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Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality

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Preliminary Remarks

With the adoption of the UN Law of the Sea Convention in 1982² there was a strong belief that with that “constitution of the world’s oceans” all the disputed issues relating to coastal State rights on the one hand, and to freedom of navigation on the other hand, had been settled for good. Since 1982, however, coastal State legislation has frequently had a negative impact on the latter. The US Freedom of Navigation Program gives ample proof of excessive maritime claims ranging from restrictions of the rights of innocent passage, transit passage, and archipelagic sea lanes passage, to the establishment of illegal baselines and maritime security zones, all of which have no basis in either the LOS Convention or in customary international law.³ The problem of “creeping jurisdiction” has gradually been reinforced by national legislation on the protection of the marine environment. Many coastal States have understood that when a deviation from the established rules and principles of the law of the sea is justified on environmental grounds, it creates enormous difficulties for those States that are prepared to counter these claims. The general public will all too easily accept them as reasonable and

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legitimate. Still, for countries like the United States and the member States of the European Union,⁴ in view of their dependence on the freedom of navigation for security and economic reasons, it is of tantamount importance to preserve the achievements of the LOS Convention.

At the same time, these very States are confronted with new challenges. There already exists reliable intelligence information that transnational terrorists may target ships and ports. Moreover, transnational terrorism may well seek to take advantage of navigational freedoms by transporting weapons, including weapons of mass destruction, by sea. In order to prevent them from reaching their destination it is necessary not only to establish effective control mechanisms in ports⁵ but also to interfere with international shipping on the high seas if there is no such effective control mechanism in the port of origin, or if the flag State is unwilling to comply with its obligations under treaties in force⁶ or under the respective resolutions of the UN Security Council.⁷

The dilemma the target States of transnational terrorism find themselves in seems to be obvious. On the one hand, there is a necessity to interfere with foreign shipping, thus restricting the freedom of navigation. On the other hand, these measures may be precedents for a modification of the law which would, if going too far, be contrary to the vital interests of these States whose economies depend on the free flow of goods by sea and whose security interests presuppose that their navies remain in a position to exercise power projection whenever and wherever necessary.

The first section of this paper will deal with the question of whether and to what extent the law as it stands provides a sufficient legal basis for Maritime Interception/Interdiction Operations (MIO)⁸ in the Global War on Terrorism (GWOT).⁹ If the answer to this question is affirmative, the said dilemma will prove to be less dramatic than it seems to be at first glance.

The second part of this paper will be devoted to three further current legal issues in maritime operations that, although dealing with the law of naval warfare and neutrality at sea, are not *in toto* unrelated to the issues dealt with in the first part. Firstly, the establishment of “exclusion/operational zones” during an international armed conflict will, in any event, interfere with the freedom of navigation of “neutral” and innocent shipping. Secondly, the threat posed by transnational terrorism will not vanish or even decrease during an international armed conflict. Rather, transnational terrorists may consider warships and hospital ships perfect targets, be it only for propaganda reasons.¹⁰ Hence, the question arises as to which measures belligerents may take in order to effectively protect their units. Thirdly, and finally, in view of the persisting terrorist threat during an international armed conflict, the traditional rules and principles of the law of (maritime) neutrality, if

applied in a strict manner, may prove to be a considerable obstacle for non-belligerent States in their contribution to the GWOT.

War on Terrorism

Developments following the terrorist attacks of September 11, 2001, have led to a broader understanding of the right of self-defense.¹¹ It not only applies to situations where a State, either with its armed forces or in some other way attributable to it, has attacked another State. It also comes into operation if an armed attack is launched against a State from outside its borders¹² by persons whose acts cannot, or for the time being cannot, be attributed to another State. Moreover, the target State, or the potential target State, and its allies do not have to adopt a wait-and-see policy but they may take all measures reasonably necessary to prevent future attacks as early and as effectively as possible.

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In the maritime context such preventive measures may comprise, *inter alia*:

- Surveillance and control of sea traffic;
- Providing for freedom and safety of navigation;
- Protection of endangered vessels;
- Disruption of lines of communication;
- Visit, search (boarding) and capture;
- Diversion;
- Establishment of security zones and of restricted sea areas;
- Capture/arrest of cargos and persons.

Self-defense

However, if maritime interception/interdiction operations¹³ are solely based upon the right of self-defense there needs to be a sufficiently clear link to the threat posed by transnational terrorism. This will, for example, be the case if there are reasonable grounds for suspicion that a given vessel is involved in the carrying of terrorists and/or of weapons destined for an area known to serve as a hiding place or training ground for terrorist groups. In any event, the generally accepted legal limitations of the right of self-defense—immediacy, necessity, proportionality—have to be observed.¹⁴ Indiscriminate MIO exercised in vast sea areas would be disproportionate and, hence, not justified by the right of self-defense.

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It may be added in this context that if a vessel can be connected to the persisting threat posed by transnational terrorism no further conditions have to be met. Especially, any form of consent—be it by the flag State or by the ship’s master—is irrelevant. The right of self-defense has never been made dependent upon the will of third States or of individuals. The UN Security Council alone would be in a position, by taking effective measures, to terminate the exercise of that inherent right.¹⁵

Law of the Sea

While MIO could be based upon the rules of the law of naval warfare on prize measures (measures short of attack)¹⁶ and on targeting¹⁷ this would presuppose the existence of an international armed conflict. While the United States is, at present, a party to an international armed conflict (Iraq), the exercise of the right of visit and search and the targeting of vessels could be based on these rules. However, transnational terrorism poses an ongoing threat that will not disappear with the termination of the hostilities in Iraq. Hence, the question is whether there are—apart from the right of self-defense and the law of naval warfare—other rules of international law that could serve as a legal basis for MIO on the high seas.

Of course, the law of the sea, as embodied in the LOS Convention and in customary international law, recognizes the right of warships and of other State ships to take measures against a merchant vessel, including visit and search,¹⁸ if

- the vessel is flying the same flag as the intercepting warship;
- the vessel is “stateless”;
- there are reasonable grounds for suspicion that the vessel is engaged in
 - (a) piracy,¹⁹
 - (b) slave trade, or
 - (c) unauthorized broadcasting.

Accordingly, the boarding of the *So San*²⁰ was justified not merely according to the right of collective self-defense, but also according to Article 110 of the LOS Convention because, at the time of the interception, it could be considered stateless and because it did not give satisfactory information about its origin and about its destination. Hence, all measures, including visit and search (boarding, including opposed boarding), undertaken for the purpose of verifying the true character, function, and destination of the vessel were admissible.²¹ The fact that, after the boarding, the nationality of the vessel proved to be North Korean and that it was engaged in the “innocent” shipping of missiles does not justify a different legal evaluation.²²

Against allegations to the contrary it is, however, doubtful whether it would be admissible to draw an analogy between transnational terrorists and pirates. While in some cases acts of transnational terrorism may be characterized as piratical, or at least similar to piracy, it must be remembered that, according to the consensus of States, there still is a clear distinction between terrorism on the one hand and piracy on the other.²³ Therefore, according to the law as it stands, the rules on piracy can not be applied to terrorists, unless their acts qualify as piracy proper.

It may be added that, according to the LOS Convention, coastal States may take action against foreign merchant vessels to enforce their domestic laws. This right to enforce varies and decreases with the sea area in question. While it would be in accordance with international law to enforce domestic immigration and security regulations in the internal waters, in the territorial sea and in the contiguous zone,²⁴ especially if the vessel affected is believed to be involved in acts of transnational terrorism, the law of the sea does not provide for such enforcement measures in the coastal State's sea areas beyond the 12-nm territorial sea or the 24-nm contiguous zone. In the exclusive economic zone (EEZ) coastal States are only entitled to prescribe and enforce rules that are designed to regulate the exploration and exploitation of the natural resources and to protect the marine environment of that sea area.²⁵ With regard to activities of foreign vessels not affecting these "sovereign rights" nor resulting in severe damage to the marine environment, the flag State principle has precedence over the coastal State's rights. Hence, Article 110 of the LOS Convention provides a legal basis for MIO on the high seas.

Other Legal Bases for MIO?

There remains one legal aspect that seemingly has not been made use of in the current discussion on the legality of MIO in the GWOT, i.e., countermeasures and/or reprisals. In this context, it is of great importance that the UN Security Council, in Resolution 1373,²⁶ has decided—in a legally binding way (!)—that with regard to transnational terrorism States shall, *inter alia*:

Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

....

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- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
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- (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.

Hence, if a State either assists transnational terrorism or has knowledge that its nationals or merchant vessels are engaged in such assistance, etc., but still remains inactive, that State is in clear violation of its obligations under the UN Charter.²⁷

Of course, if the assistance rendered amounts to direct participation in an armed terrorist attack or if the terrorist attack is in some other way attributable to the sponsoring State, the target State will be entitled to take self-defense measures. Whether the armed response qualifies as an “on-the-spot reaction” or a “defensive armed reprisal”²⁸ is merely a matter of the modalities of the exercise of the right of self-defense. In any event, the target State will have the right to respond by the use of armed force.

But what if the assistance by the sponsoring State or its inactivity does not amount to assistance in an armed attack? On the one hand, the sponsoring or inactive State would still be in violation of its obligations specified in Resolution 1373. Even more, the inactivity would be supportive of acts of transnational terrorism and could, therefore, constitute a prohibited use of force, not amounting, however, to an armed attack or an act of aggression (“smaller scale use of force”). In such a situation the target State, on the other hand, would not be under an obligation to remain inactive. Rather it would be entitled to take all necessary countermeasures or reprisals in response to the illegal acts of the sponsoring State. To some surprise this has

recently been expressly acknowledged by Judge Simma who is far from being a supporter of a broad understanding of the law governing the use of force. In his separate opinion to the Court's judgment in the *Oil Platforms* case²⁹ Judge Simma stated, *inter alia*:

In my view, the permissibility of strictly defensive military action taken against attacks of the type involving, for example, the *Sea Isle City* or the *Samuel B. Roberts* cannot be denied. What we see in such instances is an unlawful use of force "short of" an armed attack ('agression armée') within the meaning of Article 51, as indeed "the most grave form of the use of force." Against such smaller-scale use of force, defensive action—by force also "short of" Article 51—is to be regarded as lawful. In other words, I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an "armed attack" within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter.³⁰

Applied to the GWOT, the target State of acts of transnational terrorism would be entitled to take defensive countermeasures "short of Article 51" against the State that is, actively or passively, assisting or otherwise furthering transnational terrorism. Accordingly, countermeasures/reprisals involving visit and search could be taken against vessels for the mere reason that they are flying that State's flag (genuine link). However, in view of the importance of the freedom of navigation such measures must be necessary and strictly proportionate. That will only be the case if there are reasonable grounds for suspicion that the vessels affected are indeed engaged in activities of—or in assistance of—transnational terrorism, e.g., if the State in question fails to prevent the merchant vessels flying its flag from transporting terrorists or objects that are designed to further transnational terrorism.

The Use of "Zones" in the Context of Anti-Terror/Force Protection

When it comes to "zones" in a maritime context there are a number of misunderstandings due to connotations to "war zones" known from the two World Wars³¹ or to "exclusion zones" known from the Falklands/Malvinas War (1982)³² and from the Iran-Iraq War (1980–1988).³³ As a method of naval warfare such a zone—whatever its purpose or legality may be—cannot be made use of in times other than international armed conflict.

"Defense bubbles" or rather warning zones established around warships or naval units are also to be distinguished from "operational," "exclusion" or other zones. Such warning zones merely serve to protect the naval vessels from attack or

from other illegal activities and are generally recognized as in accordance with international law.³⁴ Shipping and aviation are notified of potentially hazardous conditions and are requested to clearly identify themselves if they are approaching the warning zone. The extent of these zones and the measures taken cannot be determined *in abstracto*. Rather, it will depend on the circumstances of each single case, especially on a known threat and on the location of the ships concerned, whether the extent of the warning area may be reasonable or excessive.³⁵ As the attack on the *USS Cole* clearly demonstrates, the threat posed by terrorist activities is obvious but will vary according to the region of operation and to the general security environment. If, however, the extent of the defensive/protective/warning zone is proportionate to that threat, the inconveniences imposed upon sea and air traffic will not amount to a violation of the freedom of navigation. This holds true for times of peace and during periods of international armed conflict. Still, it needs to be kept in mind that, unless the threat is overwhelming and leaves no choice of deliberations, such warning zones will have to be based upon some form of an agreement with the respective coastal State, if the warships or naval unit are deployed, or are operating, in the internal waters or territorial sea of that State.

In addition, warning zones are not to be equated with “special warnings” which are merely a tool for implementing the warning zone and for notifying it to other States and to international shipping and aviation. For example, US forces are presently operating under a heightened state of readiness. Accordingly, approaching aircraft and ships are requested to maintain radio contact and are warned that the US forces will exercise appropriate self-defense measures, without, however, impeding freedom of navigation.³⁶

The question remains whether zones may also be made use of in the GWOT for purposes other than force protection. Certainly, in view of the importance of the freedom of navigation for international trade and security, the closure of larger areas of the high seas to international navigation and aviation would be illegal. Up to the present, assertions by some States of a right to extend their sea areas for security reasons beyond the 12-nm territorial sea have regularly met protests and have, thus, never been recognized.³⁷ Older concepts, like the so-called “pacific blockade,”³⁸ or singular precedents, like the “quarantine” of Cuba,³⁹ would not justify such far reaching infringements of the freedom of navigation either. Although, in theory, the establishment of an “exclusion zone” could be based upon the right of self-defense there is but one realistic scenario this author can conceive of in which such a measure would meet the test of immediacy, necessity and proportionality: A group of transnational terrorists gains control over a submarine with launching capabilities for intermediate-range missiles and there is sufficient intelligence information that they will attack from a given sea area. Then it may be in

accordance with the right of self-defense of the threatened State to close that sea area to all underwater vehicles.

Apart from such a scenario, however, the extensive use of a given sea area in the GWOT will always be in conformity with international law, when approached from a different perspective. If the target States of terrorist attacks and their allies are allowed to conduct MIO worldwide on the high seas, clearly a decision to restrict such operations only to certain limited seas areas is lawful, particularly if the sea areas concerned are known to be used for the transport of terrorists and of weapons destined to terrorist groups. The States cooperating in the framework of Operation Enduring Freedom have been doing exactly this by restricting MIO to the sea areas surrounding the Arabian Peninsula. Up to the present, no State seems to have protested or otherwise contested the legality of these measures. Accordingly, and subject to the principles of necessity and proportionality, an operational area—that is to be distinguished from any form of “zone”—may be established in the context of the fight against transnational terrorism in order to enable the target States and their allies to identify and control international shipping and aviation or, if reasonable grounds for suspicion of an activity supportive of transnational terrorism exist, to prevent them from approaching the coastline of a State that has proved to be either unwilling or unable to comply with its obligations under the UN Security Council resolutions on transnational terrorism.

Law of Naval Warfare and Maritime Neutrality

While the San Remo Manual in most of its parts reflects customary international law, three aspects of the law of naval warfare addressed therein either remain disputed or, in view of new threats and exigencies, seemingly need to be reconsidered: maritime exclusion/operational zones, technical equipment of hospital ships, and maritime neutrality.

Maritime Exclusion/Operational Zones

There is general agreement that the “war zones” established by the belligerents of the two World Wars were, and remain, illegal.⁴⁰ No zone, whatever its denomination or alleged purpose relieves 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.⁴¹ 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.⁴²

Still, in view of State practice, the discussion on the legality of some other kind of “zone” has not ceased. On the one hand, modern weapons are far more

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discriminating than any means of naval warfare used during World War II. On the other hand, modern weapons have brought about over-the-horizon targeting capabilities. At the same time, naval platforms, in view of their construction and technical equipment, are rather vulnerable and can suffer severe damage inflicted by comparatively “primitive” means. Moreover, the number of the world’s merchant vessels has increased considerably. They may be engaged in innocent trade but they may also be integrated into the enemy’s war-fighting or war-sustaining effort, thus constituting a threat to the overall effort to bring the armed conflict to a successful end without suffering unreasonable damage. Therefore, naval armed forces are forced to control large sea areas in order to remain in a position to effectively protect their units and to achieve their military goal.

Before dealing with the legality of such exclusion/operational zones under the law of naval warfare it needs to be stressed that they must be distinguished from warning zones⁴³ and from the customary belligerent right to control the immediate area or vicinity of naval operations. 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.⁴⁴ While in many cases such measures will consist of a belligerent’s 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.⁴⁵

State Practice

After the condemnation of unrestricted submarine warfare by the Nuremberg Tribunal, the first precedent of an exclusion zone obviously occurred during the Falklands/Malvinas conflict of 1982. On April 7, the United Kingdom proclaimed a “maritime exclusion zone” around the islands. Argentina followed on April 8 by proclaiming a “maritime zone.” On April 23, the British Government proclaimed a “defensive bubble”⁴⁶ limited to the protection of the British forces against Argentine warships and Argentine military and civilian aircraft. However, on April 28, the United Kingdom proclaimed a “total exclusion zone” (TEZ) that came into effect on April 30:

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

In view of the wording of the proclamation that clearly indicates the British were prepared to attack any vessel or aircraft encountered within the TEZ, it is rather astonishing that one commentator has characterized the TEZ as a “reasonable temporary appropriation of a limited area of the high seas.”⁴⁷ This conclusion is mainly based on the fact that the zone had been adequately notified, that it had been established in a remote sea area without significant sea traffic, and that it had not resulted in any casualties to neutral ships or aircraft.⁴⁸ While these arguments are without doubt reflecting reality, they do not alter the wording of the proclamation. On the other hand, due to other rather obscure statements of the British government it may well be that, in reality, the British forces were not allowed to target just any contact within the TEZ—at least not without prior authorization from the highest political level. Therefore, the United Kingdom 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. If the latter holds true, the British measure was not illegal under the law of naval warfare. At the same time, however, the British TEZ may not serve as a legal precedent for the—alleged—legality of exclusion zones as a method of naval warfare.

During the Iran-Iraq War both belligerents made use of zones. The Iranian government issued guidelines for the safety of merchant shipping in the Persian Gulf obliging vessels to transit the Strait of Hormuz south and east of a designated line, declaring a “war zone” covering all Iranian waters, and prohibiting all transportation of cargo to Iraqi ports.⁴⁹ The Iraqi government declared the area North of 29-30N a prohibited war zone and warned all vessels appearing within the zone to be liable to attack. The Iraqi government further warned that all tankers, regardless of nationality, docking at Kharg Island were targets for the Iraqi air force.⁵⁰ In contrast to the practice of the Falklands/Malvinas conflict both belligerents of the Iran-Iraq conflict, by attacking neutral tankers, did enforce their zones thus providing sufficient evidence that they regarded them as “free-fire zones.” Since the attacks were not directed solely against legitimate military objectives,⁵¹ the zones of that conflict are generally considered illegal.⁵²

Military Manuals and Expert Opinions

In view of the general condemnation of the zones established and enforced during the two World Wars and during the Iran-Iraq War, States that are prepared to characterize exclusion zones as a legitimate method of naval warfare take a rather cautious approach. The respective parts of their military manuals⁵³ all stress that

- 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 that
- 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.

Accordingly, those States agree that the same body of law applies both inside and outside the zone and, moreover, that the establishment of an exclusion zone is in conformity with the law as an exceptional measure only. If all these conditions are met, exclusion zones are accepted as in conformity with the law of naval warfare both in the San Remo Manual⁵⁴ and in the International Law Association's Helsinki Principles.⁵⁵

Still, the question remains what object and purpose an exclusion zone is to serve. To that end, the San Remo Manual is ambiguous.⁵⁶ According to the US Navy Commander's Handbook on the Law of Naval Operations an exclusion zone may either contain the geographic area of the conflict or it may keep neutral shipping at a safe distance from areas of actual or potential hostilities.⁵⁷ A similar approach underlies the German Navy Commander's Handbook that refers to "comprehensive control rights" and to the denial of access to a given sea area "in order to protect [vessels and aircraft] from the effects of armed conflicts."⁵⁸ The Helsinki Principles also contain a reference to particular risks to which neutral shipping is exposed.⁵⁹ Hence, if not designed to contain or restrict the area of naval operations⁶⁰ and if not a—legitimate—ruse 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. Be that as it may, if serving these purposes, and if the further conditions set out above are met, there can be no doubt about the legality of exclusion zones.

Hospital Ships: New Necessities and Threats

At the time of their adoption, the rules on hospital ships laid down in Articles 22 *et seq.* of the 1949 Second Geneva Convention (GC II) were a well-balanced compromise between considerations of humanity and of military necessity and were adapted to the weapons technology of that time. However, the rapid technological

development soon gave rise to concerns. At first, the rules on the marking of hospital ships proved no longer sufficient to ensure their effective identification as specially protected platforms under the law of naval warfare.⁶¹ Then it became clear that the rules regulating the technical equipment of hospital ships for communication purposes had become outdated in view of modern forms of communication via satellite and other means. Today there is a realistic danger that a hospital ship, although exclusively employed in its humanitarian role, may be attacked by transnational terrorists who will consider it an easy and very effective target. Therefore the question arises whether and to what extent hospital ships, during an international armed conflict, may be equipped with secure communications devices and with an armament enabling them to effectively defend themselves against illegal attacks.

Secure Communications

Article 34, paragraph 2, of GC II emphasizes that “hospital ships may not possess or use a secret code for their wireless or other means of communication.” This provision appears to imply a prohibition on possession and use of secure communication equipment for both sending and receiving encrypted communications. However, the English version is not the only authoritative text of the Convention. The equally authentic French and Spanish texts prohibit only the sending of encrypted traffic (“les navires-hôpitaux ne pourront posséder ni utiliser de code secret pour leurs émissions par T.S.F. ou par tout autre moyen de communication”). According to Article 33, paragraph 3, of the Vienna Convention on the Law of Treaties, “the terms of the treaty are presumed to have the same meaning in each authentic text.”⁶² Therefore, the conclusion is justified that only the possession or use of secure communications equipment for transmitting, not for receiving, messages in secret code is prohibited.

While some States, like the United Kingdom during the Falklands/Malvinas conflict,⁶³ hesitate to share this interpretation, others, like the United States⁶⁴ and Germany,⁶⁵ obviously are prepared to provide hospital ships with equipment that would enable them to receive messages in secret code. Indeed, that would not only be in accordance with the generally accepted rules on the interpretation of multilingual treaties, it would also guarantee the effective performance of the genuinely humanitarian function of hospital ships. If hospital ships were not allowed to receive encrypted messages, the enemy would be in a position to intercept messages sent to them and to deduce from that message the location of a possible naval or military operation.⁶⁶ If a “Red Cross Box” is not a feasible alternative, the hospital ship would be prevented from performing its humanitarian function because the respective flag State would be forced to, at least, delay the message in order not to jeopardize the military operation in question.⁶⁷ In

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view of the overall importance of the protection of the wounded, sick and shipwrecked, an interpretation leading to such a result would be manifestly absurd or unreasonable. Hence, it is no surprise that the San Remo Manual provides in paragraph 171: “In order to fulfill most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment. The equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage.”⁶⁸

This statement implies that hospital ships should be permitted to also use cryptographic equipment for the sending of messages. Indeed, in the explanations to the San Remo Manual,⁶⁹ the commentators state:

The participants were of the opinion that as the inability to receive encrypted information jeopardises the ability of hospital ships to operate effectively, the rule ought to concentrate on the sending of military intelligence. Therefore, in order to fulfil their humanitarian mission effectively, hospital ships should be permitted to use cryptographic equipment (modern terminology for a secret code) which in modern technology is an integral part of most communications systems. This cryptographic equipment may not be used for any purpose other than the humanitarian tasks of the vessel, obviously not to transmit intelligence data, nor for any other incompatible purpose.

Seemingly, according to the San Remo Manual, hospital ships would not be prohibited from sending encrypted messages as long as they are strictly related to the humanitarian function of the hospital ship and not used for any militarily useful purposes. In view of the importance of the humanitarian function and in view of modern communications technology, it would indeed make sense if Article 34, paragraph 2, GC II could be interpreted in that way. In this context it needs to be kept in mind that the prohibition of a “secret code” is solely designed to reinforce the prohibition of committing acts harmful to the enemy in Article 34, paragraph 1, GC II. Moreover, according to Article 35 (1) GC II, a hospital may have on board an “apparatus exclusively intended to facilitate navigation or communication.” Today, however, modern means of communication necessitate the use of equipment that could be considered as violating the “secret code” prohibition of Article 34, GC II. The same holds true for navigation equipment, e.g., if using the military Global Positioning System (GPS). The rules on medical aircraft in Article 28.2 of the 1977 Additional Protocol I take that development into account. While medical aircraft are prohibited to “be used to collect or transmit intelligence data” this implies that they are allowed to receive and transmit messages in a secret code as long as the data are not of a military nature.

Hence, an extensive interpretation would certainly be in accordance with the object and purpose of Article 34, paragraph 2, GC II. However, every

interpretation finds its limits in the “ordinary meaning to be given to the terms of the treaty.” These terms merely justify an interpretation allowing hospital ships the use of equipment for the receiving, not for the sending, of encrypted messages. The San Remo Manual together with the explanations does not serve as evidence for a view to the contrary. In the explanations it is made clear that paragraph 171 does not reflect the law as it stands. Rather, the majority view was that “the present law still prohibits the use of such equipment and that this law has not fallen into desuetude. [Therefore the majority was] of the opinion that the text needed to reflect this fact and that the participants were encouraging a change in the law.”⁷⁰

Since the sending of encrypted messages by hospital ships cannot be based upon the *lex lata*, States whose interests are specially affected should endeavor to contribute to a modification of the law. While a codification conference is not a realistic option, those States should focus on convincing other States to recognize a deviating practice as reasonable in order to safeguard the specially protected humanitarian function of such ships under *lex ferenda*. Numerous statements to that effect would certainly contribute to a modification of the law as it now stands.

Protective Arming of Hospital Ships

The provisions of GC II on hospital ships neither expressly prohibit the arming of hospital ships for self-defense purposes nor expressly provide for such protection or defense. Article 35(1), according to which a hospital ship is not deprived of its special protection if the “crews of ships or sick-bays are armed for the maintenance of order, for their own defense or that of the sick and wounded,” is restricted to an exclusively personal scope of protection. As such it does not seem to allow any conclusion with regard to the protection or defense of the hospital ship itself. Rather, the said provisions are based on the assumption that the special protection provided for hospital ships is sufficient to ensure that they will not be captured or attacked. That may have been true in the past but it is more than doubtful whether under present conditions that assumption is still valid.⁷¹

Still, the manuals of the US Navy and of the German Navy,⁷² as well as the San Remo Manual, reflect a strict position with regard to the protective/defensive arming of hospital ships. While they either expressly or implicitly refer to Article 35(1) GC II, they prohibit all arms other than light, portable, individual weapons such as pistols and rifles.⁷³ Only the German Manual and the San Remo Manual acknowledge the right of hospital ships to take defensive measures against erroneous or arbitrary attacks, especially by missiles, and they conclude that they “may be equipped with purely deflective means of defence, such as chaff and flares.”⁷⁴

Indeed, it is more than likely that the respective enemy belligerent will not be prepared to any longer respect the special protection of a hospital ship whose crew

is armed with other than small pistols and rifles. And as the provision of the San Remo Manual referred to above clearly shows it would be nearly impossible to reach consensus on the criteria that would make possible a distinction between the offensive or defensive character of such arming. The reference to chaff and flares was the utmost the participants felt able to agree upon.

The United Kingdom, during the Iraq-Kuwait conflict, decided that they were unable to effectively protect hospital ships and that it was preferable to abandon the special protection altogether. Hence, *RFA Argus*, which was equipped with light air defense systems, was not a hospital ship proper but a “primarily casualty receiving ship” that also served for the transportation of troops.⁷⁵

If the British practice were copied by other States the special protection of hospital ships would become obsolete. This, however, would be detrimental to the humanitarian function of such ships and certainly politically inopportune. States feeling unable to directly contribute to a multinational military operation would be deprived of the possibility of indirectly participating by deploying a hospital ship. The deployment of a hospital ship would not be a merely symbolic act. It would imply a most valuable contribution for all States and parties involved. On the one hand, the belligerents would equally profit from making use of the impartial humanitarian service. On the other hand, the deploying State would be in a position to prove its credibility and to contribute to confidence building that would facilitate a future return to normal relations.

These considerations do not, of course, rule out the basic legal problem of the admissibility of the defensive arming of hospital ships, the interest in which has recently increased considerably in view of the worldwide terrorist threat. Moreover, it is quite probable that in an asymmetric war environment at least one “party to the conflict” will disrespect the fundamental protection of such vessels under the law of naval warfare.

It is doubtful whether the drafters of GC II were at all aware of this new threat. As already stated above, they started from the assumption that all parties to an international armed conflict will respect and protect hospital ships as long as they are employed in their normal role and as long as they do not commit acts harmful to the enemy. Then, however, an attack against a hospital ship will in any event be in violation of the law. The drafters of GC II may have been under the belief that no belligerent would consider such illegal behavior and that, if it occurred after all, the parties to the conflict would find a solution *ex post facto*. If one party to the conflict, or the attacker, is not a State or other recognized subject of international law, such as transnational terrorists, any remedy provided for by the law of naval warfare will be void. Moreover, the law of naval warfare contains no rule or other provision that would justify the conclusion that a belligerent is obliged to suffer an illegal attack or

other illegal act and to remain passive. In other words, the inherent right of self-defense that is not abolished by any known legal order is also implicitly recognized by the law of naval warfare. Accordingly, if there exists reasonable grounds for suspicion that hospital ships will be the target of an illegal attack, a belligerent is entitled to take all necessary measures to effectively prevent or counter that attack. If the only means available to achieve that aim is the—defensive—arming of a hospital ship, then this would not constitute a violation of the law of naval warfare.

This, however, is a solution to the problem that is far from having passed the test of practice. As already indicated above, the enemy belligerent may well consider the arming of a hospital ship a hostile act. Hence, even if the arming of a hospital ship is, in the circumstances ruling at the time, a necessary measure of protection or of self-defense there is no guarantee for a continuing respect and protection by the opposing belligerent. In addition, it would imply a deviation from a rather settled interpretation of the existing law⁷⁶ that only provides for small and light weapons for strictly personal protection. Any State that is willing to deviate from that interpretation must be prepared to take the consequences and “to live with the precedent.” This may lead either to the total abolishment of the protection of hospital ships or to the deployment of hospital ships whose “employment in an innocent role” and, consequently, whose specially protected status, could no longer be determined with the certainty necessary.

(Maritime) Neutrality

The Law of Neutrality is laid down in two of the Hague Conventions of October 18, 1907:

- Convention V Respecting the Rights and Duties of Neutral Powers in Case of War on Land [hereinafter Hague V];⁷⁷
- Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War [hereinafter Hague XIII].⁷⁸

There is no international treaty—apart from the 1977 Additional Protocol I (AP I)⁷⁹—dealing with aerial warfare, neutrality in aerial war or with the legal status of neutral airspace. The only authoritative document dealing with these issues is the Hague Rules on Air Warfare of 1923⁸⁰—a private draft whose customary character remains an unsettled matter.

In view of the limited time and space available we do not intend to deal here with the law of neutrality in a comprehensive way. Still, it is clear that, if applied to an international armed conflict, such as the current hostilities in Iraq, that body of law would imply far-reaching obligations of abstention and of prevention on part of those States that have decided not to take part in the hostilities.⁸¹ It needs to be

emphasized, however, that allegations of an absolute duty of neutral States to intern all members of belligerent armed forces present on their territory have no basis in the traditional law of neutrality. According to Article 11, paragraph 1, of Hague V, such an obligation presupposes that the neutral State “receives on its territory troops belonging to the belligerent armies.” This does, therefore, not apply to members of the belligerent armed forces whose presence on the neutral State’s territory is due to a status of forces agreement. Additionally, escaped prisoners of war and prisoners of war “brought by troops taking refuge in the territory of a neutral Power” shall be left at liberty. Finally, according to Article 5, paragraph 1 (in conjunction with Article 2) of Hague V, a neutral State “must not allow” the movement of belligerent “troops or convoys of either munitions of war or supplies” across its territory. This means that the neutral State is under an obligation to prevent such movements but it does not necessarily imply an obligation to intern the persons engaged in such transports. Hence, the duty of internment only applies to members of the belligerent armed forces who have already actively taken part in the hostilities and who, thus, have to be prevented from reentering the war from the territory of the neutral State concerned.

Scope of Applicability of the Law of Neutrality

It is a well-known fact that the applicability of the law of neutrality has always been a highly disputed issue. While some assert that it applies only in the context of a state of war,⁸² others maintain that that determination depends upon the more or less unrestricted decision of the non-participating States.⁸³

There is, however, only one situation in which the law of neutrality clearly does not apply—the authoritative determination by the UN Security Council that one party to an international armed conflict is the aggressor.⁸⁴ If the Security Council merely refers to its powers under Chapter VII, without expressly identifying the aggressor, it will remain unclear which State has breached the law and which State is the victim of an act of aggression or of a breach of the peace. *A fortiori*, this holds true if the Security Council remains inactive.

Still, despite the unsettled scope of applicability of the law of neutrality, and apart from situations in which the Security Council has identified the aggressor, State practice since 1945 gives sufficient evidence that that body of law has not become obsolete. That very State practice also reveals, however, that there is no longer any room for an automatic application of that law to every international armed conflict in the sense of common Article 2 of the four Geneva Conventions of 1949.

Current State of the Law of Neutrality

The parties to post–World War II international armed conflicts, as well as those States not actively taking part in those conflicts have, by their actual behavior, shown that they were not prepared to accept the automatic and comprehensive applicability of the law of neutrality, even if the situation in question, either materially or formally, amounted to a “war” proper.⁸⁵ On the other hand, international armed conflicts that were not characterized as “wars”—either by the parties to the conflict or by non-participating States or by international legal scholars—have certainly had an influence on the conduct of States not being parties to those conflicts.⁸⁶ Therefore, the doctrine of the necessity of a state of war proper, as well as the doctrine of “*status mixtus*,” lack authoritative substantiation by State practice. During international armed conflicts since 1945, the conduct of non-participating States at least indirectly gives evidence of their belief that the law of peace is not *in toto* replaced but is partially modified by the law of neutrality. It is also clear from that conduct that the legally binding effects of that body of law does not depend upon an individual decision of the non-participating States but upon the mere existence of an international armed conflict. Either those States have refrained from providing arms and other war material to the belligerents altogether, have denied providing such supplies officially, or have provided them clandestinely.

Hence, modern State practice gives proof of a functional and differential approach. As far as the relationship between States (that is to be distinguished from the relations between belligerents and neutral nationals) is concerned, the law of neutrality automatically comes into operation only insofar as the applicability of its rules is strictly necessary for the achievement of the very object and purpose of that body of law. Accordingly, during an international armed conflict, non-participating States are obliged to refrain from any act that may escalate that conflict. Especially, they are prohibited from assisting one party to the conflict in a way that may lead to a temporal, territorial or other expansion of the armed hostilities.⁸⁷ The delivery of weapons and of other war material by States is prohibited. Activities of private persons who attempt such deliveries must be prevented according to domestic laws and regulations already in effect. The territory, including the territorial sea and archipelagic waters, and the superjacent national airspace, may not be made available as a base of operations to any party of the conflict.⁸⁸ Moreover, non-participating States must take all measures necessary to prevent one of the belligerents from gaining military advantages by abusing their neutral status. Any permissions or restrictions with regard to the use of neutral territory must be applied and enforced impartially. The parties to the conflict, on their part, are obliged to respect the sovereignty of the non-participating States, as well as their territorial integrity and their economic relations with other States. The economic relations with the opposing belligerent to the

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conflict may be interfered with only according to, and within the limits of, the law of maritime neutrality. In other words, the law of neutrality sets an upper limit to the rights of the belligerent States.⁸⁹

As far as these *essentialia neutralitatis* are concerned, there is no room for a facultative stance on behalf of a non-participating State if, and as long as, it does not wish to become directly involved in the armed hostilities. Neither does their applicability presuppose the existence of a “war” or of a “state of war.” These fundamental obligations apply to every international armed conflict. It has to be kept in mind, however, that in case of a violation of these fundamental obligations of the law of neutrality by a non-participating State, the aggrieved belligerent remains free to assert its rights.⁹⁰

The functional and differential approach, which leaves aside the admissibility of belligerent measures under the law of neutrality, is based on the consideration that an effective prevention of unlawful activities of non-participating States, as well as of an escalation of an ongoing international armed conflict, can be achieved only if these upper legal limits are observed by all States concerned. As regards the further rights and duties of neutral States, their applicability will not depend upon a unilateral decision but rather on whether the belligerents are willing and able to enforce the law of neutrality that goes beyond the said *essentialia neutralitatis*. If the belligerents decide—for whatever reason—not to enforce the law of neutrality in a comprehensive manner, that abstention will have no impact upon the material contents of that body of law. Modern State practice has merely led to the abolishment of a comprehensive automatism regarding its applicability. Only this approach enables us to explain why States continue to maintain that the material contents of the traditional law of neutrality have not been modified.

Concluding Remarks

While there can be no doubt about the “reactive” character of any legal order, it has been one of the purposes of the present paper to show that an early call for a modification of the existing rules in view of new threats and necessities is not always the correct way of approaching the solution of—allegedly—new problems. Rather, a sober and not too formalistic scrutiny of the law as it stands will in most cases help identify the way in which a given situation should be addressed. Of course, it is not always comfortable or convenient to comply with the law. Considerations of military or political necessity and the need to rapidly react to new threats may suggest and justify a deviation from the law. It is, however, one of the most important achievements of civilized nations that they adhere to the law and, thus, show their respect for the rule of law even in situations in which this complicates things. In the

context of international law it should, moreover, not be left out of consideration that any deviation from the law will be a precedent closely observed by other States which may, in the near future, adopt a similar conduct. Although the precedent may have served a different, and legitimate, purpose, it may prove impossible to prevent those other States from referring to it and claiming their conduct to be in conformity with the modified law.

Notes

1. Professor Wolff Heintschel von Heinegg is a Professor of International Law at Europe-University in Frankfurt (Oder) Germany. He is a former Charles H. Stockton Professor of International Law at the US Naval War College.
2. United Nations Convention on the Law of the Sea, New York, Dec. 10, 1982, 21 INTERNATIONAL LEGAL MATERIALS 1261 [hereinafter LOS Convention]. 145 member States and entities are parties as of November 13, 2003. *See also* Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Aug. 7, 1994, UN Doc. A/RES/48/263, August 17, 1994, 33 INTERNATIONAL LEGAL MATERIALS 1309. 117 member States and entities are parties as of November 13, 2003.
3. For a comprehensive study of such claims, see J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996).
4. While the United States has continuously pursued the “Freedom of Navigation Program” which had been introduced to respond to excessive maritime claims, the European States have not yet decided on a similar program, although there have been private initiatives to that end. *See, e.g.,* Ger Teitler, *Enforcing UNCLOS: A Discussion of Means and Ends*, in THE ROLE OF EUROPEAN NAVAL FORCES AFTER THE COLD WAR 171–84 (Gert de Nooy ed., 1996).
5. For recent US practice, see J. Ashley Roach, *Container and Port Security: A Bilateral Perspective*, 18 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 341–362 (2003).
6. The first treaty dealing with terrorism was adopted in 1963, followed by other treaties in 1971, 1973, 1977, 1979, 1980, 1988, 1991, and 1998. Of special interest in the present context are: Convention for the Suppression of Unlawful Acts against the Safety of Navigation, Rome, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 INTERNATIONAL LEGAL MATERIALS 668; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf, Rome, Mar. 10, 1988, 1678 U.N.T.S. 304, 27 INTERNATIONAL LEGAL MATERIALS 685; International Convention for the Suppression of the Financing of Terrorism; New York, Dec. 9, 1999, UN Doc. A/RES/54/109, 27 INTERNATIONAL LEGAL MATERIALS 270.
7. UNSCR 1368 of September 12, 2001; UNSCR 1373 of September 28, 2001; UNSCR 1377 of November 12, 2001.
8. While it is common to speak of “Maritime Interdiction Operations,” it seems preferable to rather speak of Interception Operations in view of the wide spectrum of measures involved.
9. The term “GWOT” is of a purely political nature. According to the position taken here, it does not imply the existence of a “state of war” or of an “international armed conflict” unless military measures are directed against another State.
10. The attack on the *USS Cole*, although not committed during an international armed conflict, has demonstrated the propaganda effects of such attacks: some persons equipped with rather cheap and unsophisticated means are capable of inflicting harm to a warship of the sole remaining superpower.

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11. While this broad understanding may have been the prevailing view in the United States, in view of UNSCRs 1368, 1373, and 1377 (*supra* note 7), it is not shared by the international community as a whole. See Wolff Heintshel von Heinegg, *The Legality of Maritime Interception Operations/Interdiction Operations Within the Framework of Operation ENDURING FREEDOM*, in INTERNATIONAL LAW AND THE WAR ON TERROR 255–73 (Fred L. Borch & Paul S. Wilson eds., 2003) (Vol. 79, US Naval War College International Law Studies). See also Wolff Heintschel von Heinegg & Tobias Gries, *Der Einsatz der Deutschen Marine im Rahmen der “Operation Enduring Freedom,”* 40 ARCHIV DES VÖLKERRECHTS 145–182 (2002).
12. Accordingly, acts of domestic or internal terrorism do not trigger the right of self-defense under public international law. Note that in its resolutions the Security Council has steadily referred to “international” terrorism.
13. Note that the above list of measures is rather comprehensive. In practice, the term “Leadership Interdiction Operations” (LIO) is also used in order to distinguish between measures taken against persons and those taken against objects. This is not useful because it implies that there are two distinct (legal) concepts. However, when it comes to interference with foreign vessels it does not make a difference whether this is aimed at persons or at objects.
14. See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 207 (3d ed. 2001).
15. See Article 51 UN Charter: “[U]ntil the Security Council has taken measures necessary to maintain international peace and security.” For an evaluation, see DINSTEIN, *supra* note 14, at 185.
16. It suffices here to refer to SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶¶ 112–117 (Louise Doswell-Beck ed., 1995) [hereinafter SAN REMO MANUAL]. For a detailed analysis, see the commentary in Explanations, *id.*, at 187–95.
17. ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, chap. 8 (A. R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies) [hereinafter ANNOTATED SUPPLEMENT]. SAN REMO MANUAL, *supra* note 16, ¶ 38–77.
18. LOS Convention, *supra* note 2, art. 110. See also UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY (Vol. III) 237 (Myron H. Nordquist ed., 1995).
19. It needs to be stressed that “piracy” is rather narrowly defined in Article 101 of the LOS Convention and does not cover any form of “armed robbery at sea.”
20. On December 11, 2002, the *So San*, was seized by a Spanish frigate—acting on information from US sources—600 miles (965 km) off the Horn of Africa in the Indian Ocean. The vessel was found to be carrying 15 Scud missiles that were being shipped from North Korea to Yemen.
21. See LOS Convention, *supra* note 2, art. 110.2.
22. Note that Article 110.3 of the LOS Convention provides: “If the suspicions prove to be unfounded, and *provided that the ship boarded has not committed any act justifying them*, it shall be compensated for any loss or damage that may have been sustained” (emphasis added).
23. As for the treaties on terrorism, see *supra* note 6. In view of those treaties, it is more than doubtful whether there exists a lacuna at all. Moreover, being consensual in character, public international law only in rare cases is open for analogies.
24. Note that in its contiguous zone the coastal State, according to LOS Convention, Article 33.1(a), may only “punish infringements of [its] laws and regulations committed within its territory or territorial sea.”
25. LOS Convention, *supra* note 2, arts. 73 and 213.
26. UNSCR 1373 of September 28, 2001, at ¶ 1(d) and ¶¶ 2 (a) and (e).
27. The Security Council has been criticized for having acted as a “quasi-legislator.” However, in view of the wide margin of discretion it undoubtedly has when it comes to its primary responsibility for international peace and security and to enforcement measures under Chapter

VII, this criticism is not justified. The legally binding effect of this resolution, under Article 25 of the UN Charter, therefore allows no conclusion to the contrary.

28. For these concepts, see DINSTEIN, *supra* note 14, at 192.

29. Oil Platforms (Iran v. US), 2003 I.C.J. (Nov. 6) (Judgment (Merits)).

30. Separate Opinion of Judge Simma, *id.* ¶ 12.

31. For an overview of the practice of “war zones” during the two World Wars, see William J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW 91 (1986); E. Schmitz, *Sperrgebiet im Seekrieg*, 8 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 641–71 (1938); L.F.E. Goldie, *Maritime War Zones & Exclusion Zones*, in THE LAW OF NAVAL OPERATIONS 156–204 (H. B. Robertson ed., 1991) (Vol. 64, US Naval War College International Law Studies); Karl Zemanek, *War Zones*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (VOL. 4) 337 (R. Bernhardt ed., 2000); JURGEN SCHMITT, DIE ZULASSIGKEIT VON SPERRGEBIETEN IM SEEKRIEG (1966); George P. Politakis, *Waging War at Sea: The Legality of War Zones*, 38 NETHERLANDS INTERNATIONAL LAW REVIEW 125–172 (1991/2); Wolff Heintschel von Heinegg, *Exclusion Zones, Mines, Abuse of Neutral Flags and Insignia, Booty in Naval Warfare*, in THE GLADISCH COMMITTEE ON THE LAW OF NAVAL WARFARE 39–59 (Dieter Fleck ed., 1990).

32. R. P. Barston & P. W. Birnie, *The Falkland Islands/Islas Malvinas Conflict—A Question of Zones*, 7 MARINE POLICY 14–24 (1983); T. Orford, *Exclusion Zones at Sea: Some Observations on the Conduct of the Falkland War 1982*, 2 SEA CHANGES 91–120 (1985).

33. M. Jenkins, *Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals*, 7 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 517–549 (1985); R. Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones*, 37 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 629–644 (1988).

34. See, *inter alia*, ANNOTATED SUPPLEMENT, *supra* note 17, ¶ 2.4.4; KOMMANDANTEN-HANDBUCH (Commander’s Handbook of the German Navy), no. 115 (2002).

35. The US Navy established a 5nm warning zone around its warships in the Persian Gulf during the Tanker War in the 1980s to contend with suicide craft laden with high explosives. See GEORGE K. WALKER, THE TANKER WAR, 1980–88: LAW AND POLICY 57–8 (2000) (Vol. 74, US Naval War College International Law Studies). Following the Iraqi air-to-surface missile attack on *USS Stark* on May 17, 1987, the fixed distance criterion (i.e., 5nm) was deleted from the warning zone published in the Notice to Mariners. *Id.* at 61–2. While a 5nm zone in those waters may be reasonable vis-à-vis a small craft suicide threat, a zone broad enough to deal effectively with an air-to-surface missile threat would likely have been excessive in that setting, which may explain why the 5nm criterion was deleted rather than expanded.

36. International shipping and aviation was informed about this condition by the following “special warning”:

1. Due to recent events in the Middle East and the American homeland, US Forces worldwide are operating at a heightened state of readiness and taking additional defensive precautions against terrorist and other potential threats. Consequently, all aircraft, surface vessels, and subsurface vessels approaching US Forces are requested to maintain radio contact with US Forces on bridge-to-bridge channel 16, international air distress (121.5 MHZ VHF) or MILAIR distress (243.0 MHZ UHF).

2. US Forces will exercise appropriate measures in self-defense if warranted by the circumstances. Aircraft, surface vessels, and subsurface vessels approaching US Forces will, by making prior contact as described above, help make their intentions clear and avoid unnecessary initiation of such defensive measures.

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3. US Forces, especially when operating in confined waters, shall remain mindful of navigational considerations of aircraft, surface vessels, and subsurface vessels in their immediate vicinity.

4. Nothing in the special warning is intended to impede or otherwise interfere with the freedom of navigation or overflight of any vessel or aircraft, or to limit or expand the inherent self-defense rights of US Forces. This special warning is published solely to advise of the heightened state of readiness of US Forces and to request that radio contact be maintained as described above (162045Z NOV 2001).

37. See ROACH & SMITH, *supra* note 3, and F. C. Leiner, *Maritime Security Zones: Prohibited Yet Perpetuated*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 967–992 (1984).

38. This concept was made use of in the 19th and beginning 20th centuries and predominantly served to evade the consequences that would have arisen if a “state of war” had been recognized.

39. If at all, the Cuban Quarantine was a legitimate measure of self-defense. See, *inter alia*, C. Q. Christol & C. R. Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba, 1962*, 57 AMERICAN JOURNAL OF INTERNATIONAL LAW 525–543 (1963).

40. See the references cited at *supra* note 31.

41. SAN REMO MANUAL, *supra* note 16, ¶ 105; ANNOTATED SUPPLEMENT, *supra* note 17, ¶ 7.9; KOMMANDANTEN-HANDBUCH, *supra* note 34, no. 304; The Helsinki Principles on Maritime Neutrality, ¶ 3.3, in International Law Association (ILA), Report Of The Sixty-Eighth Conference 497 (1998) [hereinafter Helsinki Principles]; AUSTRALIAN BOOK OF REFERENCE—ABR 5179—MANUAL OF INTERNATIONAL LAW—Nov. 3, 1998.

42. Hence it is contrary to the law of naval warfare to claim: “There are two things out there: submarines and targets.” It needs to be stressed, however, that most of the doubts surrounding the employment of submarines during armed conflict have now been settled. The only merchant vessels—enemy and neutral—exempt from attack are those that are innocently employed in their normal role. If, e.g., a neutral merchant vessel is transporting enemy troops it may be attacked on sight. There is no duty to first provide for the safety of passengers, crew and the vessel’s documents.

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

44. SAN REMO MANUAL, *supra* note 16, ¶ 108; ANNOTATED SUPPLEMENT, *supra* note 17, ¶ 7.8; KOMMANDANTEN-HANDBUCH, *supra* note 33, no. 303. See also, Helsinki Principles, *supra* note 41, ¶ 3.3, which expressly recognizes the “rights of commanders in the zone of immediate naval operations.”

45. ANNOTATED SUPPLEMENT, *supra* note 17, ¶ 7.8: “A belligerent may not, however, purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic.”

46. The language was as follows:

Her Majesty’s Govt wishes to make clear that any approach on the part of Argentine warships, including submarines, naval auxiliaries or military aircraft which could amount to a threat to interfere with the mission of British Forces in the South Atlantic will encounter appropriate responses. 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.

THE TIMES (London), Apr. 26, 1982, at 5.

47. Fenrick, *supra* note 31, at 92.

48. See also references cited *supra* note 32.

49. Notice to Mariners Nos. 17/59 of September, 22, 1980; 18/59 of October 1, 1980; 20/59 of November 4, 1980; 22/59 of January 21, 1981; and 23/59 of January 21, 1981.
50. See the documentation in *THE IRAN-IRAQ WAR (1980–1988) AND THE LAW OF NAVAL WARFARE* 83 (Andrea de Guttry & Natalino Ronzitti eds., 1993).
51. Note, however, that if a “contribution to the war-sustaining effort” is considered sufficient to render an object a legitimate military objective, the illegality of the attacks on tankers during the Iran-Iraq War may not be that clear after all. Both belligerents were able to continue the war for eight years because the revenues of oil sales enabled them to purchase weapons abroad.
52. See R. Danziger, *The Persian Gulf Tanker War*, 111 *UNITED STATES NAVAL INSTITUTE PROCEEDINGS* 160–167 (May 1985); B. A. Boczek, *Law of Warfare at Sea and Neutrality: Lessons from the Gulf War*, 20 *OCEAN DEVELOPMENT AND INTERNATIONAL LAW* 239–264 (1989). See also references cited at *supra* note 33.
53. Australia: OPERATIONS LAW FOR RAAF COMMANDERS—DI (AF) AAP 1003 and AUSTRALIAN BOOK OF REFERENCE, *supra* note 41; United States: THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M/MCWP 5-2.1/COMPDPUB P5800.1) ¶ 7.9 [hereinafter COMMANDER’S HANDBOOK], in ANNOTATED SUPPLEMENT, *supra* note 17; Germany: KOMMANDANTEN-HANDBUCH, *supra* note 34, no. 304.
54. SAN REMO MANUAL, *supra* note 16, ¶¶ 105–108.
55. Helsinki Principles, *supra* note 41, ¶ 3.3:
Subject to Principle 5.2.9 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.
56. Paragraph 106 merely refers to an “exceptional measure” without specifying which measures a belligerent may take within the zone.
57. COMMANDER’S HANDBOOK, *supra* note 17, ¶ 7.9.
58. KOMMANDANTEN-HANDBUCH, *supra* note 34, no. 304.
59. Helsinki Principles, *supra* note 41, ¶ 3.3.
60. Note that the British TEZ during the Falklands/Malvinas conflict was misunderstood as being such a geographical restriction. It may be that it originally was meant to serve that purpose. However, in the course of the armed conflict the *General Belgrano* was sunk outside the TEZ. This clearly shows that a belligerent making use of the exclusion zone device ought to be as clear as possible as regards his intentions.
61. Accordingly, the States parties to Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 3, agreed on Annex I “Regulations concerning Identification.” That Annex was revised and now also allows for underwater identification. See Philippe Eberlin, *Underwater Acoustic Identification of Hospital Ships*, 229 *INTERNATIONAL REVIEW OF THE RED CROSS* 202–215 (July/August 1982). However, these modern means designed to facilitate the identification of hospital ships are far from being effective.

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62. Convention on the Law of Treaties, Vienna, May 22, 1969, 1155 U.N.T.S. 331. For an equal consideration of the other authentic texts, see J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 64, 75 (2000); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1262–63 (Yves Sandoz et al. eds., 1987).
63. The British did not want to send messages in the clear because they did not want the Argentine forces to get advance information about the possible movements of their forces. Instead, they created so-called “Red Cross Boxes” where the hospital ships were deployed and where they waited to receive wounded soldiers.
64. COMMANDER’S HANDBOOK, *supra* note 17, ¶ 8.2.3: “Use or possession of cryptographic means of *transmitting message traffic* by hospital ships is prohibited under current law” (emphasis added).
65. KOMMANDANTEN-HANDBUCH, *supra* note 34, no. 357: “Devices designed for the reception of encrypted messages should also be permitted when they are employed solely for the effective performance of humanitarian tasks.”
66. As early as 1970 the late Professor D. P. O’Connell noted that dilemma. See D. P. O’Connell, *International Law and Contemporary Naval Operations*, 64 BRITISH YEAR BOOK OF INTERNATIONAL LAW 19, 59 (1970).
67. During the Falklands/Malvinas conflict the “Red Cross Box” created considerable problems because the hospital ships were not informed prior to the arrival of the wounded and were thus not well prepared to treat them efficiently. See S. S. Junod, *La protection des victimes du conflit armé des îles Falkland—Malvinas* (1982), in DROIT INTERNATIONAL HUMANITAIRE ET ACTION HUMANITAIRE 26 (2d ed. 1985).
68. SAN REMO MANUAL, *supra* note 16, ¶ 171.
69. *Id.* ¶ 171.4.
70. *Id.* ¶ 171.5. Therefore, the participants could not agree on the formulation “may” but merely on the formulation “should be allowed to.”
71. For an early analysis of this problem, see S. L. Oreck, *Hospital Ships: The Right of Limited Self-Defense*, 114 UNITED STATES NAVAL INSTITUTE PROCEEDINGS 62–66 (Nov. 1988).
72. COMMANDER’S HANDBOOK, *supra* note 53, ¶ 8.2.3: “Hospital ships may not be armed although crew members may carry light individual weapons for the maintenance of order, for their own defense and that of the wounded, sick and shipwrecked.” Accord KOMMANDANTEN-HANDBUCH, *supra* note 33, no. 357.
73. See also THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY, II GENEVA FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 194 (Jean S. Pictet et al. eds., 1960).
74. SAN REMO MANUAL, *supra* note 16, ¶ 170; KOMMANDANTEN-HANDBUCH, *supra* note 34, no. 357.
75. D. Foxwell & R. Jolly, *The RFA Argus—A Gas-Tight, Floating Field Hospital*, 2 INTERNATIONAL DEFENSE REVIEW 116–117 (1991); A. Bouvier, *Fighting Hospital Ships*, 3 INTERNATIONAL DEFENSE REVIEW 246 (1992).
76. See references, *supra* note 72.
77. Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, Oct. 18, 1907, 36 Stat. 2277, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 87 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
78. Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, Oct. 18, 1907, 36 Stat. 2415, *reprinted in id.* at 128.
79. Note, however, that AP I regulates aerial warfare only in part. According to Article 49, paragraph 3, Articles 48–67 apply to air warfare only if it “may affect the civilian population,

individual civilians or civilian objects on land” or if air attacks are launched against “objectives on land.” Neutral air space is dealt with in the context of medical aircraft alone in Article 31.

80. Hague Draft Rules of Aerial Warfare, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 77, at 141.

81. For an overview of the rights and duties of neutral States under the traditional rules of the law of neutrality, see, *inter alia*, ERIK CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 421 (1954); L. OPPENHEIM & H. LAUTERPACHT, INTERNATIONAL LAW (Vol. II) 673 (7th ed. 1963); C. J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 627 (6th ed. 1968).

82. Then, however, the question arises of how to define “war” or a “state of war.” For those claiming a “state of war” to be a necessary precondition for the applicability of the law of neutrality, see L. KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 141 (1956); D. Schindler, *State of War, Belligerency, Armed Conflict*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 3–20 (A. Cassese ed., 1979); CASTRÉN, *supra* note 81, at 34, 423.

83. In that context, some of those authors refer to a *status mixtus*, i.e., a situation of international armed conflict not amounting to “war” proper. See G. Schwarzenberger, *Jus Pacis ac Belli?*, 37 AMERICAN JOURNAL OF INTERNATIONAL LAW 460–479 (1943); C. Greenwood, *The Concept of War in Modern International Law*, 36 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 298, 300 (1987); P. GUGGENHEIM, TRAITÉ DE DROIT INTERNATIONAL PUBLIC (Vol. II) 510 (1954); J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 313 (1959); Phillip C. Jessup, *Should International Law Recognize an Intermediate Status between Peace and War?*, 48 AMERICAN JOURNAL OF INTERNATIONAL LAW 98–103 (1954).

84. Helsinki Principles, *supra* note 41, Principle 1.2: . . . In particular, no State may rely upon the Principles stated herein in order to evade obligations laid upon it in pursuance of a binding decision of the Security Council. . . .” SAN REMO MANUAL, *supra* note 16, ¶ 7: “Notwithstanding any rule in this document or elsewhere on the law of neutrality, where the Security Council, acting in accordance with its powers under Chapter VII of the Charter of the United Nations, has identified one or more of the parties to an international armed conflict as responsible for resorting to force in violation of international law, neutral States : (a) are bound not to lend assistance other than humanitarian assistance to that State; and (b) may lend assistance to any State which has been the victim of a breach of the peace or an act of aggression by that State.”

85. Schindler, *supra* note 82, at 14; D. Schindler, *Transformations in the Law of Neutrality Since 1945*, in HUMANITARIAN LAW OF ARMED CONFLICT—CHALLENGES AHEAD—ESSAYS IN HONOUR OF FRITS KALSHOVEN 367–86 (A. J. M. Delissen & G. J. Tanja eds., 1991); Greenwood, *supra* note 83, at 297–300.

86. See references cited at *supra* note 85.

87. The validity of this obligation is confirmed by the statements of the United Kingdom: 57 BRITISH YEAR BOOK OF INTERNATIONAL LAW 638 (1987); United States: 88 US Department of State Bulletin 61 (1988)—during the Iraq-Iran War; and by the resolutions of the UN Security Council (UNSCR 540 of October 31, 1983; UNSCR 582 of October 8, 1986; and UNSCR 598 of July 20, 1987).

88. The United States attack against Cambodia was, *inter alia*, justified by the violations of the law of neutrality by that State. See the statement by the legal advisor of the Department of State, J. R. Stevenson of May 28, 1970, 62 US Department of State Bulletin 765 (May 1970). See also R. A. Falk, *The Cambodian Operation and International Law*, in THE VIETNAM WAR AND INTERNATIONAL LAW (Vol. 3) 35–57 (R. A. Falk ed., 1972).

89. For a similar approach, see Greenwood, *supra* note 83, at 299.

90. See P. M. Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARVARD INTERNATIONAL LAW JOURNAL 249, 276 (1976).