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The Tanker War, 1980-88: Law and Policy
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Chapter VII

GENERAL CONCLUSIONS AND APPRAISAL: POLICY AND LAW

The Tanker War is important for many reasons. For the belligerents, Iran and Iraq, it represented the maritime aspects of total war. For neutral Persian Gulf States the war was a major if not a dominant factor. Other neutral countries, *e.g.,* the United States, at first treated the conflict as a policy matter, *e.g.,* by proclaiming the need to maintain freedom of the seas and free access through the Strait of Hormuz, although they may have had naval or other forces in the area on routine or special operations. By the war's end in 1988, however, many countries, including the United States, were involved in the conflict in direct military action, *e.g.,* convoying, accompanying or escorting neutral merchantmen, or indirectly through mine clearance and similar operations, as well as continuing statements of policies of freedom of the seas and the right of straits passage. States aligned with the belligerents, *e.g.,* some Gulf countries, Arab League members, and other nations, *e.g.,* much of Western Europe, the USSR and the United States, dependent on Gulf oil or concerned with law of the sea, self-defense and law of armed conflict issues, became increasingly involved politically and economically. In some instances involvement came through individual States' actions, and in other cases through collective statements or actions through intergovernmental organizations, *e.g.,* the Arab League, the European Economic Community, the formerly moribund Western European Union, or the Group of Seven. Gulf States formed the Gulf Cooperation Council initially for internal security; the GCC assumed an economic and national security posture as the war continued. The Cold War-gridlocked UN Security Council also became increasingly involved as the Tanker War continued, passing resolutions condemning belligerents' deprivations of high seas freedoms, violations of the LOAC, and continuation of the war in general. The war ended with Iran's accepting Council Resolution 598, establishment of UNIIMOG to supervise a ceasefire, and neutrals' individual and collective efforts to clear the Gulf of mines.

Although some commentators date the Tanker War from 1982 or perhaps 1984 when belligerents' interceptions of and attacks on merchant ships accelerated, the war at sea actually began with the initial land battles in 1980 near the Shatt al-Arab when 70+ merchantmen were bottled up in the Shatt. The belligerents' exclusion zone proclamations and attempts to route neutral traffic came soon thereafter. By 1988 seafaring countries had suffered major tonnage losses in their merchant fleets, particularly tankers, but a worldwide glut of available bulk petroleum

carriers partly offset these losses. The number of ships lost, or declared constructive total losses, was relatively low because of merchant ships' growth in size since World War II. Nevertheless, more merchant mariners lost their lives during 1980-88 than at any time since that War; again, the number was low because of smaller-sized merchant crews on most ships. Iraqi attacks on Iran's Nowruz facilities produced a major oil spill in the Gulf; spills probably also resulted from belligerents' attacks on other enemy facilities and neutral countries' shoreside petroleum production or pumping facilities. Undoubtedly oil slicks resulted from belligerents' attacks on merchantmen or after neutral navies responded in self-defense to belligerents' maritime attacks.

Chapter II discusses these developments in more detail. And while Chapter III analyzes the Tanker War in the context of self-defense and other aspects of the *jus ad bellum* under the UN Charter, and Chapters IV (LOS issues), V (LOAC issues) and VI (law of the maritime environment) analyze LOS and *jus in bello* (*i.e.*, LOAC) problems during the war, a summary of important legal aspects of the Tanker War and projections for the future are useful here.

Part A. Self-Defense, Charter Law and Neutrality Issues[1]

After the Nicaragua Case and its applying customary law alongside the Charter, which is a treaty (albeit the most important of the post-World War II agreements because of its Article 103 trumping provision for other treaties and the possibility that parts of it may now have *jus cogens*[2] status), a principal issue arising from the war is the definition and scope of the right of self-defense. First, it is arguable, following the Case, that a parallel customary law of self-defense travels alongside Charter-based principles deriving from Article 51. Second, this customary right of self-defense may be different in content and scope from Charter-based norms and therefore subject to the balancing of sources of law usually employed in determining norms to be applied in a situation.[3] Third, if the right of self-defense is a *jus cogens* norm, as some claim, it has priority over all other rules (custom, treaties, general principles, *etc.*) except other *jus cogens* norms, *e.g.*, the law under the Charter, Article 2(4). (If self-defense is a *jus cogens* norm, it must be balanced with other *jus cogens* norms, *e.g.*, those under Article 2(4).)

The Tanker War did not resolve these issues. Indeed, belligerents' claims and counterclaims of aggression at the beginning of the war left neutrals in a legal quandary, if one subscribes to a view, characterized as nonbelligerency during 1939-41 when the United States was officially neutral, that under the Charter States may aid victims of aggression. Unlike the 1990-91 Coalition buildup against Iraq where Iraqi aggression was blatant, the 1980-88 war's record is far from clear. However, practice since 1945 seems to point to a right of countries to aid victims of aggression, the position of the International Law Association's Budapest Articles interpretation of the Pact of Paris (1928), still in force for the United States and

many countries when treaty succession principles are considered. The Pact condemns the use of war as an instrument of national policy, subject to the inherent right of self-defense.[4] The Falklands/Malvinas War is an example of aggression and neutrals' response to aid a target of aggression, the United Kingdom.

The Tanker War supplies several examples of informal collective self-defense, which continues to exist during the Charter era as a valid response, provided adequate notice of actions is given. Unlike the 1990-91 conflict, where the United States had self-defense agreements with Kuwait and perhaps other Gulf countries and the possibility of multilateral NATO involvement if Iraq had moved against Turkey to the north, there was no formal treaty arrangement proclaiming a right of collective self-defense like the soon to be defunct Warsaw Pact, the NATO treaties, or bilateral agreements the United States and many nations have negotiated since World War II. To be sure, the GCC pledged collective action in many respects, but it does not have a formal statement of collective self-defense. Nevertheless, it may be argued that the GCC engaged in informal collective self-defense actions among its members during the Tanker War.

Neutrals' cooperating to clear the Gulf of mines, and the Red Sea in the case of the 1984 Libyan mining, are other examples of informal collective self-defense. Insofar as the record indicates, there were no formal treaties proclaiming self-defense arrangements among Gulf and other States for this and similar purposes. Nevertheless, when these countries worked together to clear the seas of mines, they were in effect acting collectively to defend coastal States' shores, and countries' merchant shipping plying these waters, from the potential for mine attack.

The same might be said for cooperation to protect neutral shipping from belligerents' air and warship attacks. The US declaration that it would extend protection to foreign-flag neutral merchant ships not carrying goods destined for a belligerent, upon that neutral's request, was a third example of informal collective self-defense. The United States had a right to defend US-flag merchant ships under longstanding rules of international law; this included its right to defend Kuwaiti tankers reflagged under US law and the LOS. However, in those situations only US flagged vessels were involved; issues of collective self-defense, formal through treaty or informal through other arrangements, did not arise. When the United States published its policy of defending foreign-flag ships upon request, it legitimately acted under a right of informal self-defense as long as the policy was published, was clear, and did not otherwise violate Charter principles, *e.g.*, aiding an aggressor.

Belligerents' attacks on neutral territories, including oil production or pumping facilities, were violations of Article 2(4), and could have triggered a right of individual or collective self-defense. The same could be said about belligerents' attacks on neutral flag shipping where there were no LOAC violations (*e.g.*, fleeing legitimate belligerent attempts to exercise visit and search).

The United States claimed rights of self-defense in its responses to attacks on its warships and US-flag merchant ships. In most cases these responses were reactive in nature, *i.e.,* coming after a belligerent's attack. In some cases a response came while a belligerent was attacking or threatening attack; this invoked anticipatory self-defense issues. Commentators agree that self-defense responses, whether reactive or anticipatory, must be necessary and proportional under the circumstances. Commentators disagree on whether a right of anticipatory self-defense, which appends a requirement of no other alternative besides the response, exists in the Charter era. Given the nature of modern weaponry and its delivery systems, it would seem that a right of anticipatory self-defense, whether delivered individually by a State or collectively by countries acting in formal concert (*i.e.,* pursuant to treaty) or informally, is admissible during the Charter era. To repeat: This right of anticipatory self-defense is subject to limitations, *e.g.,* necessity, proportionality, admitting of no other alternative, and prior consultation (perhaps agreed in advance) for collective response. Responding States are bound by what their leadership knows, or would be reasonably expected to know, at the time of decision.[5] Necessity and proportionality principles for self-defense responses may be, but are not necessarily, the same as those to be observed during LOAC situations. For example, during war belligerents may attack any legitimate military target (*e.g.,* an enemy warship far from a war operations area), while self-defense proportionality may dictate a different rule (*e.g.,* a warship far from an area of attack invoking a self-defense response may or may not be a proper target under self-defense proportionality principles). Although under the majority view the right of reprisal through use of force in peacetime is no longer an option in the Charter era, countries may respond through nonforce reprisals (proportional acts that are unlawful, *e.g.,* trade sanctions in violation of trade treaties, seeking to compel an offender to observe the law) or retorsions (unfriendly acts, *e.g.,* naval forces operating on the high seas off a State's coasts). There is nothing in the US actions during the Tanker War to indicate that it violated principles of necessity and proportionality, or that there were viable alternative actions the United States could have taken in anticipatory self-defense situations, during the Tanker War, based on what the United States or its military commanders knew at the time of response. This is why, *e.g.,* the Airbus response was legitimate; based on what the *Vincennes* commanding officer knew at the time, he thought an attack was coming from an Iranian fighter. The response was necessary, proportional and admitting of no other alternative, thereby meeting the *Caroline Case* criteria, from what the commander then knew. It was a tragic mistake for which the United States paid compensation while not admitting liability.

In terms of UN Security Council lawmaking, *i.e.,* Council decisions binding as law on UN Members through Charter Articles 25 and 48, there were none that affected the war at sea. However, the Council's increasing interest in and resolutions

on the war was apparent. The Council passed Resolutions 540 and 552, confirming as a matter of supportive "soft law," rights of freedom of navigation and access to neutral ports. Resolution 598 (1987), the basis for the 1988 ceasefire, was the first Council resolution specifically referring to a breach of the peace and Articles 39-40 of Chapter VII of the Charter.

The Tanker War also illustrates the relationship between rules of engagement and the law of self-defense. US ROE, then and now, instruct commanders that regardless of options listed in the rules, the first duty is defense of the command or unit. This is coincident with the law of self-defense in the Charter era. ROE may give options that may be more restrictive than what international law might permit in a given situation.

Part B. The Law of the Sea and the Tanker War

The Tanker War illustrated two fundamental principles applicable to armed conflict and the LOS: (1) the primacy of self-defense over norms in the LOS conventions;[6] (2) the LOS, whether stated in treaties or customary law, is subject to other rules of international law, *i.e.*, the LOAC, in situations involving armed conflict at sea.[7]

As to specific LOS issues, Security Council Resolutions 540 and 552 and neutrals' protests and actions confirmed customary high seas freedoms and entry into neutral ports. The right of neutrals, including neutral warships, to unimpeded straits passage, *i.e.*, through the Strait of Hormuz, was also confirmed.

The straits passage controversy is but one more argument for ratifying the 1982 LOS Convention by major maritime powers, *e.g.*, the United States. Others on the periphery of the war include strengthening customary warship immunity rules, for which there is a gap in the 1958 LOS conventions; standards for warship innocent passage in the territorial sea; maritime environmental standards; and rules delimiting ocean areas like the EEZ, continental shelf, contiguous zone and territorial sea.[8]

Although more of an issue of admiralty and maritime law and only indirectly an LOS issue, the war demonstrated the relationship of national decisionmaking, and perhaps decisions at international levels, with private interests, *e.g.*, seafarers and their unions and the complicated web of parties (vessel owners, charterers, subcharterers, cargo interests, marine insurance) engaged in ocean trade, whether in war or peace. Arms suppliers might operate contrary to national policies, or perhaps with overt or covert governmental assistance.

Part C. The Tanker War and the Law of Armed Conflict

The Tanker War raised many issues relevant to modern warfare at sea. While Parts V.A-V.J analyze these in more detail, this Part offers summaries of important points.

1. Basic Principles: Necessity and Proportionality; ROE; the Spatial Dimension.[9]

The general factual record is not clear as to whether the belligerents generally observed LOAC principles of necessity, proportionality and distinction in attacks during the Tanker War, based on information they had or should have had when deciding on attacks. However, it is reasonably certain that these principles were not observed in specific situations, *e.g.*, mine warfare, discussed below and in Parts V.B-V.I.

The war is an example of the difference between necessity, proportionality, *etc.*, principles that must be observed under the LOAC and principles employing the same names, *e.g.*, necessity and proportionality, that must be observed in self-defense responses. What is necessary and proportional in a self-defense response, and what is necessary and proportional under the LOAC, may be entirely different. The United States observed these principles in its self-defense responses where its warships and military aircraft were under attack, or were reasonably believed to be under attack, and in its responses to attacks on merchant shipping. Whether these responses would have met LOAC standards, or whether a different and greater or lesser response would have been in order if the United States had been at war with Iran or Iraq, would have required different analysis. For example, the United States responded proportionally in self-defense in shooting to destroy Iranian naval vessels and platforms attacking it. The United States would not have been required to wait for an Iranian attack, or threat of attack under anticipatory self-defense principles, if the United States had been at war with that country.

The war also demonstrates differences in ocean spatial dimensions under the LOAC and the LOS. The LOAC recognizes only two divisions of ocean areas: the high seas and territorial waters, today equated to the territorial sea. The LOAC also differentiates between belligerents' territorial seas and territorial seas of neutrals, while the LOS has no similar differentiation. A belligerent may wage war, subject to other LOAC principles (*e.g.*, rights of neutrals, principles of humanity, *etc.*) on the high seas, in its territorial waters, in its allies' territorial waters and in enemy territorial waters. It may not wage war in neutral territorial waters. To do so violates the LOAC. It is also a violation of Article 2(4) of the Charter, if directed against the neutral coastal State, and would therefore be subject to that State's right to exercise individual and collective self-defense. It would also be a violation of LOS innocent passage rules. Thus belligerents' attacks on neutrals' coastal

installations during the Tanker War was an LOAC violation, an LOS violation to the extent that belligerents did not exercise innocent passage rules or overflew neutral territorial waters without coastal State permission, and a violation of the Charter.

The LOAC and Charter law are not the same in this context, either. For example, a belligerent may attack an enemy ship, *e.g.*, a submarine, lurking in neutral territorial seas where that neutral either cannot or will not cause the submarine to leave under the LOAC, under principles of necessity. A neutral could not attack that submarine unless threatened by it under principles of self-defense, and the standards for either attack might be the same or different. No such incidents occurred during the Tanker War, however, but this again illustrates the point of the difference between self-defense principles and LOAC principles. Nor are the LOS and the LOAC necessarily the same under the circumstances. For example, neutral warships are subject to the LOS innocent passage regime for territorial sea passage, while belligerents' warships are subject, under special LOAC rules applicable to them through the LOS other rules principle, to the LOAC during war. If a belligerent's warship within neutral territorial waters and subject to the LOAC for such passage threatens or attacks a coastal State, that coastal State has inherent rights of individual or collective self-defense besides rights it might have under the LOAC governing belligerent warship passage. Conversely, the warship retains its rights of individual and collective self-defense. The same is true for neutral warships legitimately exercising LOS rights of innocent passage. If a warship transiting under innocent passage rules attacks or threatens a coastal State, that State may respond in self-defense in addition to whatever claims it might have under the LOS. Conversely, the warship retains its rights of individual and collective self-defense.

As noted above, LOS divisions of the sea (*e.g.*, high seas fishing areas, EEZs, continental shelf waters, contiguous zones, or the Area) are high seas areas for LOAC purposes. Robertson advanced a view, which the *San Remo Manual* accepts, that belligerents must observe due regard for neutrals' rights in these areas, including neutrals' high seas rights of, *e.g.*, freedom of navigation and overflight, pipeline and cable laying, *etc.*, so long as there is no positive LOAC rule governing a situation. LOS high seas freedoms definitions of ocean areas, *e.g.*, of the EEZ, may be used in LOAC situations as rules for belligerent operations, but the two need not coincide. Where they do, there may be confusion as the sometimes muddled claims of the 1982 Falklands/Malvinas War demonstrate. Thus it was proper for Iran and Iraq to declare maritime exclusion zones, analyzed under the name of war zones in this volume, whose boundaries sometimes coincided with LOS lines, as in the case of Iranian territorial sea claims, and sometimes stretched over the high seas far beyond belligerents' EEZ claims. Whether use of these zones was lawful during the war is a different story, however.[10]

The war also raised issues of neutrals' straits passage rights during war. As Part IV.B.6 demonstrates, the LOS recognizes many varieties of international straits, depending on special treaty regimes in a few cases and geographic or LOS considerations, *e.g.*, whether a strait connects two high seas areas or otherwise, in other situations. The Strait of Hormuz, one of the Earth's great sea transportation arteries, or choke points in geopolitical terms, may have been a high seas passage strait when the war began in 1980 and a three-mile territorial sea limit, although waning as a customary norm, was in force for many countries including the United States. As such, Iran had no right to close the strait, any more than it had a right to close high seas areas for other than limited times incident to belligerent naval operations.[11] By the war's end, however, it was reasonably clear that coastal States could validly claim 12-mile territorial seas, the result being that except for perhaps a narrow sliver of high seas, unusable for navigation of all shipping but dhows, the Strait was governed by the 1982 LOS Convention transit passage regime as a matter of customary law. States' continued protests over perceived Iranian threats to close the Strait, and the majority view of commentators since 1980, combine to declare that no belligerent may close international straits like Hormuz to neutral shipping.

2. Visit and Search; Capture, Destruction or Diversion.[12]

Iran conducted visit and search operations involving neutral merchant ships it suspected of carrying goods to Iraq to sustain its war-fighting or war-sustaining effort. Iran was within its rights to conduct these operations, but attacking neutral merchantmen incident to otherwise lawful visit and search was inadmissible unless the merchant ships were attempting to evade visit and search. Iran could employ military aircraft for these operations, but these aircraft could not attack neutral merchantmen involved in visit and search operations unless these vessels were attempting to escape. Both belligerents legitimately flew aircraft over the Gulf for general surveillance as a high seas freedom, but these aircraft could not indiscriminately attack neutral merchantmen. The Tanker War strengthened the principle that belligerents may use military aircraft, including helicopters, in addition to warships for visit and search operations.

The United States and other neutrals were within their rights to convoy, escort or accompany neutral merchant ships that did not carry goods sustaining belligerents' war efforts. A neutral could convoy, escort or accompany a merchantman flying that neutral's flag, and that neutral could convoy, escort or accompany merchant vessels with other neutrals' registry if the two States agreed on this procedure. Belligerents' attacks on these formations could be met by self-defense responses. Neutrals could clear mines belligerents laid indiscriminately on the high seas, particularly those laid in shipping lanes, also under self-defense principles.

3. Belligerents' Seaborne Commerce; Belligerents' Convoys.[13]

Apparently the belligerents did not attack platforms the LOAC exempts as targets unless they contribute to the enemy war effort, *e.g.*, hospital ships or civil airliners. On the other hand, Iran and Iraq did not always discriminate between merchant ships carrying war-fighting or war-sustaining cargo for the enemy under enemy flags and innocent merchantmen with other cargoes. While it was lawful for Iraq to attack merchantmen, regardless of flag, under Iranian military convoy, it was not lawful for Iran or Iraq to attack independently-steaming merchantmen bound for neutral ports and not carrying goods for the enemy war effort. It was also not lawful for Iran to attack neutral flag merchant ships accompanied, escorted or convoyed by neutral warships.

As noted in Part C.1, it is also questionable whether Iranian and Iraqi attacks were necessary and proportional when visit, search and diversion were options, and whether under the circumstances belligerents observed humanitarian law standards in caring for merchant ship survivors after attacks, particularly in the case of Iranian surface ship actions.

Neutral-flag warships could respond in self-defense to belligerents' attacks on merchant ships flying their flag, and to attacks on other neutrals' merchant ships if the flag State requested protection. Although these responses were governed by the law of self-defense and not the LOAC, LOAC and LOS principles for succoring survivors applied in these situations, even though necessity and proportionality principles might have been different from LOAC standards for responses to these attacks. The same principles applied to what were perceived to be belligerents' attacks, or threats of attack, on neutral warships. There is no evidence that neutrals' responses were other than necessary and proportional, or admitting of no other alternative in the case of anticipatory self-defense, or that neutrals did not apply humanitarian standards after responding.

4. Neutral Flag Merchantmen: Enemy Character; Reflagging; Contraband.[14]

Neutral flag merchantmen that Iran convoyed down its coasts acquired enemy character by being convoyed. War-fighting or war-sustaining goods aboard neutral flag merchant ships preceding to or from belligerents' ports and under belligerent direction or control would also have resulted in characterization as flying an enemy flag and therefore being subject to belligerents' attack and destruction besides liability to visit, search, diversion and condemnation as prize. On the other hand, goods destined to or from neutral ports, invoiced under other than a belligerent's title, did not give a neutral flag merchant ship enemy character. These vessels were not subject to attack on this account.

During the war neutral States' merchantmen were reflagged under US or other registry. Besides qualifying as neutral flag merchant ships under the LOS, under the LOAC these vessels were considered as flying a neutral flag. Unless, *e.g.*, they

carried war-fighting or war-sustaining goods destined to or from a belligerent port while under belligerent direction or attempted to evade legitimate visit and search, they were not subject to attack on this account.

The law of contraband did not impact the war; it could have applied only to inbound cargoes destined for a belligerent. Therefore, this law did not apply to outbound shipments, nor did it apply to pipeline shipments to neutrals, even though there may have been later transshipment to neutral flag ships for sealift. The law of contraband could not have applied until 1988, when Iran published a list; contraband lists must be published before the law of contraband may be applied. That list comported generally with modern principles, allowing diversion and prize court condemnation of ships carrying war-fighting or war-sustaining cargoes destined to or from an enemy, instead of high seas seizure and later condemnation before a prize court, or current concepts of contraband, which tend to ignore publication of lists of absolute or conditional contraband and which only list goods not considered contraband, *i.e.*, free goods, or humanitarian cargoes. Although systems like navicerts or clearcerts have been used during the Charter era, *e.g.*, during the 1962 Cuban Missile Crisis, there is no evidence of employment of this option during the war.

5. The Law of Blockade and the Tanker War.[15]

There is no formal record of either belligerent's declaring a blockade, although commentators loosely mentioned blockade in their accounts, as similar sources would during the 1990-91 Gulf War. Even if these commentators reflected government sources, neither belligerent observed well-established rules for blockades, which must be noticed, be definite in area, and state a time when a blockade begins and a grace period for neutral ships to leave a blockaded area. It is doubtful whether Iraq could have maintained an effective blockade, since it had no appreciable naval assets to conduct one; paper blockades have been unlawful since the 1856 Paris Declaration. Although Iraq might have declared a blockade to be enforced by aircraft, provided those aircraft could have functioned as surface ships do in blockade, *e.g.*, communicating with merchant ships, diverting them as appropriate, or boarding them for visit and search, Iraq did not declare such a blockade. Iran's attempts to inhibit Kuwait or Saudi Arabia-bound merchant traffic by mining, warships or aircraft attacks could not have been characterized as a blockade; the LOAC does not permit blockades of neutral coasts. Thus the UN Security Council was fully justified in condemning this action in Resolution 552, in addition to the Resolution's explicit invocation of LOS principles of freedom of the seas and freedom to enter neutral ports.

Iraq refused to allow passage of trapped merchant ships out of the Shatt al-Arab at the beginning of the war. If it had done so, this would have been permissible as a

matter of international law by analogy to cartel ships passing through blockade, if a legitimate blockade of nearby high seas areas had been declared.

6. Zones: Excluding Shipping, Aircraft from Area of Belligerents' Naval Operations; High Seas Defense Zones; War Zones; Air Defense Identification Zones; Ocean Zones Created for Humanitarian Law Purposes.[16]

Although customary law, recently confirmed in publications like the *San Remo Manual* and *NWP 1-14M*, allows belligerents to exclude neutral shipping and aircraft from an immediate area of belligerent naval operations, there is no record of this during the Tanker War.

The United States published warnings of risk of self-defense responses if shipping or aircraft came within stated ranges of US forces operating in international waters. Although proclaiming these self-defense zones (SDZs) was admissible, there is no obligation to publish them. They are like warnings, usually published in NOTAMs and NOTMARs, that States may legitimately publish for peacetime naval maneuvers, which Iran published during the Tanker War for this purpose. States may use the seas beyond territorial waters for naval maneuvers if they have due regard for others' high seas/EEZ uses, *i.e.*, freedoms of navigation and overflight. States conducting peacetime high seas naval maneuvers may not exclude other shipping and aircraft from the areas of these maneuvers as they can for belligerent naval operations during war. If there is a belligerent naval operation during war that includes what would usually be considered peacetime naval operations, *e.g.*, high seas refueling in the course of war measures against an enemy, the right of exclusion applies to the ocean area(s) affected insofar as the areas and times for the operations coincide. States also have a right of self-defense at sea, for which an SDZ warning is notice. Exercise of self-defense does not require an SDZ notice as a prerequisite. A State's ROE or other national rules, perhaps stated in operation orders or plans, may require it, but this would be a national policy or national law requirement and not a rule of international law.

The belligerents published war zone notices. Although these zones were not "paper" zones, were reasonable in geographic scope and gave notice of times of application, they could not be used to justify free-fire on all shipping in these areas. If not a paper zone, (*i.e.*, a zone that a State proclaims when that State has insufficient military assets to enforce the zone) and if noticed with stated times of application and if reasonable in geographic scope under the circumstances, a war zone may be proclaimed under the LOAC. LOAC principles, *e.g.*, rules for visit and search, apply within the zone. States proclaiming a zone must have due regard for neutrals' LOS rights, *e.g.*, of freedom of navigation and overflight, and must have due regard for the maritime environment, within the zone. Neutrals' rights to respond in individual and collective self-defense also apply within a zone. Belligerents also have self-defense rights against neutral States within a zone.

Saudi Arabia proclaimed an ADIZ over the Gulf during the war; it was within its rights under international law to do so. Actions against intruding aircraft were governed by the law of self-defense, *i.e.*, responses had to be necessary and proportional, and in the case of anticipatory self-defense, admitting of no other alternative, under the circumstances of each situation, based on what the responsible commander, which might have been a single aviator in the case of solo flights to investigate an intruder, knew or should have known at the time.

7. Weapons and Weapons Use; Mine Warfare.[17]

There were two principal issues connected with weapons and weapons use during the Tanker War; shore bombardment from the sea and mine warfare at sea. Although Iraq used poison gas against its opponent in the land war during 1980-88, there is no record of its use in the sea war. Intermediate range ballistic missiles were employed during the War of the Cities, but these were land-launched and hit land-based targets, an issue outside the scope of this volume.

There were attacks delivered from over the sea against land-oriented targets, *e.g.*, belligerents' strikes against oil platforms in enemy territorial seas and other offshore zones and shore facilities. Shore-based aircraft, perhaps flying over the Gulf, and perhaps belligerents' naval assets, delivered these attacks. The record is not clear as to the lawfulness of these operations in terms of compliance with rules for naval bombardment from the sea or air. Whether notice if appropriate was given; whether Hague IX and Hague Air Rules standards, articulating general necessity and proportionality standards; whether civilian objects or historical, artistic, scientific or hospital sites were involved; whether belligerents attacked areas where the civil population was concentrated; whether attacks were designed to and did terrorize the civil population; or whether attacks followed general LOAC principles of necessity and proportionality; is not clear from the available evidence. If the nature of attacks on Gulf shipping or the War of the Cities and other land-based aspects of the war are indicators, there is a high likelihood that some or all of these principles were at issue, and that there were LOAC violations. It is quite likely, *e.g.*, that general principles of necessity and proportionality were violated, an example being the result of attacks on Iran's Nowruz facility in 1983, resulting in a large oil spill into the Gulf. We do not know with certainty, from the available record, whether and when LOAC violations occurred. These principles for shore bombardment, whether from aircraft or warships, applied to the Tanker War, however. Possible charges of LOAC violations are not proven in most cases.

The record of mine warfare during the war is better documented. In unleashing what was in some cases unrestricted mine warfare, *e.g.*, employing mines that did not deactivate after becoming unmoored or laying mines in neutral shipping lanes and perhaps neutrals' territorial waters, the belligerents violated general LOAC principles of discrimination, necessity and proportionality. Failure to publish

minefield locations or to give alternative routes around a minefield were also LOAC violations, as was Iran's laying mines off neutral coasts solely to intercept shipping. Iran's mining the Strait of Hormuz in an attempt to deny international straits passage to neutral vessels also violated the LOAC.[18]

During the war neutral navies engaged in mine countermeasures. International law permitted sweeping of unlawfully laid mines in international waters, and in neutrals' territorial seas with approval of the neutral coastal State. The law of self-defense also authorized these actions.[19]

8. Other Humanitarian Law Issues.[20]

Parts V.A-V.G and VII.C.1-VII.C.7 have analyzed LOAC questions that arose, or may have arisen, during the Tanker War. There were also humanitarian law issues related to merchant ship crews trapped in the Shatt al-Arab in 1980, rescuing those in peril on the sea, and neutral repatriations of belligerent armed forces members.

If crew stranded in the Shatt al-Arab were aboard vessels that had not acquired enemy character, they were protected persons under the Fourth Convention and were entitled to be returned home promptly. If aboard vessels that had acquired enemy character, they had prisoner of war status. However, these PW mariners were entitled to repatriation at cessation of hostilities in 1988, and not 10 years later, when many PW's were repatriated. If seriously ill or wounded, they should have been repatriated long before 1998. If internees under the Fourth Convention, they should have been returned at the end of hostilities.

US forces rescued surviving crew of the minelayer *Iran Ajr* after the US self-defense response. These crew members and remains of dead crew were turned over to Omani Red Crescent officials, who repatriated them to Iran. The United States also picked up Iranian Revolutionary Guards boat crew members after they went overboard during another US self-defense response. Two died aboard US Navy ships; the remains and the survivors were turned over to Omani Red Crescent officials, who sent them to Iran. After the US self-defense response against the Rostum oil platforms, Iranian tugs were allowed to pick up survivors. As a technical matter, the law of self-defense covered these situations, but the United States acted properly, following LOAC principles in rescuing survivors, or allowing them to be rescued. To the extent that other mariners were in peril after other self-defense responses, *e.g.*, the US response to Iranian warship attacks, the same principles applied.

These situations might be contrasted with a US rescue of an Iraqi pilot whose plane was shot down by an Iranian air-to-air missile; the basic rule of assisting those in peril on the sea, common to the LOS and the LOAC, applied. (The United States turned the pilot over to Saudi Arabian Red Crescent officials, who repatriated him to Iraq.) The same principles applied in other rescues of merchant

mariners in peril after belligerents' attacks on merchant ships; there is no positive record of this, but LOS and LOAC principles applied to these situations as well.

Although under humanitarian law the neutral Red Crescent officials of Oman and Saudi Arabia should have detained the Iranian crews and the Iraqi pilot until the end of hostilities, the opposing belligerents did not protest any of these actions. Therefore, it can be argued that the opposing belligerent acquiesced in their premature repatriation.

9. Deception During Armed Conflict at Sea: Ruses and Perfidy.[21]

There are no reported ruses of war, lawful or unlawful, adopted by belligerents during the war. There are no reports of perfidious conduct. Other neutrals' actions may have been deceptive in nature, but they could not be considered ruses, since neutrals employed them. These included warships' painting pendent numbers black instead of white on black in the case of US warships to minimize reflective surfaces attractive to missiles. As long as a warship displays its pendent number, the LOAC is indifferent to its coloration. The same is true of nonreflective paint for general hull coating or hull configuration to make the vessel relatively invisible to missile radar, or emission control to minimize electronic radiations that might attract missiles or invite attack.

Although there were situations where ships might have flown flags other than those of their registry States (the proposal to use the UN or ICRC ensign to extract merchantmen trapped in the Shatt early in the war, and the proposal late in the war for a UN flotilla), these possibilities did not come to fruition. False flags issues therefore did not arise.

No perfidy issues arose when merchantmen began tailing neutral naval convoys or simulating convoys during the night. This might have put the neutrals at greater risk. However, since they were neutral flagged, and perfidy applies to belligerents' conduct, no perfidy issue arose. Similarly, neutral merchant vessels that were painted grey like warships did not raise a problem of perfidy.

Part D. The Tanker War and the Law of the Maritime Environment[22]

The Tanker War's impact on the Gulf maritime environment is less than clear. The only recorded major environmental disaster occurred when Iraq attacked Iran's Nowruz offshore oil installations in 1983. Even if it could be argued that the Kuwait Regional Convention and Protocol did not apply between the parties because of law of treaties principles like suspension or termination during war, the law of treaties says that the Convention and Protocol continued to govern relations between belligerents and neutrals unless suspended or ended under theories of impossibility of performance or fundamental change of circumstances.[23] However, there were necessarily petroleum spills from vessels' bunkers or tankers split open or sunk by belligerents' attacks or during neutrals' self-defense responses. Thus,

although Chapter VI is largely theoretical when applied to the Tanker War, as media coverage of Iraq's outrageous and unlawful behavior during the 1990-91 Gulf War demonstrated, environmental issues are likely to arise and become major considerations in future conflicts.

The law of the environment as expressed in regional agreements, *e.g.*, the Kuwait Convention and Protocol, is subject to important qualifications. First, these treaties, like all international agreements, are subject to the Charter and its principles, *e.g.*, the right of self-defense.[24] Second, regional agreements cannot be inconsistent with general LOS Convention standards.[25] Third, like general LOS principles affecting navigation, *etc.*, they are subject, through the LOS Conventions' restatement of the other rules principle, to the LOAC in certain situations.[26] Fourth, any treaty-based norms must be balanced against other sources, *e.g.*, custom.[27] Fifth, any attempt to declare the right to a clean, healthful environment as a human right is subject to the human rights conventions' derogation clauses and to general law of treaties provisions dealing with LOAC situations, *e.g.*, impossibility of performance, fundamental change of circumstances, and the impact of armed conflict on treaty obligations.[28]

Although there is little positive law governing environmental protection during war, many LOAC norms offer incidental but important protection to the environment if observed. These include rules, many of which are also customary norms, stated in, *e.g.*, the 1907 Hague Conventions, the Hague Air Rules, the Geneva Gas Protocol, the 1949 Geneva Conventions, cultural property treaties like the 1954 Hague Cultural Property Convention, ENMOD, Protocol I to the 1949 Geneva Conventions, and the Conventional Weapons Convention and its protocols. Although these treaties are often site, object or warfare method specific, many (*e.g.*, Hague IX, Protocol I, Conventional Weapons Convention) restate customary rules applying to all warfare, *e.g.*, military objective, necessity, proportionality and limiting actors' liability to what they knew or should have known when they directed an attack. There seems to be no need for international agreements to govern environmental protections during naval warfare.

Modern military manuals analyzing the place of the LOS and environmental considerations during war at sea say due regard should be paid to neutrals' LOS rights and obligations and to the environment without specifying whether there should be one or two due regard applications, *i.e.*, one governing LOS obligations and another for the environment, or a single due regard analysis taking into account LOS and environmental policies and law. In some cases there is no clear statement of the place of positive rules of law, *e.g.*, in treaties governing the LOAC, in connection with environmental protection. As Robertson persuasively argues, the first step is to apply positive rules; if there are none, a due regard principle should govern for environmental considerations. Chapter VI advocates a single due regard principle, taking into account LOS issues and environmental principles. A

single due regard principle, not necessarily the same one as in LOAC situations, should also apply in self-defense situations where LOS and/or environmental considerations are at issue. Chapter VI also offers a factorial analysis for defining due regard.

Part E. Projections for the Future

With the USSR's demise and the breakup of other countries, *e.g.*, Czechoslovakia and Yugoslavia incident to the end of the Cold War, many trends portend for the future of armed conflict situations at sea and the law governing them. As Chapters II-VI demonstrate and McDougal and his associates have theorized, the law governing these situations is interactive with many factors, including values at stake; participants with different and perhaps multiple perceptions that range from the individual to the intergovernmental organization; situations that include time, geography, the degree of organization, and relative crisis level; what assets can be brought to bear on a situation; coercive or persuasive strategies that include military force, diplomacy, ideology, or financial strength; short-range outcomes and long-range effects to be achieved, after which goals should be clarified, past trends described, conditions affecting those trends evaluated, future trends predicted, and policy alternatives at that point reviewed.[29] This multifactor analysis should be no stranger to national or international planners or defense analysts, who have used variants for years.[30] Part E.1 discusses some geopolitical and other trends emerging during the Tanker War; Part E.2 follows with trends in the law related to them.

1. Geopolitical and Other Trends Emerging During the Tanker War.

The separatist disintegration of the USSR into Russia and the USSR's component republics, and a possibility of further spinoffs from Russia, today a federation of semiautonomous areas, and dismemberment of Yugoslavia and Czechoslovakia, have been echoed in other countries. These include, *e.g.*, Canada (the Quebec separatist movement, establishment of a separate Inuit province), China (Tibet), India and Pakistan (the festering Kashmir dispute), Indonesia (East Timor and other parts of that archipelago), Iraq and Turkey (Kurds), Italy (tensions between northern and southern Italian cultures), Mexico (native Americans in southern Mexico), Spain (Basque areas), the United Kingdom (separate legislatures in Scotland and Wales) and all across Africa, where colonial boundaries often divide territories in which native populations of sometimes very different ethnic origins live on different sides of lines.[31] If the end of the Cold War ended fears of Soviet dominance and a perceived need for association with the United States while remaining a cohesive State or nonalignment but with a cohesive facade for possible unified opposition to the USSR in the case of Yugoslavia and maybe other countries, and if Soviet dominance, now removed, has been a catalyst for expressing pent-up desires

for separation (the case of the USSR itself, Yugoslavia and Czechoslovakia), the result in some areas has been clustering around other ideologies, *e.g.*, tribalism,[32] messianic and sometimes fanatic or fundamental religion (a factor in the 1980-88 Iran-Iraq war[33]), or political separatism, which continues to bedevil Russia today, even after the breakup of the Soviet Union.

On the other hand, Europe, including countries beset with internal separatist movements (*e.g.*, Italy, Spain, the United Kingdom) has been moving through the European Union toward greater economic and political integration that may prevent international wars that have ravaged it during the Twentieth Century.[34] In the Western Hemisphere the United States, emerging in political, economic and military strength as the only superpower, has joined its neighbors in the North American Free Trade Agreement, a northern hemisphere free trade zone with a promise of developing even stronger economies for its members and a potential for expansion to Central and South America. The Arab League remains a potential force for cohesive action, as does the GCC,[35] formed during the Tanker War.

Today the United Nations has over 180 Members, virtually all countries on Earth except Switzerland. If it is too early today to determine whether the United Nations, acting through Security Council decisions[36] to maintain international peace and security, the Cold War era (1947-91), with the risk of a Permanent Council Member veto,[37] was certainly no measure of the UN's potential. However, Council resolutions promoting freedom of navigation were a positive indicator of the UN's potential for the future.[38]

The result of these developments may lie in an even more pluralistic world society, in which even the smallest and relatively weakest countries may choose to go their own way rather than being coerced or guided by the more powerful. Add to that the possibility of ethnic or religious fanaticism, and the possibility of national decisions not guided by political, economic or legal considerations emerges. And although certain areas of the Earth are relatively stable and prosperous due to economic integration (the EU, NAFTA), or are relatively prosperous, *e.g.*, the United States, budget expenditures for defense, and therefore naval forces, are down worldwide.

With the Soviet threat gone, a rationale for maintaining large and expensive armed forces is not as strong for many countries, including the United States. This comes when the potential for use of armed forces is more multipolar than at any time since 1945. Many similar situations involving use of forces occurred during the Cold War as before it,[39] but the principal thrust of national policies has changed dramatically since 1991.[40] One indicator of this has been the US Navy's "From the Sea" emphasis on littoral warfare as distinguished from a blue water high seas confrontation with the Soviet Union.[41] One result is that navies may be called upon to do more with less. The newer and economically weaker States may decide to employ cheaper weapons, as distinguished from the relatively

sophisticated (and expensive) weaponry that nations like the United States have. The United States and other major naval powers will be called on to counter these threats as well as more sophisticated weaponry, including adversaries' use of the Internet.[42]

The beginnings of this were apparent during the Tanker War.

Although the mechanisms for formal collective enforcement of the peace were available from 1980 through 1988, ending the war was as much a result of the belligerents' mutual exhaustion as any outside pressure. The European Economic Community, now the EU, and the Group of Seven passed resolutions, but these were of no effect; there was no legal authority behind them. The GCC was politically and militarily weak, sometimes divided on which side to support during the war. The Arab League was similarly divided, at least until the end of the war. Although NATO and WEU countries cooperated with each other and other nations, including GCC countries, Gulf naval operations were geographically "out of area" for both organizations. In the main the result was individual State action, or informal cooperation, for or against belligerents, with some countries (*e.g.*, the United States, the USSR) seemingly tilting either way, depending on circumstances. The United Nations, with its potential for Security Council action that might have ended the war sooner, did little until 1987, when Resolution 598, passed under Chapter VII of the Charter, called upon the belligerents to end the war but did not decide[43] on action. Given the end of the Warsaw Pact, and the possibility of flareups around the world where established alliances, *e.g.*, NATO or the Rio Pact, do not apply, might this be the trend for future crises?

Iranian Islamic fundamentalism was a factor in starting the war in 1980; it may well have been a factor in prolonging it until that country was totally exhausted in terms of its economy, national morale and military forces. Planning for suicidal attacks on Gulf shipping apparently was part of Iran's strategy late in the war, and this factor was echoed in at least neutral responses. The amended US SDZ announcements for a *cordon sanitaire* around US forces was one manifestation, and clearly the reason for the Airbus tragedy lay in US fears of a *kamikazi*-style aerial crash on a US warship analogous to the Beiruit truck bombing of the Marine barracks in Lebanon. The media carry almost daily accounts of ethnic or religious-based violence; unquestionably this sort of advocacy may influence national decisionmaking involving future naval wars.

Although the USSR, many European powers and the United States ordered naval forces to the Gulf or augmented forces already there, it became apparent that no single naval power, not even the United States, had the kind of forces to meet all contingencies. US lack of mine countermeasures ships and forces and dependence on Western European navies is one example; acceptance of US offers for defense of other countries' merchantmen is another. Even at the Cold War's height and as the USSR and its navy and merchant marine began declining, there were not enough

naval forces available to go around. The same was true for the contemporaneous Falklands/Malvinas War (1982), when neither belligerent could bring overwhelming naval force to bear. This might be compared with the Korean War (1950-53) or the Cuban Missile Crisis (1962), where there were plenty of naval assets to prosecute policy.

It is virtually impossible to negotiate a treaty to regulate specific weaponry in an age of rapid technological development. At the same time, for those countries with less robust economies or defense budgets, there is the option of cheaper, often indiscriminate weapons, *e.g.* sea mines whose technology may date back 100 years. For countries, *e.g.*, the United States, with economic potential and industrial bases for relatively sophisticated and expensive systems, there is the dilemma of having to meet sophisticated threats while maintaining the capability for countering more traditional but equally deadly weapons. The close-in rapid fire gun as a final defense against missile or suicide aircraft attacks on warships is an example of a response to a threat as old as World War II's *kamikazis*, where the proximity fuse and the 3-inch rapid-fire gun responded to these attacks. Lack of adequate mine countermeasures forces during the Tanker War is an example of the inability of a relatively sophisticated navy to meet and overcome a traditional, one might say archaic, weapon threat. One further problem for the future might be marrying traditional technology with inexpensive but sophisticated components, *e.g.*, using the Internet to trigger traditional devices at great distance and little cost to a country, either in manufacturing the device or means of communicating it. Fortunately for neutrals involved in the Tanker War, this variant did not occur.

Another factor that became apparent in the Tanker War was the interest of parties other than States or international organizations. These included arms suppliers, seafarers of many nations, their unions, ship owners and others involved in ocean carriage (charterers, subcharterers, cargo interests, marine insurers), that might involve still more countries' interests in a conflict. This was really a repetition of behind the scenes situations in earlier conflicts. For example, the US World War II Lend-Lease program of supplying arms began before Pearl Harbor. The pattern of parties involved in oceanic cargo transport is nearly the same as it has been for years, the major changes being the advent of larger and more automated merchantmen, smaller crews, and a greater use of open registry (flag of convenience) shipping. This trend will continue in the future and may become even more complicated with the growth of large transnational companies.

2. Developments in the Law: Trends for the Future.

Invoking the inherent right of self-defense, particularly unit and individual countries' claims for a right of anticipatory self-defense, is more likely in the pluralistic world of the next millenium. This is so for several reasons. First, the multilateral and bilateral self-defense alliances developed during the Cold War had a

goal of containing the potential opponent(s), *i.e.*, the USSR and the Soviet bloc by NATO, ANZUS, and bilateral treaties like those between Japan and the United States and Korea and the United States, or their complimentary opposites, the Warsaw Pact and a web of bilaterals between the USSR and its satellites, the latter now all defunct. Second, navies the world over are downsizing, in part due to the Cold War's end and in part because of the spiraling cost of modern naval vessels. The era of large fleet exercises as contemplated during the Cold War[44] may be over. Naval vessels that remain to patrol the world oceans, and merchant ships as well for that matter, remain expensive assets. They are also quite vulnerable to attacks, particularly by missiles that kill with the first strike. This new technology suggests that countries are more likely to act preemptively, at displays of hostile intent rather than hostile acts, to protect these scarce and increasingly valuable naval assets. An increased concern for human life, including the lives of military personnel threatened by these kinds of attacks, is also a major factor. As long as principles of proportionality, necessity and the availability of no other alternative are observed, based on information known or what should have been known at the time, countries may successfully invoke anticipatory self-defense to justify responses in these situations.

As long as new permanent Security Council Member veto issues do not arise, increased Council lawmaking through its decisions may be the order of the day in future conflicts, perhaps started with assertions of the right of individual or collective self-defense. Whether this will be true is less than clear. An active General Assembly, where there is no veto but also no authority to enact positive rules of law in these situations, may contribute to lawmaking through supporting resolutions asserting principles of law. The same may be true in other international organizations, *e.g.*, IMO, a UN specialized agency, and the ICRC, a nongovernmental organization.

Law of the sea issues will continue to arise. A major contributing factor to this may be US failure to ratify the 1982 LOS Convention. Although the Convention's navigational articles largely restate customary norms today, as the United States delared nearly 20 years ago, custom can change through practice accepted as law. However, if the LOS Convention becomes a worldwide treaty-based norm as the 1949 Geneva Conventions have for humanitarian law during war, the number of sources for applying the Convention's terms as law has doubled.[46] And while ratification is not an absolute assurance that the law will not change, since a contrary custom can develop to outweigh treaty-based norms, the risk of change through evolving custom may be halved, particularly since many nations stress the importance of treaties. For issues related to potential naval warfare situations, *e.g.*, warship innocent passage and straits passage, the difference could be critical. This is particularly true where there is an interface between LOAC standards and LOS

principles that are relatively hazy because of the nature of custom in a world of over 180 countries, most of them with seafaring capability.

If future wars at sea involve ever more sophisticated naval assets opposing sophisticated military assets, the result necessarily will be resort to traditional general LOAC principles, *e.g.,* target discrimination, military objective, necessity and proportionality. For these kinds of conflicts, present treaty law or other attempts to specify particular weapons use under particular circumstances will almost always be outrun by human inventiveness. The same can be said about wars involving less sophisticated weapons, whether opposed by technologically advanced systems or more traditional devices. Some warfare methods, particularly those that are by nature indiscriminate, *e.g.,* poison gas or bacteriological weapons, are, will be, and should be, outlawed. Beyond this, however, the law of naval warfare will remain as it has been for centuries, largely a corpus of custom and general principles.

The maritime environment will continue to be an important factor in naval warfare considerations. Although there was one reported environmental catastrophe during the Tanker War, the 1983 Nowruz spill, it was the 1990-91 war that resulted in massive destruction of the environment at sea, in the air and on the land. Given greater public awareness through the media and today the Internet, the environment may become a major force in national and international decision-making. Here too widespread ratification of the LOS Convention will help; its comprehensive terms for protection should promote due regard for the maritime environment, in connection with due regard for neutrals' LOS Convention rights, by belligerents. Moreover, many LOAC treaties, most of which restate customary norms, offer protection for the environment if States observe these standards.

3. Final Thoughts.

Future conflicts at sea, like the Tanker War and in reality all wars, are likely to be multidimensional in terms of participants, levels of participants, organization of participants, interests of participants (economic or otherwise), relative sophistication of participants (*e.g.,* in weapons available to them), perspectives of participants (perhaps based on ethnic or religious persuasions instead of nationalism or ideologies like communism), and factors participants must consider (*e.g.,* Charter law, neutrality or shades of it, the general LOS, LOAC principles, the maritime environment). Despite a growing number of international organizations and new countries which may attempt to harness the worst or best intentions of humanity, the beginning of the next millenium may be more pluralistic, more integrated and at the same time more disintegrated than at any recent time before.

NOTES

1. For further analysis of the issues, *see generally* Chapter III.

2. *See* n. III.10 and accompanying text.

3. *See, e.g.,* ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03.

4. Pact of Paris, n. III.160.

5. Other limitations may include examination of LOAC principles, *e.g.,* prohibitions on attacking some targets under the LOAC (*e.g.,* hospital ships), or collective self-defense arrangements' terms (*e.g.,* treaty provisions).

6. UN Charter, arts. 51, 103.

7. *See, e.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2.

8. For a recent analysis, advocating US ratification of the LOS Convention as part of a comprehensive international oceans policy, *see generally* GEORGE V. GALDORSI & KEVIN R. VIENNA, BEYOND THE LAW OF THE SEA: NEW DIRECTIONS FOR U.S. OCEANS POLICY (1997), discussing other key features of the Convention not at issue in the Tanker War, *e.g.,* archipelagic waters, the Area, islands, marine scientific research and dispute resolution through peaceful means.

9. For further analysis, *see* Parts V.A.5, VII.A.

10. *See* Parts V.F.2, V.F.5, VII.C.6.

11. For analysis of belligerents' temporary closure of high seas areas for naval operations during war, *see* Parts V.F.1.a, V.F.5, VII.C.6.

12. For further analysis, *see* Part V.B.2.

13. For further analysis, *see* Part V.C.5.

14. For further analysis, *see* Part V.D.4.

15. For further analysis, *see* Part V.E.3.

16. For further analysis, *see* Part V.F.5.

17. For further analysis, *see* Part V.G.1, V.G.3.

18. *See also* Parts IV, V.A.5, VII.A, VII.C.1.

19. *See also* Parts III-IV, VII.A, V.D.1.

20. For further analysis, *see* Part V.H.

21. For further analysis, *see* Part V.I.2.

22. *See* Chapter VI for further analysis.

23. Vienna Convention, arts. 61-62.

24. UN Charter, arts. 51, 103.

25. LOS Convention, art. 237.

26. *E.g.,* LOS Convention, art. 87(1); High Seas Convention, art. 2; *see also* Part B.

27. *See, e.g.,* ICJ Statute, arts. 38, 59; RESTATEMENT (THIRD) §§ 102-03.

28. *E.g.,* Civil & Political Rights Covenant, art. 4; Vienna Convention, arts. 61-62.

29. *See generally* Moore, *Prolegomenon,* n. III.1, 662-72; McDougal *et al., Theories,* n. III.2, 189-206; McDougal *et al., The World,* n. III.1; Suzuki, n. III.1, 23-27; Walker, *Sea Power,* n. III.1, 310-14, analyzing the analytical method of, *e.g.,* MCDOUGAL & BURKE 1-52; MCDOUGAL & FELICIANO 1-59; MCDOUGAL, LASSWELL & CHEN chs. 1-4; MCDOUGAL *et al.,* LAW AND PUBLIC ORDER, n. III.1, ch. 1.

30. *See, e.g.,* THEODORE W. BAUER, REQUIREMENTS FOR NATIONAL DEFENSE 47-111 (1975); KEN BOOTH, NAVIES AND FOREIGN POLICY 136 (1977); KLAUS KNORR & OSKAR MORGENSTERN, POLITICAL CONJECTURE IN MILITARY PLANNING (1968); E.S. Quade, *Introduction* to ANALYSIS FOR MILITARY DECISIONS (Quade ed. 1964); Demitri B. Shimkin, *The Social Sciences and National Defense: Trends, Potential and Uses,* 30 NWC REV. 41 (No. 1, 1977); Snyder, n. VI.649; John E. Starron, Jr., *Approaches to Decisionmaking, in* MANAGEMENT: CONCEPTS AND PRACTICE 88-108 (Fred R. Brown ed., 4th

ed. 1977); Larry N. Tibbetts, *A Practitioner's Guide to Systems Analysis*, 28 NWC REV. 21 (No. 3, 1976); Walker, Sea Power, n. III.1, 307-08; N. Clark Williams, *Decision Analysis: Toward Better Naval Management Decisions*, 27 NWC REV. 39 (No. 1, 1974). Alfred Thayer Mahan's influential INFLUENCE OF SEA POWER UPON HISTORY (1890) employed similar broad-based analytical techniques. Thomas B. Buell, *Admiral Edward C. Kalbfus and the Naval Planner's "Holy Scripture": Sound Military Decision*, 25 *id.* 31 (No. 5, 1973); Charles W. Cullen, *From the Kriegsacadamie to the Naval War College: The Military Planning Process*, 21 *id.* 6 (No. 1, 1970) and Snyder trace evolution of the military planning process from last century's German General Staff through World War II naval planning to current work at the Naval War College. For a current example of command and control warfare, *see, e.g.*, US Chairman of the Joints Chiefs of Staff, Joint Doctrine for Command and Control Warfare (C2W) ch. 5 & Appendix A (Joint Pub. 3-13.1, Feb. 7, 1996).

31. For the story of some of these developments through late 1992, *see generally* Walker, *Integration and Disintegration* 4-13.

32. *See, e.g.*, Walter Goldstein, *Europe After Maastricht*, 71 FOREIGN AFFAIRS 117, 123 (No. 5, 1992); Robert S. Wood, *Europe: Transfigured or Transfixed?*, 45 NWC REV. 20, 22-23 (No. 4, 1992).

33. *See, e.g.*, nn. II.13, 505, 514 and accompanying text.

34. *See generally* Walker, *Integration and Disintegration* 12-25.

35. *See* nn. II.543-545 and accompanying text.

36. *See* UN Charter, arts. 25, 48, 103.

37. *See id.*, art. 27(3).

38. *See* n. II.537 and accompanying text.

39. *See, e.g.*, CABLE (tracing employment of naval forces in "gunboat diplomacy" missions, 1919-94), James D. Watkins, *The Maritime Strategy, in The Maritime Strategy*, 112 PROCEEDINGS 8 (Supp. Jan. 1986) (more than 60 uses of limited naval force between 1970 and 1979, at height of Cold War).

40. *Compare, e.g.*, President of the United States, A National Security Strategy for the United States (Oct. 1998) (noting expanded alliances like NATO; NATO's Partnership for Peace and its partnerships with Russia, Ukraine; free trade through the World Trade Organization, n. III.949, and moves toward free trade areas in the Americas; arms control; multinational coalitions to combat terrorism, corruption, crime, drug trafficking; binding commitments to protect the environment and safeguard human rights in contexts of smaller scale contingencies and major theater warfare, perhaps involving weapons of mass destruction); Chairman of the Joint Chiefs of Staff, National Military Strategy of the United States of America: Shape, Respond, Prepare Now: A Military Strategy for a New Era (1997) (same) *with* President of the United States, National Security Strategy of the United States (Mar. 1990) (US policy as USSR was in a state of collapse) *and, e.g.*, NORMAN FRIEDMAN, THE US MARITIME STRATEGY (1988) (naval strategy based on blue-water, deep ocean confrontation with the USSR); Watkins, n. 39 (same).

41. *Compare, e.g.*, Friedman, n. 40; Watkins, n. 39; *with* US Department of the Navy, 1999 Posture Statement: America's 21st Century Force chs. 1-2 (1999) (Posture Statement); Sean O'Keefe *et al.*, ... From the Sea: Preparing the Naval Service for the 21st Century (Sept. 1992); John H. Dalton *et al.*, Forward ... from the Sea (1994), analyzed *in* Edward Rhodes, *"... From the Sea" and Back Again: Naval Power in National Strategy in the Second American Century, in* STRATEGIC TRANSFORMATION AND NAVAL POWER IN THE 21ST CENTURY 307, 322-30 (Pelham G. Boyer & Robert S. Wood eds. 1998).

42. Posture Statement, n. 41, 42, 51, 55; *cf.* Arthur K. Cebrowski, *President's Notes*, 52 NWC REV. 4 (No. 3, 1999). In 1999 the Naval War College convened an information warfare symposium; a forthcoming *International Law Studies* volume will publish the symposium papers. *See* STRATEGIC TRANSFORMATION, n. 41, for excellent essays on trends in national strategy and naval power for the next century.

43. *Cf.* UN Charter, arts. 25, 48, 103.

44. For an exegesis of this in the Cold War context at the end of the Tanker War, *see generally* FRIEDMAN, n. 40.

45. *See* ICJ Statute, art. 38(1)(b); RESTATEMENT (THIRD) § 102.

46. ICJ Statute, art. 38(1); RESTATEMENT (THIRD) §§ 102-03.