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Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice

Sandesh Sivakumaran

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Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice

*Sandesh Sivakumaran**

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I. INTRODUCTION

Maritime exclusion zones have been described as “one of the most controversial issues in the law of armed conflict at sea” and as an issue “that remains unresolved.”¹ Part of the reason for the controversy relates to the potential infringement on the freedom of the high seas which, since the time of Grotius, has been seen as open to all States.² Another part of the explanation relates to the lack of consistent State practice and the diversity of States’ views on the subject of exclusion zones. State parties to armed conflicts in which exclusion zones were utilized took the view that they were justified, either for an exceptional reason, for example, as a belligerent reprisal, or due to a rule of law that authorized them. The justifications thus varied considerably, with significant consequences for when exclusion zones could be used. By contrast, States that were not parties to the armed conflicts criticized them, sometimes as unlawful for interfering with the freedom of the high seas, or remained silent on their legality.³ This difference of opinion extended to commentators. Whereas some commentators observed in no uncertain terms that exclusion zones were unlawful, others expressed the view, in equally clear terms, that exclusion zones were lawful.⁴ The uncertainty was not helped by different terms being used to describe the same practice, such as “war zones,” “exclusion zones” and “barred areas,”⁵ and by

1. Christopher Michaelsen, *Maritime Exclusion Zones in Times of Armed Conflict at Sea: Legal Controversies Still Unresolved*, 8 JOURNAL OF CONFLICT & SECURITY LAW 363, 364 (2003).

2. See HUGO GROTIUS, *THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* 28 (James Brown Scott ed., Ralph Van Deman Magoffin trans., Oxford Univ. Press 1916) (1608); Convention on the High Seas art. 2, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; United Nations Convention on the Law of the Sea art. 87, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

3. See Part III.

4. Compare, for example, the views of GEORGE POLITAKIS, *MODERN ASPECTS OF THE LAWS OF NAVAL WARFARE AND MARITIME NEUTRALITY* (1998) with W.T. MALLISON JR., *STUDIES IN THE LAW OF NAVAL WARFARE: SUBMARINES IN GENERAL AND LIMITED WARS* 74 (1968) (Vol. 58, U.S. Naval War College International Law Studies).

5. The term “exclusion zone” will be used in the present article, unless a different term is used by a party to an armed conflict, such as the term “war zone” in the Iran–Iraq armed conflict. See *infra* Part III.D.

certain similarities with associated concepts such as “defensive bubbles,” the “immediate area of operations,”⁶ and “blockades.”⁷

This article traces the evolution in the law and practice of exclusion zones and argues that the zones have gone through three distinct phases. The first phase of the exclusion zone—and Part II of the present article—corresponds to the use of exclusion zones in the Russo-Japanese War of 1904–5. In that war, exclusion zones were defensive in character, modest in size and located adjacent to the State that authorized their creation. Part III explores the second phase of their evolution, which saw them transformed into something rather different. During the First World War, and in a number of wars and armed conflicts that followed, if a vessel was within an exclusion zone, it was deemed susceptible to attack. This was true regardless of whether the vessel was a neutral or belligerent one. Exclusion zones of this period were also far larger in size than the exclusion zones of the Russo-Japanese War and were located, in certain instances, at quite some distance from the coast of the State that authorized them. The start of the third (and present) phase of exclusion zones, discussed in Part IV, can be traced to the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, which was adopted in 1994.⁸ That Manual transformed the law and practice of exclusion zones. In particular, it separated out the establishment of the zone from the enforcement of the zone and specified that the same law applies within the zone as outside it. It also set out regulations for the zones should they be created. The *San Remo Manual* has had a considerable effect on States’ views of exclusion zones, as is evident from the manuals of a number of States that have been published since the *San Remo Manual*. The *San Remo Manual* thus ushered in a third phase of exclusion zones, one that is fundamentally different from the phases that preceded it.

6. The immediate area of operations is “that area within which hostilities are taking place or belligerent forces are actually operating.” In that area, “a belligerent may establish special restrictions upon the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering.” SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 183 (Louise Doswald Beck ed., 1995) [hereinafter SAN REMO MANUAL].

7. A blockade is “the blocking of the approach to the enemy coast, or a part of it, for the purpose of preventing ingress and egress of vessels or aircraft of all States.” *Id.* at 176.

8. SAN REMO MANUAL, *supra* note 6.

II. DEFENSE ZONES: THE RUSSO-JAPANESE WAR

The first armed conflict in which an exclusion zone was established was the Russo-Japanese War of 1904–5. Shortly prior to the outbreak of that war, Japan issued an ordinance which read as follows:

ART 1. In case of war or emergency, the minister of the navy may, limiting an area, designate a defence sea area under this ordinance. . . .

ART. 3. In the defence sea area, the ingress and egress and passage of any vessels other than those belonging to the army or navy are prohibited from sunset to sunrise.

ART. 4. Within the limits of naval and secondary naval ports included in a defence sea area the ingress and egress and passage of all vessels other than those belonging to the army or navy are prohibited.

ART. 5. All vessels which enter, leave, pass through, or anchor in a defence sea area shall obey the direction of the commander in chief of the naval station, or the commandant of the secondary naval station, concerned. . . .

ART. 8. Any vessel which has transgressed this ordinance, or orders issued under this ordinance, may be ordered to leave the defense sea area by a route which shall be designated.

Regarding vessels which do not obey the order mentioned in the preceding paragraph, armed force may be used when necessary. . . .⁹

Pursuant to the ordinance, some twelve or so strategic areas were designated. These included, among other sites, “the bays at Tokio, the waters about the Pescadores Islands, those adjacent to the naval stations of Sazebo and Nagasaki, [and] the Tougaru straits.”¹⁰ In certain places, the strategic areas extended to some ten miles from the coast,¹¹ beyond the three mile limit, which was, at the time, the maximum extent of the breadth of the territorial sea recognized in international law. In these places, then, the strategic area covered portions of the high seas.

Japan thus sought to limit access to certain waters to vessels other than those of its navy. It did so by prohibiting the movement of other vessels

9. See Imperial Ordinance No. 11 (Jan. 23, 1904), reprinted in INTERNATIONAL LAW SITUATIONS WITH SOLUTIONS AND NOTES 1912, at 122 (1912) (Vol. 12, U.S. Naval War College International Law Studies), <https://www.usnwc.edu/getattachment/f6af26bc-a409-40d1-949c-498c3507e5f5/Vol-12---International-Law-Situations-with-Soluti.aspx> [hereinafter INTERNATIONAL LAW SITUATIONS 1912].

10. 1 JAMES GARNER, INTERNATIONAL LAW AND THE WORLD WAR 351 n.2 (1920).

11. *Id.*

between sunset and sunrise, and by prohibiting movement of such vessels at all times near its naval ports. Vessels that were permitted to move within the restricted areas were required to follow the instructions of the relevant commander. More detailed rules were issued governing the movement of vessels in the restricted areas.¹² Vessels that did not follow the ordinance, or did not follow the more detailed rules, were required to leave the defensive area along a particular route, a requirement which could be enforced by armed force.

In at least one instance, a neutral vessel that was found in the restricted area was condemned as prize. A Japanese warship captured the *Quang-nam*, a steamship flying the flag of France, following its entry into the protected area around the Pescadores Islands. The Prize Court at Sasebo held:

That she purposely chose the difficult passage between Formosa and the Pescadores on the pretence of going to Manila . . . was evidently for the purpose of reconnoitring the defences near these islands, and the movements of the Japanese Squadron. . . . When a ship, though neutral, has taken part in reconnoitring the defences and the movements of a squadron for the assistance of the enemy, as in this case, her condemnation is allowed by International Law.¹³

On appeal, the Higher Prize Court took a similar position.¹⁴ The presence of the vessel in the strategic area reportedly “seemed to be a circumstance that weighed against its release and an evidence of unneutral service.”¹⁵ Notably—and contrary to the practice during the second phase of exclusion zones—although the merchant vessel was found in the restricted area, it was not attacked; rather, it was captured and condemned as prize.

The defense zones used by Japan did not meet with protest on the part of other States. Commentators also considered them lawful. A belligerent, it was said,

12. See, e.g., Rules governing the Strategic Area at Nagasaki, issued by the Commander in Chief of Sasebo, reprinted in INTERNATIONAL LAW SITUATIONS 1912, *supra* note 9, at 125.

13. See 2 RUSSIAN AND JAPANESE PRIZE CASES 343, 346 (Sir Cecil James Barrington Hurst & Francis Edmond Bray eds., 1913).

14. *Id.*

15. INTERNATIONAL LAW SITUATIONS 1912, *supra* note 9, at 128. *But cf.* POLITAKIS, *supra* note 4, at 39 n.8 (arguing that the case was one of “unneutral service rather than war zone running”).

is entitled to regulate the use of his territorial waters in such fashion as shall be necessary for his well-being. Similarly a belligerent may be obliged to assume in time of war for his own protection a measure of control over the waters which in time of peace would be outside of his jurisdiction.¹⁶

This was considered to be “undoubtedly sanctioned by the customary law.”¹⁷

The nature of the exclusion zone was transformed fundamentally in the practice of the international armed conflicts that followed the Russo-Japanese War. Whereas exclusion zones during that war were defensive in their nature, those utilized in later armed conflicts, starting with the First World War, were tantamount to free-fire zones. Such is the difference between the two practices that the zones of the Russo-Japanese War are barely discussed in much of the literature on exclusion zones. Nonetheless, the Japanese zones are important as they are the precursor to the better known exclusion zones that were used during the First World War.

III. FREE-FIRE ZONES: FROM THE FIRST WORLD WAR TO THE IRAN-IRAQ ARMED CONFLICT

A. First World War

During the First World War, Germany planted mines in the high seas and in the territorial waters of neutral States. Reports at the time suggested that mines were being laid by fishing vessels and by ships flying the flag of neutral States.¹⁸ As a result, Great Britain instituted a number of measures, including the laying of mines, the closure of ports on the eastern coast of England to neutral fishing vessels and the adoption of “special measures of control” over the waters of the North Sea contiguous to the English coast.¹⁹ Within certain designated zones, neutral fishing vessels were to be “treated as under suspicion of being engaged in mine laying for Germany

16. INTERNATIONAL LAW SITUATIONS 1912, *supra* note 9, at 128.

17. JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES AND WAR LAW 572 (1954).

18. GARNER, *supra* note 10, at 329. *See also* COLEMAN PHILLIPSON, INTERNATIONAL LAW AND THE GREAT WAR 377 (1915).

19. GARNER, *supra* note 10, at 329 n.1. Other States adopted similar measures. *See* POLITAKIS, *supra* note 4, at 42.

and, if caught in the act . . . sunk.”²⁰ This led to a protest on the part of the Netherlands, which contested the measures adopted as “an encroachment upon the right of neutral fishermen to exercise in a peaceable manner their trade in the open seas.”²¹

On November 3, 1914, Britain issued an admiralty notice, which recalled the mining of the seas on the part of Germany and provided:

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

All merchant and fishing vessels of every description are hereby warned of the dangers they encounter by entering this area except in strict accordance with Admiralty directions. . . .

Ships of all countries wishing to trade to and from Norway, the Baltic, Denmark, and Holland are advised to come, if inwards bound, by the English Channel and Straits of Dover. There they will be given sailing directions which will pass them safely. . . .

By strict adherence to these routes the commerce of all countries will be able to reach its destination in safety, so far as Great Britain is concerned, but any straying, even for a few miles, from the course thus indicated may be followed by serious consequences.²²

Over the months and years that followed, further minefields were laid, and the area extended.²³

For its part, on February 4, 1915, Germany issued a decree establishing an exclusion zone. After recalling the measures taken by Great Britain, the decree provided that Germany:

20. GARNER, *supra* note 10, at 329 n.1.

21. *Id.*

22. British Admiralty Notice No. 1706 (Nov. 3, 1914), *reprinted in* GARNER, *supra* note 10, at 333.

23. *See* Telegrams from Ambassador W.H. Page to the Secretary of State (Jan. 25 & Feb. 15, 1917), *reprinted in* 4 DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE WITH BELLIGERENT GOVERNMENTS RELATING TO NEUTRAL RIGHTS AND DUTIES 47–48 (1918).

[T]herefore finds itself under the necessity, to its regret, of taking military measures against England in retaliation for the practice followed by England. Just as England declared the whole North Sea between Scotland and Norway to be comprised within the seat of war, so does Germany now declare the waters surrounding Great Britain and Ireland, including the whole English Channel, to be comprised within the seat of war, and will prevent by all the military means at its disposal all navigation by the enemy in those waters. To this end it will endeavor to destroy, after February 18 next, any merchant vessels of the enemy which present themselves at the seat of war above indicated, although it may not always be possible to avert the dangers which may menace persons and merchandise. Neutral powers are accordingly forewarned not to continue to entrust their crews, passengers, or merchandise to such vessels. Their attention is furthermore called to the fact that it is of urgency to recommend to their own vessels to steer clear of these waters. It is true that the German navy has received instructions to abstain from all violence against neutral vessels recognizable as such; but in view of the hazards of war, and of the misuse of the neutral flag ordered by the British government, it will not always be possible to prevent a neutral vessel from becoming the victim of an attack intended to be directed against a vessel of the enemy.²⁴

Germany's exclusion zone was extended and, by January 1917, included the waters around Great Britain, France, Italy and the eastern Mediterranean.²⁵ The notice informing of the extension of the zone came with the warning that "[a]ll ships met within that zone will be sunk."²⁶ Exceptionally, American merchant vessels were allowed safe passage along a designated route subject to very specific conditions.²⁷

Great Britain and Germany thus each effectively instituted zones covering large tracts of water which interfered with neutral shipping. There were, however, important differences both between the zones established by the two States, as well as between those zones and the zones established by Japan immediately prior to the Russo-Japanese War.

24. German Decree of February 4, 1915, *reprinted in* GARNER, *supra* note 10, at 335.

25. GARNER, *supra* note 10, at 337.

26. Message from the German Ambassador to the Secretary of State (Jan. 31, 1917), *reprinted in* NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS 1943, at 55 (1945) (Vol. 43, U.S. Naval War College International Law Studies), <https://www.usnwc.edu/getattachment/a8dd9e0d-792b-4a10-a886-cbc5db4fb9a7/Vol-44---International-Law-Documents--1943.aspx>.

27. *See* GARNER, *supra* note 10, at 337.

Britain heavily mined certain waters, but made provision for safe passage through the mined area, providing sailing directions to the masters of vessels. The laying of mines was regulated by Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines.²⁸ Reportedly, no neutral vessels were destroyed or damaged as a result of the mines laid by Britain while navigating the area.²⁹ Britain also did not engage in attacks on neutral shipping.³⁰ However, neutral vessels had to travel hundreds of miles off-route in order to reach particular destinations. This interfered with the freedom of the seas and with neutral shipping, and consequently led to protest.³¹

For its part, Germany's exclusion zones not only interfered with the freedom of the seas for neutral shipping, but the decree establishing them indicated that Germany would "endeavor to destroy" enemy merchant vessels that were found in the exclusion zone. Indeed, according to one account, in the first six months following the entry into force of the decree, seventy-eight British merchant vessels and eighty-two fishing craft were sunk.³² Furthermore, the decree went on to specify that neutral merchant vessels were susceptible to attack "in view of the hazards of war, and of the misuse of the neutral flag ordered by the British government."³³ Germany did not issue instructions to masters of vessels to enable safe passage along particular sea routes, and many neutral merchant vessels were indeed destroyed.³⁴

Many of the sinkings were contrary to the international law rules of the time. The standard response to enemy merchant vessels was visit, search and seizure. Enemy merchant vessels could be sunk if they were taking a direct part in hostilities,³⁵ or if they resisted visit "after having been duly signalled to do so."³⁶ Enemy merchant vessels sailing in convoy with enemy

28. Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, Oct 18, 1907, 36 Stat. 2332, T.S. No. 541.

29. GARNER, *supra* note 10, at 336.

30. W.J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW 91, 96 (1986).

31. *See infra*, pp. 162–64.

32. J.W. Garner, *Some Questions of International Law in the European War (VII): War Zones and Submarine Warfare*, 9 AMERICAN JOURNAL OF INTERNATIONAL LAW 594, 606 (1915).

33. German Decree of Feb. 4, 1915, *supra* note 24.

34. *See* Garner, *supra* note 32, at 609–11.

35. W. J. Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 29 CANADIAN YEARBOOK OF INTERNATIONAL LAW 238, 244 (1991).

36. 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 226 (1912).

warships were deemed to be resisting.³⁷ In limited—and disputed—circumstances, a captured enemy merchant vessel could also be sunk.³⁸ Neutral merchant vessels also benefitted from significant protection. The general remedy for the carriage of contraband was condemnation of the goods and/or the vessel.³⁹ Likewise, the remedy for unneutral service was condemnation of the vessel.⁴⁰ Accordingly, the vessel had to be taken into port to determine the legality of the capture. Captured neutral vessels could be sunk only in limited—and again disputed—circumstances and only if all persons on board were placed in safety and all the ship’s papers and certain documents were taken on board the warship.⁴¹ Neutral merchant vessels were subject to the same treatment as that afforded to enemy merchant vessels in certain circumstances, namely, where the vessel was taking a direct part in the hostilities, if the vessel was “under the orders or control of an agent placed on board by the enemy Government,” if it was “in the exclusive employment of the enemy Government,” or if it was “exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.”⁴² Accordingly, although it was disputed as to precisely in which situations merchant vessels could be attacked, even the broadest approach considered attacks authorized only in limited situations. Thus, the standard response remained visit, search and seizure.

The British and German measures met with protests. Following the issuance of the British admiralty notice, the Netherlands criticized the laying of mines and, on the issue of the exclusion zone, expressed the view that:

[A]ccording to the law of nations, the immediate sphere of military action alone constitutes a “military zone” in which the right of belligerent police may be exercised. A body of water of the area of the North Sea could not be considered in its whole extent as such a sphere of operations. In thus treating this region as a military zone, the British government was com-

37. Fenrick, *supra* note 35, at 244.

38. See J.W. Garner, *Some Questions of International Law in the European War (IX): Destruction of Neutral Merchant Vessels*, 10 AMERICAN JOURNAL OF INTERNATIONAL LAW 12 (1916); HANS WEHBERG, CAPTURE IN WAR ON LAND AND SEA ch. VII (1911).

39. Declaration Concerning the Laws of Naval War arts. 39, 40 (Feb. 26, 1909), <https://www.icrc.org/ihl/INTRO/255?OpenDocument>. The Declaration did not enter into force.

40. *Id.*, art. 45.

41. See *id.*, arts. 48–51.

42. See *id.*, art. 46.

mitting a grave infraction upon the freedom of the seas, a principle recognized by all nations.⁴³

The United States likewise expressed disquiet. The Secretary of State wrote to the British Ambassador:

As the question of appropriating certain portions of the high seas for military operations, to the exclusion of the use of the hostile area as a common highway of commerce, has not become a settled principle of international law assented to by the family of nations, it will be recognized that the Government of the United States must, and hereby does, for the protection of American interests, reserve generally all of its rights in the premises, including the right not only to question the validity of these measures, but to present demands and claims in relation to any American interests which may be unlawfully affected, directly or indirectly, by virtue of the enforcement of these measures.⁴⁴

Likewise, Garner considered the proclamation of the military area to be “a serious infringement upon the principle of the freedom of the seas,” although he went on to note that “in extenuation of the measure . . . safety lanes were provided, and every endeavor was made by the admiralty to insure the safety of neutral navigation within the area.”⁴⁵

Britain responded to the Netherlands on the issue of the laying of mines, but did not respond to the portion of the protest concerning the exclusion zone.⁴⁶ Elsewhere, Britain justified its exclusion zone as “an exceptional measure, appropriate to the novel conditions under which this war is being carried on,”⁴⁷ and as a reprisal.⁴⁸

Germany’s exclusion zone also met with protest on the part of neutral States, including Greece, Italy, the Netherlands and the United States.⁴⁹ Akin to its protest to Britain, the Netherlands protested that the exclusion zone unlawfully encroached upon the principle of the freedom of the

43. GARNER, *supra* note 10, at 345.

44. Telegram from the Secretary of State to the British Ambassador (Feb. 19, 1917), reprinted in 4 DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE WITH BELLIGERENT GOVERNMENTS RELATING TO NEUTRAL RIGHTS AND DUTIES 49 (1918).

45. GARNER, *supra* note 10, at 352–54.

46. *Id.* at 345.

47. *Id.* at 333.

48. STONE, *supra* note 17, at 573; ERIK JOHANNES SAKARI CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY 310 (1954).

49. GARNER, *supra* note 10, at 350.

seas.⁵⁰ The U.S. protest concerned the attacks on neutral shipping, rather than the establishment of the zone itself. It observed:

It is of course not necessary to remind the German Government that the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise the right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no just presumption that all ships traversing a prescribed area are subject to the same suspicion. It is to determine exactly such questions that this Government understands the right of visit and search to have been recognized.⁵¹

The language of the protest demonstrates just how remarkable Germany's actions were considered to have been. Germany responded to the note, denouncing Britain's actions and justifying its decree as a "counter measure," and as being necessary to "compel her adversary to conduct maritime warfare in accordance with international law and thus to reestablish the freedom of the seas."⁵² At the same time, Germany conceded that there was no rule in the law of naval warfare that allowed it to take such measures, describing its measures as "new forms of maritime war."⁵³ In-

50. *Id.* at 351 (citing *Recueil de Diverses Communications du Ministère des Affaires Étrangères aux États Généraux par Rapport à la Neutralité des Pays-Bas et au Respect du Droit des Gens* 94–96 (1916)).

51. Note from U.S. Ambassador to Germany to German Secretary of Foreign Affairs (Feb. 10, 1915), *reprinted in* DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE WITH BELLIGERENT GOVERNMENTS RELATING TO NEUTRAL RIGHTS AND COMMERCE 54 (1915).

52. Letter from the German Minister for Foreign Affairs to [U.S.] Ambassador Gerard (Feb. 16, 1915), *reprinted in* DEPARTMENT OF STATE, DIPLOMATIC CORRESPONDENCE WITH BELLIGERENT GOVERNMENTS RELATING TO NEUTRAL RIGHTS AND COMMERCE 56, 58 (1915) [hereinafter Letter from the German Minister for Foreign Affairs]. For an assessment of the claim, see MALLISON, *supra* note 4, at 65–69; Maxwell Jenkins, *Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals*, 8 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 517, 531–32 (1985).

53. Letter from the German Minister for Foreign Affairs, *supra* note 52, at 58.

deed, Garner characterizes the decree as “so flagrantly contrary to the laws of maritime warfare that nothing can be said in defence of it.”⁵⁴ And the German decree of January 1917 “was the chief cause of the outbreak of war between Germany and various American republics, including the United States.”⁵⁵

Following its entry into the war, the United States established “defensive sea areas,”⁵⁶ akin to those created by Japan immediately prior to the Russo-Japanese War. The sea areas were proclaimed around ports and harbors on the Atlantic coast and extended from two to ten miles.⁵⁷ Regulations were adopted governing the identification of vessels; entry into, and exit from, the designated areas; and the speed of travel.⁵⁸

The neutral States of Italy, Greece and Turkey also established security zones off their coastlines. Some of these extended to three miles, thus corresponding to the breadth of a State’s territorial sea.⁵⁹ The security zones of other States extended beyond this limit, to nine miles beyond the territorial sea in the case of Ecuador and two miles beyond in the case of Argentina.⁶⁰ The belligerents protested against some of these zones but not others; however, none of the zones were effectively enforced.⁶¹

In sum, the exclusion zones established during the First World War covered large areas of the high seas and involved the destruction of enemy and neutral merchant vessels. Neutral States condemned the attacks on neutral merchant vessels and, in some cases, also the very creation of the zones. The zones were justified by the States that enacted them by reference to reprisals and as novel measures in light of the prevailing circumstances, not through a suggestion that international law authorized their creation. As a result, their otherwise illegal nature was confirmed.

54. GARNER, *supra* note 10, at 352–54.

55. *Id.* at 346.

56. Exec. Order No. 2584 (Apr. 5, 1917), *reprinted in* 12 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 13 (1918).

57. GARNER, *supra* note 10, at 352.

58. Regulations for Carrying into Effect the Executive Order of the President Establishing Defensive Sea Areas (Apr. 5, 1917), *reprinted in* 12 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 16 (1918).

59. Frederick C. Leiner, *Maritime Security Zones: Prohibited Yet Perpetuated*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 967, 975 (1984).

60. *Id.*

61. *Id.* at 975–76.

B. Second World War

1. Neutral States

On October 3, 1939, shortly after the outbreak of the Second World War, neutral States in the Americas issued the Declaration of Panamá, which established a maritime neutrality zone. The preamble of the Declaration noted that “there can be no justification for the interests of the belligerents to prevail over the rights of neutrals causing disturbances and suffering to nations which by their neutrality in the conflict and their distance from the scene of events, should not be burdened with its fatal and painful consequences.”⁶² The operative part of the Declaration provided that:

As a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air.⁶³

The waters stretched from the U.S.-Canada border, south along the coast of the American continent, and out to sea for approximately three hundred miles.⁶⁴ The Inter-American Neutrality Committee issued regulations in April 1940, which prohibited “any hostile act or . . . any belligerent activities, such as attack, aggression, detention, capture or pursuit, the discharge of projectiles, the placing of mines of any kind, or any operation of war whether carried out from land, from sea, or from the air” in the zone.⁶⁵

The Declaration of Panamá did not purport to bind the belligerents without their consent. Instead, the signatories agreed to endeavor to secure

62. Declaration Adopted by the Meeting of the Foreign Ministers of the American Republics at Panamá (Oct. 3, 1939), <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000003-0608.pdf> [hereinafter Declaration of Panamá].

63. *Id.*

64. DANIEL PATRICK O’CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 162 (1975).

65. Inter-American Neutrality Committee, Recommendations Submitted to the Governments, Members of the Pan-American Union, The Security Zone Created by the Declaration of Panamá (Apr. 27 1940), *reprinted in* 35 *AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT* 38 (1941).

the compliance of the belligerents with the Declaration,⁶⁶ but the belligerents did not agree to comply. In December 1939, the German warship *Graf Spee* entered the zone while engaged with British warships; Britain and Germany had also sunk merchant vessels within the zone.⁶⁷ Accordingly, the signatories of the Declaration protested against the violations of the zone.⁶⁸ In response, the belligerents argued that their consent was required in order for the zone to operate. Britain argued that “the proposal, involving as it does abandonment by belligerents of certain legitimate belligerent rights, is not one which, on any basis of international law, can be imposed upon them by unilateral actions and that its adoption requires their specific assent.”⁶⁹ France and Germany responded in a similar manner.⁷⁰

A month or so after the adoption of the Declaration, on November 4, 1939, the United States declared a segment of the Atlantic Ocean to be a “combat area.” U.S. citizens vessels, and aircraft were prohibited from entering it.⁷¹ The measure was designed to protect U.S. citizens from the effects of the war,⁷² and was thus an exclusion zone of a very different sort. It only purported to limit the movement of U.S. nationals and was not enforced in the same way as the other exclusion zones.

2. Belligerent States

Almost from the outset of the war, Germany established exclusion zones. On November 24, 1939, Germany sent a note to neutral States, in which it referred to the creation of the combat area by the United States and to the British practice of using merchant vessels for aggressive purposes, and warned that

66. Declaration of Panamá, *supra* note 62, ¶ 2.

67. American Republics’ Statement on the “Graf von Spee” Incident (Dec. 23, 1939), reprinted in INTERNATIONAL LAW SITUATIONS 1939, at 69 (1940) (Vol. 39, U.S. Naval War College International Law Studies), <https://www.usnwc.edu/getattachment/e78b1004-e8a1-4f30-bd93-3544cdd23a2c/Vol--39---International-Law-Situations--1939.aspx>.

68. *Id.* at 70.

69. Belligerents’ Reply to Neutrality Zone Protest, reprinted in INTERNATIONAL LAW SITUATIONS 1939, *supra* note 67, at 71.

70. *Id.* at 74, 76. See also Fenrick, *supra* note 30, at 101 (noting that the belligerents did not protest “over-loudly” as Britain depended on the support of the United States and Germany sought not to antagonize the United States).

71. Proclamation 2376, Defining Combat Areas Under the New Neutrality Act of 1939 (Nov. 4, 1939), <http://www.presidency.ucsb.edu/ws/?pid=15832>.

72. *Id.*

in view of the fact that the actions are carried on with all the technical means of modern warfare, and in view of the fact that these actions are increasing in the waters around the British Isles and near the French coast, these waters can no longer be considered safe for neutral shipping.⁷³

The note went on to recommend the use of certain shipping routes, the use of which would not endanger neutral shipping.⁷⁴ The danger of sailing in the waters around Great Britain and France did not stem solely from the possibility of being caught in the hostilities, or due to possible misidentification of a vessel. As recounted by counsel for Admiral Dönitz at Nuremberg: “[s]tarting in January [1940] the German command . . . opened up to the German naval forces, within the operational area announced, certain accurately defined zones around the British coast, in which an attack without warning against all ships sailing there was admissible.”⁷⁵ The *Dönitz* judgment recounts some of the orders to attack vessels:

On 1 January 1940, the German U-Boat command, acting on the instructions of Hitler, ordered U-Boats to attack all Greek merchant ships in the zone surrounding the British Isles which was banned by the United States to its own ships and also merchant ships of every nationality in the limited area of the Bristol Channel. Five days later a further order was given to U-Boats “to make immediate unrestricted use of weapons against all ships” in an area of the North Sea, the limits of which were defined. Finally, on 18 January 1940, U-Boats were authorized to sink, without warning, all ships “in those waters near the enemy coast in which the use of mines can be pretended.” Exceptions were to be made in the cases of the United States, Italian, Japanese and Soviet ships.⁷⁶

73. Note, excerpted in 18 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 328 (1948), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XVIII.pdf [hereinafter 18 TRIAL OF THE MAJOR WAR CRIMINALS].

74. *See id.*

75. *Id.*

76. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 558 (1948), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XXII.pdf [hereinafter 22 TRIAL OF THE MAJOR WAR CRIMINALS].

For its part, on May 8, 1940, the United Kingdom announced an exclusion zone in the Skagerrak. As the First Lord of the Admiralty stated before the House of Commons: “The usual restrictions which we have imposed on the actions of our submarines were relaxed. As I told the House [of Commons], all German ships by day and all ships by night were to be sunk as opportunity served.”⁷⁷

In the exclusion zone, during the day when identification was easier, only German ships could be sunk. This included all German ships, whether warship, auxiliary or merchant vessel. At night, all ships could be sunk, including neutral merchant vessels. According to commentators, it was “highly unlikely” that neutral ships were passing through the Skagerrak at the time in which the usual restrictions were relaxed;⁷⁸ and that it was “most probable” that German merchant vessels were “either armed or participating in the German naval war effort” such that they could be attacked.⁷⁹ Even assuming this to be the case, the relaxing of the measures had the effect that the “unlikely” situation in which a neutral merchant vessel was present or a German merchant vessel was unarmed and participating in neutral trade would not be taken into account. What may have been highly likely or most probable was transformed into a blanket practice.

A few months later, on August 17, 1940, Germany sent a declaration to neutral States, in which it stated that the area the United States had previously declared to be a combat area was an operational zone and that “[e]very ship which sails in this area exposes itself to destruction not only by mines but also by other combat means.”⁸⁰ As recounted by counsel for Dönitz, “[f]rom this time on the area was fully utilized and the immediate use of arms against craft encountered in it was permitted to all naval and air forces, except where special exceptions had been ordered.”⁸¹ Unlike the note of November 24, 1939, safe shipping routes were not provided. Following the U.S. entry into the war, Germany extended the “zone of operation in which fighting may be expected” to much of the Atlantic Ocean. It

77. 360 Parl Deb HC (5th ser.) (1940) col. 1351 (UK).

78. MALLISON, *supra* note 4, at 86. *See also*, Fenrick, *supra* note 30, at 100 (considering it “unlikely”).

79. MALLISON, *supra* note 4, at 86.

80. 18 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 73, at 329.

81. *Id.*

warned that “[e]very ship which enters this zone after June 26, 1942, will expose itself to destruction.”⁸²

As in the First World War, no differentiation was made between different categories of vessel, for example, between merchant vessels and warships, or between various uses of merchant vessels, for example, neutral trade and the laying of mines. Vessels were targeted by reason of their presence within the zone.

Following its entry into the war, the United States engaged in unrestricted submarine warfare. On December 7, 1941, in a secret message to the Commander in Chief of the U.S. Pacific Fleet, the U.S. Chief of Naval Operations ordered: “EXECUTE AGAINST JAPAN UNRESTRICTED AIR AND SUBMARINE WARFARE.”⁸³

No mention was made of the zone in which unrestricted air and submarine warfare was to take place, but, in practice, it amounted to the Pacific Ocean areas.⁸⁴ In the interrogatories put to Admiral Nimitz, during the Dönitz trial, Nimitz indicated that “[f]or the purpose of command of operations against Japan the Pacific Ocean areas were declared a theater of operations” and that “[t]he Chief of Naval Operations on 7 December 1941 ordered unrestricted submarine warfare against Japan.” In response to a question as to whether it was “customary in such areas for submarines to attack merchantmen without warning with the exception of her own and those of her Allies?” Admiral Nimitz responded, “Yes, with the exception of hospital ships and other vessels under ‘safe conduct’ voyages for humanitarian purposes.”⁸⁵

Despite suggestions to the contrary,⁸⁶ in this instance it appears that an exclusion zone was not formally established. A proclamation establishing an exclusion zone was not issued and a warning was not given to neutral States to avoid certain areas. Rather, a secret message was sent to U.S. Na-

82. Berlin Radio Broadcast Recorded by the Columbia Broadcasting Company, *NEW YORK TIMES*, June 15, 1942, *reprinted in* INTERNATIONAL LAW DOCUMENTS 1941, at 158, 159 (1943) (Vol. 41, U.S. Naval War College International Law Studies), <https://www.usnwc.edu/getattachment/e0be64b1-9269-4208-a18f-99627a0e37ee/Vol-41---International-Law-Documents--1941.aspx>.

83. *See* MALLISON, *supra* note 4, at 87.

84. *Id.*

85. 40 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, 108–9 (1949), http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-XL.pdf [hereinafter 40 TRIAL OF THE MAJOR WAR CRIMINALS].

86. *See, e.g.*, Fenrick, *supra* note 30, at 101.

vy units and certain others,⁸⁷ with the instruction to carry out unrestricted air and submarine warfare. The consequence was the creation of a de facto exclusion zone; however, an exclusion zone was not formally designated or publicized.

Mallison notes that, “[c]onsidering the factual characteristics of the Pacific war, the area of the Pacific Ocean is not an unreasonable extent for the United States submarine operational area.”⁸⁸ Japanese merchant vessels were “armed, reported submarine sightings, and attempted to ram or otherwise attack submarines.” Accordingly, they were “functionally incorporated into the Japanese naval forces” and thus liable to attack.⁸⁹ Mallison also argues that, in practice, “the Pacific Ocean areas were not frequented by neutral shipping after December 7, 1941,”⁹⁰ although he goes on to note that there was “a limited commerce conducted by neutral Soviet Union vessels.”⁹¹ The analysis of the UK practice in the Skagerrak applies here with equal force.

Unlike during the First World War, rather than justifying the exclusion zones by reference to belligerent reprisals, or due to the novelty of the situation, it was argued by some that it was permissible to establish exclusion zones provided that the zones were made known to neutrals.⁹² During the trial of Admiral Dönitz, counsel for Dönitz contended that, following the practice of the First World War, exclusion zones were considered lawful under international law. He contended that

[a] development, typical for the rules of naval warfare, was confirmed here, namely, that the modern technique of war forcibly leads to the use of war methods which at first are introduced in the guise of reprisals, but which gradually come to be employed without such a justification and recognized as legitimate.⁹³

87. The message also stated: “CINCAF INFORM BRITISH AND DUTCH. INFORM ARMY.” MALLISON, *supra* note 4, at 86.

88. *Id.* at 87.

89. *Id.* at 89.

90. *Id.* at 89. *See also* Fenrick, *supra* note 30, at 101.

91. MALLISON, *supra* note 4, at 89. *See also* Fenrick, *supra* note 30, at 101.

92. ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 301 (1957) (Vol. 50, U.S. Naval War College International Law Studies) (referring to E. Schmitz, *Sperregebiete im Seekrieg*, 8 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 641 (1938)). *See also* the discussion in POLITAKIS, *supra* note 4, at 61–64.

93. 18 *TRIAL OF THE MAJOR WAR CRIMINALS*, *supra* note 73, at 329.

Contrary to this argument, following the practice of the First World War, the rules relating to attacks on merchant vessels were reaffirmed. In 1922, the Treaty Relating to the Use of Submarines and Noxious Gases in Warfare was concluded, but did not enter into force.⁹⁴ A few years later, in 1930, a treaty was concluded on the limitation and reduction of naval armaments.⁹⁵ Article 22 of that treaty provided for rules relating to submarines and attacks on merchant vessels. Although the treaty was drafted so as to remain in force only until December 31, 1936, an exception was made for Article 22, which was expressly drafted so as to “remain in force without limit of time.”⁹⁶ Prior to the expiration of the treaty, and in order to encourage other States to express assent to the rules,⁹⁷ a *Procès-Verbal* was signed in 1936 (often referred to as the London Submarine Protocol), which duplicated the terms of Article 22 and to which many other States assented.⁹⁸

Article 22 did not purport to create new rules; rather, it set out to codify pre-existing rules of international law, as is evident from the text that preceded the substance: “The following are accepted as established rules of international law.”⁹⁹ The Article provided that, “[i]n their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.”¹⁰⁰ It continued:

In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of naviga-

94. Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, <https://www.icrc.org/ihl/INTRO/270?OpenDocument>. Article 1 provided *inter alia* that “A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning, or to proceed as directed after seizure.” No exception was made for a merchant vessel that entered an exclusion zone.

95. Treaty for the Limitation and Reduction of Naval Armaments, Apr. 22, 1930, 46 Stat. 2858, 112 L.N.T.S. 65, <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=32C5DA6C8C43775AC12563CD002D69CC>.

96. *Id.*, art. 23.

97. This encouragement formed part of the text of Article 22: “The High Contracting Parties invite all other Powers to express their assent to the above rules.”

98. *Procès-Verbal: Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930*, Nov. 6, 1936, 173 L.N.T.S. 353, 3 Bevens 298, reprinted in 31 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 137 (1939).

99. Treaty for the Limitation and Reduction of Naval Armaments, *supra* note 95, art. 22.

100. *Id.*, art. 22(1).

tion a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. . . .¹⁰¹

No exception was made for exclusion zones, despite the practice of the First World War.¹⁰²

Although the language of the paragraph seemed to contain an exhaustive list of the situations in which a warship could sink a merchant vessel or render it incapable of navigation, the Committee of Jurists which drafted the provision noted otherwise. The report of the Committee provides that:

The committee wish to place it on record that the expression "merchant vessel," where it is employed in the declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel.¹⁰³

However, the Committee did not specify what amounted to participating in hostilities such as to cause the merchant vessel to lose immunity. What is evident is that it extended beyond persistent refusal to stop upon being summoned and active resistance to visit or search.¹⁰⁴

Although it has been suggested that the London Submarine Protocol has fallen into desuetude,¹⁰⁵ that is not the case. It was incorporated into Germany's 1939 Prize Ordinance, with which German U-boats were instructed to comply at the start of the war.¹⁰⁶ Following the war, Admiral

101. *Id.*, art. 22(2).

102. This proved crucial for the International Military Tribunal. It observed that [t]he Washington Conference of 1922, the London Naval Agreement of 1930 and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in that war [the First World War]. Yet the Protocol made no exception for operational zones. The order of Dönitz to sink neutral ships without warning when found within these zones was, in the opinion of the Tribunal, therefore a violation of the Protocol.

22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 76, at 558.

103. PROCEEDINGS OF THE LONDON NAVAL CONFERENCE OF 1930 AND SUPPLEMENTARY DOCUMENTS 189 (Herbert Francis Wright, ed., 1931).

104. For a recent statement of the position, see SAN REMO MANUAL, *supra* note 6, ¶¶ 60, 67.

105. D. P. O'Connell, *International Law and Contemporary Naval Operations*, 44 BRITISH YEARBOOK OF INTERNATIONAL LAW 19, 52 (1970); Jane Gilliland, Note, *Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare*, 73 GEORGETOWN LAW JOURNAL 975, 991 (1985).

106. See 18 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 73, at 314.

Dönitz was charged with, *inter alia*, “waging unrestricted submarine warfare contrary to the [London Submarine Protocol],”¹⁰⁷ and the International Military Tribunal (IMT) determined Dönitz’s liability on this matter by reference to it.¹⁰⁸ Some States also amended the geographical scope of application of the Protocol in respect of their territories, and other States deposited notifications of succession.¹⁰⁹ Accordingly, the Protocol cannot be considered to have fallen into desuetude.¹¹⁰

In determining Dönitz’s guilt, the IMT distinguished between attacks on British armed merchant vessels and those on neutral merchant vessels, finding Dönitz guilty of the latter, but not the former. The part of the judgment that explains the difference in treatment is ambiguous at best, perhaps deliberately so.¹¹¹ The language used suggests that the difference was not so much due to the nationality of the merchant vessels—enemy or neutral—but due to the way in which the two sorts of vessels tended to be used during the war. The judgment recalls that Britain “armed its merchant vessels,” “convoyed them with armed escort,” ordered them “to send position reports upon sighting submarines” and later ordered them “to ram U-Boats if possible.”¹¹² By contrast, no mention is made of any such actions on the part of neutral vessels. Accordingly, implicit in the IMT’s finding is that the actions of Great Britain rendered British merchant vessels liable to attack without warning. These actions thus seemed to fall within the

107. 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 76, at 557.

108. *Id.* at 558.

109. See Depository Status List, *Procès-Verbal* Relating to the Rules of Submarine Warfare Set forth in Part IV of the Treaty of London of April 22, 1930 (Nov. 6, 1936), <https://www.gov.uk/government/publications/proces-verbal-relating-to-the-rules-of-submarine-warfare-set-forth-in-part-iv-of-the-treaty-of-london-of-april-22-1930-london-6111936>.

110. See also POLITAKIS, *supra* note 4, at 157; Wolff Heintschel von Heinegg, *The Law of Armed Conflict at Sea*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 463, 519–20 (Dieter Fleck ed., 3d ed. 2013). That does not mean that all the substantive rules of the Protocol continue to reflect the law. While it is generally accepted that in their action with respect to merchant vessels submarines must conform to the same rules of international law as surface vessels, the instances in which a merchant vessel may be attacked has since been clarified. See, e.g., SAN REMO MANUAL, *supra* note 6, ¶¶ 60, 67, 139, 140, 151, 152.

111. See Fenrick, *supra* note 30, at 103 (noting that this portion of the judgment was written by the U.S. member of the Tribunal, Francis Biddle, who was opposed to Dönitz’s conviction on the charges relating to submarine warfare, and that the rest of the bench allowed Biddle to write the section relating to the charges in order to avoid his threatened dissent).

112. 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 76, at 558.

Committee of Jurists' notion of participating in hostilities in such a manner as to result in the loss of immunity.¹¹³

Thus, the *Dönitz* judgment does not stand for the proposition that enemy merchant vessels generally may be attacked. Furthermore, despite suggestions to the contrary,¹¹⁴ the judgment does not stand for the proposition that all neutral merchant vessels are protected from attack even if they are armed, report on sightings of submarines and so on. Although this was indeed the practice of many neutral vessels during the war, the IMT seems to have ignored it; no mention is made of the practice in the Tribunal's judgment. Indeed, whereas the judgment refers to "British armed merchant vessels," it only refers to "neutral merchant vessels," omitting the reference to their being armed.¹¹⁵ The alternative reading, by which all neutral merchant vessels are protected from attack, does not sit easily with the London Submarine Protocol, which the Tribunal was interpreting, or the report of the Committee of Jurists, which did not differentiate between enemy merchant vessels and neutral ones. The crucial distinction insofar as the Protocol is concerned, is not the nationality of the merchant vessel (enemy or neutral), but on the activities it undertakes (whether it is participating in hostilities or not). The alternative approach would be unrealistic. A belligerent is highly unlikely to withhold taking measures against a neutral merchant vessel if that vessel is participating in hostilities; nor should it be required to do so.¹¹⁶

The IMT also held that, in light of the order of the British Admiralty concerning the *Skagerrak* and in light of Admiral Nimitz's answers concerning unrestricted submarine warfare in the Pacific, "the sentence of Dönitz is not assessed on the ground of his breaches of the international law of submarine warfare."¹¹⁷ Dönitz was still found guilty of the conduct—confirming its illegality—but his sentence did not reflect the illegality in light of the related illegality on the part of Britain and the United States. The IMT thus confirmed the continued relevance of the London Submarine Protocol as well as the illegality of the enforcement of the exclusion zones of the Second World War type.

Indeed, unlike the legal basis for Germany's measures, as argued by counsel for Dönitz, Admiral Nimitz considered the order of December 7,

113. See Fenrick, *supra* note 30, at 102.

114. See Heintschel von Heinegg, *supra* note 110, at 520.

115. See 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 76, at 557–58.

116. See MALLISON, *supra* note 4, at 82, 129–30.

117. 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 76, at 559.

1941 to have been issued as a reprisal.¹¹⁸ His interrogatories relating to the Dönitz trial provide:

17. Q. Has any order of the U.S. Naval authorities mentioned in the above questionnaire concerning the tactics of U.S. submarines toward Japanese merchantmen been based on the grounds of reprisal? If yes, what orders?

A. The unrestricted submarine and air warfare ordered on 7 December 1941 resulted from the recognition of Japanese tactics revealed on that date. No further orders to U.S. submarines concerning tactics toward Japanese merchantmen throughout the war were based on reprisal, although specific instances of Japanese submarines committing atrocities toward U.S. merchant marine survivors became known and would have justified such a course. . . .

19. Q. On the basis of what Japanese tactics was the reprisal considered justified?

A. The unrestricted submarine and air warfare ordered by the Chief of Naval Operations on 7 December 1941 was justified by the Japanese attacks on that date on U.S. bases, and on both armed and unarmed ships and nationals, without warning or declaration of war.¹¹⁹

The practice of exclusion zones in the Second World War was thus similar to that of the First World War, in that the concept of an exclusion zone was inextricably linked with the measures that could be taken within the zone, namely attack on sight. The exclusion zones of the Second World War were justified both on the basis of belligerent reprisals and on the basis of a rule of law that authorized it. However, the IMT was clear that attacking all vessels within an exclusion zone on sight was unlawful, even if it was less than clear as to which vessels could lawfully be attacked and on what basis.

C. Armed Conflict Over the Falkland Islands/Islas Malvinas

During the 1982 armed conflict between the UK and Argentina over the Falkland Islands/Islas Malvinas, numerous zones were established.

118. *But see* MALLISON, *supra* note 4, at 90–91 (noting that, apart from Nimitz’s answers, “there is no indication that reprisal has been used to justify the United States operational area”).

119. 40 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 85, at 111.

1. United Kingdom Practice

A few days after the Argentinian invasion of the Falkland Islands/Islas Malvinas, on April, 7 1982, the UK issued a notice, indicating that, from April 12, a Maritime Exclusion Zone would be in force. The outer limit of the zone was a circle of two hundred nautical mile radius from the center of the islands. The notice continued:

From the time indicated, any Argentine warships and Argentine naval auxiliaries found within this zone will be treated as hostile and are liable to be attacked by British forces. This measure is without prejudice to the right of the United Kingdom to take whatever additional measures may be needed in exercise of its right of self-defence under Article 51 of the United Nations Charter.¹²⁰

As is apparent from the language of the notice, aside from actions taken in self-defense pursuant to Article 51, only Argentine warships and Argentine naval auxiliaries within the zone were liable to attack. The passage of Argentine merchant vessels and neutral merchant vessels were not impeded and the freedom of the high seas for those vessels was unaffected. The measure did not therefore amount to a blockade,¹²¹ as was argued at the time by Argentina.¹²² As Argentine warships and Argentine naval auxiliaries were military objectives and thus targetable at any location in which acts of naval warfare could be carried out, the Maritime Exclusion Zone was evidently lawful. Indeed, one commentator suggested that the zone was a “curious” one as, “[i]n time of armed conflict at sea, such a limit would restrict action by the Royal Navy to an extent not required by international law.”¹²³ Reportedly, the declaration of the zone was a ruse, as it served to reinforce

120. See Charge d’Affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter Dated 9 April 1982 from the Charge d’Affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/14963 (Apr. 10, 1982).

121. For the definition of a blockade, see *supra* note 7.

122. See Permanent Representative of Argentina to the U.N., Letter Dated 9 April 1982 from the Permanent Representative of Argentina to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/14961 (Apr. 9, 1982).

123. See Fenrick, *supra* note 30, at 109 n.65 (quoting Col. G.I.A.D. Draper, Letter to the Editor, THE TIMES (London), Apr. 7, 1982, at 5),

an Argentine belief that a British nuclear submarine was already in the area when, in fact, it was in Scotland.¹²⁴

Some two weeks later, on April 23, 1982, the UK communicated the establishment of a defensive bubble surrounding the Task Force that was on its way to the Falkland Islands. The notification establishing the defensive bubble provided that:

[A]ny 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 the British forces in the South Atlantic, will encounter the appropriate response. All Argentine aircraft including civil aircraft engaging in surveillance of these British forces will be regarded as hostile and are liable to be dealt with accordingly.¹²⁵

The notification also indicated that the defensive bubble was established pursuant to Britain's right to self-defense under Article 51 of the UN Charter.¹²⁶

Unlike the April 7 declaration, and in the nature of a defensive bubble, no geographic limitation was placed on the bubble. As the Task Force moved, so too did the bubble. Akin to the analysis of the April 7 declaration, insofar as the first sentence is concerned, the listed objects could be targeted at any location,¹²⁷ irrespective of any approach to the defensive bubble. Accordingly, the measure set out in the first sentence is uncontroversial. The lack of punctuation in the final sentence, however, renders it unclear. Reading the phrase to the effect that "all Argentine aircraft, including civil aircraft, engaging in surveillance would be treated as hostile," would be uncontroversial as engaging in surveillance might render the air-

124. L.F.E. Goldie, *Maritime War Zones & Exclusion Zones*, in *THE LAW OF NAVAL OPERATIONS* 156, 172 (Horace B. Robertson Jr. ed., 1991) (Vol. 64, U.S. Naval War College International Law Studies); Howard S. Levie, *The Falkland Islands Crisis and the Laws of War*, in *PROFESSOR HOWARD LEVIE AND THE LAW OF WAR* 203, 203-4 (Michael N. Schmitt & Leslie C. Green eds., 1998) (Vol. 70, U.S. Naval War College International Law Studies).

125. *See* Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter Dated 24 April 1982 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/14997 (Apr. 24, 1982).

126. *Id.*

127. Aside from certain areas such as the territorial sea of neutral States.

craft a military objective and thus liable to attack.¹²⁸ However, if the sentence meant “all Argentine aircraft, including civil aircraft engaging in surveillance, would be treated as hostile,” it would be overly-broad by reason of including enemy civil aircraft, for example passenger jets, whether or not they were conducting surveillance.¹²⁹

A few days later, on April 28, a Total Exclusion Zone around the Falkland Islands was established. The Total Exclusion Zone encompassed the same geographical area as the Maritime Exclusion Zone. However, as its name suggests, its scope *ratione personae* was broader. The announcement establishing the Total Exclusion Zone read:

From the time indicated, the exclusion zone will apply not only to Argentine warships and Argentine naval auxiliaries but also to any other ship, whether naval or merchant vessel, which is operating in support of the illegal occupation of the Falkland Islands by Argentine forces. The exclusion zone will also apply to any aircraft, whether military or civil, operating in support of the illegal occupation. Any ship and any aircraft, whether military or civil, which is found within this zone without due authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile and will be liable to be attacked by the British forces.¹³⁰

The announcement also indicated that the UK reserved the right to take additional measures in exercise of its right to self-defense.¹³¹ A UK spokesman clarified that the Total Exclusion Zone “applied to all ships and all aircraft, including any Soviet spy ships that might be trailing British

128. A later publication of the notification did include punctuation in this manner. *See Text of the British Statement on Extending Blockade Area*, NEW YORK TIMES, May 8, 1982, at 4, <http://www.nytimes.com/1982/05/08/world/text-of-the-british-statement-on-extending-blockade-area.html>.

129. Argentina seems to have read the notification in this manner. *See* Permanent Representative of Argentina to the U.N., Letter Dated 24 April 1982 from the Permanent Representative of Argentina to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/14998 (Apr. 24, 1982).

130. *See* Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter Dated 28 April 1982 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/15006 (Apr. 28, 1982).

131. *Id.*

forces inside the Zone.”¹³² Any ship or aircraft which was found in the zone and which was not authorized to be there was deemed to be operating in support of the occupation, regarded as hostile, and liable to attack. As with the exclusion zones of the First and Second World Wars, mere presence in the exclusion zone rendered the vessel targetable.

Later still, on May 7, shortly after the sinking of the *Belgrano*,¹³³ the UK issued a press statement, which provided that

[b]ecause of the proximity of Argentine bases and the distances that hostile forces can cover undetected, particularly at night and in bad weather, Her Majesty’s Government warns that any Argentine warship or military aircraft which are found more than 12 nautical miles from the Argentine coast will be regarded as hostile and are liable to be dealt with accordingly.¹³⁴

As with its Maritime Exclusion Zone, the statement was directed at Argentine warships and military aircraft, not Argentine merchant vessels or civil aircraft, or neutral vessels. As such objects were military objectives and targetable in any area in which acts of naval warfare could be carried out, the statement is likely to have been issued as a clarification, in light of criticism regarding the sinking of the *Belgrano*.¹³⁵ Given its limitation to these ships and aircraft, it did not amount to a blockade as alleged by Argentina at the time.¹³⁶

The USSR objected that:

The British Government continues expanding the zone of combat operations in the Atlantic Ocean, arbitrarily proclaiming vast expanses of high

132. Fenrick, *supra* note 30, at 111 (citing THE TIMES (London), Apr. 29, 1982, at 1).

133. The *General Belgrano* was an Argentine warship that was attacked whilst outside the Total Exclusion Zone. The attack was criticised in certain quarters on the grounds that the warship was located outside the Total Exclusion Zone and sailing away from the Zone at the time of the attack. However, as a warship, the *Belgrano* could be targeted by the UK pursuant to the law of armed conflict at sea at any location in which hostile actions could lawfully take place.

134. *Press Statement of 7 May 1982, reproduced in* 53 BRITISH YEAR BOOK OF INTERNATIONAL LAW 549 (1982).

135. POLITAKIS, *supra* note 4, at 140 (suggesting that “the intention was to accord a *posteriori* legitimacy to the widely condemned torpedoing of the *General Belgrano*”).

136. *See* Permanent Representative of Argentina to the U.N., Letter Dated 7 May 1982 from the Permanent Representative of Argentina to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/15055 (May 7, 1982).

seas closed to ships and aircraft of other countries. These actions clearly contradict the 1958 Convention on the High Seas and, consequently, are regarded by the Soviet side as unlawful.¹³⁷

Aside from the USSR, the exclusion zones did not generally receive condemnation on the part of the international community.¹³⁸

2. Argentine Practice

For its part, Argentina also established exclusion zones, as reactions to the British exclusion zones. On April 8, following the notification by the UK of the maritime exclusion zone, Argentina declared a maritime exclusion zone of 200 miles “around the Falklands, South Georgia, and the Argentine coast as a theatre of operations in which military action could be taken if necessary for self-defence.”¹³⁹ On April 30, following the notification of the defensive bubble, Argentina notified that:

[A]ll British ships, including merchant and fishing vessels, operating within the 200-mile zone of the Argentine sea, of the Malvinas Islands, the South Georgias and the South Sandwich Islands, are considered hostile; . . .
any British aircraft, whether military or civil, which flies through Argentine airspace will be considered hostile and treated accordingly . . .¹⁴⁰

Argentina also indicated that these measures were without prejudice to additional measures that might be taken in self-defense.¹⁴¹ Following the issuance of the British policy statement, on May 11, Argentina declared that, “any vessel flying the United Kingdom flag which is navigating in the [South Atlantic] towards the area of operations and/or which may be pre-

137. See Serge Schmemmann, *British War Zones Called Unlawful in Soviet Protest*, NEW YORK TIMES, May 15, 1982, at 1, <http://www.nytimes.com/1982/05/15/world/british-war-zones-called-unlawful-in-soviet-protest.html>.

138. For possible reasons as to the general silence, see Part III.E.

139. See Fenrick, *supra* note 30, at 112 (citing THE TIMES (London), Apr. 10, 1982, at 1).

140. Permanent Representative of Argentina to the U.N., Letter Dated 30 April 1982 from the Permanent Representative of Argentina to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/15018 (Apr. 30, 1982).

141. *Id.*

sumed to constitute a threat to national security shall be considered hostile, and action will be taken accordingly.”¹⁴²

Both measures differentiated between enemy vessels and neutral vessels, with the latter left unaffected. However, one neutral vessel was attacked by Argentina while in the zone. The *Hercules*, a Liberian tanker, was located some five hundred miles off the Falkland Islands and engaged in passage unrelated to the armed conflict when it was attacked.¹⁴³ The attack on the *Hercules* reveals the dangers associated with the establishment of an exclusion zone. Insofar as the British vessels were concerned, Argentina did not differentiate between warships and auxiliaries on the one hand and merchant vessels on the other.¹⁴⁴ Rather, it indicated that all British ships would be considered as hostile and treated accordingly. It has been suggested that it is “probable” that any British merchant vessel or civil aircraft approaching the Maritime Exclusion Zone following the April 30 proclamation would have been supporting the British task force and thus subject to attack.¹⁴⁵ However, as with the exclusion zones of the Second World War, this is to convert what is “probable” into a bright line rule. This is all the more true of the May 11 proclamation, which provided that the entire South Atlantic was a war zone, given the increased possibility of a British vessel, unconnected with the armed conflict, being in the zone.¹⁴⁶

D. *Armed Conflict between Iran and Iraq*

On September 22, 1980, Iraq launched an attack on Iran. Iran responded, on the same day, by issuing a notice to mariners which read:

Regarding to the Iraqi aggression we declare Iranian maritime border nearby coast war area.

142. Permanent Representative of Argentina to the U.N., Letter Dated 11 May 1982 from the Permanent Representative of Argentina to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/15069 (May 11, 1982).

143. *See* *Amerada Hess Shipping Corporation v Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *rev'd* 488 U.S. 428.

144. The UK also used “ships taken up from trade” (STUFT) to transport troops and supplies in support of the military response. These vessels would have been acting as auxiliary vessels and thus would have been lawful targets.

145. Fenrick, *supra* note 30, at 112–13.

146. *Id.* at 113.

The Iranian Government does not give any authorization to the vessels intending to proceed to Iraqi ports for the safety of shipping in Persian Gulf the following route shall be strictly observed . . .¹⁴⁷

Iran thus adopted three measures. It declared its coastal waters to be a war zone; it provided an alternative shipping route; and, although not characterized as such, it instituted a blockade of Iraqi ports.¹⁴⁸ The United States re-issued the warning to mariners, but noted that the publication “in no way constitutes a legal recognition by the United States of the international validity of any rule, regulation or proclamation so published.”¹⁴⁹

Insofar as the war zone was concerned, the contours of the zone were not specified, but it was limited to the territorial sea of Iran and adjacent waters on the high seas. Iran’s closure of its territorial sea is less problematic.¹⁵⁰ Even in peacetime, subject to certain exceptions, notably international straits, a State may temporarily suspend innocent passage of foreign ships if such suspension is essential to protect its security.¹⁵¹ To the extent that the closure extended outside Iran’s territorial waters to part of the high seas, it was limited in its extent, defensive in nature, and interfered only to a limited extent with free passage of neutral vessels.¹⁵² In many ways, it was akin

147. Notice to Mariners No. 17/59, Sept. 22, 1980, *reprinted in* THE IRAN-IRAQ WAR (1980–1988) AND THE LAW OF NAVAL WARFARE 37 (Andrea de Guttry & Natalino Ronzitti eds., 1993). A slightly different version, to the same effect, reads:

Bearing in mind the violations of the Iraqi armed forces, all waterways near the Iranian shores are hereby declared war zones. Iran will not allow any merchant ship to carry cargo to the Iraqi ports. Also, for the sake of the safety of shipping in the Persian Gulf, we announce that the following routes should be observed. . . .

Notice to Mariners No. 17/59, Sept. 22, 1980, *reprinted in* S.P. Menefee, *Commentary, in* THE IRAN-IRAQ WAR (1980–1988) AND THE LAW OF NAVAL WARFARE, *supra*, at 147.

148. See J. Ashley Roach, *Missiles on Target: Targeting and Defense Zones in the Tanker War*, 31 VIRGINIA JOURNAL OF INTERNATIONAL LAW 593, 601 (1991).

149. Defense Mapping Agency and Hydrographic Center, Special Warning No. 48 (Sep. 22, 1980), *reprinted in* Menefee, *supra* note 147, at 134.

150. Though there might be some dispute as to the relevant baseline and thus the extent of Iran’s territorial sea. See J. ASHELY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 89 (2012).

151. Convention on the Territorial Sea and the Contiguous Zone art. 16(3)–(4), Apr. 29, 1958, 516 U.N.T.S. 205; UNCLOS, *supra* note 2, arts. 25(3), 44. Roach, *supra* note 148, at 602, notes that “[i]t would seem that ‘temporarily’ can properly last for the duration of the hostilities, even in a war of this extraordinary length.”

152. See Ross Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones*, 37 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 629, 639 (1988); Roach, *supra* note 148, at 601–2.

to the zone established by Japan immediately prior to the Russo-Japanese War.

For its part, responding to Iran's establishment of a war zone, on October 7, 1980, Iraq indicated that the area of the Persian Gulf north of 29° 30' N was a "prohibited war zone."¹⁵³ On August 12, 1982, Iraq expanded its war zone. According to a warning reissued by the United States:

The Iraqi government has warned that it will attack all vessels appearing within a zone believed to be north and east of a line connecting the following points. . . . The Iraqi government has further warned that all tankers docking at Kharg Island, regardless of nationality, are targets for the Iraqi air force.¹⁵⁴

The contours of the zone were subsequently amended and Iraq issued further warnings relating to the possibility of attacks.¹⁵⁵ As with Iran's zones, the United States passed on the warnings, but indicated that doing so did not constitute legal recognition of the zones.¹⁵⁶ A report of the UK House of Commons Foreign Affairs Committee also indicated that the war zones of both Iran and Iraq were "not generally recognised by the foreign navies."¹⁵⁷

Iraq justified its actions on the basis of self-defense,¹⁵⁸ and considered declarations establishing war zones to be lawful.¹⁵⁹ It considered its declara-

153. Defense Mapping Agency and Hydrographic Center, Special Warning No. 50 (Oct. 7, 1980), *reprinted in* Menefee, *supra* note 147, at 135.

154. Defense Mapping Agency and Hydrographic Center, Special Warning No. 62 (Aug. 16, 1982), *reprinted in* Menefee, *supra* note 147, at 136. *See also* Andrea Gioia, *Commentary*, in *THE IRAN-IRAQ WAR (1980-1988) AND THE LAW OF NAVAL WARFARE*, *supra* note 147, at 73.

155. Gioia, *supra* note 154, at 73; Roach, *supra* note 148, at 605; Adam Boleslaw Boczek, *Law of Warfare at Sea and Neutrality: Lessons from the Gulf War*, 20 *OCEAN DEVELOPMENT AND INTERNATIONAL LAW* 239, 244 (1989).

156. Defense Mapping Agency and Hydrographic Center, Special Warning No. 67 (Sep. 1985), *reprinted in* Menefee, *supra* note 147, at 139.

157. FOREIGN AFFAIRS COMMITTEE, SECOND REPORT, CURRENT UK POLICY TOWARDS THE IRAN/IRAQ CONFLICT, 1987-88, HC 279-I-II, *reprinted in* *THE IRAN-IRAQ WAR (1980-1988) AND THE LAW OF NAVAL WARFARE*, *supra* note 147, at 302.

158. Permanent Representative of Iraq to the U.N., Letter Dated 5 May 1983 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, U.N. Doc. A/38/187, S/15752 (May 9, 1983) [hereinafter Letter from the Permanent Representative of Iraq].

159. Michaelsen, *supra* note 1, at 375 (indicating that Iraq also justified the establishment on the basis of reprisals).

tion establishing the war zone to be “in conformity with rules of international law which are applicable in times of armed conflict and which have the object of limiting the suffering caused by such conflicts and sparing mankind the consequences to which military operations might give rise.”¹⁶⁰ This is one of the few occasions on which a State has justified its establishment of an exclusion zone by reference to a rule of international law it claims authorizes it. In prior conflicts, the zones tended to be justified on the basis of reprisals, self-defense, or some other exceptional measure.

Later, Iraq also justified its actions pursuant to the law of blockade. In this respect, Iraq referred to “those provisions of international law which authorize a State which is a party to an armed conflict to impose a blockade on the ports of the adversary State, within a precisely defined zone made known to all, in order to induce that State to accept peace.”¹⁶¹ Although characterized as a blockade, Iraq sought to enforce the measure by attacking vessels without warning. By contrast, the consequence of a breach of blockade is capture.¹⁶² Accordingly, Iraq’s measure was more in the nature of an exclusion zone than a blockade.

The establishment of the zones did not have a containing effect. Despite their establishment, Iran, and to a lesser degree Iraq, did not limit their attacks to the zones.¹⁶³ Both Iran and Iraq attacked merchant vessels of neutral and enemy States.¹⁶⁴ The attacks on neutral shipping generally, and in international waters and en route to and from neutral States specifically, were condemned.¹⁶⁵ Neutral States also protested against the attacks.¹⁶⁶ There was little comment on the zones as such; however, as indi-

160. Letter from the Permanent Representative of Iraq, *supra* note 158.

161. Permanent Representative of Iraq to the U.N., Letter Dated 20 February 1985 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, S/16972 (Feb. 20, 1985).

162. Pursuant to the law of blockade, “[m]erchant vessels believed on reasonable grounds to be breaching a blockade may be captured.” See SAN REMO MANUAL, *supra* note 6, ¶ 98. Only if, after prior warning, a merchant vessel clearly resists capture may it be attacked. *Id.*

163. 85 percent of Iraqi attacks on merchant ships took place within one of the three exclusion zones. Roach, *supra* note 148, at 605.

164. See Jenkins, *supra* note 52, at 546 n.314.

165. See S.C. Res. 552 (June 1, 1984); S.C. Res. 582 (Feb. 24, 1986).

166. See, e.g., U.N. SCOR, 39th Sess., 2546th mtg., ¶¶ 23, 33, 78, 92, U.N. Doc. S/PV.2546 (June 1, 1984) (noting protests from China, the Netherlands, the UK and India). See also Alan Vaughan Lowe, *Commentary, in THE IRAN-IRAQ WAR (1980–1988) AND THE LAW OF NAVAL WARFARE*, *supra* note 147, at 251.

cated above, while not condemning exclusion zones, some States indicated that they did not accept them.

Although the attacks are often condemned as unlawful,¹⁶⁷ it is inappropriate to judge them as such as a whole. Many attacks were indeed unlawful, such as those that were carried out against neutral ships when they were “engaging in truly neutral commerce,”¹⁶⁸ or “fishing in the Gulf.”¹⁶⁹ Iran also attacked vessels after having stopped them and searched them for contraband,¹⁷⁰ and attacked vessels that were in neutral territorial waters.¹⁷¹ Other attacks seem to have been lawful, such as Iraqi attacks against tankers that were travelling in convoy with Iranian warships.¹⁷² The legality of many attacks, however, turns on whether a contribution to the war-sustaining effort renders an object a military objective.¹⁷³ Both parties carried out attacks in order to deprive the other side of the income from oil exports that was used to wage the armed conflict.¹⁷⁴ Indeed, Iraq justified its attacks “on the basis of the rules of international law relating to armed conflicts at sea, which permit attacks on vessels engaged in acts of trade or unneutral service with a belligerent in a situation of armed conflict.”¹⁷⁵ It continued:

We trust that the Secretary-General and the organizations whose appeals have been conveyed do not contest the fact that lifting Iranian oil, and consequently providing Iran with financial resources which enable it to continue its aggression against Iraq . . . is impermissible trade under in-

167. See, e.g., Leckow, *supra* note 152, at 637, 640 (suggesting that all attacks were unlawful).

168. Roach, *supra* note 148, at 603.

169. Goldie, *supra* note 124, at 176.

170. Boczek, *supra* note 155, at 247.

171. *Id.* at 245; Fenrick, *supra* note 30, at 120.

172. Boczek, *supra* note 155, at 244.

173. Wolff Heintschel von Heinegg, *Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships, and Maritime Neutrality*, in *ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS* 207, 216 (Richard B. Jaques ed., 2006) (Vol. 80, U.S. Naval War College International Law Studies). See also Fenrick, *supra* note 30, at 121.

174. Goldie, *supra* note 124, at 175; Roach, *supra* note 148, at 605 (reporting that “over 70% (146 of 205) of the Iraqi attacks on merchant ships were against tankers”).

175. U.N. Secretary-General, *Report of the Secretary-General*, Annex 6, U.N. Doc. S/18480 (Nov. 26, 1986). See also Permanent Representative of Iraq to the U.N., Letter dated 20 February 1985 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, U.N. Doc. S/16972 (Feb. 20, 1985).

ternational law in the context of the armed conflict between Iran and Iraq.¹⁷⁶

Iran seemed to justify its actions on the basis of reprisals, arguing that Iraq was attacking foreign vessels in the Persian Gulf indiscriminately and had disrupted freedom of navigation and commerce. Iran also argued that third States had

pour[ed] extensive financial and material resources into Iraq, encouraging it to threaten commercial shipping in the Persian Gulf, and yet they wish to remain secure from the consequences of their obvious backing of the aggressor Iraq in its war of aggression against us as well as against international peace and security.¹⁷⁷

Iran argued further that “[i]f the security of the Persian Gulf is violated, then it is violated for all” and that it would not permit the Persian Gulf to be closed to it or to be used by others against it.¹⁷⁸

Of particular importance for present purposes is the policy of attacking all vessels in the exclusion zones. Although it has been suggested that Iraq’s targeting of all vessels in the Iranian exclusion zone can be justified on the basis that the exclusion zone kept out neutral vessels, that large radar returns from a ship within the zone were assumed to be tankers carrying Iranian oil, and that “there is no evidence that any protected vessels were found within the Iranian exclusion zone,”¹⁷⁹ this transforms the general practice into an absolute one. Indeed, the same author notes that one of the ships that was hit was, in fact, *prima facie* “entitled to protected status: a shrimp trawler that was hit by Iraq within Iran’s exclusion zone.”¹⁸⁰

176. *Id.*

177. Permanent Representative of Iraq to the U.N., Letter dated 25 May 1984 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, U.N. Doc. S/16585 (May 25, 1984).

178. *Id.*

179. Roach, *supra* note 148, at 607.

180. *Id.* at 607 n.51. Small coastal fishing vessels are protected against attack and, indeed, capture. *See* Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War art. 3, Oct 18, 1907, 36 Stat. 2396, T.S. No. 544; SAN REMO MANUAL, *supra* note 6, ¶ 47(g).

E. Summary

One of the key features of this second phase of exclusion zones is that the establishment of an exclusion zone was inextricably linked with the measures that could be taken within it. For example, writing in 1922, shortly after the exclusion zones of the First World War, Hyde defined an exclusion zone as “an area of water which a belligerent attempts to control, and within which it denies to foreign shipping generally the same measure of protection which the latter might elsewhere justly claim.”¹⁸¹ An exclusion zone was thus defined by reference to the measures that could be taken within it, measures that afforded far less protection to vessels that were within the zone as compared to what they would receive were they outside the zone. Other explanations of exclusion zones of this period were more specific, referring explicitly to the possibility of attacks within the zone regardless of the identity of the vessel. For example, before the IMT, counsel for Dönitz argued that: “[w]hether these areas are designated as military area, barred zone, operational area, or danger zone, the point always remained that the naval forces in the area determined had permission to destroy any ship encountered there.”¹⁸² Indeed, O’Connell explained that “the *only purpose* in declaring a war zone is to circumvent the difficulties of identification by supposing all contacts to be hostile.”¹⁸³

Views of this sort continued to be expressed up until the early 1990s. For example, writing in 1988, Leckow noted that: “[i]n a war zone . . . a belligerent purports to suspend the rules of naval warfare, normally through the use of minefields and submarines, rendering the area dangerous for the merchant traffic of enemy or neutral countries.”¹⁸⁴ Likewise, in his influential article on exclusion zones, Fenrick referred to the consequences of unauthorized entry into an exclusion zone: “[u]nauthorized ships or aircraft entering the zone do so at the risk of facing sanctions, often including being attacked by missiles, aircraft, submarines, or surface warships, or of running into minefields.”¹⁸⁵ The key concept of the exclu-

181. 2 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 423–24 (1922).

182. 18 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 73, at 329.

183. O’CONNELL, *supra* note 64, at 167 (emphasis added).

184. Leckow, *supra* note 152, at 632. For descriptions of a war zone along similar lines, see POLITAKIS, *supra* note 4, at 38, 127; Karl Zemanek, *War Zones*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 337 (Rudolf Bernhardt ed., 1981).

185. Fenrick, *supra* note 30, at 92. *See also* Michaelsen, *supra* note 1, at 365.

sion zone thus related to the measures that could be taken within it; measures which could not be taken outside it.

However, the close link between the creation of an exclusion zone and its enforcement is not without doubt. At times, States were critical of the enforcement of zones, but not of their creation. For example, during the First World War, the United States objected to the German practice of attacking vessels within the zones. In the view of the United States, the proper course of action involved the visit and search of the vessels within the zone.¹⁸⁶ Likewise, during the Iran-Iraq armed conflict, it was the attacks on neutral shipping that were condemned rather than the establishment of the zones.¹⁸⁷

The distinction between the creation of an exclusion zone and the enforcement of that zone can prove important. A case in point is the British Total Exclusion Zone, created during the Falklands/Malvinas armed conflict. Unlike the exclusion zones established during the two world wars, neither neutral vessels nor Argentine merchant vessels that were entitled to protection were attacked within the zone.¹⁸⁸ A fishing vessel, the *Narwal*, was attacked. However, it was spying on the movements of the British fleet and transmitting the information back to Argentina.¹⁸⁹ As a result of its actions, it did not benefit from the protections afforded to merchant vessels at the time of the attack. Accordingly, unlike the zones of the world wars, the Total Exclusion Zone cannot be condemned for violation of the law relating to targeting.¹⁹⁰

This does not mean that the establishment of the Total Exclusion Zone was necessarily lawful. The zone might be considered a threat to commit a violation of the law of armed conflict at sea. However, threats to commit violations of that body of law are not unlawful *per se*. Only if a particular rule of the law of armed conflict at sea prohibits threats will the threats be unlawful,¹⁹¹ as there is no liability for threats under the secondary

186. See *supra* p. 164.

187. See *supra* p. 185.

188. Leckow, *supra* note 152, at 634; Heintschel von Heinegg, *supra* note 110, at 524.

189. Levie, *supra* note 124, at 206–7 (citing CHRISTOPHER DOBSON, *THE FALKLANDS CONFLICT* 104 (1982)).

190. But certain commentators do consider the exclusion zone illegal precisely for this reason. See, e.g., Fausto Pocar, *Missile Warfare and Exclusion Zones in Naval Warfare*, 27 *ISRAEL YEARBOOK ON HUMAN RIGHTS* 215, 221 (1998).

191. *But see* Note of February 10, 1915, reprinted in DEPARTMENT OF STATE, *DIPLOMATIC CORRESPONDENCE WITH BELLIGERENT GOVERNMENTS RELATING TO NEUTRAL*

rules of international law. With some exceptions, the law of armed conflict does not generally prohibit threats.¹⁹² Although, as noted by the ICRC Commentary on Additional Protocol II, “the use of threats will generally constitute violence to mental well-being,”¹⁹³ in the context of the establishment of an exclusion zone, the threat is not aimed at, or issued to, a particular individual. Accordingly, it is one step removed and would unlikely amount to such violence. Furthermore, the announcement establishing the Total Exclusion Zone refers to ships and aircraft within the zone as being “liable to be attacked.”¹⁹⁴ Thus, the UK could give effect to the zone in such a manner that does not violate its international obligations, for example, by attacking vessels that constituted military objectives and escorting other vessels out of the zone.

Indeed, the announcement might have constituted a ruse.¹⁹⁵ A ruse “consists either of inducing an adversary to make a mistake by deliberately deceiving him, or of inducing him to commit an imprudent act, though without necessarily deceiving him to this end,”¹⁹⁶ and is permitted under the law of armed conflict at sea.¹⁹⁷ In issuing an announcement to the effect that all vessels and aircraft within a certain area might be attacked on sight, enemy forces might stay away from the area. However, neutral vessels and aircraft might also avoid the area, raising the issue of whether and to what extent exclusion zones can impinge on the freedom of the seas. This is a matter that is discussed in Part IV below. Suffice it to note at this stage that the Total Exclusion Zone was away from major shipping routes. The key point for present purposes is that the establishment of an exclusion zone can be separated from its enforcement.

A second feature of the practice of exclusion zones during this period concerns the measures that were used to enforce them. These measures

RIGHTS AND COMMERCE 54 (1915) (considering the declaration of a right to attack all vessels within a zone as being unprecedented).

192. Exceptions include the SAN REMO MANUAL, *supra* note 6, ¶ 43. The *jus ad bellum* does prohibit the threat of force. *See* U.N. Charter art. 2(4).

193. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1376 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

194. Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations, *supra* note 130 (emphasis added).

195. Heintschel von Heinegg, *supra* note 173, at 217.

196. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 193, at 441.

197. *See, e.g.*, SAN REMO MANUAL, *supra* note 6, ¶ 110 (prohibiting certain acts).

reflected the technological advances during the periods in question, for example, the use of submarine attacks during the Second World War and attacks by air during the Iran-Iraq conflict. The general practice of the period seems to have been that all enemy vessels could be targeted within an exclusion zone, irrespective of whether they were warships or enemy merchant vessels. The proclamations establishing the zones often extended the possibility of attack to neutral vessels, and, in many cases, this resulted in neutral merchant vessels being attacked. Writings of the period suggest that, during an armed conflict, only vessels assisting the war effort would be present within the area in question. However, this transformed a tendency into a blanket proposition, resulting in attacks on neutral merchant vessels.

A third feature of this period concerns the changing justification for the establishment of exclusion zones. States that established the zones justified their creation on the basis of exceptional measures—reprisals, necessity, or self-defense. Only rarely did States justify the measures on the basis of a positive rule of international law that authorized their creation.

Finally, also evident from the practice of exclusion zones during this period is that relatively few States issued protests against their creation. Many States were simply unaffected by the exclusion zones, for example because they were not a maritime power or because the zone did not cover an area through which their vessels passed. Accordingly, there was little need for them to protest. Other States did not protest for political reasons, for example, due to tacit or active support for one party to the conflict or another. Those States that did protest tended to focus on the measures that were taken to enforce the zone rather than on the zone itself. Most of the protests thus concerned attacks on neutral shipping. For example, the Security Council condemned the attacks on neutral merchant vessels during the Iran-Iraq war rather than the zones themselves.¹⁹⁸ Only on occasion did States protest against the zones themselves. Where the concerns expressed by States did relate to the creation of the zone, the criticisms tended to relate to infringement of the freedom of the seas.¹⁹⁹

198. See e.g., S.C. Res. 552, *supra* note 165; S.C. Res. 582, *supra* note 165.

199. See, e.g., Schmemmann, *supra* note 137 (reporting on the USSR's protest of the UK's Total Exclusion Zone as infringing on high seas freedoms); Garner, *supra* note 38 (recounting the objection of the Netherlands to the British admiralty notice).

IV. THE SAN REMO MANUAL CONCEPT OF AN EXCLUSION ZONE

A fundamental change in the approach taken to exclusion zones can be found in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, which was prepared between 1988 and 1994.²⁰⁰ It approached the issue of exclusion zones differently from the practice described above in two principal respects. First, it separated out the establishment of an exclusion zone from the measures that could be taken within it. Second, it purported to regulate the zones should belligerents decide to create them. Although not a source of international law in the sense of Article 38(1)(a)–(c) of the Statute of the International Court of Justice,²⁰¹ the *San Remo Manual* has had a tremendous influence on the development of the law of armed conflict at sea. For example, the approach of the *Manual* on the issue of exclusion zones is now reflected in the military manuals of a number of States.²⁰²

A. The San Remo Manual

One of the important contributions of the *San Remo Manual* to the issue of exclusion zones is the way in which it separates out the establishment of the zone from the measures that could be taken within it. As discussed above, during the second phase of exclusion zones, the very concept of an exclusion zone was closely linked to the measures that could be taken within it. By contrast, the *San Remo Manual* provides that “[a] belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea.”²⁰³ In one sentence, the *Manual* casts aside much of the prior practice of exclusion zones. The *Manual* also takes into account States’ criticisms of the practice of exclusion zones in prior conflicts. As already noted, this sometimes concerned the targeting of vessels within an exclusion zone rather than the creation of the zone itself.

The commentary to the relevant provision of the *San Remo Manual* reveals that “[s]ome participants . . . argued that State practice supported the

200. SAN REMO MANUAL, *supra* note 6.

201. Statute of the International Court of Justice art 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (accepted as setting out the sources of international law). The San Remo Manual does, however, reflect customary international law in certain respects.

202. *See* Part IV.B.

203. SAN REMO MANUAL, *supra* note 6, ¶ 105.

view that belligerents could be absolved of their duties under international humanitarian law” in the zone, but that, “[a]fter an extended discussion . . . a consensus emerged that the establishment of zones did not and could not absolve belligerents from their duties or create new rights to attack ships or aircraft.”²⁰⁴ This is reinforced by the paragraph of the *Manual* that follows, which provides that, if a belligerent establishes an exclusion zone, “the same body of law applies both inside and outside the zone.”²⁰⁵ That paragraph might be considered redundant in light of the fact that the previous one provides that the belligerent is required to comply with international humanitarian law. Nonetheless, given the practice of the exclusion zones that pre-dated the *Manual*, it serves to confirm the importance of the point.

Unfortunately, the clarity of the two paragraphs is reduced by the text of the accompanying “explanation.” The explanation notes that:

Bearing in mind the factual circumstances surrounding zone creation . . . parties might be more likely to do certain things in a zone than outside of a zone, particularly if the zone were created for defensive purposes. For example, if a party established a zone in accordance with the [listed] criteria . . . it might be more likely to presume that ships or aircraft in the area without permission were there for hostile purposes than it would be if no zone had been established.²⁰⁶

The import of this paragraph is unclear.²⁰⁷ The language used—“parties might be more likely” and “it might be more likely”—suggests that the drafters are not advocating the possibility; rather, they are describing what might happen in practice. However, the fact that the language is included in the explanation suggests that the drafters condone the possibility. This is unfortunate given that the *Manual* confirms that “the same body of law applies both inside and outside the zone” and outside the zone, a vessel could not be presumed to be hostile. In the law of land warfare, in case of doubt, certain objects are to be presumed to be civilian objects.²⁰⁸ The presumption ought also to apply to armed conflicts at sea given that it is closely related to the principle of distinction, which is a principle of the law of armed

204. *Id.*, ¶ 104.

205. *Id.*, ¶ 106(a).

206. *Id.*, ¶ 104.

207. See Pocar, *supra* note 190, at 223 (describing the issue as a “grey area”).

208. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 52(3), June 8, 1977, 1125 U.N.T.S. 3.

conflict at sea.²⁰⁹ Rather, what an exclusion zone does is enable the State establishing the zone to ascertain more easily the character of a vessel by *inter alia* reducing the number of vessels that are likely to enter the zone.²¹⁰ The presence of a vessel within the exclusion zone might support an *inference* that the vessel is hostile, but should not amount to a *presumption* of hostile status.²¹¹

In any event, a presumption that a vessel is hostile cannot automatically lead to attack. It is incumbent on the party to the armed conflict to take all feasible precautions in attack, including doing “everything feasible to ensure that attacks are limited to military objectives.”²¹² Accordingly, the entry of a vessel into an exclusion zone, by itself, should not automatically lead to an attack. Instead, the vessel should be instructed to leave the zone, or “subjected to extensive control measures.”²¹³

The second important contribution of the *San Remo Manual* to this area of the law follows on from the separation of the creation of the zone from the measures that may be taken within it. Given that the same body of law applies within the zone as outside it, the law of armed conflict at sea does not prohibit exclusion zones. At the same time, it does not expressly permit them. There is no rule of conventional law that authorizes the practice and State practice and *opinio juris* do not yet point to a customary authorization.²¹⁴ There are very few possible occasions on which the San Remo type of exclusion zone has been used in practice,²¹⁵ but a number of military manuals do refer to it. Thus, the practice seems to be moving in the direction of a customary authorization. Accordingly, the *San Remo Manual* does not comment on the inherent legality or illegality of exclusion zones but

209. See Heintschel von Heinegg, *supra* note 110, at 481, 522.

210. See Gert-Jan van Hegelsom, *Methods and Means of Combat in Naval Warfare*, in *METHODS AND MEANS OF COMBAT IN NAVAL WARFARE* 1, 52 (Wolff Heintschel von Heinegg ed., 1992).

211. Cf. Christopher Greenwood, *Commentary*, in *METHODS AND MEANS OF COMBAT IN NAVAL WARFARE*, *supra* note 202, at 210.

212. *SAN REMO MANUAL*, *supra* note 6, ¶ 46(b).

213. Heintschel von Heinegg, *supra* note 110, at 530.

214. Wolff Heintschel von Heinegg, *Maritime Warfare*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT* 145, 168 (Andrew Clapham & Paola Gaeta eds., 2014) (noting that “it is not absolutely clear whether and to what extent so-called exclusion zones are in accordance with the law of naval warfare”). But in another publication, the same author notes that, “today such zones may be considered a generally recognized method under customary international law.” Heintschel von Heinegg, *supra* note 110, at 522.

215. See Part IV.B.

regulates the zones in the event that belligerents decide to create them.²¹⁶ Each zone thus needs to be judged on its own terms.

In order for a particular exclusion zone to be lawful, it must take account of the rules of the law of the sea. Two rules that are of particular importance for present purposes are the reservation of the high seas for peaceful purposes and the freedom of the high seas.

Article 88 of the United Nations Convention on the Law of the Sea (UNCLOS) provides that “[t]he high seas shall be reserved for peaceful purposes.”²¹⁷ At first sight, that provision might be considered to render unlawful the conduct of hostilities on the high seas. However, it can hardly be imagined that States, including the major naval powers, agreed to prohibit armed conflict on the high seas, let alone through such an ambiguous provision.²¹⁸ Rather, the scope of the provision can be determined by reference to another provision of UNCLOS, namely Article 301.²¹⁹ That Article is entitled “[p]eaceful uses of the seas” and provides that, “[i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”²²⁰ Accordingly, Article 88 does not prohibit armed conflict on the high seas in general.²²¹

216. SAN REMO MANUAL, *supra* note 6, ¶ 106.

217. UNCLOS, *supra* note 2, art. 88. Other provisions of UNCLOS also reference peaceful purposes or uses. *See, e.g., id.*, arts. 141, 240, 301 (discussing specific uses of the oceans for peaceful purposes).

218. *See* Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 809, 812, 831–32 (1984); Adam Boleslaw Boczek, *Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea*, 20 OCEAN DEVELOPMENT & INTERNATIONAL LAW 359 (1989).

219. *See* U.N. Secretary General, *The Naval Arms Race*, ¶ 188, U.N. Doc. A/40/535 (Sept. 17, 1985); Douglas Guilfoyle, *The High Seas*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 203, 211 (Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott & Tim Stephens eds., 2015); David Attard & Patricia Mallia, *The High Seas*, in 1 THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW 239, 241 (David Attard, Malgosia Fitzmaurice & Norman A. Martinez Gutierrez eds., 2014).

220. UNCLOS, *supra* note 2, art. 301.

221. *See* Message from the President of the United States transmitting United Nations Convention on the Law of the Sea, with Annexes, and the Agreement Relating to the Implementation of Part XI of the United Nations on the Law of the Sea of December 10, 1982, S. TREATY DOC. 103-39 (1994), *reprinted in* 34 INTERNATIONAL LEGAL MATERIALS 1396, 1446.

The second rule of particular importance is the freedom of the high seas. This can be found in a number of treaties and reflects long-standing customary international law.²²² The freedom of the high seas includes *inter alia* freedom of navigation, freedom of overflight, and freedom of fishing.²²³ The freedom of the high seas is “exercised under the conditions laid down by this Convention [UNCLOS] and by other rules of international law.”²²⁴ The reference to “other rules of international law” includes the rules in the law of armed conflict at sea and would thus include, for example, blockades and associated measures, such as visit, search, and diversion. It also “leaves the door open to consider the exclusion zones as legitimate.”²²⁵

Pursuant to UNCLOS, the freedom of the high seas must be exercised “with due regard for the interests of other States in their exercise” of that freedom.²²⁶ Accordingly, the freedom of the high seas for neutral States must be exercised with due regard for the freedom of belligerents to carry out their operations on the high seas and vice versa. Contrary to some suggestions, it is not the case that “whenever military activities come into conflict with peaceful uses, the former must yield to the latter.”²²⁷ Equally, the law of the sea is not overridden by the law of armed conflict at sea. In time of armed conflict at sea, the law of the sea does not fall away, but continues to apply. There is a horizontal relationship between the law of the sea and the law of armed conflict at sea rather than a vertical one. In general terms, the freedom of the high seas for neutrals does not take precedence over the same freedom for belligerents; likewise, the freedom of belligerents does not take precedence over the freedom for neutrals. Rather, the freedom of the high seas must be read *together with* the law of armed conflict at sea; and the law of armed conflict at sea must take into account the importance of the freedom of the high seas for neutral States.²²⁸ This has to be considered

222. See UNCLOS, *supra* note 2, art. 87; Convention on the High Seas, *supra* note 2, art. 2.

223. UNCLOS, *supra* note 2, art. 87(1).

224. *Id.*

225. Pocar, *supra* note 190, at 221. See also Michaelsen, *supra* note 1, at 374.

226. UNCLOS, *supra* note 2, art. 87(2).

227. Francesco Francioni, *Peacetime Use of Force, Military Activities, and the New Law of the Sea*, 18 CORNELL INTERNATIONAL LAW JOURNAL 203, 225 (1985).

228. For example, the SAN REMO MANUAL, *supra* note 6, ¶ 12, provides that, “[i]n carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States.”

at the level of a particular norm at not at the level of a body of law (law of the sea versus law of armed conflict at sea).

In finding the proper balance, the “due regard” principle applies. As one author notes: “[t]he principle underlying this rule is that the exercise of one freedom is the limit to the exercise of the others. No preferences are given and the coexistence of the various activities has to be sought through the necessary accommodations.”²²⁹ Thus, insofar as exclusion zones are concerned, the legality of a particular exclusion zone will depend on the specificities of that zone, in particular, how it balances the freedom of the high seas for neutrals with that same freedom for belligerents. The precise location of the zone will therefore be critical, for example, the extent to which it interferes with shipping lanes and fishing areas. So too will the measures taken by the belligerents, for example, providing alternate shipping routes or escorting vessels through the zone, and the extent to which these routes depart in terms of length and duration from the usual shipping routes.²³⁰

In describing the regulation of exclusion zones should they be created, the *San Remo Manual* provides for this very balance. It provides that:

- (b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principle of proportionality;
- (c) due regard shall be given to the rights of neutral States to legitimate uses of the seas;
- (d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided:
 - (i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;
 - (ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; *and*
- (e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.²³¹

229. Tullio Treves, *High Seas*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 31 (2009), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1174?rskey=GS7XIS&result=5&prd=EPIL>.

230. *See also* UNITED STATES NAVAL WAR COLLEGE, MARITIME OPERATIONAL ZONES 4-22–4-23 (2015).

231. SAN REMO MANUAL, *supra* note 6, ¶ 107.

Although framed as “progressive development of the law,” the San Remo text quoted above constitutes sensible guidance for interpreting the rights of neutrals to the freedom of the high seas together with the rights of belligerents in that same area. As the *San Remo Manual* goes on to note, “[z]ones located in isolated areas far from normal shipping routes . . . are less likely to raise objections than zones on major shipping routes Zones occupying relatively small areas or established for relatively brief periods are more likely than the converse to be considered acceptable.”²³² The same guidance readily explains why defensive zones of limited area and adjacent to the coast, such as that created by Japan prior to the Russo-Japanese War, are more easily accepted.

B. Beyond the San Remo Manual

The two contributions of the *San Remo Manual* discussed above demonstrate the importance of that *Manual* to the conceptualization of exclusion zones. However, the *Manual* would have only a limited effect were it not accepted by States. Accordingly, the reaction of States to the *Manual* is crucial in determining the extent to which the change in approach reflects a change in the law and practice of exclusion zones.

The reaction of States is revealing. A number of States have incorporated the approach taken in the *San Remo Manual* into their own military manuals and associated publications.²³³ The U.S. Navy’s *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* is the clearest example of the impact of the *San Remo Manual* in this regard. The 1989 version of the *Annotated Supplement* considers “war zones” in a footnote, contrasting them to the immediate area of naval operations. It provides:

Operational or war zones refer to areas of the high seas, of widely varying extent which, for substantial periods of time, are barred altogether to neu-

232. *Id.*, ¶ 106.2. See also Fenrick, *supra* note 30, at 125. On the influence of Fenrick’s article on the *San Remo Manual*, see van Hegelsom, *supra* note 210, at 51.

233. The approach of the *San Remo Manual* also “inspired” Principle 3.3 of the International Law Association’s Helsinki Principles on the Law of Maritime Neutrality. See Committee on Maritime Neutrality, International Law Association, *Helsinki Principles on the Law of Maritime Neutrality*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 68TH CONFERENCE, TAIPEI, 1998, at 505 (1998), reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 1425 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

tral shipping or within which belligerents claim the right to exercise a degree of control over neutral vessels not otherwise permitted by the rules of naval warfare. In practice, belligerents have based the establishment of operational or war zones on the right of reprisal against alleged illegal behavior of an enemy.²³⁴

This reflects the understanding of an exclusion zone prior to the *San Remo Manual*, which was discussed in Part III, and which saw measures being taken within the zone that could not be taken outside it. Furthermore, the *Annotated Supplement* confirmed that zones were established as an exceptional measure.

By contrast, the 1997 iteration of the *Annotated Supplement*, which was published just a few years after the *San Remo Manual*, took an altogether different view. It devoted a short section to “exclusion zones and war zones” and distinguished between the concept of an exclusion zone practiced during the world wars and the San Remo concept of an exclusion zone. The 1997 iteration of the *Annotated Supplement* provided:

To the extent that such zones serve to warn neutral vessels and aircraft away from belligerent activities and thereby reduce their exposure to collateral damage and incidental injury . . . and to the extent that they do not unreasonably interfere with legitimate neutral commerce, they are undoubtedly lawful. However, 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. In short, an otherwise protected platform does not lose that protection by crossing an imaginary line drawn in the ocean by a belligerent.²³⁵

The approach of the *San Remo Manual* is thus reflected in the 1997 *Supplement*. The creation of the zone is separated from the measures that may be taken within it and the *Supplement* confirms that a vessel’s protection does not suddenly change once it crosses the “imaginary line” that constitutes the boundary of the zone. Indeed, the *Supplement* cites the *San Remo Manual*

234. OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPARTMENT OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 7-39 n.141 (1989), <http://www.dtic.mil/dtic/tr/fulltext/u2/a221855.pdf>.

235. ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 7.9 (A.R. Thomas & James C. Duncan eds., 1999) (Vol. 73, U.S. Naval War College International Law Studies) (internal citations omitted).

for that proposition. The *Supplement* goes on to note that, in certain circumstances, exclusion zones are deemed “undoubtedly lawful.”²³⁶ The same passage is repeated in the 2007 *Commander’s Handbook on the Law of Naval Operations*.²³⁷

The influence of the *San Remo Manual* is most evident in the *Supplement* due to the two editions being published shortly before and shortly after the *San Remo Manual*, but its influence extends to other manuals. For example, the German *Commander’s Handbook* notes that exclusion zones must not “be confused with . . . the exclusion areas of the world wars”, that they are “admissible only in exceptional cases,” and that “[a] vehicle that must not be attacked, i.e. especially neutral merchant vessels and civil aircraft, will never lose this protection for the sole reason that they have entered an exclusion zone without authorization.”²³⁸ The Australian *Manual* is to similar effect, noting that “[t]here is no specific international law treaty provision referring to [Maritime Exclusion Zones (MEZ)], however, their use has acquired a degree of validity under customary international law” and that “[t]he establishment of an MEZ does not relieve the belligerent of its duties under IHL.”²³⁹ The Canadian *Manual* takes much the same approach.²⁴⁰ Likewise, the UK *Manual* provides that exclusion zones “are legitimate means of exercising the right of self-defence and other rights enjoyed under international law” and that the same body of law applies within the zone as it does outside.²⁴¹ For its part, the U.S. Department of Defense *Law of War Manual*, in the context of the “Use of Zones to Warn Vessels or

236. *Id.*

237. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCWP 5-12/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 7.9 (2007) [hereinafter U.S. COMMANDER’S HANDBOOK].

238. GERMAN NAVY, COMMANDER’S HANDBOOK: LEGAL BASES FOR THE OPERATIONS OF NAVAL FORCES ¶ 304 (2002). See also FEDERAL MINISTRY OF DEFENCE (GERMANY), ZDV 15/2, LAW OF ARMED CONFLICT MANUAL ¶¶ 1055–56 (2013); Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 35 INTERNATIONAL REVIEW OF THE RED CROSS 583 (1995) (noting that the *San Remo Manual* “influenced the provisions relating to naval warfare in the German manual,” but not specifying which provisions were so influenced).

239. AUSTRALIAN DEFENCE HEADQUARTERS, ADDP 06.4, LAW OF ARMED CONFLICT ¶¶ 6.33–6.34 (2006) [hereinafter AUSTRALIAN MANUAL].

240. CHIEF OF THE GENERAL STAFF (CANADA), B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS ¶¶ 852–53 (2001) [hereinafter CANADIAN MANUAL].

241. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶¶ 13.77.1, 13.78 (2004) [hereinafter UK MANUAL].

Aircraft—War, Operational, Warning, and Safety Zones,” provides that “[t]he establishment of such a zone does not relieve the proclaiming belligerent State of its obligation under the law of war to refrain from attacking vessels and aircraft that do not constitute military objectives” and that “a vessel or aircraft that is otherwise protected does not forfeit its protection from being made the object of attack simply by entering a zone of the ocean on the high seas established by a belligerent State.”²⁴² Indeed, by 2015, a U.S. Naval War College manual on maritime operational zones could observe that “all legal texts universally state that such a belligerent operational zone is *not* a free fire zone” and that “[t]his remains an undoubted and immutable legal proposition.”²⁴³ This stands in complete contrast to the practice of exclusion zones in the second phase of exclusion zones discussed in Part III.

The Australian, Canadian, German and UK manuals also set out regulations for the zones, should they be established, that are contained in the *San Remo Manual*, sometimes word for word,²⁴⁴ while the *Commander’s Handbook on the Law of Naval Operations* and the U.S. Department of Defense *Law Of War Manual* reflect some, but not all, of the restrictions.²⁴⁵ The *San Remo Manual* has thus had an important effect on State military manuals and associated publications, all the more notable for the *San Remo Manual’s* status as a writing of a publicist.²⁴⁶

Since the publication of the *San Remo Manual*, few zones have been established and it is unclear whether those that have constitute exclusion zones.²⁴⁷ Thus, the *San Remo Manual’s* position on exclusion zones is yet to

242. U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL ¶ 13.9.2 (2015) [hereinafter DOD LAW OF WAR MANUAL].

243. MARITIME OPERATIONAL ZONES, *supra* note 230, at 4-8.

244. GERMAN NAVY, COMMANDER’S HANDBOOK, *supra* note 238, ¶ 305; AUSTRALIAN MANUAL, *supra* note 239, ¶ 6.34; CANADIAN MANUAL, *supra* note 240, ¶ 853; UK MANUAL, *supra* note 241, ¶ 13.78; SAN REMO MANUAL, *supra* note 6, ¶ 106.

245. U.S. COMMANDER’S HANDBOOK, *supra* note 237, at 7-12; DOD LAW OF WAR MANUAL, *supra* note 242, ¶ 13.9.4.

246. *See* Statute of the International Court of Justice, *supra* note 201, art. 38(1)(d).

247. As part of Operation Iraqi Freedom, on March 20, 2003, upon the commencement of the armed conflict, the United States provided notification of the creation of a ‘Maritime Safety Zone’ in the Eastern Mediterranean Sea. Vessels were advised to exercise caution and stay away from the zone. Freedom of navigation was thus curtailed. The notification provided that “VESSELS THAT ENTER THE MARITIME SAFETY ZONE WHICH ARE APPROACHING U.S. FORCES, OR VESSELS WHOSE INTENTIONS ARE UNCLEAR ARE SUBJECT TO BOARDING AND VISIT BY U.S. FORCES.” HYDROLANT 597/03 (54, 56), March 20, 2003, reproduced in MARITIME

be tested fully. However, it has had a considerable effect on States' views on the matter, as reflected in their military manuals.

V. CONCLUSION

The notion of an exclusion zone in the law of armed conflict at sea has undergone considerable change. When used in the Russo-Japanese War of 1904–5, the exclusion zone was defensive in character and located adjacent to the State that authorized it. By contrast, the next iteration of the exclusion zone saw it transformed into something rather different.

During the First World War, the exclusion zone served to trigger a difference in the level of protection. If a vessel was within an exclusion zone, it was deemed susceptible to attack, regardless of whether it was a neutral or belligerent one. This understanding of an exclusion zone continued during subsequent wars and armed conflicts.

The third (and present) iteration of exclusion zones can be traced back to the *San Remo Manual*. The *San Remo Manual* process triggered a transformation in the law and practice of exclusion zones. In particular, the *San Remo Manual* distinguished between the establishment of an exclusion zone and the enforcement of the zone. It clarified that the same law applies within an exclusion zone as it does outside it and set out regulations for the zone should one be created. Thus, Heintschel von Heinegg notes that “[n]o zone, whatever its denomination or alleged purpose, does relieve the proclaiming belligerent of the obligation under the law of naval warfare to refrain from attacking vessels and aircraft which do not constitute legitimate military objectives.”²⁴⁸

State military manuals that have been published after the *San Remo Manual* take the same approach as the *San Remo Manual*. They, too, separate out the establishment of an exclusion zone from its enforcement. They also reproduce, sometimes word for word, the regulations for exclusion zones should they be created. Given that before the *San Remo Manual*, the concept

OPERATIONAL ZONES, *supra* note 230, at C-60. It further requested that vessels that were approaching US forces maintain radio contact; and provided that appropriate measures may be taken in self-defence if circumstances warrant. If the zone amounted to an exclusion zone, by contrast to the previous incarnation of the exclusion zone, it did not amount to a free-fire zone. Rather, the notification made clear that vessels entering the zone would be subject to visit. However, the zone might better be considered some sort of warning zone for protection of the naval units, akin to the immediate area of naval operations.

248. Heintschel von Heinegg, *supra* note 173, at 163.

of an exclusion zones was considered inextricably linked with the measures that could be taken within it, and which departed from the level of protection that would be afforded outside the zone, the *San Remo Manual* has had a profound influence on this area of the law. Indeed, contrary to the earlier practice of exclusion zones, which were justified as exceptional measures, in the view of some States, certain exclusion zones are now considered to be authorized under customary international law.