack Precautions

The principles of distinction and proportionality require those who plan, decide upon or execute an attack to exercise precaution prior to launching an attack or otherwise engaging a target.²⁵ In applying the principles of attack precautions, military commanders must:²⁶

²² See, for example, *Galić* Judgement, paras. 33-62 (rejecting earlier ICTY cases that had found that “prohibited attacks are those launched deliberately against civilians and civilian objects in the course of armed conflict and are not justified by military necessity”) and especially *ibid.*, para. 44, footnote 76 (“Under no circumstances are civilians to be considered legitimate military targets. Consequently, attacking civilians or the civilian population as such cannot be justified by involving military necessity.”). See also *Krupp*, p. 1347:

It is an essence of war that one or the other side must lose, and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of anyone belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.

See also U.K. Manual, para. 2.3; Canadian Manual, para. 202.4.

²³ See, for example, 1949 Geneva Convention II, Articles 8(3), 28 and 30(1). But see U.K. Manual, para. 2.3, footnote 6.

²⁴ See, for example, 1907 Hague Regulations, Article 23(g). But see U.K. Manual, para. 2.3, footnote 6.

²⁵ *Galić* Judgement, para. 58; U.K. Manual, paras. 2.5.3, 13.32; German Manual, para. 510; ICRC Model Manual, paras. 1108, 1701(f); San Remo Manual, para. 46.

²⁶ U.K. Manual, para. 13.32; Canadian Manual, paras. 204.2, 417-421, 521.4(b); German Manual, paras. 457, 510, 1017, 1017.7; Interim New Zealand Manual, paras. 205, 714.2; San Remo Manual, para. 46. These requirements are similar to Article 57 of the 1977 Additional Protocol I, although that provision applies only to land warfare pursuant to Article 49(3) of the treaty. A naval commander may consider a number of options in choosing an attack that would minimize civilian casualties and collateral damage, including the choice of weapons and weapons platform, the timing or angle of attack, and the fusing of the ordnance. 1995 U.S. Navy Commander’s Handbook, para. 8.1.2.1, footnote 20.

- [T]ake all feasible measures to gather the information needed to determine whether or not objects that are military objectives are present in the area of attack;
- [D]o everything feasible to ensure that attacks are limited to military objectives, based on the information available;
- [T]ake all feasible precautions in the choice of means and methods to ensure that collateral casualties or damage is avoided or at least minimised;
- [N]ot launch the attack if it is expected to cause collateral casualties or damage that would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole;
- [C]ancel or suspend an on-going attack as soon as it becomes apparent that the collateral casualties or damage would be excessive.

Additional precautionary rules apply to civil aircraft.²⁷

It will be noted that the attack precautionary principle refers to “collateral casualties or damage.” It is not unlawful to cause incidental injury to civilians or collateral damage to civilian objects during an attack upon a legitimate military objective.²⁸ Reflecting the requirements of the proportionality principle, however, such incidental injury or damage must not be excessive in light of the military advantage anticipated by the attack.²⁹

With respect to those components of the attack precautionary principle based on the proportionality principle, the U.S. Navy adopts an approach that is more subjective from the perspective of the military commander than the approach set forth above and which focuses on mission accomplishment and force protection:

Naval commanders must take all reasonable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force. In each instance, the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him. Similarly, the commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether

²⁷ U.K. Manual, paras. 12.45-12.50; Canadian Manual, para. 711.3; San Remo Manual, paras. 72-77.

²⁸ 1995 U.S. Navy Commander’s Handbook, paras. 8.1, 8.1.2.1; German Manual, para. 445.

²⁹ 1995 U.S. Navy Commander’s Handbook, para. 8.1.2.1.

to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.³⁰

VI. Self-Defence

In accordance with Article 51 of the U.N. Charter, any exercise of the right of individual or collective self-defence must be consistent with the principles of military necessity and proportionality.³¹ The Explanation to paragraph 3 of the San Remo Manual succinctly describes the legal requirements relating to self-defence as follows:

The effect of these principles is that a State which is the victim of an armed attack is entitled to resort to force against the attacker but only to the extent necessary to defend itself and to achieve such defensive goals as repelling the attack, recovering territory and removing threats to its future security. These principles do not require that a State which is attacked use only the degree and kind of force that has been used against it but that the force employed by the State acting in self-defence be proportionate to what is required for the achievement of legitimate objectives of self-defence.³²

Inherent in the right of self-defence is the notion that proportionate and necessary acts undertaken in self-defence may nevertheless be unlawful if they exceed what the law of self-defence permits the State to achieve by force.³³ This reflects the fact that once the armed attack has been repelled and the security of the victim State has been re-established, no further hostile actions are required.³⁴ Moreover, only in exceptional circumstances (if even then) can a State exercising the right of self-defence seek the total submission of the enemy, since this course of action is likely to exceed the permissible boundaries of self-defence.³⁵

³⁰ 1995 U.S. Navy Commander's Handbook, para. 8.1.2.1 (footnotes omitted). The explanations for these differences, which are based on statements made by certain NATO States at the time the 1977 Additional Protocol I was signed, are set forth in *ibid.*, footnotes 18-20. See also *ibid.*, paras. 8.1, 11.2.

³¹ *Military And Paramilitary Activities*, para. 194; 1995 U.S. Navy Commander's Handbook, para. 4.3.2-4.3.2.1. The provisions of the U.S. Standing ROE governing self-defence specifically refer to these principles, as do the U.S. Navy Regulations. *Ibid.*, Annex A4-3, pp. 277-285, para. 5d. See also Australian Manual, paras. 7.1, 7.13-7.14, 7.19-7.23; San Remo Manual, paras. 3-5, Explanation, paras. 3.1-5.2;

³² San Remo Manual, Explanation, para. 3.3.

³³ San Remo Manual, para. 4, Explanation, para. 4.2. See also Christopher J. Greenwood, "The Relationship Between *Ius ad Bellum* and *Ius in Bello*, in Greenwood Essays, pp. 13-31, *ad passim*.

³⁴ San Remo Manual, para. 4, Explanation, paras. 4.1-4.6. But see 1995 U.S. Navy Commander's Handbook, para. 5.2.

³⁵ San Remo Manual, para. 5, Explanation, paras. 5.1-5.2.

The establishment of NEZs can be an important aspect of self-defence and in this respect, the U.K. Manual makes two interesting points. First, the provisions on NEZs make specific reference to self-defence, stating that zones are “legitimate means of exercising the right of self-defence.”³⁶ Second, the U.K. Manual specifically cites to the Falklands War (in which exclusion zones were used extensively) as an example of the exercise of self-defence.³⁷

Of course, the commander of a naval vessel also exercises “unit self-defence,” the right to protect his vessel and crew.³⁸ This form of self-defence, which must also meet the proportionality and necessity tests, may “only be undertaken in response to the commission of a hostile act or demonstration of hostile intent.”³⁹ The Australian Manual indicates that the *Caroline* principles apply to this form of self-defence, and thus for an act of unit self-defence to be lawful, there must be “an instant and overwhelming necessity for self defence leaving no choice of means and no moment for deliberation.”⁴⁰

VII. Naval Targeting in General

Due to the nature of naval warfare, the principle of distinction raises slightly different problems than those typically encountered by commanders engaged in land or air warfare, with the exception of sea-based attacks on land targets.⁴¹ Unlike land or air warfare, which increasingly occurs in and around urban areas, combat often occurs in areas where there are significant concentrations of civilians and civilian objects. By comparison, there are significantly fewer civilians and civilian objects in most maritime environments. Fenrick has noted the following with respect to the problems presented by naval targeting:

³⁶ U.K. Manual, para. 13.77.1.

³⁷ U.K. Manual, para. 3.2.2, footnote 4 (“The UK’s actions in recovering the Falklands Islands in 1982 were based throughout on self-defence.”) See also German Manual, para. 204.

³⁸ The provisions of the U.S. Standing ROE governing unit self-defence stipulate that a commander has the “obligation” to protect his unit and other U.S. forces in the vicinity. 1995 U.S. Navy Commander’s Handbook, Annex A4-3, pp. 277-285, para. 2a. See also Australian Manual, paras. 7.5-7.13.

³⁹ See Australian Manual, paras. 7.8.

⁴⁰ Australian Manual, paras. 7.6, 7.12.

⁴¹ This is not to suggest that targeting decision are not occasionally made on the basis of faulty or inadequate intelligence or that targeting accidents do not occur in armed conflict at sea, but rather, for the reasons that follow, naval warfare is not beset with many of the difficulties facing ground commanders or military pilots with respect to distinguishing between legitimate and unlawful targets.

It is quite understandable that naval officers tasked with making targeting decisions would prefer “bright line” rules which draw easily identifiable distinctions between permissible and impermissible objects of attack. Unfortunately, just as reality in the form of the irregular combatant makes “bright line” rules difficult to draw in the law of land warfare, so reality in the form of the merchant ship may or may not be providing support for the belligerent war effort makes “bright line” rules difficult to draw in the law of naval warfare. The existence of a refractory reality does not mean that one abandons the search for “bright line” rules. It does mean, however, that the search may be difficult.⁴²

One of the major problems encountered in naval warfare is target identification. Vessels are generally categorised into warships (and auxiliaries) and merchant vessels, with the latter category further subdivided into enemy and neutral merchantment. As Fenrick has written:

Naval commanders have weapons available to them which they can use to attack targets which are beyond visual range (BVR) or even over the horizon (OTH). The naval commander can attack and destroy targets at ranges where it is difficult or impossible for him to confirm that the target is a legitimate military objective. ... Commanders must make targeting decisions on the basis of an assessment of probabilities.⁴³

The targeting rules set forth in this chapter apply to all aspects of naval warfare, and the general legal principles set forth above are applicable to all aspects of naval targeting. After each engagement, all possible measures should be taken without delay to search for and collect the shipwrecked, wounded and sick; dead bodies should be recovered.⁴⁴ This duty is subject to military exigencies and reflects the potential dangers that await any warship that lingers in the area after an attack or engagement.⁴⁵ Although submarines may be particularly vulnerable in such circumstances, they remain under a similar duty, although if to meet this obligation, the submarine would face “undue additional hazard” or be unable to accomplish its military mission, the location of possible survivors should be passed to surface vessels, aircraft or shore facilities that are capable of performing the necessary search and rescue

⁴² Fenrick *Bochumer Schriften*, pp. 4-5.

⁴³ Fenrick *Bochumer Schriften*, p. 37.

⁴⁴ 1907 Hague Convention X, Article 16; 1949 Geneva Convention II, Article 18; 1977 Additional Protocol I, Article 33; 1995 U.S. Navy Commander's Handbook, para. 8.2.1; U.K. Manual, para. 13.129; Canadian Manual, para. 904; German Manual, paras. 1017, 1017.8; Interim New Zealand Manual, para. 724.

⁴⁵ Operational necessity, however, can never excuse the unlawful killing of survivors. *Peleus*.

mission.⁴⁶ Military aircraft have a similar obligation to conduct searches and in the event military exigencies do not permit such a search, the location of possible survivors must be passed to units that can render assistance.⁴⁷

VIII. Targeting of Enemy Warships and Military Aircraft

One of the few areas of naval targeting that allows for “bright line” rules concerns enemy warships (both surface vessels and submarines), military aircraft and naval and military auxiliaries.⁴⁸ These categories of vessels and aircraft may be attacked, destroyed or captured without warning by surface vessels, submarines or military aircraft in any area outside neutral territory or neutralised zones.⁴⁹ The German Manual reflects a minority position and takes a more restrictive approach, explicitly stating that the principles of naval warfare:

[T]hose peculiar to naval warfare as well as the general principles of the laws of armed conflict, may, however, in specific cases oblige belligerents to refrain from destroying or sinking such ships and aircraft. This would be the case, for example, if in relation to the military advantage anticipated sinking or destruction were unnecessary or disproportionate. A geographical limitation of the conflict may also be of significance in so far as hostilities beyond a certain area may not take place even if directed at military objectives.⁵⁰

The attacker has an obligation to cease the attack once the enemy warship or auxiliary indicates a readiness to surrender.⁵¹ The officers and crews of warships that have surrendered,

⁴⁶ 1907 Hague Convention X, Article 16; 1949 Geneva Convention II, Article 18; 1977 Additional Protocol I, Article 33; 1995 U.S. Navy Commander’s Handbook, paras. 8.2.1, 8.3; U.K. Manual, para. 13.129; Canadian Manual, para. 904.1; German Manual, paras. 1017, 1017.8; Interim New Zealand Manual, para. 724; Mallison, pp. 134-139.

⁴⁷ 1949 Geneva Convention II, Article 18; 1995 U.S. Navy Commander’s Handbook, para. 8.4; U.K. Manual, para. 13.129; Canadian Manual, para. 904.1.

⁴⁸ Fenrick Bochumer Schriften, p. 30.

⁴⁹ 1995 U.S. Navy Commander’s Handbook, paras. 8.2.1, 8.3, 8.4; U.K. Manual, paras. 13.44-13.45; Canadian Manual, para. 833; German Manual, para. 1021; Australian Manual, para. 8.4; Interim New Zealand Manual, para. 715; San Remo Manual, paras. 65-66.

⁵⁰ German Manual, para. 1021.2 (footnotes omitted). The footnote accompanying the final sentence of the quoted section cites to the sinking of the *Belgrano*. Even though the German Manual indicates that this sinking was lawful, it notes (in *ibid.*, footnote 103) that, “The reactions in State practice as well as in legal writings show, however, that in geographically limited conflicts even the sinking of warships is subject to more legal restrictions than in a conflict of a general nature.”

⁵¹ See the following section. Although the same rule applies in principle to the surrender of military aircraft, it is much more difficult for aircraft to signal an intention to surrender and given today’s

as well as any survivors from ships that have been attacked, are to be accorded the status of prisoners of war.⁵²

IX. Targeting: Exempt Vessels

Reflecting the distinction principle, there are a number of types of vessels that are exempt from attack, in addition to vessels that have surrendered⁵³ and persons who have taken to life boats,⁵⁴ including the following:⁵⁵

- Passenger liners carrying only civilians and civilian aircraft⁵⁶
- Hospital ships, medical transports, medical aircraft and small coastal vessels engaged in search and rescue operations⁵⁷

modern surface-to-air and air-to-air weaponry, the chances that an aircraft would be hit and be in any condition to indicate a willingness to surrender is remote, to say the least. See 1995 U.S. Navy Commander's Handbook, para. 8.2.1, footnotes 31-33.

⁵² 1949 Geneva Convention II, Article 16; 1995 U.S. Navy Commander's Handbook, para. 8.2.1; German Manual, paras. 1021, 1021.3; Interim New Zealand Manual, para. 725.

⁵³ 1907 Hague Regulations, Article 23(c); 1913 Oxford Manual, Article 17.2; 1977 Additional Protocol II, Article 41; *Von Ruckteschell*, p. 82; 1995 U.S. Navy Commander's Handbook, para. 8.2.1; U.K. Manual, para. 13.33(j); German Manual, paras. 1017, 1017.8; Canadian Manual, para. 828.1(h); Interim New Zealand Manual, para. 719.2; ICRC Model Manual, para. 1703(i); San Remo Manual, para. 47(i), Explanation, paras. 47.56-47.57; Mallison, p. 134.

⁵⁴ 1949 Geneva Convention II, Articles 12, 18; 1977 Additional Protocol I, 8(b); *Llandoverly Castle; Peleus; Von Ruckteschell; Moehle*; U.K. Manual, para. 13.33(k); Canadian Manual, para. 828.1(i); ICRC Model Manual, para. 1703(j); San Remo Manual, para. 47(j), Explanation, para. 47.58.

⁵⁵ 1995 U.S. Navy Commander's Handbook, para. 8.2.3; U.K. Manual, para. 13.33; Canadian Manual, para. 828.1; German Manual, para. 1034; Interim New Zealand Manual, para. 718.1; ICRC Model Manual, para. 1703; San Remo Manual, paras. 47, 136. To this list, the Interim New Zealand Manual (at para. 718.1[e]) adds "vessels and aircraft exempt by proclamation, operation plan, order or other directive." With respect to types of aircraft that are immune from attack, see U.K. Manual, paras. 12.28-12.33; San Remo Manual, paras. 53-58. See also Fenrick *Bochumer Schriften*, pp. 28-29. Although these categories of exempt vessels are generally described as "exempt enemy vessels," it follows that if these types of vessels are exempt from attack as enemy vessels, similar types of neutral vessels are also exempt, since greater protection is afforded to neutral vessels. Of course, as is the case with exempt enemy vessels, exempt neutral vessels may lose exemption if they violate the rules set forth below.

⁵⁶ The general view is that while passenger vessels are not subject to attack, they are liable to capture. See 1995 U.S. Navy Commander's Handbook, para. 8.3.2, p. 418; U.K. Manual, para. 13.33(f); Canadian Manual, para. 828.1(e); German Manual, paras. 1004, 1034.6; ICRC Model Manual, para. 1703(h). Reflecting, at least in part, the views of Heintschel von Heinegg and Doswald-Beck (see Heintschel von Heinegg *Bochumer Schriften*, p. 95), however, the San Remo Manual takes a more restrictive approach. San Remo Manual, paras. 47(e), 53(c), 56.

⁵⁷ 1949 Geneva Convention II, Articles 22-35; 1995 U.S. Navy Commander's Handbook, para. 8.2.3, footnotes 62-71; U.K. Manual, paras. 13.33(a), 13.33(d), 13.35-13.37; Canadian Manual, paras. 828.1(a), 828.1(b); German Manual, paras. 1054-1064; Australian Manual, paras. 8.10(a)-8.10(b); Interim New Zealand Manual, para. 718.1(b); ICRC Model Manual, paras. 1703(a), 1703(b); San Remo Manual, para. 47(a), Explanation, paras. 47.1-47.17; Tucker, pp. 97, 123-134; Mallison, pp. 124-125;

- Vessels and aircraft designated for and engaged in the exchange of prisoners of war (often referred to as “cartel vessels”)⁵⁸
- Vessels and aircraft that have been guaranteed safe conduct by agreement of the belligerents⁵⁹
- Vessels engaged in religious, non-military scientific or philanthropic missions or carrying cultural property⁶⁰
- Small coastal (but not deep-sea) fishing vessels and small boats engaged in coastal trade⁶¹
- Vessels specifically designed for responding to maritime pollution incidents⁶²
- Vessels protected by the U.N. flag⁶³

The above categories will remain exempt from attack provided they: (1) are innocently engaged in the specific roles that are the source of the exemption; (2) they refrain from taking part in the hostilities or otherwise assisting any of the belligerents (including intelligence-gathering); (3) they do not hamper the movement of military vessels or aircraft; (4) they

Richard J. Grunawalt, “Hospital Ships in the War on Terror: Sanctuaries or Targets,” 58 *NWCR* (No. 1, Winter 2005), pp. 89-119. See also the *Dover Castle* and *Llandovery Castle* cases, both of which involved the sinking of British hospital ships by German submarines in the First World War.

⁵⁸ U.K. Manual, para. 13.33(c)(1); Canadian Manual, para. 828.1(c); German Manual, para. 1034.5; Australian Manual, para. 8.10(c)(1); Interim New Zealand Manual, para. 718.1(a); ICRC Model Manual, para. 1703(c)(1); San Remo Manual, paras. 47(c), 136(c), Explanation, paras. 47.18-47.23; Tucker, pp. 97-98; Mallison, p. 126.

⁵⁹ These agreements typically relate to the provision of essential humanitarian supplies. U.K. Manual, para. 13.33(c)(2); Canadian Manual, para. 828.1(c); Australian Manual, para. 8.10(c)(2); Interim New Zealand Manual, para. 718.1(d); ICRC Model Manual, para. 1703(c)(2); San Remo Manual, paras. 47(c), 136(c), Explanation, paras. 47.24-47.29;

⁶⁰ 1907 Hague Convention XI, Article 4; 1954 Cultural Property Convention, Articles 12-14; U.K. Manual, para. 13.33(e); Canadian Manual, paras. 828.1(d), 828.1(f); German Manual, paras. 923-925, 1034.3, 1034.4; Australian Manual, paras. 8.10(d)-8.10(d); Interim New Zealand Manual, para. 718.1(c); ICRC Model Manual, paras. 1703(d), 1703(e); San Remo Manual, paras. 47(f), 136(e), Explanation, paras. 47.30-47.32, 47.37-47.44. According to Mallison (at p. 128) and Tucker (at pp. 96-97), the practice has been to interpret this provision narrowly and often express agreements are entered with respect to these categories of vessels.

⁶¹ 1907 Hague Convention XI, Article 4; U.K. Manual, para. 13.33(h); Canadian Manual, para. 828.1(g); German Manual, para. 1034.2; Australian Manual, para. 8.10(f); Interim New Zealand Manual, para. 718.1(f); ICRC Model Manual, para. 1703(f); San Remo Manual, paras. 47(g), 136(f), Explanation, paras. 47.45-47.55; For examples of instances where small coastal fishing craft were used illegitimately for mine-laying and logistical support in the Korean and Vietnam Wars, respectively, see Cagle and Manson, pp. 296-297; O’Connell Influence, p. 177.

⁶² U.K. Manual, para. 13.33(i); Australian Manual, para. 8.10(g); ICRC Model Manual, para. 1703(g); San Remo Manual, para. 47(h), Explanation, paras. 47.52-47.55.

⁶³ U.K. Manual, para. 13.33(l).

submit to any identification and inspection regimes developed by the belligerents; and (5) they obey all orders to leave the area where combat is occurring when issued.⁶⁴ Special rules apply for attacking a vessel that is otherwise exempt, but which loses that exemption for any of the above reasons.⁶⁵

With respect to merchantmen, the general rule is that merchant vessels and civil aircraft are considered civilian objects *unless* they fall into certain specified categories or undertake specific acts that cause them to be military objectives.⁶⁶ The following two sub-sections discuss how belligerents may lawfully engage enemy merchant vessels and neutral merchant vessels, respectively.

X. Targeting of Enemy Merchant Vessels⁶⁷

The 1936 London Protocol prohibited the destruction of enemy merchant vessels by belligerent surface ships unless the safety of the crew and any passengers was assured, unless the merchant vessel engaged in active resistance to capture or failed to stop after being ordered to do so.⁶⁸ Belligerents on both sides widely and notoriously ignored this prohibition during World War II, attacking and sinking neutral merchantment without warning and without making any effort to provide for the safety of crews or passengers.⁶⁹ Reprisals were

⁶⁴ 1907 Hague Convention XI, Article 4; 1995 U.S. Navy Commander's Handbook, para. 8.2.3; U.K. Manual, para. 13.34; Canadian Manual, para. 829.1; German Manual, para. 1035; Australian Manual, para. 8.12; Interim New Zealand Manual, para. 718.1; ICRC Model Manual, para. 1703.1; San Remo Manual, para. 48, Explanation, paras. 48.1-48.14. With respect to the loss of exemption of hospital ships, see U.K. Manual, paras. 13.35-13.37; Canadian Manual, paras. 42, 830; German Manual, para. 1062; ICRC Model Manual, para. 1704; San Remo Manual, paras. 49-51 and the corresponding paragraphs of the Explanation. Concerning the loss of exemption for the other categories of vessels, see U.K. Manual, para. 13.34; ICRC Model Manual, para. 170.5; San Remo Manual, para. 52, Explanation, paras. 52.1-52.2.

⁶⁵ Such vessels may be attacked only if diversion or capture is impossible; if there is no other method for establishing control over the vessel; when the circumstances of non-compliance are sufficiently grave that vessel has become, or is reasonably assumed to be, a military objective; and when the expected collateral casualties or damage are proportionate to the military advantage gained or expected. U.K. Manual, para. 13.38; Canadian Manual, para. 832; German Manual, para. 1035; San Remo Manual, para. 52. With respect to the situations in which a hospital ship may be attacked, see U.K. Manual, para. 13.37; Canadian Manual, para. 831; German Manual, para. 1062; San Remo Manual, para. 51.

⁶⁶ U.K. Manual, para. 13.27; Canadian Manual, para. 407.2; German Manual, para. 1004; San Remo Manual, para. 41.

⁶⁷ In general, see Grunawalt; Fenrick Bochumer Schriften, pp. 30-37.

⁶⁸ 1936 London Protocol, Rule 2.

⁶⁹ In general, see Tucker, pp. 55-70; Mallison, pp. 106-121; Mallison and Mallison, pp. 85-103.

the initial justification for such policies, but as the war continued, most merchant vessels became increasingly integrated into the war-fighting or war-sustaining efforts of the belligerents.⁷⁰ Given the global scope of the Second World War, these policies meant few merchant vessels sailed under protection of the law: “Only those few neutral merchant vessels engaged in genuine inter-neutral trade were immune from attack.”⁷¹ In short, enemy merchantmen were widely regarded as legitimate military objectives subject to attack on sight.

Enemy merchant vessels may only be attacked if they meet the criteria of a military objective⁷² and a survey of the modern military manuals reveals that enemy merchant vessels may be attacked (with or without warning) in the following circumstances:⁷³

- When the enemy merchant vessel is engaged in acts of war, such as laying mines, mine-sweeping, or attacking other merchant vessels or warships.
- When the enemy merchant vessel persistently refuses to stop upon being ordered to do so.
- When the enemy merchant vessel actively resists visit and search or capture.⁷⁴
- When the enemy merchant vessel is sailing under convoy of enemy warships or military aircraft.
- When the enemy merchant vessel is armed with weapons that could inflict damage to a warship.⁷⁵

⁷⁰ 1995 U.S. Navy Commander’s Handbook, para. 8.2.2.2.

⁷¹ Mallison and Mallison, p. 90.

⁷² U.K. Manual, para. 13.40; Canadian Manual, para. 834.1; German Manual, paras. 1025-1025.1; Australian Manual, para. 8.5; ICRC Model Manual, para. 1706; San Remo Manual, para. 59.

⁷³ 1995 U.S. Navy Commander’s Handbook, paras. 8.2.2.2, 8.3.1; U.K. Manual, para. 13.41; Canadian Manual, paras. 718.2, 834.2; German Manual, paras. 1025-1025.6; Australian Manual, paras. 8.5, 8.8-8.9; Interim New Zealand Manual, paras. 716.3-716.6. See also ICRC Model Manual, para. 1706.2; San Remo Manual, para. 60, Explanation, paras. 60.1-60.14.

⁷⁴ While enemy merchant vessels may exercise self-defence, it entails “considerable risks because it conflicts with the warship’s right of capture.” German Manual, para. 1025.2. Perhaps the best-known example is the *Fryatt* case, in which the captain of the unarmed British steamer *Brussels* was tried and executed as an unlawful combatant by the Germans in 1916 for his attempt to ram a German U-Boat that had ordered him to stop and show his colours and surrender in 1915. *Fryatt*, pp. 865-866; Garner, Vol. I, pp. 407-413. Captain Fryatt was acting pursuant to Admiralty Instructions that British merchant vessels should forcibly resist German U-Boats. See also 1913 Oxford Manual, Article 12.

⁷⁵ The United States holds the position that any armed enemy merchant vessel is subject to attack, regardless of the type of weapons the merchantmen carries. See 1995 U.S. Navy Commander’s Handbook, para. 8.2.2.2, and footnote 54, which notes that in light of modern weapon systems:

[I]t is impossible to determine, if it ever was possible, whether the armament on

- When the enemy merchant vessel is incorporated into or otherwise assisting the intelligence-gathering system of the enemy.
- When the enemy merchant vessel is serving in any capacity as a naval or military auxiliary to the enemy.
- When the enemy merchant vessel is integrated into the enemy's war-fighting or war-sustaining effort and to comply with the 1936 London Protocol would place the warship in imminent danger or would otherwise preclude mission accomplishment.⁷⁶
- When the enemy merchant vessel is breaching or attempting to breach a blockade.⁷⁷

As a general rule, military aircraft may also launch attacks against enemy merchant ships under the same circumstances.⁷⁸

XI. Targeting of Neutral Merchant Ships

Although as a general rule, some belligerents have reduced their reliance on certain aspects of economic warfare at sea in recent conflicts, others have turned to policies that may be characterised as “unrestricted sinking” of neutral merchant vessels.⁷⁹ This section explores instances when neutral vessels may be lawfully targeted and also looks at State practice—whether lawful or otherwise—concerning such targeting in recent naval conflicts.

In short, neutral merchant vessels that fail to meet their obligations may, under certain conditions, find themselves liable to attack. The modern military manuals and the San Remo

merchant ships is to be used offensively against an enemy or merely defensively. It is unrealistic to expect enemy forces to be able to make that determination.

See also *ibid.*, for additional sources on earlier conflicting views concerning armed merchant vessels, and San Remo Manual, para. 60(f), Explanation, para. 60.14.

⁷⁶ The description of this category is from 1995 U.S. Navy Commander's Handbook, paras. 8.2.2.2 and 8.3. The drafters of the San Remo Manual rejected this approach as being too broad for a residual category. Consequently, the San Remo Manual (and those military manuals based on that document) phrase the residual category as permitting attacks on enemy merchant vessels that are “otherwise making an effective contribution to military action, e.g., carrying military materials.” See San Remo Manual, Explanation, paras. 60.10-60.12.

⁷⁷ The German Manual (at para. 1025.1, footnote 122) refers to blockade-running as a possible justification for attacking enemy merchant vessels, without reference to providing prior warning. Other manuals indicate that merchant vessels (without distinguishing between neutral and enemy merchantmen) that are breaching or attempting to breach a blockade may be attacked after warning when resisting capture if they are military objectives. See U.K. Manual, para. 13.70; Canadian Manual, para. 847; San Remo Manual, para.98.

⁷⁸ 1995 U.S. Navy Commander's Handbook, para. 8.4

⁷⁹ Heinstchel von Heinegg Bochumer Schriften, p. 1.

Manual set forth the rules that govern when neutral merchant vessels may be the object of a lawful attack. Such vessels may not be attacked unless:

- They engage in belligerent acts on behalf of an enemy; act as auxiliaries to enemy forces; are incorporated or act on behalf of enemy intelligence; sail under convoy of enemy warships or military aircraft; or otherwise make an effective contribution to the enemy's military action;⁸⁰ or
- They are reasonably believed to be carrying contraband or breaching a blockade and they fail to heed a warning to stop or intentionally and clearly resist visit, search or capture.⁸¹

Any attack on neutral merchant vessels must otherwise comply with the general rules of international humanitarian law that are set forth above and the mere fact that a neutral vessel is armed is not justification for attacking it.⁸²

There are three clear situations when neutral merchant vessels and civil aircraft may be attacked *without warning*:⁸³

- When they engage in acts of war on behalf of the enemy;⁸⁴
- When they act as *de facto* auxiliaries to the enemy's armed forces;⁸⁵ and
- When they are incorporated into, or assist the enemy's intelligence gathering.⁸⁶

⁸⁰ San Remo Manual, paras. 67(b)-(f).

⁸¹ Ibid., para. 67(a).

⁸² U.K. Manual, para. 13.48; Canadian Manual, para. 835.2; German Manual, paras. 1004, 1025; San Remo Manual, para. 69.

⁸³ Any attack on such vessels must otherwise comply with the general rules of international humanitarian law that are set forth in Chapter 6. See San Remo Manual, paras. 38-46, 68; Tucker, pp. 319-321.

⁸⁴ 1995 U.S. Navy Commander's Handbook, para. 7.5.1; U.K. Manual, para. 13.47(b); Canadian Manual, para. 835.1(b); Australian Manual, para. 8.12(b); Interim New Zealand Manual, para. 717.4(a); San Remo Manual, paras. 67(b), 70(b), Explanation, paras. 67.1, 67.10, 67.23-67.24, 70.3.

⁸⁵ 1995 U.S. Navy Commander's Handbook, para. 7.5.1; U.K. Manual, para. 13.47(c); Canadian Manual, para. 835.1(c); Australian Manual, para. 8.12(c); Interim New Zealand Manual, para. 717.4(b); San Remo Manual, paras. 67(c), 70(c), Explanation, paras. 67.1, 67.10, 67.23, 67.25, 70.3.

⁸⁶ U.K. Manual, para. 13.47(d); Canadian Manual, para. 835.1(d); Australian Manual, para. 8.12(d); San Remo Manual, paras. 67(d), 70(d), Explanation, paras. 67.1, 67.10, 67.23, 67.26, 70.3. This provision is to be strictly interpreted so as to cover only those situations where neutral merchant vessels are primarily engaged in intelligence-gathering and have special equipment and personnel on board. See *ibid.*, para. 67.26, referring to the sinking of the Argentine fishing trawler *Narwal* by British forces during the Falklands War. *Narwal* was regularly engaged in reporting the location of Royal Navy warships and carried an Argentine Navy detachment.

These are among the activities that have historically been referred to as engaging in “unneutral service.”⁸⁷ The U.S. Navy takes the position that by engaging in any of the above activities, “neutral merchant vessels and civil aircraft acquire enemy character and may be treated by a belligerent as enemy warships and military aircraft.”⁸⁸ These acts may be distinguished from other acts of neutral merchant vessels or civil aircraft, such as those that operate “directly under enemy control, orders, charter, employment or direction” or which resist “an attempt to establish identity, including visit and search.”⁸⁹ These acts will result in the neutral merchant vessel or civil aircraft acquiring the character of an enemy merchant vessel or civil aircraft, rendering them liable to capture and potentially destruction, as described in the preceding section.⁹⁰

Determining that a neutral merchant vessel or civil aircraft is engaged in any of the above-mentioned activities may prove difficult to establish. Making such a determination pales, however, in comparison with the final clause of paragraph 67 of the San Remo Manual, namely that neutral merchant vessels may be attacked if they:

[O]therwise make an effective contribution to the enemy’s military action, e.g., by carrying military materials and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.⁹¹

According to the drafters of the San Remo Manual, this residual category includes most imports that could be used for military operations or for the production of military goods, but

⁸⁷ 1995 U.S. Navy Commander’s Handbook, para. 7.5.1, footnote 112. See also *ibid.*, para. 7.10 for other examples of engaging in unneutral service; see also Australian Manual, paras. 8.12-8.13; Tucker, pp. 318-331.

⁸⁸ 1995 U.S. Navy Commander’s Handbook, para. 7.5.1.

⁸⁹ 1995 U.S. Navy Commander’s Handbook, para. 7.5.2. The first category includes sailing under convoy of belligerent warships or military aircraft. See also Interim New Zealand Manual, para. 717.1(g).

⁹⁰ 1995 U.S. Navy Commander’s Handbook, paras. 7.5.2, 8.2.2-8.2.3.

⁹¹ San Remo Manual, para. 67(f). See also U.K. Manual, para. 13.47(f); Canadian Manual, para. 835.1(f). A slightly different rule applies to neutral civil aircraft, as set forth in the San Remo Manual, para. 70(e) and Explanation, para. 70.4. Pursuant to paragraph 70(e), neutral civil aircraft are subject to attack if they:

[O]therwise make an effective contribution to the enemy’s military action, e.g., by carrying military materials, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.

See also U.K. Manual, paras. 12.43-12.44;

would exclude the exportation of materials that might be used to finance the war on the grounds that the nexus between such exports for financial purposes and the armed conflict would be too remote.⁹²

According to the San Remo Manual commentary, paragraph 67(f) was based on a proposal put forward by the special rapporteur and then the discussion leader of this section of the manual.⁹³ This proposal would have permitted attacks *without warning* on neutral merchant vessels that were integrated into either the enemy's "war-fighting" or "war-sustaining" efforts when it was not feasible for the attacking ship to place passengers and crew in a place of safety.⁹⁴ This proved to be controversial during the drafting process, with the majority of the experts concluding that these were inadequate justifications for attacking neutral merchantmen.⁹⁵ It was finally decided to replace the proposed language with the phrase "effective contribution to military action," which corresponds to the language used in Article 52(2) of the 1977 Additional Protocol I.⁹⁶

Nevertheless, the rejected position reflects the position that had been advanced by Mallison, who argued for what has been characterised as a "flexible approach"⁹⁷ with respect to targeting neutral merchant vessels that are "integrated into the enemy war effort:"

Historically, neutral merchant ships have not been claimed as objects of direct military attack to as great a degree as have enemy merchant vessels. It is clear that this situation was drastically changed during the World Wars.

...

It seems clear on the basis of moral and legal principles as well as on the customary law developed in both World Wars, that neutral merchant vessels which are integrated into the enemy war effort may be lawfully accorded the same treatment as enemy merchant vessels which are integrated. It has been demonstrated that the

⁹² Fenrick Bochumer Schriften, Discussions, p. 166; see also San Remo Manual, Explanation, para. 67.27.

⁹³ William Fenrick was the special rapporteur and was the drafter of this proposal. See Fenrick Bochumer Schriften, pp. 42-43 and Bring, Comment No. 1, *ibid.*, pp. 45-46. It appears that Heintschel von Heinegg was the discussion leader for this aspect of the San Remo Manual. See Discussions, *ibid.*, pp. 141-169.

⁹⁴ San Remo Manual, Explanation, paras. 67.1, 67.10-67.20, 67.27. The text of the proposed rules are set forth in *ibid.*, para. 67.1.

⁹⁵ Fenrick Bochumer Schriften, Discussions, pp. 158-167; see also San Remo Manual, Explanation, para. 67.20.

⁹⁶ Fenrick Bochumer Schriften, Discussions, p. 166; see also San Remo Manual, Explanation, para. 67.20.

⁹⁷ A. Gioia, "Iraq: Commentary," in De Guttry and Ronzitti, p. 68.

[1909 London] Protocol does not protect enemy merchant ships which are participating in the war or hostilities. There is no reason in either experience or logic why the [1909 London] Protocol should be interpreted as protecting neutral merchant ships which are engaged in the same functional activities that result in lack of protection for an enemy merchant ship.⁹⁸

This approach had been advanced by a number of American and Canadian military lawyers, including Grunawalt⁹⁹ and Fenrick.¹⁰⁰

Evaluating state practice from the First and Second World Wars concerning the targeting of merchant vessels is particularly troublesome for a number of reasons. First, as recognised in the *Dönitz* Judgement, the practice of unrestricted submarine warfare directed at neutral vessels was widespread,¹⁰¹ although both Dönitz and Räder were found guilty of waging unrestricted warfare against neutral shipping, no sentence was imposed for this unlawful practice, a form of *tu quoque* in mitigation.¹⁰² Second, the British, in particular, had adopted policies that “allowed for virtual total government control of its civilian merchant fleet, as well as the trading practices of many neutral States,” including the arming of British merchantmen and the requirement that neutral merchant vessels operating in waters controlled

⁹⁸ Mallison, pp. 129-130. See also *ibid.*, pp. 117-123, 129-132.

⁹⁹ Richard J. Grunawalt, *The Rights of Neutrals and Belligerents*, 19 *Ocean Development and International Law*, p. 303 (1988), at p. 308 (“the law ought to recognize that neutral shipping that sustains a belligerent’s warfighting capability may be subject to interdiction by whatever platforms and weapons systems are available to the other side”).

¹⁰⁰ Fenrick, pp. 106:

In a general war, the true merchant vessel is rarely to be found because the belligerent States normally assume such a degree of control over their own vessels and neutral vessels engaged in trading with them as to convert them into *de facto* naval auxiliaries. As such, they should be subject to the same treatment as *de jure* naval auxiliaries, that is, they may be sunk on sight outside neutral waters.

See also Fenrick *Merchant Vessel*, pp. 438-442.

¹⁰¹ The British zone of the Skaggerak and the U.S. Pacific Ocean zone particularly influenced the tribunal in this respect. Fenrick notes that “before the Soviet Union declared war on Japan in 1945, there was significant neutral merchant traffic to and from the Pacific coast of the Soviet Union which passed through the United States declared Pacific War Zone and was not molested by the United States submarines.” Fenrick *Merchant Vessel*, p. 434. Of course, the U.S. and Soviets were Allies, which might explain why such shipping went unmolested. The fact that the Soviets had not declared war on Japan would not have altered this conclusion.

¹⁰² *Dönitz* Judgement, pp. 558-559; *Räder* Judgement, p. 563. The Nürnberg Tribunal did, however, convict Dönitz with respect to the *Laconia* Order, which Fenrick notes is “inconsistent with the earlier finding exonerating Dönitz on a charge concerning the conduct of submarine warfare against belligerent merchant vessels.” Fenrick *Merchant Vessel*, p. 432. Robertson has argued that the finding regarding the *Laconia* Order applies exclusively to neutral merchant vessels. Horace B. Robertson, Jr., “Submarine Warfare,” *JAG Journal*, (1956) pp. 7-25, cited in Fenrick *Merchant Vessel*, p. 432.

by Britain to report all sightings of German submarines.¹⁰³ Thus, the line between belligerent and neutral merchant shipping was sufficiently blurred with respect to the 1936 London Protocol. As a result, the Nürnberg Tribunal avoided the issue of the “compatibility of the London Protocol Rules with the demonstrated conduct of neutral merchant shipping when such shipping was used in a manner functionally indistinguishable from the use of belligerent merchant shipping.”¹⁰⁴

During the Korean War, the U.S. Navy conducted carrier operations from the high seas and there are no recorded incidents of attacks on neutral merchant vessels.¹⁰⁵ In the Vietnam War, the U.S. Navy again conducted carrier-based air operations from the high seas and “scrupulous regard [was] paid to the territorial sea or contiguous zone limits as the boundaries of military action.”¹⁰⁶ As a result of this approach, and because there was little international shipping along the Vietnamese coast, there were no significant problems affecting what little neutral shipping occurred in the area; there were no incidents involving neutral merchant shipping on the high seas.¹⁰⁷

During the Indo-Pakistani War of 1971, there were two incidents involving neutral merchant vessels. First, on 8 December 1971, the Indian Navy launched an attack against the port of Karachi, during which a British cargo vessel, *Harmattan*, a Greek tanker, the *Gulf Star*, and a Panamanian vessel were hit and sunk, apparently collateral damage on the otherwise lawful attack.¹⁰⁸ As noted above, a Liberian-registered ship, the *Venus Challenger*, was sunk more than 25 miles out to sea, although it is unclear if the vessel was deliberately targeted or whether it was sunk accidentally during combat between the belligerents.¹⁰⁹

Primarily because the location where it was fought does not include major sea-lanes of communication, the Falklands War—as destructive as it was to the fleets of the British and Argentine Navies—had a minimal impact on neutral merchant shipping with one notable exception, the Argentine Navy’s ill-conceived idea to sink the *Hercules*, a supertanker. As a

¹⁰³ Russo, p. 387.

¹⁰⁴ Fenrick Merchant Vessel, p. 431.

¹⁰⁵ Fenrick Bocumer Schriften, p. 17.

¹⁰⁶ O’Connell Influence, pp. 124-125. See also Fenrick Bochumer Schriften, p. 18.

¹⁰⁷ O’Connell Influence, pp. 124-126. See also Fenrick Bochumer Schriften, p. 18.

¹⁰⁸ O’Connell Influence, pp. 86-87; Politakis, p. 69.

¹⁰⁹ O’Connell Influence, pp. 86-87, 129-130. There were reports that the *Venus Challenger* was carrying ammunition for the Pakistani forces.

result of the on-going naval conflict in the South Atlantic, and in order to protect neutral merchant vessels, the U.S. Government had informed the parties that a number of U.S.-flagged vessels (or those in which the U.S. had an interest, such as *Hercules*) would be traversing the South Atlantic.¹¹⁰ Nevertheless, Argentine forces attacked the ship when she was several hundred miles from both the Falklands Islands and the Argentine coastline.¹¹¹ This is the only example of a neutral merchant ship being attacked in that conflict¹¹² and was clearly unlawful.

Neutral merchant shipping is particularly vulnerable when naval armed conflict occurs in geographically limited areas, as was the case during the Iran-Iraq War, when fighting at sea took place in one of the world's busiest sea lanes—the Persian Gulf. This conflict also presents the “sole major post-World War II conflict in which a sustained maritime anti-commerce campaign was conducted.”¹¹³ This conflict is particularly interesting in this context since neutral powers had the naval force to “demonstrate that they were not willing to tolerate any interference with their economic interests.”¹¹⁴

One of the unfortunate characteristics of the Iran-Iraq War was the targeting of neutral merchant vessels in the Persian Gulf.¹¹⁵ Based on a number of sources,¹¹⁶ Russo accumulated the following statistics in 1988, which paint an interesting—if grim—picture of the effects of the Iran-Iraq War on shipping in the Persian Gulf:

Throughout the eight year curse of the Gulf War, Iran and Iraq have attacked more than 400 commercial vessels, almost all of which were neutral State flagships. Over 200 merchant seamen have lost their lives because of these attacks. In material terms, the attacks have resulted in excess of 400 million dead weight tons of damaged shipping. Thirty-one of the attacked merchants were sunk, and another 50 declared total losses. For 1987 alone, the strikes against commercial shipping numbered 178, with a resulting death toll of 108. In relative terms, by the end of 1987, write-off losses in the

¹¹⁰ *Amerada Hess*, p. 424.

¹¹¹ *Ibid.*, pp. 421, 423.

¹¹² Fenrick, p. 112.

¹¹³ Fenrick Merchant Vessel, p. 434.

¹¹⁴ San Remo Manual, Explanation, para. 67.4.

¹¹⁵ In general, see Walker Tanker War; A. Gioia, “Iraq: Commentary,” in De Guttry and Ronzitti, pp. 61-66.

¹¹⁶ See the sources cited in Russo, p. 397, footnote 1.

Gulf War stood at nearly half the tonnage of merchant shipping sent to the bottom in World War II. In all, ships flying the flags of more than 30 different countries, including each of the permanent members of the United Nations Security Council, have been subjected to attacks.¹¹⁷

Notwithstanding this grim portrayal, only about 1% of the 26,000 ship voyages undertaken in the period 1984-1988 were targeted, which says as much about the huge size of the typical modern tanker and the scope of shipping in the Persian Gulf as it does about the scale of the attacks on neutral merchantment.¹¹⁸

Although some of the Iraqi attacks on merchantmen occurred prior to the announcement of that State's war zones, many occurred inside these zones.¹¹⁹ Moreover, as that armed conflict dragged on, when Iran shifted its oil export operations from Kharg Island to facilities in the southern parts of its territorial waters, Iraq began targeting oil tankers in this area, without declaring it to be a "war zone."¹²⁰ In effect, Iraq was targeting neutral vessels both inside and outside of its declared zones.¹²¹ Consequently, an analysis of the legality of the Iraqi attacks on merchant shipping in that war sheds little light on the issue of the legality of attacks on neutral merchant vessels in NEZs.¹²²

As is clear from the above discussion, even on the high seas, the rights of neutrals are subject to interference—including visit and search, capture, diversion and even attack—by belligerent forces during armed conflict. One commentator has noted that international law has "never legitimized attacks upon neutral merchant vessels simply because they ventured into a specified area of the high seas," and thus Iran's attempts to justify the targeting of such vessels because they failed to comply with the Iranian exclusion zone "could not operate to excuse Iran from its legal obligations to avoid attacks on protected vessels wherever located."¹²³ The law is clear with respect to the crucial determining factor in the

¹¹⁷ Russo, p. 381.

¹¹⁸ Ibid., p. 397, footnote 1.

¹¹⁹ A. Gioia, "Iraq: Commentary," in De Guttry and Ronzitti, p. 62.

¹²⁰ A. Gioia, "Iraq: Commentary," in De Guttry and Ronzitti, pp. 62-63.

¹²¹ With respect to the war zones established by the parties to the Iran-Iraq War, see the official documents published in De Guttry and Ronzitti, pp. 37-38, 83-95, 133-142. See also *ibid.* pp. 20-23, 72-76; Walker Tanker War, pp. 394-415, 433-434, 615-616; Fenrick, pp. 118-122.

¹²² A. Gioia, "Iraq: Commentary," in De Guttry and Ronzitti, p. 63.

¹²³ John H. McNeill, "Neutral Rights and Maritime Sanctions: The Effect of Two Gulf Wars," 31 *Virginia JIL* 631 (1991), p. 636.

determination of whether a neutral merchant vessel is a legitimate target: it is the ship's function relative to the on-going conflict—and not its mere location—that renders the merchantman a lawful target.¹²⁴

XII. Note on Belligerent Reprisals

Reprisals are acts that would otherwise be unlawful, but which are taken to punish or redress a wrong and are proportionate to the wrong sought to be addressed.¹²⁵ They are, therefore, a means of self-help for the enforcement of international law, although by their nature, reprisals may lead to abuses or situations where their application by the belligerents can spin out of control. There are numerous categories of persons and objects that may not be the subject of reprisals¹²⁶ and if the present trend continues, “it must be asked whether there is any future for belligerent reprisals as an institution of international law.”¹²⁷

As Greenwood points out, there are four requirements that must be established if an act is to be considered lawful as a belligerent reprisal:

1. It must be in response to an unlawful act which is imputable to the State (or in some circumstances, to an ally of that State) against which the reprisal is directed;
2. It must be proportionate to the unlawful act;
3. It must be undertaken in order to put an end to the enemy's unlawful conduct and to prevent future illegal acts and not for revenge; and
4. No other means of redress must be available.¹²⁸

With respect to naval warfare, the scope of permissible reprisals is broader than in land warfare, and includes the possibility of reprisals against enemy merchant vessels.¹²⁹ The

¹²⁴ Russo, p. 390.

¹²⁵ 1995 U.S. Navy Commander's Handbook, paras. 6.2.3-6.2.3.2; U.K. Manual, paras. 16.16-16.19.2; Canadian Manual, para. 1507; German Manual, paras. 476-479; Interim New Zealand Manual, para. 1606. On belligerent reprisals, see Frits Kalshoven, Belligerent Reprisals (1971); Greenwood Belligerent Reprisals; Derek W. Bowett, “Reprisals Involving Recourse to Armed Force,” 66 AJIL 1 (1972); R. Barsotti, “Armed Reprisals,” in Antonio Cassese, ed., The Current Legal Regulation of the Use of Force, 79-103; 10 Whiteman, pp. 879-913.

¹²⁶ Including *inter alia* the wounded, sick and shipwrecked; prisoners of war; the civilian population; and civilian objects. See, for example, 1949 Geneva Convention II, Article 47; 1977 Additional Protocol I, Articles 20, 51(6), 52(1), 53(c), 54(4).

¹²⁷ Greenwood Belligerent Reprisals, p. 296. See also *ibid.*, pp. 315-321

¹²⁸ Greenwood Belligerent Reprisals, p. 299. See also *ibid.*, pp. 299-309.

concept of belligerent reprisals has played a role in the development of NEZs, since belligerent reprisals were the legal justifications invoked for the establishment of long-distance blockades and for unrestricted submarine warfare policies during the First and Second World Wars. Moreover, many commentators rely upon the notion of belligerent reprisals as a means for explaining and arguing either for or against the legality of the zone concept, which makes the identification of rules of customary international law more difficult.

XIII. Conclusion

The legal principles described in this chapter apply to all forms of naval warfare, including those instances where a belligerent takes the decision to establish an exclusion zone, and consequently, a belligerent may not avoid these legal obligations through the establishment of an exclusion zone. These fundamental principles may influence the decision to establish an exclusion zone and will set the parameters of permissible behaviour within those zones. For example, self-defence is often cited as one of the primary justifications for establishing NEZs. Notwithstanding this justification, however, naval commanders must continue to apply the principles of distinction and precaution. They may rely upon the concept of self-defence, as defined by the geographic scope of the zone, to attack any vessel or aircraft entering the zone indiscriminately, or to otherwise disregard the precautionary principles that they are otherwise required to follow.

From the policy and operational standpoint, the decision to establish a zone should be made after a thorough analysis of the legal and military principles of warfare to determine if likelihood of mission accomplishment will be increased through the adoption of this method of naval warfare. When the synergies afforded by coupling the applicable legal principles with the military principles of warfare are maximised, the potential for military success should increase correspondingly.

Enemy warships and military aircraft are subject to attack on sight (whether inside or outside the zone); merchant vessels (whether enemy or neutral) may be attacked if they meet the criteria of a military objective; and certain categories of vessels and aircraft are immune from attack, provided they meet certain minimum requirements, such as being innocently

¹²⁹

Natalino Ronzitti, "The Crisis in the Law of Naval Warfare," in Ronzitti, pp. 48-50. See also Greenwood *Belligerent Reprisals*, p. 313 (noting that Article 49(3) of the 1977 Additional Protocol I, which seems to permit reprisals in ship-to-ship or ship-to-air combat [unless such combat has an incidental effect on civilians or civilian objects on land], is "scarcely a model of clarity").

engaged in the specific roles that give rise to the exemption and refraining from taking part in the hostilities or otherwise assisting any of the belligerents.

Chapter 7

Naval Warfare: Means and Methods

“Naval warfare has never been limited to the military subjugation of the enemy. Its overall aim is sea denial and sea control. Methods necessary for sea control do not merely affect the parties to an international armed conflict but also states which are neutral or states not party to the conflict.”¹

I. Introduction

As a *sui generis* method of naval warfare, the conceptual development of the NEZ relied heavily on other established methods of warfare. This chapter examines how areas subject to blockades, naval mining, and submarine warfare have influenced the development of the zone. At the same time, it will be apparent that although these methods contributed to the development of the zone, there are significant differences between these methods and NEZs.

It is clear that NEZs can pose significant hardships on commercial shipping, both in terms of re-routing to avoid such zones and also as a result of the potential risks posed by zones. As the following section makes clear, however, commercial maritime shipping has always been subject to interference by belligerents. These measures, including visit, search, diversion and capture, may seem irrelevant to the primary purpose of this study. They are included, however, to show the limits of such interference with commercial shipping by belligerents and to explore whether these measures have influenced the concept of the NEZ.

II. Note on Modern Merchant Vessels

Since the end of the Second World War, the shipping industry has undergone a revolution in terms of the size and types of ships that are used for commercial purposes. These fundamental changes have profound implications on how naval forces conduct operations, such as visit, search and seizure. Photos 1-4 give a general overview of the differences in size between merchant vessels used in World War II and those in use today.

¹ German Manual, p. 405, Chapter 10, Preliminary Remarks.

Photo 1
S.S. Tiberton



Source: Wikipedia; www.uboot.net

At 04.05 hours on 19 Feb, 1940, the The *S.S. Tiberton*, which was unescorted, was hit by one torpedo from the German submarine U-23, broke in two and sank in 30 seconds east of the Orkney Islands. The master and 32 crew members were lost. The steamship, which had a capacity of 5,225-8,500 dead-weight tons, was 414.5 feet long with a beam measuring 42.4 by 28.4 feet. She was powered by 397 horsepower triple expansion engines and was capable of making 11.0 knots.

Photo 2
Liberty Ships

Liberty Ships were 441 feet long and 56 feet wide, powered by a three-cylinder, reciprocating steam engine, fed by two oil-burning boilers, which produced 2,500 hp and a speed of 11 knots. These ships had five holds that could carry over 9,000 tons of cargo, plus airplanes, tanks, and locomotives lashed to its deck. A Liberty could carry 2,840 jeeps, 440 tanks, or 230 million rounds of rifle ammunition.



Source: Merchant Marine at War, www.usmm.org

Photo 3
Modern Container Vessels



Container capacity is measured in “transport equivalent units” (TEU). A transport equivalent unit is a measure of containerized cargo capacity equal to one standard 20 ft (length) × 8 ft (width) × 8 ft 6 in (height) container. In metric units this is 6.10 m (length) × 2.44 m (width) × 2.59 m (height), or approximately 38.5 m³.

Source: Wikipedia

As can be adduced from a comparison of Photos 1 and 2 with Photo 3, the very nature of commercial shipping has changed dramatically in the six decades since the major naval conflicts of World War II, with cargo today being carried primarily in standardised containers on vessels (or in tankers or other bulk carriers) which are truly astonishing in terms of size, as demonstrated by Photo 4, which depicts the *Emma Maersk*, the largest container ship currently operating.

These factors have a number of significant effects on the ability of naval forces to conduct searches of such vessels. First given the immense size of these modern vessels, the only way to board them while they are underway is by helicopter. The notion that a sea-borne boarding party could approach such a vessel with the aim of conducting a search is unrealistic. Once the issue of landing a boarding party by air is resolved, however, the problem remains how to actually conduct the search. As Photo 3 above demonstrates, the way that such containers are loaded on these vessels makes it impossible to access—let alone to search—the overwhelming majority of the containers. Even if it was possible to access the containers, though, it is not possible to search the contents since there is simply no room on the deck of the ship to place the contents of the containers in order to physically search them.

Photo 4
Emma Maersk



The *Emma Maersk* is currently the largest container vessel in operation. Officially, *Emma Maersk* is able to carry around 11,000 TEU in the calculation of the Maersk company which is about 1,400 more containers than any other ship is capable of carrying. In normal calculation, her cargo capacity is much bigger — between 13,500 and 14,500 TEU. The difference between the official and estimated number results from the fact that Maersk calculates the cargo capacity of a container ship by using the number of containers with a weight of 14 tons that can be carried on a vessel. For the *Emma Maersk*, this is 11,000 containers. Other companies calculate the cargo capacity of a ship according to the maximum number of containers that can be put on the ship, independent of the weight of the containers.

Source: Wikipedia

Moreover, it is virtually impossible for the master of such vessels to have confidence in the precise cargo that his ship is carrying. The ship's master must rely upon the manifests provided by the shipper or forwarding agent. There is simply no practical way to determine with any degree of precision what type of cargo is carried in any of the thousands of containers on the vessel. Thus, the boarding party must simply rely on the information provided by the vessel's master.

On the other hand, the immense size of these modern merchant vessels makes the identification of such ships relatively easy even from long distances. This means that it should be much easier for naval forces to distinguish such vessels from warships which are

much smaller. For example, the world's largest capital naval vessels are the 10 Nimitz-class aircraft carriers operated by the U.S. Navy. These ships are 333 metres (1092 feet) long, 76.8-78.4 metres (252 – 257 feet, five inches) wide, with a beam measuring 41 metres (134 feet). They displace 98,235-104,112 tons of water when fully loaded. By comparison, the *Emma Maersk* is 397 metres (1302 feet, six inches) long, with a beam measuring 56 metres (183 feet, eight inches).² Thus, the largest merchant ships operating today are larger than any naval vessel on the seas, and most navies today do not have any ships that even come close in size to a Nimitz-class carrier. This will lessen the likelihood that a large modern merchant vessel could be mistaken for an enemy warship.

For the reasons set forth above, the concept of visit and search really plays little or no role in modern naval operations, with the obvious exception of smaller coastal vessels. Consequently, the discussion below concerning visit and search must be considered with care. This discussion is included primarily to demonstrate how this concept influenced the development of exclusion zones.

III. Measures Short of Attack: Visit, Search, Diversion and Capture

Prior to the signing of the Kellogg-Briand Pact, States were relatively free to engage in war in furtherance of national policy and as Doswald-Beck has noted, “[a]gainst this background, and the fact that rules were made for ‘war,’ i.e., all wars, whatever their nature, it is not surprising that extensive actions at sea were permissible as being militarily necessary.”³ To this end, the destruction of the enemy's ability to wage war was historically one of the primary strategic objectives of naval power, or, as Heintschel von Heinegg puts it:

The annihilation of the enemy's commerce being one of the great aims of naval warfare the traditional law provides a set of measures of economic warfare which enables belligerents to achieve this task.⁴

As a result, certain rules developed that permit belligerents to interfere with merchant shipping on the high seas. This trade-off between the rights of States, and particularly

² It is interesting to note that a Nimitz-class carrier has a ship's crew of 3,200 sailors (excluding the 2,500 persons associated with the air wing). The *Emma Maersk* has space to accommodate 30 crew members, but is designed to operate with only 13.

³ Doswald-Beck, Comment #1 in Heintschel von Heinegg *Bochumer Schriften*, p. 93.

⁴ Heintschel von Heinegg *Bochumer Schriften*, p. 6 (footnote omitted).

neutrals, to engage in international commerce via the sea and their duty to comply with certain established principles that benefit belligerents, that is, the right of belligerents to interfere with freedom of the seas, lay at the heart of much of the discussion in this subsection.

Although economic warfare at sea is an ancient concept, the modern law governing this aspect of warfare can be traced to the 1856 Paris Declaration.⁵ As a result of trade between belligerents and neutrals, the notion of contraband⁶ developed and while neutral property was considered inviolable or immune to capture or destruction, the distinction between enemy and neutral property led to the development of the right of visit and search.⁷ Visit and search, which permits belligerents to stop and search all merchant vessels—whether neutral or enemy—and extends to diversion into port when necessary,⁸ is defined by paragraph 7.6 of the 1995 U.S. Navy Commander’s Handbook as the:

[M]eans 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.⁹

The right of visit and search is a belligerent right that may be exercised only during periods of armed conflict; only outside the territorial seas or archipelagic waters of neutral States; and only when reasonable grounds exist to suspect that the vessel is subject to capture.¹⁰

⁵ Ibid., p. 2.

⁶ Historically, there were two types of contraband, absolute and conditional. The 1909 London Declaration set forth lists of absolute contraband (Article 22), conditional contraband (Article 24) and items that may not be considered as contraband (Article 28). The distinctions between absolute and conditional contraband are of little importance today. See San Remo Manual, para. 148 and Helsinki Principles, paras. 5.2.3 and 5.2.5 for the modern approach. See also 1995 U.S. Navy Commander’s Handbook, paras. 7.41-7.42; U.K. Manual, paras. 13.5(h), 13.107-13.110; Soviet Manual, pp. 435-438; German Manual, paras. 1029, 1142; Australian Manual, paras. 9.17-9.22; Interim New Zealand Manual, para. 721; Tucker, pp. 263-282.

⁷ Heinstchel von Heinegg Bochumer Schriften, pp. 2-3. See also 1995 U.S. Navy Commander’s Handbook, para. 7.6; U.K. Manual, paras. 13.91-13.92; San Remo Manual, paras. 118-124; Helsinki Principles, para. 5.2.1; Tucker, pp. 332-344.

⁸ U.K. Manual, paras. 13.92, 13.94; Canadian Manual, para. 861; Australian Manual, para. 9.11; San Remo Manual, para. 119.

⁹ 1995 U.S. Navy Commander’s Handbook, para. 7.6; see also U.K. Manual, paras. 13.92, 13.94; German Manual, paras. 1138-1140, 1142-1144; Australian Manual, paras. 9.5-9.6; San Remo Manual, paras. 118-119, 121; see also 1907 Hague Convention XIII, Article 2; Tucker, pp. 332-333.

¹⁰ 1995 U.S. Navy Commander’s Handbook, para. 7.6; U.K. Manual, para. 13.91; German Manual, para.

Unless protected by a rule of customary or conventional law,¹¹ private property of the enemy, including merchant vessels which are found outside neutral territorial waters, is subject to capture and the prior exercise of visit and search is not required.¹² Neutral vessels and goods, however, are subject to capture only if certain conditions are met.¹³ As a result, the distinction between enemy and neutral vessels and goods has great importance.¹⁴ As a general rule, the enemy character of a merchant vessel may be determined by reference to the flag that the vessel is entitled to fly, while there is no such presumption that vessels flying the flag of neutral States are in fact neutral vessels.¹⁵ This distinction lies at the heart of the right of visit and search, since it is the belligerent warship captain's suspicions that a neutral-flagged merchantman actually has enemy character that is the legal justification that permits the visit and search.¹⁶

The first article of the 1856 Paris Declaration outlaws privateering, with the result that only commissioned military vessels (including submarines) and aircraft are permitted to exercise visit and search.¹⁷

Enemy merchant vessels may resist the right of visit, search and capture, although to do so is to risk the consequences.¹⁸ Neutral merchant vessels, on the other hand, must submit

1138; Australian Manual, paras. 9.7, 9.8; San Remo Manual, para. 118.

¹¹ Certain categories of vessels are exempt, including hospital ships and small coastal fishing vessels. See 1995 U.S. Navy Commander's Handbook, para. 8.2.3; U.K. Manual, para. 13.100; Canadian Manual, paras. 828, 864-865; San Remo Manual, paras. 136-137.

¹² 1995 U.S. Navy Commander's Handbook, para. 8.2.2.1; U.K. Manual, para. 13.99; Canadian Manual, para. 863; Australian Manual, paras. 9.5-9.8; Interim New Zealand Manual, para. 716.1; ICRC Model Manual, para. 1707; San Remo Manual, para. 135; Tucker, pp. 74-75, 102-103, 108-109; Mallison, pp. 101-103; Heinstchel von Heinegg Bochumer Schriften, p. 6. This rule stands in marked contrast to the law of land warfare, where the general rule is that the private property of the enemy population may not be seized and confiscated.

¹³ 1856 Paris Declaration, Articles 2-3; 1995 U.S. Navy Commander's Handbook, para. 7.10; U.K. Manual, para. 13.106; San Remo Manual, para. 146.

¹⁴ Concerning the distinctions between enemy and neutral vessels, see 1995 U.S. Navy Commander's Handbook, para. 7.5; San Remo Manual, paras. 112-117; Tucker, pp. 76-86.

¹⁵ 1909 London Declaration, Article 57; 1995 U.S. Navy Commander's Handbook, para. 7.5; U.K. Manual, paras. 13.85, 13.86, 13.90; Canadian Manual, paras. 858.1, 858.2, 858.6; German Manual, para. 1022; San Remo Manual, paras. 112-113, 117, Explanation, paras. 112.1-113.2, 117.1-117.8.

¹⁶ 1995 U.S. Navy Commander's Handbook, para. 7.5; U.K. Manual, paras. 13.87-13.89; Canadian Manual, paras. 858.3-858.5; German Manual, para. 1022; San Remo Manual, paras. 114-116, Explanation, paras. 114.1-116.1.

¹⁷ See also 1977 Additional Protocol I, Article 43.

¹⁸ Heinstchel von Heinegg Bochumer Schriften, p. 18 ("by the traditional law a deliberate and continued

without resistance to visit and search, and if they attempt to avoid visit and search the belligerent warship is entitled to use force to stop the resisting merchant vessel.¹⁹ Forcible resistance to visit and search by the neutral merchant vessel is a hostile act and renders the vessel liable to capture and destruction, although this is an exceptional measure and requires the belligerent warship to provide the safety of the merchant crew (and any passengers), as well as the papers and documents of the merchant vessel.²⁰ The capture or destruction of civilian passenger vessels (including enemy passenger liners) is prohibited.²¹

Under the traditional law, neutral vessels travelling under convoy of neutral warships of the same flag are exempt from visit and search.²² Neutral merchant vessels under convoy of belligerent warships or military aircraft, however, might be military objectives or considered to be forcibly resisting visit and search and this practice could result in the neutral merchant vessel being captured or attacked.²³

Doswald-Beck highlights two important humanitarian aspects that underlie this area of the law of naval warfare:

[F]irst, the fact that merchant vessels were captured or seized, rather than sunk on sight, clearly protected the life of those on board. Secondly, in the exceptional situation where a vessel could

resistance to search is followed by the legal consequence of condemnation (and even destruction) of the vessel and her cargo.’) Heintschel von Heinegg relies on Oppenheim in reaching this conclusion, and L.C. Green finds it difficult to reconcile the fact that if the enemy merchant vessel has a “right” to resist, why it must suffer any consequences of the exercise of that right. Green, Comment #5 in Heintschel von Heinegg Bochumer Schriften, p. 107. See also Edwin I. Nwogugu, Commentary on 1936 London Procès Verbal, Ronzitti, pp. 353-365 at p. 353.

¹⁹ 1995 U.S. Navy Commander’s Handbook, para. 7.10; Australian Manual, para. 8.12(a); Tucker, pp. 336-337; Heintschel von Heinegg Bochumer Schriften, pp. 19.

²⁰ 1936 London Protocol, Rule 2; 1995 U.S. Navy Commander’s Handbook, paras. 7.10, 7.10.1; Canadian Manual, para. 873; San Remo Manual, paras. 146, 151-152; 1909 London Protocol, Article 22; Heintschel von Heinegg Bochumer Schriften, pp. 19; Tucker, p. 325.

²¹ U.K. Manual, para. 13.104; Canadian Manual, para. 868; San Remo Manual, para. 140.

²² 1909 London Declaration, Article 61; 1995 U.S. Navy Commander’s Handbook, para. 7.6; U.K. Manual, para. 13.93; Canadian Manual, para. 860; German Manual, paras. 1141, 1147; San Remo Manual, para. 120; Helsinki Principles, para. 6.1; Heintschel von Heinegg Bochumer Schriften, pp. 17-18.

²³ 1909 London Declaration, Article 63; U.K. Manual, para. 13.47(e); Canadian Manual, para. 719.3(e); Australian Manual, para. 8.12(e); Interim New Zealand Manual, para. 717.1(g); San Remo Manual, para. 67(e); Heintschel von Heinegg Bochumer Schriften, p. 17. The U.S. Navy considers neutral merchant vessels travelling under convoy of enemy warships or military aircraft to have acquired the status of enemy merchantmen. See 1995 U.S. Navy Commander’s Handbook, paras. 7.5.2, 8.2.2.1, 8.2.2.2.

not arrange for the prize to be taken to port, the crew and passengers had to be safely removed *before* the destruction.²⁴

She goes on to argue convincingly that these values are at least as important today, as they were in earlier periods when economic warfare at sea was more prevalent:

Since the demise of war and neutrality as absolute legal states, and the expectation that warfare be limited, neutral nations (in the sense here of not party to the conflict), tolerate less the kind of interference that was permissible under the old law. In any event, the law as it would in fact function in modern conditions ought not to result in neutrals being in a worse condition that they were in 100 years ago.²⁵

IV. Means and Methods of Warfare: Blockades

The law of blockade deals with the rights of, and limits upon, belligerents to prevent an enemy from receiving goods necessary to wage war and the naval blockade is analogous to the concept of siege in land warfare.²⁶ As such, blockade is another historic aspect of economic warfare conducted at sea and the customary international law rules are set forth Articles 1-21 of the 1909 London Declaration.²⁷ For a naval blockade to be lawful, it must be effective;²⁸ applied impartially;²⁹ notified and declared;³⁰ and directed only against belligerent ports and coasts.³¹ Pursuant to the 1909 London Declaration, vessels that break out of a blockade may be pursued (unless such pursuit is abandoned, in which case capture is prohibited)³² and vessels on continuous voyage to a non-blockaded port are not subject to capture.³³ Vessels found to be in breach of a blockade are subject to condemnation.³⁴

²⁴ Louise Doswald-Beck, Comment #1 in Heintschel von Heinegg Bochumer Schriften, p. 94.

²⁵ Ibid.

²⁶ Tucker, p. 283.

²⁷ See also 1856 Paris Declaration, Article 4; for a good overview of the traditional law of blockade, see Tucker, pp. 283-317. For an interesting discussion on the impact of technology on the practical aspects of imposing and maintaining blockades, see Roger W. Barnett, "Technology and Naval Blockade: Past Impact and Future Prospects," 58 *NWCR*, p. 87 (No. 3, Summer 2005), pp. 87-98.

²⁸ 1909 London Declaration, Articles 2-3; see also 1856 Paris Declaration, Article 4; Tucker, pp. 288-289.

²⁹ 1909 London Declaration, Article 5.

³⁰ Ibid., Articles 8-16.

³¹ Ibid., Article 18.

³² Ibid., Article 20.

³³ Ibid., Article 19.

It should be noted that the U.N. General Assembly, in an effort to flesh out and define aggression under the Charter, has determined that “the blockade of the ports or coasts of a State by the armed forces of another State” constitutes aggression even in the absence of a formal declaration of war.³⁵ Although the drafters of the San Remo debated whether the concept of blockade had fallen into *desuetude*, a majority of the participants concluded otherwise, pointing to a number of sources to support the continuing viability of blockade as a coercive instrument.³⁶ For example, Article 42 of the U.N. Charter³⁷ and modern military manuals governing armed conflict at sea contain provisions on blockade.³⁸ The San Remo Manual drafters sought to articulate (and modernise) the rules governing this form of naval warfare, after having made the determination that the law of blockade remains viable.³⁹ This modern approach requires the belligerent State to meet all of the following rules:

- The blockade must be effective, which is a question of fact.⁴⁰
- The ports and coasts of neutral States may not be the subject of a naval blockade.⁴¹
- Blockades may not be declared or established if:⁴²

³⁴ Ibid., Article 21.

³⁵ UN Doc. A/9631 (14 December 1974) (General Assembly Definition of Aggression Resolution).

³⁶ San Remo Manual, Explanation, p. 176. See also Bothe, pp. 397-398.

³⁷ “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

³⁸ 1995 U.S. Navy Commander’s Handbook, para. 7.7 *et seq.*; U.K. Manual, paras. 13.65-13.76; Canadian Manual, paras. 844-851; German Manual, paras. 1051-1053.

³⁹ San Remo Manual, Explanation, p. 176; these rules are set forth in *ibid.*, paras. 93-104.

⁴⁰ 1995 U.S. Navy Commander’s Handbook, para. 7.7.2.3; U.K. Manual, para. 13.67; Canadian Manual, para. 846; German Manual, para. 1053; Australian Manual, paras. 9.13, 9.16; Interim New Zealand Manual, para. 722.4; ICRC Model Manual, paras. 1710(a), 1710.1; San Remo Manual, para. 95. Reflecting Soviet disapproval of the entire concept of blockade (see Soviet Manual, pp. 430-435) the Soviet Manual (at p. 430) rejected the effectiveness requirement:

With the present rapid development and possible utilization of surface ships and submarines equipped with nuclear power plants, jet aircraft, missiles, mines and torpedoes with nuclear charges, the criterion of effectiveness cannot be the legal grounds for determining the legality of a blockade or other combat operations at sea.

⁴¹ 1995 U.S. Navy Commander’s Handbook, para. 7.7.2.5; U.K. Manual, para. 13.71; Canadian Manual, para. 848.1(a); Australian Manual, para. 9.13; Interim New Zealand Manual, para. 722.5; ICRC Model Manual, para. 1710.3; San Remo Manual, para. 99.

- The sole purpose of the blockade is to starve the civilian population or to deny that population other items essential for its survival; *or*
- The damage to the civilian population is, or is expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.
- If the civilian population of the blockaded State has insufficient food, medical supplies, or other items essential for its survival, the blockading State must provide for the passage of such foodstuffs, medical supplies, or other items, although the blockading party has the right to establish the technical arrangement concerning such passage the distribution of such goods.⁴³
- The rule of impartiality applies to blockades and the blockading power may not discriminate by allowing vessels of certain States to enter the blockaded area, although it may permit the entry and exit of neutral military warships and military aircraft.⁴⁴
- Military requirements determine the distance at which the force maintaining the blockade may be stationed.⁴⁵
- Legitimate methods and means of warfare may be combined to enforce and maintain the blockade, provided such combined methods and means are not otherwise inconsistent with the law of naval warfare.⁴⁶
- The blockade must be declared and notified to all belligerent and neutral States and the declaration must specify:⁴⁷

⁴² U.K. Manual, para. 13.74; Canadian Manual, para. 850; German Manual, para. 1051.4; Australian Manual, para. 9.14; ICRC Model Manual, paras. 1710(c), 1710(d); San Remo Manual, para. 102. See also 1977 Additional Protocol I, Article 54, which prohibits starvation as a means of warfare; and Bothe, p. 398.

⁴³ U.K. Manual, paras. 13.75-13.76; Canadian Manual, para. 851; ICRC Model Manual, para. 1710.5; San Remo Manual, paras. 103-104; see also 1977 Additional Protocol I, Article 70; Bothe, p. 398 (“There are some indications that Article 54 was not meant to change the traditional law of blockade, but Article 70 certainly constitutes a serious limitation on the right of a blockading state to bar any access to a blockaded port or coast.”)

⁴⁴ 1995 U.S. Navy Commander’s Handbook, paras. 7.7.2.4, 7.7.3; U.K. Manual, para. 13.72; Canadian Manual, para. 848.1(b); German Manual, para. 1051.2; Australian Manual, para. 9.13; Interim New Zealand Manual, paras. 722.6, 722.10; ICRC Model Manual, para. 1710.3; San Remo Manual, para. 100; 1909 London Declaration, Article 5.

⁴⁵ U.K. Manual, para. 13.68; German Manual, para. 1053; Australian Manual, para. 9.16; San Remo Manual, para. 96. In the past, there was considerable debate about the legality of so-called “long-distance” blockades, but modern practice, bolstered by technological developments that permit a smaller number of ships to patrol larger areas of the sea, have led to the rule as stated in the text.

⁴⁶ U.K. Manual, para. 13.69; San Remo Manual, para. 97.

⁴⁷ 1995 U.S. Navy Commander’s Handbook, paras. 7.7.2.1-7.7.2.2; U.K. Manual, paras. 13.65-13.66; Canadian Manual, para. 845; German Manual, para. 1052; Australian Manual, para. 9.13; Interim New Zealand Manual, paras. 722.2-722.3; ICRC Model Manual, paras. 1710(b), 1710.2; San Remo Manual,

- The commencement, duration, location and extent of the blockade; and
- The time period in which neutral vessels must leave the blockaded coastline prior to the commencement of the blockade.
- If the blockade is terminated, temporarily lifted, re-established, extended or otherwise altered, the blockading State must make further declarations and notifications.⁴⁸
- When reasonable grounds exist to believe that merchant vessels are breaching a blockade, such vessels may be captured.⁴⁹
- After prior warning, merchant vessels that clearly resist capture are subject to attack.⁵⁰

Thus, as was the case with neutral vessels that forcibly resist visit and search or which travel under convoy of belligerent warships or military aircraft and are thereby subject to attack, neutral vessels may be targeted when such ships are attempting to run a blockade and they clearly resist capture after being warned to submit. Bothe succinctly draws the following distinctions:

It must be stressed that the means of enforcing the blockade is to stop and seize a “blockade runner.” The essential difference between the normal control of neutral shipping and a blockade consists in the fact that a blockade runner can be seized for the mere breach of a blockade, even if it does not carry contraband. The use of force against a blockade runner is permissible to the extent necessary to stop and seize it. A blockade does not give any right to destroy neutral ships where no attempt is made to stop and seize them.⁵¹

In short, the law of blockade requires a number of steps to be taken, most notably from the perspective of the neutral merchant vessel, which must acquiesce to the blockading power’s terms. With respect to the belligerent imposing the blockade, the law requires

paras. 93-94. The notification should be made by way of a Notice to Mariners and must be communicated to the IMO. This requirement is similar to notification provision regarding the laying of naval mines. San Remo Manual, para. 83.

⁴⁸ U.K. Manual, para. 13.73; Canadian Manual, para. 849; San Remo Manual, paras. 101.

⁴⁹ 1995 U.S. Navy Commander’s Handbook, paras. 7.7.4, 7.10; U.K. Manual, paras. 13.70, 13.106(f); Canadian Manual, paras. 847, 869.2(f); Australian Manual, para. 9.15; Interim New Zealand Manual, paras. 722.8-722.9; ICRC Model Manual, para. 1710.4; San Remo Manual, paras. 98, 146(f).

⁵⁰ 1995 U.S. Navy Commander’s Handbook, paras. 7.7.4, 7.10; U.K. Manual, paras. 13.47, 13.70, 13.106; Canadian Manual, para. 847; Australian Manual, para. 9.15; San Remo Manual, paras. 67(a), 98.

⁵¹ Bothe, pp. 398-399.

notification, effectiveness, impartiality and the free passage of foodstuffs and other materials at a level to maintain minimal living standards among the civilian population.

V. Means and Methods of Warfare: Naval Mines

In some respects, areas of the sea that have been mined resemble NEZs and this section explores the extent to which such areas have contributed to the development of the NEZ as a distinct method of naval warfare and to an understanding of the permissible scope of activity within exclusion zones.⁵² Naval mines may be used in a variety of roles, including coastal and harbour defence, blockade, anti-ship (including anti-submarine) warfare and area denial.⁵³ In addition to customary international law, naval mine warfare is governed by the 1907 Hague Convention VIII, to which only a few States are parties and which “provides little practical basis for the legal regulation of the use of mines.”⁵⁴

The following restrictions apply to the use of naval mines by parties to an armed conflict:⁵⁵

- International notification of the location of the minefield must be made by the party laying the mines, unless the mines can only detonate against vessels that are military objectives.⁵⁶

⁵² For an excellent discussion of the legality of naval mine warfare in general, including a description of the various types of naval mines in use, see Busuttil, pp. 12-100. See also Politakis, pp. 166-266; German Manual, pp. 442-446.

⁵³ 1995 U.S. Navy Commander’s Handbook, para. 9.2, U.K. Manual, para. 13.52; German Manual, paras. 1039, 1042; ICRC Model Manual, para. 1709(a); San Remo Manual, para. 80, Explanation, para. 80.2.

⁵⁴ Busuttil, p. 78. Although by its terms, the 1907 Hague Convention VIII refers only to “automatic contact mines,” Levie has noted that “it does not appear that any belligerent has ever contended that the range of application of the Convention was limited to automatic contact mines and did not extend to the subsequently developed other types of mines.” Howard S. Levie, Commentary on the 1907 Hague Convention VIII, in Ronzitti, pp. 140-148, at p. 142. The Interim New Zealand Manual (at para. 710.2) specifically extends the application of the 1907 Hague Convention VIII to other types of mines. See also German Manual, para. 2, pp. 444-445 and Australian Manual, para. 8.23 (both of which take the position that the 1907 Hague Convention VIII regulates mining operations carried out by warships during armed conflict, regardless of the type of mine employed). In addition to Levie, Commentary on the 1907 Hague Convention VIII, in Ronzitti, pp. 140-148, other analyses of the 1907 Hague Convention VIII, may be found in Busuttil, pp. 18-29 and Politakis, pp. 219-228. The 1971 Seabed Arms Control Treaty prohibits the emplacement on, or tethering to, the seabed of nuclear mines. O’Connell took the view that low-yield nuclear mines tethered to the seabed for anti-submarine warfare might not be covered by the treaty. O’Connell Influence, pp. 156-157. The German Manual specifically rejects this position. German Manual, p. 445, para. 3.

⁵⁵ With respect to peace-time use of naval mines, see 1995 U.S. Navy Commander’s Handbook, para. 9.2.2. Except “under the most demanding requirements of individual or collective self-defence,” naval mines may not be sown in international waters prior to the outbreak of armed conflict. *Ibid.*, at footnote 24.

⁵⁶ 1907 Hague Convention VIII, Article 3; *Corfu Channel Case*, p. 22; *Military and Paramilitary*

- The parties laying the mines must keep detailed records of the locations of the mines in order to ensure accurate notification and to facilitate the removal or destructions of the mines after the armed conflict has been terminated.⁵⁷
- When belligerents conduct mining operations in the internal waters, territorial sea or archipelagic waters of other belligerents, the State laying the mines should ensure free exit for neutral vessels.⁵⁸
- Belligerents may not place mines in neutral waters.⁵⁹
- Naval mines can be deployed to force neutral shipping traffic into specific channels, but may not be used to deny transit passage of international straits or archipelagic sea lanes passage by neutral ships.⁶⁰
- Naval mines may not be placed off the coasts and ports of the enemy with the sole purpose of interfering with commercial shipping, but may be used to enforce a blockade of enemy coasts, ports and waterways.⁶¹

Activities, paras. 76-80, 215, 292(8); The 1995 U.S. Navy Commander's Handbook (at para. 9.2.3), adds the phrase "as soon as military exigencies permit." This phrase was rejected by the drafters of the San Remo Manual as being contrary to general requirements imposed upon belligerents by the law of armed conflict to limit as much as possible the effects of hostilities. See San Remo Manual, Explanation, para. 83.3; see also U.K. Manual, para. 13.55; Canadian Manual, para. 838.1; ICRC Model Manual, para. 1709(d); San Remo Manual, para. 83. The issuance of NOTAMs and communication of the extent of the minefield to the IMO is generally sufficient, although in some instances, notification through diplomatic channels to all States may be appropriate. San Remo Manual, Explanation, para. 83.2.

⁵⁷ 1907 Hague Convention VIII, Article 5; 1995 U.S. Navy Commander's Handbook, para. 9.2.3; U.K. Manual, paras. 13.56, 13.62-13.63; Canadian Manual, paras. 836.1, 842-843; German Manual, para. 1043; Australian Manual, para. 8.23; ICRC Model Manual, paras. 1709(e), 1709.1; San Remo Manual, paras. 84, 90-91.

⁵⁸ U.K. Manual, para. 13.57; Canadian Manual, para. 836.1; San Remo Manual, para. 85.

⁵⁹ 1907 Hague Convention VIII, Articles 1-2; 1995 U.S. Navy Commander's Handbook, para. 9.2.3; U.K. Manual, paras. 13.8, 13.9, 13.58; Canadian Manual, para. 836.1; Australian Manual, para. 8.23; ICRC Model Manual, para. 1709(f); San Remo Manual, para. 86.

⁶⁰ 1995 U.S. Navy Commander's Handbook, para. 9.2.3; U.K. Manual, paras. 13.8, 13.9, 13.71; Canadian Manual, para. 841.1; Australian Manual, para. 8.23; ICRC Model Manual, para. 1709(f); San Remo Manual, para. 89.

⁶¹ 1907 Hague Convention VIII, Article 2; 1909 London Declaration, Articles 1, 4-5; 1995 U.S. Navy Commander's Handbook, para. 9.2.3; U.K. Manual, paras. 13.69; German Manual, para. 1042.4; Australian Manual, para. 8.23; Interim New Zealand Manual, para. 710.1; San Remo Manual, para. 97, Explanation, para. 97.1. The 1995 U.S. Navy Commander's Handbook asserts (at para. 9.2.3, footnote 33) that the "international acceptance of the U.S. mine blockade of Haiphong Harbor during the Vietnam conflict has established a legal precedent for blockades enforced by mines alone." The German Manual (at para. 1042.4) states that while mines may be employed to establish and enforce a blockade, mines cannot be the *sole* means of enforcing a blockade, and if mines are so used, the belligerent using mines must ensure that warships or other units are in the vicinity to assist any vessels in distress as a result of striking a mine. See also Howard S. Levie, *Mine Warfare at Sea*, pp. 144-147, 156-157; Howard S. Levie, Commentary on the 1907 Hague Convention VIII, in Ronzitti, pp. 140-148, at p. 143.

- International waters may not be mined to an indefinite extent, although reasonably limited areas may be mined, provided that an alternate route exists for neutral commercial shipping to transit around or through the mined area with a reasonable assurance of safety.⁶²
- Anchored mines must become harmless as soon as they have broken their moorings.⁶³
- Unanchored or free-floating mines that are not attached to or imbedded in the seafloor must be directed against a military objective and must become harmless within one hour after loss of control over them.⁶⁴

With respect to State practice concerning the use of naval mines, statistics from both the First and Second World Wars demonstrate the full extent of this method of warfare on shipping. In World War I, in which all the belligerents (and many neutrals) laid naval mines, it is estimated that at least 250,000 mines were deployed, resulting in hundreds—if not thousands—of ships being destroyed.⁶⁵ Figures for World War II point to between 600,000 and 1,000,000 mines being sowed, with approximately 3,000-3,500 ships being sunk after striking a mine (or mines).⁶⁶

VI. Means and Methods of Warfare: Submarines

As the practice of the First and Second World Wars clearly demonstrates, the use of mined areas, when combined with submarine warfare, proved particularly devastating to commercial shipping. One of the basic rules of modern naval warfare is that surface vessels

⁶² 1995 U.S. Navy Commander's Handbook, para. 9.2.3; U.K. Manual, paras. 13.59, 13.60; Canadian Manual, paras. 839-840; Australian Manual, para. 8.23; ICRC Model Manual, para. 1709(f); San Remo Manual, paras. 87-88.

⁶³ 1907 Hague Convention VIII, Article 1(2); 1995 U.S. Navy Commander's Handbook, para. 9.2.3; U.K. Manual, paras. 13.53, 13.54; Canadian Manual, paras. 836.1, 837.1; Australian Manual, para. 8.23; Interim New Zealand Manual, paras. 710.1; ICRC Model Manual, paras. 1709(b), 1709.1; San Remo Manual, paras. 81-82, Explanation, paras. 81.2, 81.3.

⁶⁴ 1907 Hague Convention VIII, Article 1(1); 1995 U.S. Navy Commander's Handbook, para. 9.2.3; U.K. Manual, paras. 13.54; Canadian Manual, para. 837.1; Australian Manual, para. 8.23; Interim New Zealand Manual, paras. 710.1; ICRC Model Manual, paras. 1709(c), 1709.1; San Remo Manual, para. 82.

⁶⁵ Busuttil, p. 33. In terms of the number of vessels that struck naval mines, Busuttil cites (at *ibid.*, footnotes 192, 193) to sources indicating a wide range of between 966 and 6,679 ships.

⁶⁶ Busuttil, pp. 36-37, footnotes 232-236.

and submarines—as well as military aircraft—are governed by the same legal rules and principles.⁶⁷

For the present purposes, the 1936 London Protocol is the starting point for any discussion of submarine warfare, notwithstanding the fact that some commentators have expressed the opinion that the State practice indicates that the treaty has fallen into *desuetude*,⁶⁸ a subject that is beyond the scope of this work. The 1936 London Protocol incorporated *verbatim* Article 22 of the 1930 London Naval Treaty. Most of the terms of the 1930 London Naval Treaty (but *not* Article 22) expired on 31 December 1936. However, in order to allow the opportunity for States that were not party to the 1930 London Naval Treaty to join the submarine regime, the 1936 London Protocol was adopted.⁶⁹ This treaty sets forth only two rules, the first of which requires submarines to conform to the same rules of international law that govern the conduct of surface vessels and the second rule, which provides that:

[E]xcept in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface or submarine, may not sink or render incapable of navigation a merchant vessel without first having placed passengers, crew and ship's papers in a place of safety. For this purpose, the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

Although this rule might appear to lay down a bright-line rule concerning attacks on merchant vessels, the German Manual cautions that against taking a simplistic or overly restrictive approach, noting that merchant vessels that are participating in hostilities lose the right to the protection afforded by this rule.⁷⁰

⁶⁷ 1936 London Protocol, Rule 1; 1995 U.S. Navy Commander's Handbook, para. 8.3; U.K. Manual, para. 13.31; Canadian Manual, para. 826.1; German Manual, para. 1046; Interim New Zealand Manual, para. 709.1(a); San Remo Manual, para. 45. With respect to submarine warfare in general, see Mallison, Busuttil, pp. 101-186; Gilliland; German Manual, pp. 459-462.

⁶⁸ See, for example, O'Connell Contemporary Naval Operations, p. 52; Gilliland, pp. 978-979. Busuttil (at pp. 166-182) sets forth a comprehensive summary and analysis of the numerous commentators, including service lawyers, who have explored this issue. See also Howard S. Levie, "Submarine Warfare: With Emphasis on the 1936 London Protocol," in Grunawalt, pp. 28-71.

⁶⁹ The 1936 London Protocol is still in force and has 50 States Parties.

⁷⁰ German Manual, para. 1025.1.

The modern military manuals, therefore, deal with this rule in a number of different ways. For example, the 1995 U.S. Navy Commander's Handbook⁷¹ and the Canadian Manual restate the language of this rule in the sections dealing with submarine warfare and the destruction of captured prizes,⁷² while the U.K. Manual⁷³ and Australian Manual,⁷⁴ include these provisions in their rules on capture, without distinguishing between surface warships and submarines. Interestingly, in the section dealing with submarine warfare, the Australian Manual notes that "the confined nature of submarine accommodation makes it impractical to place the crew and passengers of a merchant vessel in safety prior to an attack."⁷⁵

The German Manual provisions on submarine warfare also incorporate the language set forth in the second rule of the 1936 London Protocol with respect to the safety of crew, passengers and the ships's papers.⁷⁶ Without distinguishing between enemy and neutral merchantmen, this provision also states that:

Merchant ships which meet the requirements of a military objective may also be attacked and sunk by submarines without prior warning.⁷⁷

The commentary to this provision, however, refers to enemy merchant vessels and provides that such ships may not be attacked if:

[U]nder the prevailing circumstances the sinking of an enemy merchant vessel offers no definite military advantage, if less severe measures are available, or if the military character of the vessel cannot be clearly established.⁷⁸

⁷¹ 1995 U.S. Navy Commander's Handbook, paras. 7.10.1 (destruction of captured neutral prizes), 8.2.2.1 (destruction of captured enemy prizes) and para. 8.3.1 (interdiction of enemy merchant shipping by submarines).

⁷² See Canadian Manual, paras. 826.1-826.2. The Canadian Manual also includes these provisions in the sections on the destruction of captured enemy merchantmen (*ibid.*, para. 867.1) and the destruction of captured neutral merchantmen (*ibid.*, para. 873.1). See also; San Remo Manual, paras. 139(a), 151(a).

⁷³ U.K. Manual, para. 13.104, relating to enemy merchantmen. The U.K. Manual provisions do not specifically provide for the destruction of neutral merchant vessels that

⁷⁴ Australian Manual, para. 8.6.

⁷⁵ *Ibid.*, para. 8.25.

⁷⁶ German Manual, para. 1047.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, para. 1047.1. See also *ibid.*, paras. 1025, 1025.1.

The most important case dealing with submarine warfare in general is *Dönitz* (discussed in greater detail in Chapter 3), although the *Peleus* and *Moehle* cases, which involved submarine commanders who had ordered the killing of survivors after sinking merchant vessels, are also important precedents. The IMT found Dönitz guilty of ordering the sinking of *neutral* merchant vessels without warning in the German operational zones, contrary to the 1936 London Protocol. Given the widespread practice of the belligerents in both world wars of sinking merchant vessels, however, the IMT judges found Dönitz guilty, but declined to impose a sentence on Dönitz for these crimes.

Although the 1936 London Protocol was certainly disregarded for the most part by the major naval powers in World War II,⁷⁹ it must be borne in mind that no State renounced that treaty. Rather, States excused their compliance with its rules on the basis of reprisals against illegal actions undertaken by other belligerents, such as the arming of merchant vessels, convoying merchantmen, ordering merchant vessels to report submarine sightings or ordering merchant vessels to ram submarines. The reliance on reprisals to justify policies in response to violations of the 1936 London Protocol suggests that the rules set down in that treaty are still valid.

VII. Means and Methods of Warfare: Air War at Sea

Air warfare in general, as well as the sub-set of air warfare at sea, is a broad topic and this discussion highlights only the general rules in order to demonstrate how carrier- or land-based naval aircraft can play a role in patrolling or enforcing NEZs. The basic rule is that aircraft involved in operations superjacent to the seas are bound by the same rules as surface warships and submarines.⁸⁰ Thus, military aircraft may engage enemy warships, military aircraft, merchant vessels and civil aircraft pursuant to the same rules that apply to warships.⁸¹ As the 1995 U.S. Navy Commander's Handbook notes, it is rare for a ship to surrender to an

⁷⁹ See Mallison and Mallison, pp. 97-99, for a discussion of crimes committed by U.S. forces following the Battle of the Bismarck Sea in March 1943, when aircraft and PT boats strafed and bombed Japanese survivors in lifeboats and clinging to the wreckage of ships that had been attacked.

⁸⁰ San Remo Manual, para. 45. See also San Remo Manual, Explanation, para. 45.4, indicating that paragraph 45 of the San Remo Manual represents the first time this rule was extended to aircraft and that this development "logically follows from the increasingly important role aircraft play in armed conflict at sea."

⁸¹ See, for example, 1995 U.S. Navy Commander's Handbook, paras. 8.4, 8.4.1; U.K. Manual, para. 13.31; Canadian Manual, paras. 717-724.

aircraft, but if the ship surrenders in good faith or indicates a clear intention to surrender, the aircraft must refrain from attacking.⁸²

Hospital zones and neutralised zones should be made immune from aerial bombardment pursuant to the terms of any agreement establishing such zones.⁸³

VIII. Means and Methods of Warfare: Naval Missiles

Unlike other methods of naval warfare, the rules governing the use of naval missiles, and particularly anti-ship missiles, have not been the subject of *any* specific treaties and no international courts have rendered decisions on the use of such missiles.⁸⁴ The overarching principle governing the use of naval missiles is that these weapons systems must be used only in conformity with the targeting principles set forth in Chapter 6.⁸⁵ This raises a number of issues since these missiles are capable of being used at great distances, where target discrimination raises numerous concerns.

Anti-ship missile warfare played a relatively important role in both the Falklands and Iran-Iraq Wars, with the belligerents in those conflicts employing missiles to sink vessels and down aircraft.⁸⁶ Nevertheless, given the rules governing both the use of anti-missiles and NEZs, it is clear that precautionary steps must be taken when using such systems, whether they are to be employed inside or outside of the exclusion zone. This may require, in certain circumstances that the attacker take into consideration the possibility that the intended target may take defensive measures, such as through the use of chaff or decoys, with the result that other vessels not targeted (including neutral merchant ships in the vicinity) may be endangered or destroyed.⁸⁷

⁸² 1995 U.S. Navy Commander's Handbook, para. 8.4, footnote 103, refers to several instances in the Second World War where ships surrendered to aircraft.

⁸³ 1995 U.S. Navy Commander's Handbook, para. 8.5.1.5, footnote 121 (referring *inter alia* to the Red Cross Box utilised in the Falklands War).

⁸⁴ On anti-ship missiles in general, see Busuttil pp. 187-207; Pocar; and van Hegelsom Bochumer Schriften, pp. 33-37.

⁸⁵ 1995 U.S. Navy Commander's Handbook, para. 9.9; U.K. Manual, para. 13.50; Canadian Manual, paras. 613.1, 827.1; German Manual, para. 1045; San Remo Manual, para. 78, Explanation, paras. 78.1-78.4. See also Busuttil, pp. 204-207.

⁸⁶ See Fenrick Falklands, pp. 47-49; Busuttil, pp. 194-195. See also O'Connell Influence at pp. 86-90 with respect to the sinking of the *Venus Challenger*, which was probably sunk by anti-ship missiles after the missile guidance systems probably malfunctioned during an attack on the Pakistani destroyer *Khaibar*, which was attacked by Indian Navy missile boats and sunk in the vicinity.

⁸⁷ Busuttil, p. 207; van Hegelsom, p. 36.

IX. Conclusion

Based upon this survey of the means and methods of warfare, some preliminary conclusions can be reached with respect to the impact that these methods have had on the development of the exclusion zone as a distinct method of warfare. Moreover, there are certain concepts and principles in these means and methods of warfare that overlap. For example, all of these methods of warfare allow warships and military aircraft to interfere with commercial shipping on the high seas. This interference may take the form of visit, search, diversion or capture. The imposition of a blockade also affects merchant shipping. Blockades and minefields may not be employed in neutral waters. Submarine and mine warfare can result in significant difficulties for merchant vessels and may require re-routing and diversion to avoid such areas. Naval exclusion zones also interfere with commercial shipping and in order to avoid NEZs, merchantmen may divert course to avoid the zone, increasing travel time and expense.

In order to minimise the effects and risks to commercial shipping presented by blockades and mining operations, the belligerents engaged in these operations are required to issue international notifications concerning the scope and duration of these methods of warfare. A similar obligation rests on the belligerent establishing a NEZ.

Although submarines enjoy certain tactical advantages over surface warships, they are bound by the same rules and legal principles, with the effect that some of the advantages inherent in submarine warfare are tempered by the law. Thus, under the modern law, the concept of unrestricted submarine warfare—as practiced by the belligerents in both the First and Second World Wars—is unlawful and submarines may not practice this form of warfare in area of the sea, including within an exclusion zone.

Table 3 sets forth a comparative analysis of the characteristics of the various means and methods of naval warfare and is useful in understanding the similarities and differences between these concepts, and also as a means of illustrating the principles that have influenced the development of the NEZ as a distinct method of naval warfare. In the column under the specific headings for the various methods of naval warfare, a row of X's designates the primary characteristics of that method of naval warfare, while row of asterisks indicates that the rule applies when this method of naval warfare is employed in conjunction with the exclusion zone.⁸⁸ In the column under the "Exclusion Zone" heading, a number of rows have

⁸⁸ For example, the asterisks in the first two rows, under the column headings for mine, submarine, aerial,

question marks, indicating that while these rules may not be specifically listed in the military manuals and restatements dealing with exclusion zones, these characteristics should apply in exclusion zones.

and missile warfare indicates that although the corresponding characteristics are not inherent to those methods of warfare, these rules apply when those methods are used to enforce a NEZ.

Table 3
Comparative Analysis: Methods of Naval Warfare

Characteristics	Exclusion Zone	Blockade	Mine Warfare	Submarine and Aerial Warfare	Naval Missiles
The same body of law applies both inside and outside the zone	XXXXXXX		*****	*****	*****
Adherence to military necessity and the principle of proportionality concerning the extent, location and duration of the zone	XXXXXXX		*****	*****	*****
Due regard for the rights of neutrals	XXXXXXX		*****	*****	*****
Safe passage for neutral vessels and aircraft	XXXXXXX				
Requires public declaration and notification	XXXXXXX	XXXXXXX	XXXXXXX		
Must be “effective”	??????????	XXXXXXX			
May not be directed against neutral ports or coasts	??????????	XXXXXXX	XXXXXXX		
Must not be directed at the civilian population	??????????	XXXXXXX			
Rule of impartiality applies		XXXXXXX			
Merchant vessels breaching or attempting to breach are subject to capture		XXXXXXX			
Merchant vessels resisting capture are subject to attack		XXXXXXX			
Military requirements determine distance between blockade and vessels enforcing the blockade		XXXXXXX			

XXXXXXX: Defining Characteristic

*******:** Applicable if employed to enforce a NEZ

??????????: Not specifically required in NEZs, but should apply

Characteristics	Exclusion Zone	Blockade	Mine Warfare	Submarine and Aerial Warfare	Naval Missiles
Legitimate methods and means may be combined to enforce and maintain the zone or blockade	??????????	XXXXXXX	*****	*****	*****
May not be employed in neutral waters	??????????		XXXXXXX		
May not be used to deny neutral ships transit passage through international straits or archipelagic sea lanes	??????????		XXXXXXX		
May not be used to an indefinite extent	XXXXXXX		XXXXXXX		
May be applied in reasonably limited areas, <i>provided</i> that an alternate safe route exists for commercial shipping			XXXXXXX		
Generally, must apply the same rules as for surface warships				XXXXXXX	XXXXXXX

XXXXXXX: Defining Characteristic

*******:** Applicable if employed to enforce a NEZ

??????????: Not specifically required in NEZs, but should apply

Chapter 8

Conclusions

“[R]ule-makers should be careful not to create rules that will be honoured more in their breach than in their observance.”¹

As noted above, the fundamental rule of naval exclusion zones is that if a belligerent establishes such a zone, the same body of law applies equally both inside and outside of the zone and therefore the legal principles enshrined in international humanitarian law apply in NEZs. Moreover, because the rules governing naval targeting are based on these principles, it necessarily follows that the belligerent is bound by the targeting rules described in Chapter 6. Consequently, under no circumstances may naval exclusion zones be considered “free-fire” zones, where a belligerent may target any vessel that enters the zone. Belligerents may not avoid their legal obligation by designating exclusion zones and simply issuing warnings to the international community to avoid the area. On the other hand, a belligerent may decide, as a matter of policy, not to target certain ships or aircraft which are legitimate military objectives that are *outside* the zone, while reserving the right to attack those legitimate military objectives if *inside* the zone.²

Although submarines enjoy certain tactical advantages over surface warships, they are bound by the same rules and legal principles, with the effect that some of the advantages inherent in submarine warfare are tempered by the law. Thus, under the modern law, the concept of unrestricted submarine warfare—as practiced by the belligerents in both the First and Second World Wars—is unlawful and submarines may not practice this form of warfare in area of the sea, including within an exclusion zone. In this respect, the law has certainly progressed by taking into account the practice used by the belligerents in the First and Second World Wars in waging this form of warfare with the resulting loss of tens of thousands of lives and countless wealth.

Based upon the brief survey of the means and methods of warfare set forth in Chapter 7, some conclusions can be reached with respect to the impact that these methods have had on the development of the exclusion zone as a distinct method of warfare. Moreover, there are certain concepts and principles in these means and methods of warfare that overlap. For

¹ Robertson Bochumer Schriften, pp. 60-61.

² San Remo Manual, Explanation, para. 106.1.

example, all of these methods of warfare result in interference by warships and military aircraft with commercial shipping on the high seas. This interference may take the form of visit, search, diversion or capture, with the resulting expenses these forms of interference necessarily cause. While blockades and minefields may not be employed in neutral waters, the imposition of a blockade or a naval minefield similarly affects merchant shipping and can and may require re-routing and diversion to avoid such areas, resulting in increased financial burdens, in addition to obviously increasing the risks to life and property. Naval exclusion zones also interfere with commercial shipping and present some of the same problems as viewed from the perspective of the bridge of a merchantman.

In order to minimise the effects and risks to commercial shipping presented by blockades and mining operations, the belligerents engaged in these operations are required to issue international notifications concerning the scope and duration of these methods of warfare. A similar obligation rests on the belligerent establishing a NEZ.

Since the rules governing conduct inside the zone are the same as those that apply outside the zone, it may be argued that NEZs do not possess juridical status and the “law of naval exclusion zones” therefore does not exist. While this may be true, depending on one’s definition or concept of “law,” there are several important legal and policy considerations to be taken into account before rejecting the notion of the exclusion zone as a method of naval warfare, notwithstanding the fact that the body of law applicable in such zones is not unique to them.

First, as the preceding chapters of this thesis demonstrate, State practice and *opinion juris* both support the argument that NEZs have emerged as a *sui generis* form of naval warfare. States which have engaged in warfare at sea have established such zones and in doing so proclaimed them to be lawful. The military manuals of the major naval powers have incorporated provisions on exclusion zones, as has the San Remo Manual, the most important restatement of the law of armed conflict at sea.

Second, the drafters of the San Remo Manual, in identifying and setting forth the legal requirements for naval exclusion zones, noted that such zones should be considered as an “exceptional measure” and concluded that setting forth detailed criteria for such zones would be a progressive development of the law.³ Admittedly, the fact that the San Remo Manual drafters introduced this discussion by indicating that this would contribute to developing the law progressively indicates that this area of the law has not yet ripened into custom. Be that

³ San Remo Manual, para. 106, Explanation, para. 106.1.

as it is may, the fact remains that States engaged in naval warfare establish exclusion zones. At the very least, we appear to be witnessing the development of customary rules governing this method of naval warfare.

Third, it is likely that in any future conflict at sea one or more of the parties to the conflict will seek to establish some form of exclusion zones. Consequently, naval commanders, who must often make split-second decisions while operating in NEZs, and naval judge advocates and other legal professionals who must draft the ROE, must have a clear understanding of the law applicable to NEZs. The fact that NEZs have no independent juridical status does not mean that there is not a coherent and well-defined body of law applicable to such zones. In the absence of an over-arching modern convention on the means and methods of naval warfare, including specific provisions on naval exclusion zones, custom plays an important role in determining the law applicable to NEZs and thus any restatement of the law applicable to such zones, therefore, will be welcome to those who must plan for, and engage in, armed conflict at sea.

Fourth, although not dispositive of the issue of whether NEZs possess juridical status, there are important policy reasons for establishing NEZs, including the limitation of the area of armed conflict at sea. This is a valid reason for promoting the concept of the NEZ and the questions posed in the Interim New Zealand Manual provide an excellent starting point for the evaluation of NEZs from a policy perspective. After stating that “a dogmatic statement that exclusion zones are legally acceptable or unacceptable would be inaccurate,”⁴ the Interim New Zealand Manual adopts a case-by-case approach, based on the answers to seven enumerated questions.

1. What is the purpose of the zone?
2. Who or what is excluded from the zone?
3. What is the sanction imposed on vessels or aircraft entering the zone without its permission?
4. Where is the zone located?
5. How large an area does the zone occupy?
6. For how long is the zone established?
7. To what extent are neutral States and their shipping affected by compliance with the requirements of the State establishing the zone?⁵

⁴ Interim New Zealand Manual, para. 705.4. See also San Remo Manual, Explanation, para. 106.2; Fenrick, pp. 124-125.

⁵ Interim New Zealand Manual, para. 705.4.

The Interim New Zealand Manual goes on to state that zones that are established for a brief period of time, in relatively limited areas of the sea and which are away from established shipping routes are more likely to be considered legal than those of longer duration over wider areas of the oceans and which encompass shipping routes.⁶

Fifth, there may be solid military reasons for establishing NEZs. Based on the above restatement and analysis of exclusion zones, several questions emerge. Since the establishment of an exclusion zone does not confer any additional rights upon belligerents and does not diminish or affect the duties imposed by the law of armed conflict upon the belligerent, what is the point of establishing such a zone? In other words, if the law does not confer any special advantages through the establishment of the NEZ, why should a belligerent take this step?

If the exclusion zone device confers no additional legal rights upon the belligerent establishing the zone, and in no way otherwise excuses non-compliance with the law, there must be other compelling reasons why States would opt for this method of naval warfare. In this respect, the principles of warfare described in the final section of Chapter 1 are of assistance in providing answers. A belligerent will not establish a zone that does not comply with the principles of warfare or advance the likelihood of prevailing in a conflict. Zones may also be a useful way to lure the belligerent's naval forces into a specified area for the sole purpose of engaging such vessels. In this sense, Goldie has likened zones to a "killing ground."⁷

The Interim New Zealand Manual stresses that the decision to establish an exclusion zone must be made at the "government level," precluding naval commanders from establishing exclusion zones.⁸ From the policy and operational standpoint, the decision to establish a zone should be made after a thorough analysis of the principles of warfare to determine if likelihood of mission accomplishment will be increased through the adoption of this method of naval warfare.

The zones established by the United Kingdom around the Falkland Islands validate this point. The goal of the United Kingdom was to reclaim the Falklands and this would only be possible by mounting a sea-based assault. In order to achieve this strategic goal, the Royal

⁶ Ibid., para. 705.4, footnote 6 therein.

⁷ Goldie, p. 158.

⁸ Ibid.

Navy needed to ensure unimpeded access to the islands. By establishing the TEZ, the Royal Navy was able to reduce the risks to the ships (and supporting aircraft) that were carrying the troops and logistics required to launch the assault. As such, the zone allowed the British to advance the overall strategic objective, to seize the initiative to retake the islands, to mass their naval power within the TEZ and to use that power in the most economical manner possible. Moreover, the TEZ provided a certain degree of operational security and since the zone had no impact on the maneuverability of the fleet, it contributed to the overall success of the campaign. At the same time, the Argentinian Navy was forced to operate in and around the TEZ if their goal to thwart the British invasion was to have any chance of success.

Sixth, as is the case in virtually every other aspect of warfare, technological developments are pushing the need for clearly defined modern legal rules, so that the current rules do not become obsolete. In light of modern military technologies, which permit belligerents to perform reconnaissance and surveillance over large areas of the sea, operational requirements may necessitate the creation of zones that cover hundreds of square miles so that the enforcing warships will not be necessarily confined within a small area. As van Hegelsom has noted, “An approach in which only areas in which hostilities are taking place can become MOZs [Maritime Operational Zones], will be unacceptable to belligerents.”⁹

Evolving technologies—and how those technologies are harnessed in enforcing zones—will thus play an important role in assessing the legality of future zones. The ability to perform reconnaissance and surveillance at longer distances greatly enhances the ability of naval commanders to distinguish between merchantmen and enemy warships. Moreover, in the wake of the 9/11 attacks, steps have been taken to enhance the ability to monitor commercial shipping. For example, the Proliferation Security Initiative and the Container Security Initiative, although designed to prevent the shipment of weapons of mass destruction, may be the precursor to the day when the belligerent right of visit and search is no longer necessary.¹⁰ To the extent that naval commanders can know with a reasonable degree of certainty whether or not a given merchantman is carrying cargo that contributes to the enemy’s war-fighting efforts, thus rendering the vessel a legitimate military objective, the less the likelihood that the vessel will be mistakenly attacked in the zone.

⁹ van Hegelsom *Bochumer Schriften*, p. 52.

¹⁰ See, for example, Roger W. Barnett, “Technology and Naval Blockade: Past Impact and Future Prospects,” 58 *NWCR*, p. 87 (No. 3, Summer 2005), p. 9 (“The PSI [Proliferation Security Initiative] is indicative of the form the ‘modern-day belligerent right of visit and search’ has taken”).

Seventh, there is a growing trend among maritime stakeholders towards conferring greater legitimacy upon the NEZ as a legal concept. With respect to the rights of neutrals, one naval practitioner has pointed out that the shipping industry generally supports the concept of the exclusion zone:

It is important to note, however, that the commercial shipping industry—by and large, neutral merchants—has been among the most vocal supporters of belligerent war-exclusion zones as a means of controlling the area of maritime hostilities. This is indicative of the extent to which the loss of legal protection for those neutral vessels trading with belligerents in economically vital goods has gained recognition and acceptability in law and practice.¹¹

While the decision to establish a zone need not take into account the views of neutrals (as distinct from the obligation to respect the rights of neutrals once the zone is established), common sense dictates that the commercial shipping sector would support any steps taken to reduce the likely area where armed conflict at sea occurs and to the extent the establishment of zones accomplishes this limited goal, zones are likely to find support from merchant shipping concerns.

While naval exclusion zones may serve useful purposes by attempting to limit the geographical scope of the armed conflict, thus reducing the possibility that innocent life will be lost and neutral shipping will suffer unnecessary interference, zones do not alter the legal rights of the parties within such zones. By no means can exclusion zones be considered “free-fire” zones where any ship entering the zone is subject to attack on sight. In short, the following legal principles must be respected for an exclusion zone to be legal:

- the applicability of the same body of law both inside and outside the zone;¹²
- the applicability of strict adherence to military necessity and the principle of proportionality concerning the extent, location and duration of the zone;¹³
- due regard must be given to the rights of neutrals to enjoy legitimate uses of the sea;¹⁴

¹¹ Francis V. Russo, Jr., “Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law,” 19 *Ocean Development and International Law*, pp. 381-399 (1988), p. 391. Unfortunately, Russo provides no authority to support the quoted statement.

¹² San Remo Manual, para. 106(a).

¹³ *Ibid.*, para. 106(b).

¹⁴ *Ibid.*, para. 106(c).

- provisions for the safe passage of neutral vessels and aircraft under certain circumstances;¹⁵ and
- public declarations and notifications concerning the commencement, duration, location and extent of the zone, as well as the restrictions imposed within the zone.¹⁶

Notwithstanding the above, the central issue presented by exclusion zones remain extremely difficult to resolve, as O’Connell pointed out:

The rule that neutral shipping may not be denied the right of navigation on the high seas is one of the fundamentals of the law of war at sea, and it is especially rigid in times of limited wars or states of belligerency short of formal war. Yet it is precisely in these circumstances that the problem of positive identification in the exercise of self-defence is most acute. For modern naval planning, therefore, the condition of tension between these two requirements of the law leads to inevitable perplexity. If all shipping could be excluded from an operational area, or around a convoy or task force, the designation of a contact as potentially hostile would be easier, and that would tend to solve the problem of identification. But if shipping may not be so excluded, the risk of successful attack against such convoy or task force is magnified by the latter’s need to take care in identifying a contact.¹⁷

It is likely that exclusion zones will feature in any future armed conflict that has a maritime component, and undoubtedly the legality of any such zones will be raised. Despite numerous calls in the past for an international conference to draft a treaty revising the law of naval warfare in light of State practice and technological advancements, the prospects of this occurring are slim—if only because the further refinement of other areas of international humanitarian law seem more pressing.¹⁸ Nevertheless, as Greenwood wrote during the drafting of the San Remo Manual in the early 1990s, “The legal implication of these zones is so complex a subject that we may need to return to it at a later date.”¹⁹

¹⁵ Ibid., para. 106(d).

¹⁶ Ibid., para. 106(e).

¹⁷ O’Connell *Law of the Sea*, p. 1109 (footnote omitted).

¹⁸ One need only to think of the issues presented by the “War on Terror,” including non-State actors and unlawful combatants as being among the areas of the law that might be considered a higher priority than refining the law of naval warfare.

¹⁹ Christopher Greenwood, Comment, *van Hegelsom Bochum Schriften*, p. 101.

Appendix

Legal Divisions of the Seas Under the 1982 LOS Convention

I. Introduction

The modern law of the sea regime generally reflects the customary division of the oceans into internal waters, territorial sea and the high seas. The first two categories have been characterised as “national waters,” with the latter category characterised as “international waters.”¹ This is not to imply either that coastal States have exclusive rights or unhindered sovereignty over the former category and no rights with respect to the high seas adjacent to their territorial seas. Rather, as will be discussed below, vessels of all States have the right of innocent passage through the territorial seas, and States may exercise certain rights in the contiguous and exclusive economic zones that are adjacent to the territorial sea.

This section will examine the division of the world’s oceans and airspace above under the modern law of the sea regime in the following order: internal waters; territorial sea; contiguous zones; resource zones; the continental shelf; the high seas; international straits; and airspace above the oceans. Under the 1982 LOS Convention regime, maritime zones, including the territorial sea and contiguous and exclusive economic zones are measured from baselines. Consequently, an understanding of how baselines are determined is thus essential to grasping the divisions of the ocean under the law of the sea.

II. Baselines²

Article 4 of the 1958 Territorial Sea Convention was significant because it established detailed provisions for establishing baselines³ and incorporated the principles governing straight baselines for deeply indented coasts or a fringe of coastal islands set forth by the ICJ in the *Anglo-Norwegian Fisheries Case*. As one prominent commentator has noted:

¹ The 1995 U.S. Navy Commander’s Handbook, for example, uses these characterisations, while acknowledging that international law does not make this distinction. See *ibid*, para. 1.4, footnote 27.

² This discussion assumes that the claimant State exercises undisputed sovereignty over the land territory abutting the shoreline, which may not always be the case. See, for example, 1995 U.S. Navy Commander’s Handbook, para. 1.3, footnote 11. Regarding baselines in general, see Churchill and Lowe, pp. 31-59.

³ 1958 Territorial Sea Convention, Section II, Articles 3-13.

The result has been to incorporate large areas that were formerly high seas into the internal waters or territorial waters of coastal States. In some cases, the adoption of straight baselines results in the appropriation of much larger areas of the high seas than would an increase in the breadth of the territorial sea to twelve miles or more.⁴

Articles 4 through 16 of the 1982 LOS Convention elaborate upon the rules established in Section II of the 1958 Territorial Sea Convention concerning the delimitation of baselines. Additionally, there are several important ICJ decisions concerning or impacting on baseline calculations.⁵

Unless a special rule applies, the normal baseline from which national maritime claims are calculated is the coastal low-water line⁶ as marked on the coastal State's official large-scale charts.⁷ Littoral States may use straight baselines for measuring their territorial sea when the coast is deeply indented or when a chain of islands is in the immediate vicinity of the shoreline.⁸ In employing straight baselines, the general rule is that such lines must not "depart to any appreciable extent from the general direction of the coast."⁹ The determination of baselines for bays¹⁰ is complicated: the water area of the coastal indentation must be greater than that of a semicircle with a diameter the length of the line drawn across the mouth of the indentation; and the maximum baseline across the mouth of a bay may not exceed 24 nautical

⁴ Robertson, p. 9.

⁵ Anglo-Norwegian Fisheries Case; Fisheries Jurisdiction Case; Gulf of Maine Case; Land, Island and Maritime Frontier Dispute Case.

⁶ This is the intersection of the plane of low water with the shore. 1995 U.S. Navy Commander's Handbook, para. 1.3.1, footnote 12.

⁷ 1982 LOS Convention Article 5; 1958 Territorial Sea Convention, Article 3. In 1935, Norway, a State with a deeply indented coast with hundreds of small islands lying off its shores, was the first State to employ straight baselines. In the *Anglo-Norwegian Fisheries Case*, the I.C.J. approved of this scheme, which was then codified in the 1958 1958 Territorial Sea Convention and subsequently in the 1982 LOS Convention.

⁸ 1982 LOS Convention, Article 7; 1958 Territorial Sea Convention, Article 4.

⁹ The sea areas contained within the lines must be such that they are subject to the regime of internal waters and may not be applied in such a way as to cut off the territorial sea of another State from the high seas or from an exclusive economic zone. 1982 LOS Convention, Articles 7(3) and 7(6); compare 1958 Territorial Sea Convention, Articles 4(2) and 4(5).

¹⁰ For baseline purposes, a "bay" is a "well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." 1982 LOS Convention Article 10(2); 1958 Territorial Sea Convention, Article 7(2). These rules apply only to bays the coasts of which belong to a single State, pursuant to 1982 LOS Convention Articles 10(1) and 1958 Territorial Sea Convention, Articles 7(1).

miles, and if the mouth exceeds that limit, the State may draw a baseline of 24 nautical miles within the bay enclosing the maximum area of water.¹¹

Archipelagos, which are defined as a group of islands, interconnecting waters and other natural features that are so closely inter-related that they form an intrinsic geographical, economic and political entity, or which have historically been regarded as such,¹² present particular difficulties. Archipelagic States, such as the Philippines or Indonesia, are made up of one or more archipelagos and may also include islands not part of the archipelago(s).¹³ Archipelagic States may employ straight baselines connecting the outermost points of the outermost islands provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land is between 1:1 and 9:1.¹⁴ The waters enclosed by the archipelagic baselines are known as archipelagic waters, which is an entirely new concept under the 1982 LOS Convention.¹⁵ One commentator has written, “[O]f the ‘new zones’ recognised in the 1982 LOS Convention, archipelagic waters present the most difficult issues.”¹⁶ These difficulties mainly arise from the geographic characteristics

¹¹ 1982 LOS Convention, Articles 10(2), 10(4) and 10(5); 1958 Territorial Sea Convention, Articles 7(2), 7(4) and 7(5); see also 1995 U.S. Navy Commander’s Handbook, Figures 1-1 through 1-3, pp. 9-10. Only if *both* the semicircle and 24 nautical mile tests are met will the body of water constitute a “bay” under international law; all water enclosed within the bay are considered internal waters. There are two special situations where the general rules on bays do not apply: when straight baselines are employed pursuant to 1982 LOS Convention Article 7 and in the case of so-called “historic bays.” 1982 LOS Convention, Article 10(6); 1958 Territorial Sea Convention, Articles 4 and 7(6). In order for a State to make a claim to a historic bay, the State must demonstrate its “open, effective, long term, and continuous exercise of authority over the bay, coupled with acquiescence by foreign nations in the exercise of that authority.” 1995 U.S. Navy Commander’s Handbook, para. 1.3.3.1. See also *ibid.*, p. 96, Table A1-4, which contains a list of 38 bays that have been claimed as historic bays by the States concerned.

¹² 1982 LOS Convention, Article 46(b).

¹³ *Ibid.*, Article 46(a). Part IV of the 1982 LOS Convention sets forth the specific rules governing archipelagic States. 1995 U.S. Navy Commander’s Handbook, p. 105, Table A1-9 contains a list of 18 States which have claimed archipelagic status under the 1982 LOS Convention. See also *ibid.*, p. 104, Table A1-8, p. 104, for a list of multi-island States not qualified for archipelagic status and dependent territories which would qualify for archipelagic status if independent.

¹⁴ 1982 LOS Convention, Article 47(1).

¹⁵ *Ibid.*, Article 49(1). Archipelagic waters are those enclosed by archipelagic baselines generally not exceeding 100 nautical miles long, joining the outermost points of the outermost islands and drying reefs of the archipelago. *Ibid.*, Article 47. Archipelagic States are discussed in Churchill and Lowe, pp. 118-131. See also O’Connell *Law of the Sea*, pp. 236-258.

¹⁶ Robertson, p. 34. Robertson also notes that, with three apparent exceptions, “[T]he relationship between the status of archipelagic waters and the law of armed conflict at sea (including the law of neutrality), is largely unexamined in the published legal literature.” *Ibid.*, p. 35.

of archipelagic waters, since the legal character of archipelagic waters is essentially identical to that of the territorial sea.¹⁷

Special rules govern the establishment of baselines for other geographical features and Article 14 permits States to combine the different methods of determining baselines to suit different conditions.¹⁸

III. Internal Waters¹⁹

Internal waters are those bodies of water on the landward side of the baseline of the territorial sea,²⁰ including, *inter alia*, lakes, harbours, some bays, some canals, and rivers.²¹ Archipelagic States may draw closing lines for the delimitation of internal waters.²² States may exercise the same degree of sovereignty over their internal waters as they exercise over their land territory. Thus, there is no right of innocent passage in internal waters and ships and aircraft may not sail upon or fly over a State's internal waters without the permission of that State, unless when rendered necessary by *force majeure* or when in distress.²³

¹⁷ Robertson, p. 31.

¹⁸ For example, with respect to rivers flowing directly into the sea, a straight baseline extending across the mouth of the river between the points on the low-water line of the riverbanks is employed. 1982 LOS Convention, Article 9; 1958 Territorial Sea Convention, Article 13. In the case of islands situated on atolls or islands with reefs, the territorial sea baseline is the seaward low-water line of the reef. 1982 LOS Convention, Article 6. When harbour works, such as ports, form an integral part of the harbour system, they are regarded as part of the coast for the purpose of establishing the baseline. 1982 LOS Convention, Article 11; 1958 Territorial Sea Convention, Article 8.

¹⁹ See Churchill and Lowe, pp. 60-70.

²⁰ 1982 LOS Convention, Articles 2(1) and 8(1); 1958 Territorial Sea Convention, Article 5(1).

²¹ With the exception of rivers that flow between or traverse two or more States and are generally considered to be international rivers. See 1995 U.S. Navy Commander's Handbook, para. 1.4.1, footnote 30.

²² 1982 LOS Convention, Article 53. Such closing lines must conform to Articles 9-11 of the 1982 LOS Convention.

²³ 1995 U.S. Navy Commander's Handbook, paras. 1.4.1, 2.3.1; O'Connell Law of the Sea, pp. 853-858.

IV. Territorial Sea²⁴

A. Breadth

Notwithstanding the considerable controversy surrounding the breadth of the territorial sea, agreement was finally reached on this issue at UNCLOS III and pursuant to Article 3 of the 1982 LOS Convention, coastal and archipelagic States may claim a territorial sea up to a limit not exceeding twelve nautical miles from the baseline. The world's major naval powers all claim a twelve-mile wide territorial sea, while a few States claim territorial seas of less than twelve miles and some claim more than twelve miles, including ten States that claim 200 nautical miles.²⁵ Islands, rocks and low-tide elevations have their own territorial seas, with baselines determined in the same manner as for other land territory.²⁶

The claiming State exercises sovereignty over its territorial sea to the same extent that as its sovereignty over land territory, subject to international law and other provisions of the 1982 LOS Convention. In this respect, the 1982 LOS Convention sets forth certain navigational rights for other States, such as innocent passage²⁷ and the right of archipelagic sea lanes passage.²⁸

As a result of both the expansion of the breadth of the territorial sea to 12 miles and the use of straight baselines, the area of waters subject to coastal State sovereignty has quadrupled under the 1982 LOS Convention when straight baselines are employed.²⁹ However, pursuant to Article 8(2) of the 1982 LOS Convention, when straight baselines are employed which have the effect of enclosing as internal waters areas that were not considered as such previously, a right of innocent passage shall exist in those waters.³⁰

²⁴ See Churchill and Lowe, pp. 71-101.

²⁵ See 1995 U.S. Navy Commander's Handbook, p. 97, Table A1-5.

²⁶ 1982 LOS Convention, Article 121(2); 1958 Territorial Sea Convention, Article 10(2). Islands are defined as "a naturally formed area of land, surrounded by water, which is above water at high tide." 1982 LOS Convention, Article 121(1); 1958 Territorial Sea Convention, Article 10(1).

²⁷ 1982 LOS Convention, Article 2(1); 1958 Territorial Sea Convention, Article 1(1).

²⁸ 1982 LOS Convention, Article 53.

²⁹ Robertson, p. 16.

³⁰ 1982 LOS Convention, Article 8(2); 1958 Territorial Sea Convention, Article 5(2).

B. Innocent Passage³¹

The 1958 Territorial Sea Convention included an ambiguous article on warships within the ambit of the right of innocent passage, setting forth specific rules for all ships,³² merchant ships,³³ government ships other than warships,³⁴ and warships.³⁵ The existence and precise scope of the right of innocent passage for warships under the 1958 treaty is not clear.³⁶ Although the 1958 treaty does not specifically grant warships the right of innocent passage, Article 23 of the treaty implies that such a right exists, since it permits coastal States to require warships exercising innocent passage to leave their territorial sea if the warship disregards a request for compliance with the coastal State's regulations regarding such passage.³⁷ Thus, a textual interpretation of the treaty supports the conclusion that the right of innocent passage through the territorial sea exists for warships pursuant to the 1958 treaty. Nevertheless, both State practice and the commentators remain divided with respect to the omission in the 1958 treaty of an explicit right of innocent passage for warships.³⁸

Furthermore, notwithstanding an express inclusion of warships in the regime of innocent passage, many coastal States made reservations to the effect that warships must seek authorisation prior to passing through the territorial sea.³⁹ This would seem to imply that at least those States making such reservations considered warships to be included within the scope of the right of innocent passage.⁴⁰ Moreover, the general section of the treaty dealing

³¹ On innocent passage in general, see Myles McDougal and W. Burke, Public Order of the Oceans, (1962), pp. 174 *et seq.*, Colombos, pp. 132-135; Restatement, para. 513(1)(a); William E. Butler, *Soviet Concepts of Innocent Passage*, 7 Harvard JIL 113; William E. Butler, The Soviet Union and the Law of the Sea, 1971, pp. 51-70.

³² 1958 Territorial Sea Convention, Sub-section A, Articles 14-17.

³³ *Ibid.*, Sub-section B, Articles 18-20.

³⁴ *Ibid.*, Sub-section C, Articles 21-22.

³⁵ *Ibid.*, Sub-section D, Article 23.

³⁶ See discussion in Oppenheim, Vol. 1, pp. 618-619, para. 201; Lowe July 1986, pp. 173-174; Lowe July 1988, pp. 289-292; Oxman, pp. 851-855.

³⁷ Compare with Article 30 of the 1982 LOS Convention, which requires warships in this situation to "immediately" leave the territorial sea in the event of non-compliance with the littoral State's request.

³⁸ Lowe July 1986, pp. 173-174.

³⁹ More than 40 States consider the mere passage of warships to be prejudicial and have insisted upon prior notification and/or authorisation prior to permitting warships to transit their territorial sea. 1995 U.S. Navy Commander's Handbook, p. 202, Table A2-1.

with innocent passage specifically requires submarines to navigate on the surface and display their flag while exercising the right of innocent passage.⁴¹

Like the 1958 Territorial Sea Convention, the relevant provisions of the 1982 LOS Convention do not expressly provide for a right of innocent passage through the territorial sea for warships.⁴² However, a reasonable reading of Article 19 of the 1982 LOS Convention leads to the inescapable conclusion that such a right exists, notwithstanding the lack of an explicit reference to such a right.⁴³

Copying verbatim Article 14(4) of the 1958 treaty, Article 19(1) of the 1982 LOS Convention states, “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.”⁴⁴ In the *Corfu Channel* case, the only case in which the ICJ has interpreted the right of innocent passage of warships, the court examined the manner in which the passage was conducted in order to determine whether it was innocent, while indicating that motive was irrelevant.

In an apparent attempt to clear up some of the ambiguity of the 1958 treaty, Article 19(2) of the 1982 LOS Convention, sets forth twelve types of activity that are inconsistent with innocent passage, including, *inter alia*, any threat or use of force against the coastal State or in violation of the UN Charter;⁴⁵ exercises involving any type of weapons;⁴⁶ intelligence gathering;⁴⁷ the broadcasting of propaganda that affects the security of the littoral State;⁴⁸ and the launching, landing or taking onboard of any aircraft⁴⁹ or other military device.⁵⁰ Whether

⁴⁰ Slonim, pp. 116-121. The issue of prior notification or approval for innocent passage through the territorial sea was vigorously debated at UNCLOS III. Oxman, p. 854.

⁴¹ 1958 Territorial Sea Convention, Article 14(6); see also 1982 LOS Convention, Article 20.

⁴² Lowe July 1988, p. 289.

⁴³ The 1995 U.S. Navy Commander’s Handbook, para. 2.3.2.4; Restatement, para. 513(1)(a) and comment h; and Robertson, p. 17, clearly take the view that innocent passage by warships through territorial seas is legally permissible. Lowe, however, writing in 1986, stated, “The present position appears to be that there is no general agreement upon the right of innocent passage for warships and that consequently the rights of passage for such ships turns on the issue of opposability.” Lowe July 1986, p. 173.

⁴⁴ This definition may be in the process of becoming customary international law. Lowe July 1986, p. 174.

⁴⁵ 1982 LOS Convention, Article 19(2)(a).

⁴⁶ *Ibid.*, Article 19(2)(b).

⁴⁷ *Ibid.*, Article 19(2)(c).

⁴⁸ *Ibid.*, Article 19(2)(d).

⁴⁹ *Ibid.*, Article 19(2)(e).

this list is exhaustive or merely illustrative is a matter of some dispute.⁵¹ Lowe has written that the list of proscribed activities in Article 19 is “remarkably wide,” with the consequence that the 1982 LOS Convention may afford coastal States more rights to prevent innocent passage than they possessed under either the 1958 treaty or customary law.⁵²

Because the law extends the coastal State’s sovereignty over its territorial seas, that State may take the necessary steps in the territorial sea action to prevent passage that is not innocent,⁵³ including the use of force.⁵⁴ In 1989, The United States and the Soviet Union, in a joint interpretation of international law governing innocent passage, took the position that prior to taking action in cases where the innocence of the passage was challenged, the coastal State had a duty to:

[I]nform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.⁵⁵

The coastal State retains other rights with respect to warships exercising a right of innocent passage. For example, foreign warships must comply with the laws and regulations of the coastal State with respect to, *inter alia*, safety of navigation (including the use of designated sea lanes and traffic separation systems), conservation of sea life; customs, fiscal, immigration or sanitary matters; and prevention of collisions at sea.⁵⁶ In order to protect its

⁵⁰ Ibid., Article 19(2)(f). This clause may prove troublesome in that “military device” is not defined.

⁵¹ Compare Uniform Interpretation [of the United States and Union of Soviet Socialist Republics] of the Rules of International Law Governing Innocent Passage, reprinted in 1995 U.S. Navy Commander’s Handbook, p. 161, Annex A2-2, para. 3 (list is exhaustive) and Lowe July 1986, p. 174 (list may be only illustrative) with O’Connell Law of the Sea, p. 270 (“This catalogue of non-innocent actions is the reflex of the catalogue of subject-matters in respect of which the coastal State may make laws and regulations.”)

⁵² Lowe July 1986, pp. 174-175.

⁵³ 1982 LOS Convention, Article 25(1); Kinley, “The Law of Self-Defence, Contemporary Naval Operations, and the United Nations Convention on the Law of the Sea,” 19 Law of the Sea Institute Proceedings 10, pp. 12-15 (1987).

⁵⁴ 1995 U.S. Navy Commander’s Handbook, para. 2.3.2.1.

⁵⁵ Uniform Interpretation [of the United States and Union of Soviet Socialist Republics] of the Rules of International Law Governing Innocent Passage, 23 September 1989, reprinted in 28 ILM, pp 1444-1447 and 1995 U.S. Navy Commander’s Handbook as Annex A2-2, p. 161, para. 4. In this document, the two parties also agreed that warships enjoy the right of innocent passage through the territorial seas without prior notification or approval.

⁵⁶ 1982 LOS Convention, Article 21; 1958 Territorial Sea Convention, Article 17. Article 236 of the 1982 LOS Convention exempts warships, auxiliaries and State-owned or operated aircraft from any

national security, the littoral State may temporarily suspend the right of innocent passage through designated areas of its territorial sea, assuming that such suspension is non-discriminatory and published.⁵⁷

As noted above, the coastal State may require any warship that fails to comply with such laws and regulations and disregards any request for compliance therewith, to leave the territorial sea immediately.⁵⁸ Additionally, in the event the foreign warship causes any loss or damage resulting from non-compliance with the laws or regulations of the coastal State governing passage through the territorial sea, the flag State shall bear international responsibility for such loss or damage.⁵⁹

V. Archipelagic Sea Lanes Passage

Ships of all States enjoy a right of innocent passage through archipelagic waters, subject to the right of the archipelagic State to designate archipelagic sea lanes (and air routes thereabove) through which all States enjoy a right of passage.⁶⁰ Such sea lanes traverse the archipelagic waters and the adjacent territorial sea and must include all “normal passage routes for international navigation or overflight through or over archipelagic waters” and (with respect to vessels) all normal navigational channels.⁶¹ Article 53(5) sets forth the formula for determining the sea lanes:

Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 per cent of the

provisions of the coastal State’s laws or regulations regarding the protection and preservation of the marine environment. However, the flag State of the warship remains responsible for ensuring that reasonable and practicable steps are taken to ensure that their warships act in a manner consistent with the 1982 LOS Convention. 1982 LOS Convention, Article 236. See also Oxman, at pp. 819-821. The 1982 LOS Convention sets forth detailed provisions regarding the protection of the marine environment. This regime is beyond the scope of the present analysis. See Sonja Ann Jozef Boelaert-Suominen, International Environmental Law and Naval War: The Effect of Marine Safety and Pollution Conventions During International Armed Conflict, Newport Paper No. 15.

⁵⁷ 1982 LOS Convention, Article 25(3); 1958 Territorial Sea Convention, Article 16(3).

⁵⁸ 1982 LOS Convention, Article 30; compare Article 23, 1958 Territorial Sea Convention.

⁵⁹ 1982 LOS Convention, Article 31.

⁶⁰ *Ibid.*, Article 52(1).

⁶¹ *Ibid.*, Article 53(4).

distance between the nearest points on islands bordering the sea lane.⁶²

Within such sea lanes, the archipelagic State may employ traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes.⁶³ In the event that the archipelagic State does not designate sea lanes, the right of archipelagic sea lanes passage may be used through the route(s) normally used for international navigation.⁶⁴

Archipelagic sea lanes passage must be made for the purpose of continuous, expeditious and unobstructed passage from one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.⁶⁵

VI. Contiguous Zones⁶⁶

The next zone seaward from the territorial sea is the contiguous zone, which may not extend beyond 24 nautical miles from the baselines delimiting the territorial sea.⁶⁷ Within this zone, the coastal State may exercise the control necessary to prevent and punish violation of its customs, fiscal, immigration or sanitary laws and regulations within its territory, including its territorial sea.⁶⁸ Provisions recognising the security rights of the coastal State in the contiguous zone were explicitly rejected under both the 1958 Territorial Sea Convention and the 1982 LOS Convention.⁶⁹

⁶² Ibid., Article 53(5).

⁶³ Ibid., Article 53(6).

⁶⁴ Ibid., Article 53(12).

⁶⁵ Ibid., Article 53(3). The Philippines, one of the primary archipelagic States, has declared that the transit passage regime does not apply to straits connecting archipelagic waters with the EEZ or high seas. 5 UN Law of the Sea Bulletin (July 1985), p. 19. Lowe characterizes this declaration as “plainly inconsistent with the Convention provisions creating a right of archipelagic sea lanes passage.” Lowe, p. 178.

⁶⁶ See Churchill and Lowe, pp. 132-140.

⁶⁷ 1982 LOS Convention, Article 33(2).

⁶⁸ Ibid., Article 33(1); 1958 Territorial Sea Convention, Article 24(1).

⁶⁹ Robertson, pp. 8-9 and 22-23.

VII. Exclusive Economic Zones⁷⁰

Exclusive Economic Zones (“EEZs”) are economic resource zones adjacent to the territorial sea and thus overlap with the contiguous zone⁷¹ and the concept of EEZs has “entered the realm of customary practice.”⁷² States that opt to claim an EEZ may do so, provided that the breadth of the EEZ does not extend beyond 200 nautical miles from the baseline.⁷³ Approximately one-third of the world’s oceans are subject to being claimed by coastal States as an EEZ,⁷⁴ and the establishment of the concept of the EEZ is often cited as an example of the potential for “jurisdiction creep” leading to further erosion of the high seas.⁷⁵

Within the EEZ, the claiming State may exercise certain sovereign rights for the limited purposes of exploring and exploiting, conserving and managing natural resources, and with regard to other economic uses, including energy generation.⁷⁶ Additionally, the coastal State has limited jurisdiction in the EEZ in order to establish and use artificial islands, installations and structures; to conduct marine scientific research; and to protect and preserve the marine environment.⁷⁷

In times of peace, naval forces may conduct exercises or manoeuvres in the EEZs of other States, pursuant to 1982 LOS Convention Article 58(1), which states:

In the Exclusive Economic Zone, all States, whether coastal or land-locked, enjoy, subject to the relevant parts of this Convention, the freedoms referred to in Article 87 of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and

⁷⁰ For a discussion of the evolution of the Exclusive Economic Zone as a legal concept, see Ann L. Hollick, *The Origins of 200-Mile Offshore Zones*, 71 *AJIL* 494-500 (July 1977). In general, see also Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* and Churchill and Lowe, pp. 160-180.

⁷¹ 1982 LOS Convention, Article, 55.

⁷² Rose, p. 83.

⁷³ 1982 LOS Convention, Article 57.

⁷⁴ Rose, p. 68.

⁷⁵ *Ibid.*, p. 79.

⁷⁶ 1982 LOS Convention, Article 56(1)(a).

⁷⁷ *Ibid.*, Article 56(1)(b). Naval vessels and military aircraft are exempt, pursuant to Article 236 of the 1982 LOS Convention, from the coastal State’s pollution and maritime environment protection schemes, however. See also Oxman, pp. 819-821 (regarding the effect of Article 236 on warships) and pp. 841-844 (regarding artificial islands, installations and structures); and fn. 124, *supra*.

submarine cables and pipelines, and compatible with the other provisions of this Convention.

The negotiating history of the 1982 LOS Convention and the subsequent State practice support the position that the phrase “internationally lawful uses of the sea” permits military exercises in the EEZ to the same extent as those exercises would be permitted on the high seas.⁷⁸ That is, such exercises or manoeuvres may be conducted without requiring notice to, or authorisation from, the coastal State. Notwithstanding the unambiguous language of this provision, several States⁷⁹ have announced that they will require such notification and consent prior to permitting naval exercises in their EEZs, a position which drew protests by several maritime powers and was rejected by the President of UNCLOS III.⁸⁰ Nevertheless, as Professor Oxman has pointed out, “It is essentially a futile exercise to engage in speculation as to whether naval manoeuvres and exercises within the economic zone are permissible.”⁸¹ The central remaining issue is thus temporal: may a State assert exclusive control over another State’s EEZ for lengthy periods of time in order to conduct extensive naval operations of exercises in that EEZ.

VIII. Continental Shelf⁸²

The continental shelf is the seabed and subsoil of submarine areas that extend beyond the territorial sea of a coastal State to the outer edge of the continental margin or to a distance of 200 nautical miles from the baseline in instances where the outer edge of the continental margin does not extend to that distance.⁸³ Although the littoral State may exercise sovereignty over the continental shelf for resource-related purposes, this has no effect on the legal status of the waters above the continental shelf,⁸⁴ and in any event, all States may lay submarine

⁷⁸ Barbara Kwaitkowska, *Military Uses in the EEZ—a reply* (letter to the editor), 11 Marine Policy, pp. 249-252 (No. 3, July 1987), p. 249. See also Vaughan A. Lowe, *Rejoinder*, 11 Marine Policy, pp. 249-252 (No. 3, July 1987).

⁷⁹ Including Brazil, Cape Verde and Uruguay. 5 UN Law of the Sea Bulletin (July 1985), pp. 6-8, 24. See also Lowe July 1986, p. 179; Rose, p. 73.

⁸⁰ See Robertson, p. 26 and the footnotes cited therein.

⁸¹ Oxman, p. 838. See also Lowe July 1986, p. 179 and letter to the editor and rejoinder in 11 Marine Policy, pp. 249-252 (No. 3, July 1987).

⁸² See Churchill and Lowe, pp. 141-159.

⁸³ 1958 Continental Shelf Convention, Articles 1-3, 5; 1982 LOS Convention, Article 76(1).

cables and pipelines on the continental shelf.⁸⁵ The coastal State has the same rights with respect to artificial islands, installations, structures and marine scientific research on the continental shelf as it does in the EEZ.⁸⁶

IX. High Seas⁸⁷

All parts of the sea that are not included in the EEZ, territorial sea, or internal waters of a State, or in the archipelagic waters of an archipelagic State constitute the high seas.⁸⁸ The high seas regime also applies to the EEZ, at least to the extent that the high seas regime is not incompatible with the more detailed provisions governing the EEZ.⁸⁹ The high seas are open to all States, including land-locked States,⁹⁰ and freedom of the high seas includes, *inter alia*, freedom of navigation⁹¹ and overflight.⁹² For warships, freedom of navigation on the high seas has been interpreted to include task force manoeuvring, flight operations, military exercises, surveillance and intelligence gathering, and ordnance testing and firing.⁹³ The only limitation on the activities of warships on the high seas under the 1982 LOS Convention is Article 87(2), which provides that all freedoms on the high seas must be exercised with “due regard for the interests of other States in their exercise of the freedom of the high seas.”⁹⁴ On the high seas, warships of all States enjoy complete immunity from the jurisdiction of all States except the flag State.⁹⁵

⁸⁴ 1958 Continental Shelf Convention, Article 3.

⁸⁵ Ibid., Article 4; 1982 LOS Convention, Article 79(1).

⁸⁶ 1982 LOS Convention, Articles 80, 346, 248 and 249.

⁸⁷ See Churchill and Lowe, pp. 203-222.

⁸⁸ 1982 LOS Convention, Article 86.

⁸⁹ Ibid., Article 58. Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 Virginia JIL, pp. 809-863 (No. 4, Summer 1984), p. 825.

⁹⁰ 1982 LOS Convention, Article 87(1).

⁹¹ Ibid., Article 87(1)(a).

⁹² Ibid., Article 87(1)(b).

⁹³ 1995 U.S. Navy Commander's Handbook, para. 2.4.3.

⁹⁴ 1982 LOS Convention, Article 87(2).

⁹⁵ 1958 High Seas Convention, Article 8(1); 1982 LOS Convention, Article 95.

X. International Straits⁹⁶

Part III of the 1982 LOS Convention⁹⁷ concerns straits used for international navigation. The 1982 LOS Convention makes a distinction between straits used for international navigation through the territorial sea between one part of the high seas (or EEZ) and another part of the high seas (or EEZ) and those straits used for international navigation in which there is not a complete overlapping of the international strait and the territorial sea. In the former situation, the 1982 LOS Convention establishes a regime of transit passage that is generally more liberal than the regime of innocent passage.⁹⁸ In the event the strait connects a part of the high seas (or EEZ) with the territorial seas of a coastal State, the regime of innocent passage governs⁹⁹ with one difference: the right of innocent passage through such straits may not be suspended.¹⁰⁰

In situations where a corridor in the high seas (or EEZ) exists through the international straits which does not completely overlap with the territorial sea and which is suitable for navigation, all States enjoy freedom of navigation through and over such waters, provided they remain beyond the territorial sea.¹⁰¹

⁹⁶ In general, see Bing Jia, Regime of Straits in International Law and Churchill and Lowe, pp. 102-117.

⁹⁷ Articles 34-45.

⁹⁸ 1982 LOS Convention, Article 37-44. For a comparison of the rights afforded under transit and innocent passage, see Oxman, pp. 856-858. For an analysis of transit passage through international straits by submarines, see Ronald I. Clove, *Submarine Navigation in International Straits: A Legal Perspective*. 39 Naval Law Review 103-116 (1990). See also W. Michael Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AJIL, pp. 48-76 (Vol. 1, January 1980).

⁹⁹ 1982 LOS Convention, Article 45(1)(a). In the *Corfu Channel Case*, the ICJ held that warships had the right of innocent passage through territorial seas of international straits.

¹⁰⁰ 1982 LOS Convention, Article 45(2). Compare with 1982 LOS Convention, Article 25(3), governing innocent passage through the territorial sea. See also Article 16(4) of the 1958 Territorial Sea Convention and the San Remo Manual, para. 33 ("The right of non-suspendable innocent passage ascribed to certain international straits by international law may not be suspended in time of armed conflict.") Lowe raises certain issues regarding whether Article 16(4) of the 1958 treaty is now customary international law, and if so, what is the scope of that customary law. Lowe July 1988, pp. 291-292.

¹⁰¹ 1982 LOS Convention, Article 36.

XI. Airspace

Like the seas, airspace may be classified as either national or international, and for the present purposes, the law of airspace may be briefly summarised as follows: aircraft over the land, internal waters, archipelagic waters and territorial seas of a State are subject to the jurisdiction of that State, while aircraft in the airspace over contiguous zones, EEZs, the high seas, and territory which is not subject to the sovereignty of any State (such as Antarctica),¹⁰² are subject to the jurisdiction of the flag State only.¹⁰³ Thus, with one notable exception, aircraft enjoy the same rights as vessels with respect to operating in marine environments and the superjacent airspace. This exception concerns the right of innocent passage for overflight above territorial seas, and unlike ships, aircraft do not enjoy such a right of innocent passage.¹⁰⁴

¹⁰² Antarctic Treaty, Article IV.

¹⁰³ 1982 LOS Convention, Articles 2(2), 49(2), 58(1) and 87(1); 1958 Territorial Sea Convention, Article 2; 1958 High Seas Convention, Article 2.

¹⁰⁴ 1982 LOS Convention, Article 17; 1995 U.S. Navy Commander's Handbook, para. 2.3.2.1.

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