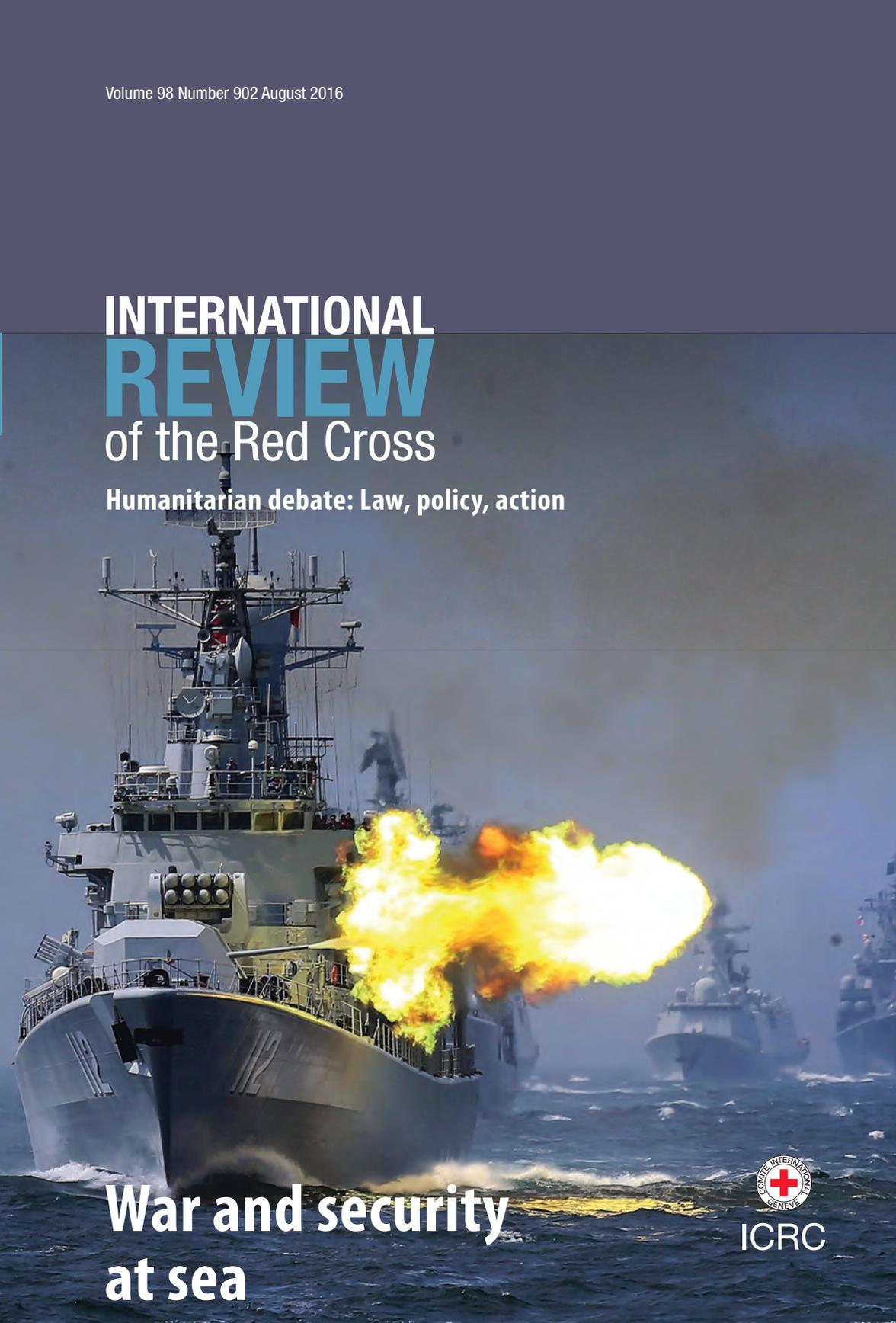


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INTERNATIONAL REVIEW of the Red Cross

Humanitarian debate: Law, policy, action



War and security
at sea



ICRC

Aim and scope

Established in 1869, the *International Review of the Red Cross* is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the *Review* informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the International Red Cross and Red Crescent Movement in armed conflict and other situations of violence. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Movement.

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Cover Photo: China's Harbin (112) guided-missile destroyer warship takes part in a week-long China-Russia "Joint Sea-2014" navy exercise in the East China Sea off the coast of Shanghai, China. 24 May 2014. Credit: KEYSTONE/AP.

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EDITORIAL

WAR AND SECURITY AT SEA: WARNING SHOTS

Vincent Bernard, Editor-in-Chief

Naval warfare and maritime security may seem a surprising theme to choose for the *Review* today. As a matter of fact, in the last few years most discussion about humanitarian law and action has centred on other spaces such as the arid reaches of Central Asia and the Sahel, urban areas in the Middle East, or even cyberspace, rather than the seas. However, there is a geopolitical chess game under way on the world's oceans, which despite rarely being the centre of media attention, nevertheless carries colossal stakes. The stakes – political, but also environmental and human – are played out on a background of exponential technological developments, of States' assertion of their sovereignty, of globalization of trade and wealth, but also of vulnerability. Our interdependence is laid bare on the ocean waves, for good or ill.

The *Review* believes that these developments must be understood in terms of the risks they harbour from a humanitarian viewpoint. Naval warfare is changing, and more than 20 years after the *Review* last dedicated an issue to the subject,¹ it is time to examine that evolution. In May 2017, the International Committee of the Red Cross (ICRC) published its updated Commentary on Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (GC II). This provides an opportunity to reassert the existing legal rules and discuss how to apply them in light of today's realities and the genuine risk of confrontation.

High stakes on the high seas

A third of the world's oil and a fifth of its gas production takes place at sea, while 90% of gas reserves lie under the seabed. The oceans contain 84% of the world's minerals and other raw materials. The world has over 90,000 commercial vessels,² including around 50,000 ships that transport some 90% of all international freight.³ And according to some estimates, 99% of all transoceanic data traffic goes through undersea cables, including internet usage, phone calls and text

messages. This route is faster than satellite transmissions.⁴ Economic activity at sea comes in a variety of forms, including passenger transport and cruises; the transport of goods, fuel and raw materials; ports; fishing and aquaculture; offshore oil and gas platforms; marine renewable energies (offshore wind- and wave-power facilities, etc.); and shipbuilding. If the Internet is the symbol of economic globalization, it is the world's ports, container ships and supertankers that make such globalization possible.

If a strategically important seaway were to be disrupted by a conflict – even a relatively limited one – there would be major repercussions on an incalculable number of people who depend directly or indirectly on these economic activities.

As the explorer Sir Walter Raleigh stated in the 1600s, “whosoever commands the sea commands the trade; whosoever commands the trade of the world commands the riches of the world, and consequently the world itself”.⁵ The economic stakes inevitably give rise to power struggles. It is in Asia that present-day disputes about who commands the sea, shipping lanes and the riches beneath the seabed are most acute.⁶

Today, China and a number of other States make competing and diversified claims over large parts of the South China Sea,⁷ across which are transported half of China's trade by volume, but also half of Japan's and South Korea's trade, half of the world's fossil fuels and four fifths of oil tankers coming from the Middle East.⁸

The South China Sea could be the epicentre of a major regional conflict, stoked by renewed nationalism in the region and the need for the various States to ensure economic growth or see their domestic stability collapse. In the last few years, serious tensions have flared in the East China Sea and the Sea of Japan;

1 Thematic issue on “War at Sea”, *International Review of the Red Cross*, Vol. 77, No. 816, 1995.

2 United Nations Conference on Trade and Development, *Review of Maritime Transport 2016*, UN Doc. UNCTAD/RMT/2016, 7 November 2016, p. 30, available at: http://unctad.org/en/PublicationsLibrary/rmt2016_en.pdf.

3 Figures quoted in Patrick Hébrard, “Cybersécurité du domaine maritime”, *Défense et Sécurité Internationale*, No. 52, February–March 2017, p. 54. See also: www.statista.com/statistics/264024/number-of-merchant-ships-worldwide-by-type/ (all internet references were accessed in July 2017).

4 Douglas Main, “Undersea Cables Transport 99 Percent of International Data”, *Newsweek*, 2 April 2015, available at: www.newsweek.com/undersea-cables-transport-99-percent-international-communications-319072.

5 Sir Walter Raleigh, “A Discourse of the Invention of Ships, Anchors, Compass, &c.,” *The Works of Sir Walter Raleigh*, Kt., Vol. 8, 1829 (reprinted 1965), p. 325.

6 The Council on Foreign Relations' Global Conflict Tracker shows that two of the world's five critical conflicts are in the South China and East China seas; see: www.cfr.org/global/global-conflict-tracker/p32137#!/. CrisisWatch also has the South China Sea on its radar; see: www.crisisgroup.org/crisiswatch.

7 See, for instance, Barthélémy Courmont and Eric Mottet, “La mer de Chine méridionale: Une mer chinoise?”, *Diplomatie*, No. 84, January–February 2017. For a Chinese perspective see *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, Ministry of Foreign Affairs of the People's Republic of China, position paper, 7 December 2014, available at: www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml; *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea*, Ministry of Foreign Affairs of the People's Republic of China, white paper, 13 July 2016, available at: www.fmprc.gov.cn/mfa_eng/zxxx_662805/t138061.

8 Figures quoted in Alexis Bautzmann, “Tensions en mer de Chine”, *Diplomatie*, No. 84, January–February 2017, p. 3.

and since 2014, Russia and NATO have once more assumed a Cold War stance in the Baltic Sea and Black Sea. Tensions could flare again in the Persian Gulf, and one could invoke numerous other fault lines between States. Some States are quick to assert their sovereignty, sometimes rejecting the territorial limits set by the law of the sea and drawing their own maritime boundaries. Incidents linked to rival territorial claims could well multiply in the coming years in an isolationist and sovereigntist climate where States appear to be placing more importance on military power than on multilateralism.

In addition to conflict between States seeking control of the seas, there are other security risks below the threshold of armed conflict such as sea-borne terrorism, trafficking of all kinds, and piracy, which still exists in some parts of the world.

Al Qaeda has claimed responsibility for several attacks at sea, such as those on the USS *Cole* in 2000, on the French oil tanker *Limburg* in 2002 and on a passenger ferry in the Philippines in 2004. The terrible attacks in Bombay in November 2008 were also carried out by armed individuals who had travelled to the city undetected by sea. More recently, several vessels have been subjected to rocket or missile attack in the Suez Canal (2013) and in the Gulf of Aden (2016). Coastal holiday resorts have also been targeted in order to disrupt the tourism on which many States rely, particularly African States, which have been severely affected, for example in Kenya (2014), Tunisia (2015) and Côte d'Ivoire (2016).⁹

It is estimated that between 2005 and 2014, piracy off the coast of Somalia cost \$18 billion in international trade.¹⁰ Renewed activity by Somali pirates has prompted many States to mobilize naval capabilities, with significant results. Although international naval cooperation has been successful in combating piracy along the Somali coast, piracy (so-called “petro-terrorism”) is on the rise in the Gulf of Guinea, in the Philippines and elsewhere.¹¹ Time and again, piracy flourishes in lawless coastal areas, places where the government is weak, where corruption is rife, or where there is a failed State. Combating pirates at sea depends on onshore solutions.

The distress suffered by men, women and children taking their chances on makeshift boats recalls scenes of shipwrecks from another era. Many are risking their lives in the uncertain hope of finding refuge, often because they are fleeing even greater danger in the war zones of Iraq, Syria and the Lac region of Chad. Coastguard services are used to combat all kinds of trafficking and for border control, notably to prevent irregular immigration. In the last few years, the most important aim of coastal operations has been to rescue irregular migrants. Certain NGOs have equipped themselves with rescue craft, and the navies of several States are also carrying out rescue missions. Security and humanitarian concerns are closely linked in such

9 Attack in the Suez Canal on the *Cosco Asia* container ship, 31 August 2013; attacks in the Gulf of Aden on the HSV2 *Swift*, the USS *Mason* and the liquefied natural gas tanker *Galicía Spirit*, October 2016; attack in Tunisia on the Riu Imperial Marhaba hotel, 26 June 2015; attack in Grand Bassam, Côte d'Ivoire, 13 March 2016; attack in Lamu, Kenya, 5–6 July 2014.

10 Louis Arthur Borer and Edouard Pflimlin, “La piraterie maritime en Afrique: D’un golfe à l’autre”, *Défense et Sécurité Internationale*, No. 38, October–November 2014, p. 61.

11 International Maritime Organization, *Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report 2016*, 30 March 2017, available at: www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Reports/Documents/245%20Annual%202016.pdf.

missions, as are political and identity questions, often set against a background of a public mood of dwindling empathy and the exploitation of xenophobia for political gain.

Naval operations in the twenty-first century

The world has seen few naval battles since the Second World War, and none have been on a scale similar to those seen in the battles of 1914–18 and 1940–45.¹² Huge cruisers bristling with large-calibre cannons today lie rusting at the bottom of the ocean.

Indeed, contemporary wars are mainly non-international conflicts, the principal actors of which are always non-State armed groups. Those groups do not have the resources or the strategic interest to obtain naval capabilities, with the notable exception of the Tamil Tigers during the conflict in Sri Lanka.¹³ Conversely, national navies play a sizeable role in, as it were, “high-tech guerrilla operations” – drone strikes, a helping hand for special forces, gathering intelligence, fire support for allied forces, etc. – that States use against armed groups ashore, specifically in counterterrorism operations.

Naval forces, like ground troops, are no longer designed to face up to each other in huge, decisive battles. Their main mission is to monitor and control the three dimensions of the maritime domain – submarine, surface and aerial – and to project air and land force towards the coast when taking part in combined operations; or, when acting in defence, to prevent such operations from succeeding. Some 80% of the world’s population lives within 200 kilometres of a coastline. Increasingly, therefore, the mission of navies is force projection, including air and amphibious force. A large number of land operations have been conducted entirely or partially from the seas and oceans, recent examples being operations in Afghanistan and Iraq, and air strikes in Syria.

Naval forces are also used to respond to humanitarian crises. For example, Japan and the United States sent ships to help victims of Typhoon Haiyan in the Philippines in November 2013. The US hospital ships USS *Mercy* and USS *Comfort* are sent to provide emergency medical care when disaster strikes.¹⁴

Although they may change in form, naval forces remain an essential part of States’ military arsenal. In this way, bases in Crimea and Syria are key components of Russian naval strategy. That strategy cannot be ignored when analyzing the conflicts in these two parts of the world. The navies of Australia, China, Japan and other Far East States are expanding rapidly. Between 2006 and 2016, China

12 The main battles have been the Indo-Pakistani naval war of 1971, the Falklands War between Argentina and the United Kingdom in 1982, and the air–sea battle between the US and Iranian navies around the *Sassan* and *Siri* oil platforms in 1988, known to Americans as Operation Praying Mantis.

13 See Malaka Chandradasa, “Learning from Our Enemies: Sri Lankan Naval Special Warfare against the Sea Tigers”, *CTX Journal*, Vol. 2, No. 2, 2012, available at: <https://globalecco.org/learning-from-our-enemies-sri-lankan-naval-special-warfare-against-the-sea-tigers>.

14 See Jesus Diaz, “How the US Navy Uses the Largest Hospital Ships in the World to Help Everyone”, *Gizmodo*, 10 March 2012, available at: <https://gizmodo.com/5948246/how-the-us-navy-uses-the-largest-hospital-ships-in-the-world-to-help-everyone>.

nearly doubled the number of modern destroyers and frigates in its fleet.¹⁵ In April 2017, it launched its first domestically built aircraft carrier. Although naval forces in some Asian States have entered into an arms race, the seas are still dominated by the crushing superiority of the US Navy, which is itself focusing increasingly on Asia.

Deploying naval power allows “gunboat diplomacy”—displays of force intended to show a State’s resolve, to intimidate or to assert sovereignty claims. Rival fleets often play dangerous games: naval deployments by NATO and Russia are sometimes accompanied by flyovers and simulated attacks in the Baltic Sea and Black Sea. Fortunately, these instances of “cold” inter-State tension rarely degenerate into open confrontations. Where violence has occurred, it has remained at a low level, quickly contained by diplomatic means to avoid escalation.

Regional organizations can play a major role in managing these rivalries, as in the case of the Association of South East Asian Nations in the South China Sea, as pointed out by Ambassador Ong Keng Yong, the Association’s former secretary-general, in the interview that opens this issue of the *Review*. Even if frequently contested, international justice and arbitration also continue to play an important role in resolving disputes and above all in establishing the rules of the game.¹⁶

There is an apparent trend in which certain States are adopting an aggressive posture towards others by deploying their naval arsenals in maritime hot spots, increasing the risk of incidents. It must be hoped that States will continue to avoid direct confrontation. However, States will doubtless use other types of limited force that the parties concerned will avoid qualifying as “armed conflict”, such as intervention via special forces, “maritime militia”,¹⁷ or even merchant ships and fishing vessels. The nature of these operations, which fall short of actual armed conflict, and the laws applicable to them are often intentionally shrouded in fog.

Technology has always played a major role in naval warfare. The times we live in see unprecedented speed in the development of new technologies. Autonomous devices still only distant possibilities in the context of war on land are already being deployed at sea. In 2016 the US Navy launched *Sea Hunter*, an autonomous ship that can sail not only without a crew but without remote steering. It can patrol the oceans autonomously for seventy days. Once armed, it

15 See Joseph Henrotin, “Mutations de la guerre navale”, *Défense et Sécurité Internationale*, No. 38, 2014, p. 8.

16 See, for example, Permanent Court of Arbitration, *The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China)*, Case No. 2013-19, Ruling, 12 July 2016. But see also Bill Hayton, “When Good Lawyers Write Bad History: Unreliable Evidence and the South China Sea Territorial Dispute”, *Ocean Development and International Law*, Vol. 48, No. 1, 2017, contesting that arbitration resolved the dispute between the States Parties.

17 See also James Kraska and Michael Monti, “The Law of Naval Warfare and China’s Maritime Militia”, *International Law Studies*, Vol. 91, No. 450, 2015, available at: <http://stockton.usnwc.edu/ils/vol91/iss1/13/>. See also Andrew S. Erickson and Conor M. Kennedy, “China’s Maritime Militia: What It Is and How to Deal with It”, *Foreign Affairs*, 23 June 2016, available at: www.foreignaffairs.com/articles/china/2016-06-23/chinas-maritime-militia; Andrew S. Erickson and Conor M. Kennedy, “Meet the Chinese Maritime Militia Waging a ‘People’s War at Sea’”, *Wall Street Journal Commentary*, 31 March 2015, available at: <https://blogs.wsj.com/chinarealtime/2015/03/31/meet-the-chinese-maritime-militia-waging-a-peoples-war-at-sea/>.

could become the first of a new generation of destroyers.¹⁸ However, these technologies are extremely expensive and only a small number of States will be able to have access to them.

Cyber-attacks are also a growing threat. Ships and ports are today packed with IT systems that constitute potential targets. If the briny deep is open to one and all, so is cyberspace. Attacks on cyberspace – along with outer space, another “global commons” – could wreak havoc on economic activity, as well as causing shipwrecks and pollution. In a report, the European Agency for Network and Information Security (ENISA) warned of insufficient measures to protect maritime systems, at a time when more than 50% of goods shipped from Europe are transported by sea.¹⁹

No such thing as a “clean” war

Happily, the era of battles between armadas on the high seas seems to be over. In the absence of naval battles, warship crews are no longer being slaughtered. The use of robotics in weapons systems could also reduce military losses in future. However, this does not mean that modern war at sea will be without bloodshed. In our time, distinguishing between civilian and military ships and aircraft remains a problem. Several dozen civilians died recently when a civilian vessel was attacked off the coast of Yemen. The huge stocks of naval mines around the world are every bit as dangerous for civilian ships as they are for naval vessels.

Coastal warfare can have extremely serious consequences for populations. The bombing of ports in Yemen,²⁰ combined with the closure of land borders, is now having a devastating effect on Yemen’s people, who have always depended on imports for their survival. Cholera has reached epidemic proportions in a population weakened by food shortages, inadequate access to health care and poor hygiene. Blockades are another example of naval tactics that can cause grave humanitarian concern, and States have always made regular use of them, as recent examples in Yemen and Qatar show. The Israeli naval blockade has limited the Gaza Strip’s access to the resources it needs for decades, particularly by affecting its fishing industry.²¹

The maritime environment can be contaminated by the effects of hostilities. Radioactive contamination unleashed by, for example, an attack on a nuclear power plant could produce pollution similar to that caused after the Fukushima plant was

18 Phil Stewart, “US Military Christens Self-Driving ‘Sea Hunter’ Warship”, *Reuters*, 7 April 2017, available at: www.reuters.com/article/us-usa-military-robot-ship-idUSKCN0X4214.

19 European Network and Information Security Agency, *Analysis of Cyber Security Aspects in the Maritime Sector*, report, November 2011, available at: www.enisa.europa.eu/publications/cyber-security-aspects-in-the-maritime-sector-1/at_download/fullReport.

20 See, for example, Stephen Snyder, “The Threat of War over Yemen’s main Seaport Is Slowing Delivery of Food Aid”, *Public Radio International*, 29 April 2017, available at: www.pri.org/stories/2017-04-29/if-theres-war-around-port-its-going-have-grave-consequences.

21 See Ezz Zanoun, “Work at Sea: The Daily Struggle of Gaza’s Fishermen”, photogallery, ICRC, 15 December 2016, available at: www.icrc.org/en/document/photo-gallery-gaza-fishermen%23photo-32596.

damaged by a natural catastrophe. Attacks on nuclear-powered ships pose the same risk. During the “Tanker War” between 1984 and 1988, several hundred oil tankers were attacked in the Persian Gulf as part of the Iran–Iraq War. And seas could be intentionally polluted in order to harm coastal populations.

Reference was made above to the situation of people who are risking their lives by taking to the seas in order to seek refuge or a better life abroad. This major source of humanitarian concern will be addressed in a forthcoming issue of the *Review* dedicated to displacement.

A reality check for the law

The sea is an open space where both rivalry and the need for cooperation between nations crystallize. As such, it has shown itself to be a key area for the development of norms of international law. For example, the ban on piracy is an ancient rule of the sea. Very early on in the development of international law, pirates were defined as *hostis humani generis* (enemies of mankind), and any State that captured them had the authority to try them, in what was the first example of universal jurisdiction.

For decades, judgments on maritime cases by the International Court of Justice (ICJ) have defined the broad principles of international law, some examples being the *Corfu Channel*,²² *North Sea Continental Shelf*²³ and *Nicaragua*²⁴ cases.

Various bodies of law are relevant when considering violence at sea, and should be interpreted as complementary: the law of the sea (the most important source of which is the United Nations Convention on the Law of the Sea (UNCLOS)²⁵), international humanitarian law (IHL), human rights law, the law of neutrality and environmental law.

The broad principles of IHL, which mainly concern the protection of non-combatants, are identical regardless of where the fighting occurs – land, sea, air, outer space or cyberspace. The cardinal principle of protection in war at sea is the belligerents’ obligation to take all possible measures to help the shipwrecked, regardless of who they are.²⁶ During war at sea, surviving sailors not only become *hors de combat* if their ship sinks: if not rescued, they are condemned to a slow, horrific death. The obligation to come to their aid has been universally accepted for centuries.²⁷

The duty to render assistance to shipwrecked people also applies in peacetime²⁸ and has been particularly important in recent years given the number

22 ICJ, *Corfu Channel Case*, Judgment, 9 April 1949, *ICJ Reports 1949*, p. 4.

23 ICJ, *North Sea Continental Shelf Case*, Judgment, *ICJ Reports 1969*, p. 3.

24 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *ICJ Reports 1986*, p. 14.

25 United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994).

26 GC II, Art. 18; GC IV, Art. 16.

27 Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Vol. 1, London, 1758, p. 170.

28 For example, Article 98 of UNCLOS.

of people risking their lives in the Mediterranean to seek asylum or migrate to Europe.

Until the First World War, armed conflicts at sea were mainly governed by the Hague Conventions of 1907 and customary law. Developments in the two World Wars raised the question of whether the balance established by IHL at sea between military necessity and humanitarian needs was still being respected. For example, means and methods of war such as submarines, naval mines, long-range missiles and, increasingly, aviation led to numerous attacks against neutral, civilian and hospital ships.²⁹

The safety of civilians, the use of blockades and the creation of maritime exclusion zones have continued to raise questions, for example during the Falklands War, the Iran–Iraq War and the 1991 Gulf War. A group of experts and government representatives worked on non-binding directives between 1987 and 1994. These are set out in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo Manual),³⁰ adopted in 1994. The San Remo Manual is, for the most part, still a valid restatement of customary and treaty international law applicable to armed conflicts at sea.³¹

GC II deals with the protection of injured, sick or shipwrecked members of the armed forces. In May 2017, the ICRC published its updated Commentary on GC II,³² which brings up to date the legal interpretations of various provisions of the Convention. There have been changes in both practice and law since the initial 1960 Commentary, particularly with the adoption of UNCLOS and other treaties adopted under the auspices of the International Maritime Organization.³³ Military capabilities have also grown, particularly in terms of increasing strike range, which has profoundly transformed the nature of war. New technologies such as satellite imaging mean that vessels in distress and shipwrecked survivors can be located more effectively. Locating bodies after a shipwreck is also being made easier by the use of underwater robots. The updated Commentary takes these developments into account.

However, there remain several grey areas and questions arising from recent developments. For example, should the concept of the use of force at sea be defined more clearly, given practices adopted by States? Since there is a fine line between “incidents at sea” and “armed conflict”, how best to distinguish mere “incidents” from actual international conflict, for which the definition threshold is low under IHL? How best to cover the activities of underwater robots and autonomous

29 See Louise Doswald-Beck, “The San Remo Manual on International Law Applicable to Armed Conflicts at Sea”, *International Review of the Red Cross*, Vol. 77, No. 816, 1995, pp. 635–647.

30 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995.

31 It has been argued, however, that it may be time to consider updating parts of the San Remo Manual. See, in particular, Wolff Heintschel von Heinegg, “How to Update the San Remo Manual on International Law Applicable to Armed Conflicts at Sea”, *Israel Yearbook on Human Rights*, Vol. 36, 2006.

32 See ICRC, “Updated Commentary Brings Fresh Insights on Continued Relevance of Geneva Conventions for Warfare at Sea”, 4 May 2017, available at: www.icrc.org/en/document/updated-commentaries-second-geneva-convention.

33 See the International Maritime Organization website, available at: www.imo.org/EN/Pages/Default.aspx.

ships? Do they have passage rights under UNCLOS? Should they be qualified as warships and thus entitled to engage in attacks?

Addressing the humanitarian consequences

Even if it remains quite exceptional, humanitarian actors can carry out rescue at sea operations. For instance, at time of writing, Médecins Sans Frontières is using three ships, in partnership with SOS Méditerranée, to rescue migrants in the Mediterranean.³⁴

Furthermore, just as modern naval operations aim above all to project power onto land, the use of ships by humanitarian organizations enables rapid deployment of medical materials and evacuation of people when crises occur in coastal regions. In recent years, the ICRC has used ships to evacuate injured people,³⁵ return detainees safely to their homes and reunite people separated from their loved ones.³⁶ It has also used them to transport relief supplies, most recently in Yemen.³⁷

Humanitarian organizations face the same difficulties gaining access to combat zones at sea or by sea as they do on land. On this note, one humanitarian in charge of evacuating injured people during the war in Sri Lanka explained:

Bringing a boat into a conflict area is a delicate undertaking which we will become involved in only if both sides provide us with the necessary assurances. They do this because they recognize the neutral and independent nature of our work. Only when the safety of our staff, passengers and the vessel itself have been guaranteed can an evacuation by sea take place.³⁸

Speaking at the launch of the updated Commentary on GC II, ICRC president Peter Maurer stated that the ICRC is thinking about procuring hospital ships in order “[t]o adapt to the complex reality of modern-day warfare and the growing challenges of assisting victims of armed conflicts”. He noted that “[s]uch vessels would significantly increase the ICRC’s emergency response capacities and would allow us to innovate and adapt to a rapidly changing world”.³⁹

Another area where international actors could do more is in training and prevention of violations of IHL. The ICRC’s military training experts are concerned that the rules of IHL – also known as the law of armed conflict (LOAC) – applicable to maritime operations are relatively poorly understood and little taught by many navies. In addition, there are currently very few people

34 See Médecins Sans Frontières, “10 Things You Need to Know about the Mediterranean Crisis”, 2 December 2016, available at: www.msf.org/en/article/10-things-you-need-know-about-mediterranean-crisis.

35 In Sri Lanka in 2009; see Morven Murchison, “Sri Lanka: Organizing Medical Evacuations by Sea”, interview, ICRC, 26 February 2009, available at: www.icrc.org/eng/resources/documents/interview/sri-lanka-interview-260209.htm.

36 In Libya in 2011; see ICRC, “Libya: Reuniting Hundreds of Families”, press release, 23 June 2011, available at: www.icrc.org/eng/resources/documents/news-release/2011/libya-news-2011-06-23.htm.

37 In 2015; see ICRC, “Red Cross and Red Crescent Relief Aid in Yemen”, 28 September 2015, available at: www.icrc.org/en/document/red-cross-red-crescent-relief-efforts-yemen.

38 M. Murchison, above note 35.

39 The text of his remarks can be found in this issue of the *Review*.

specializing in these matters. In recent years, the ICRC has organized specialist workshops⁴⁰ to increase knowledge about the LOAC, particularly in Asia. The “LOAC at Sea for Naval Operators” workshop is now in its fourth year, and further events are planned for 2017: the “LOAC at Sea for Military Lawyers” workshop and the “Maritime Security Course for Police and Security Forces”. The International Institute of Humanitarian Law in Sanremo also organizes regular workshops on naval operations and the law.⁴¹ This edition of the *Review* is intended to help generate fresh interest in issues of humanitarian concern and the resulting rules applicable to war and security at sea.

A shot across the bows

In their “techno-thriller” *Ghost Fleet*, Peter W. Singer and August Cole envisage a third World War which takes place mainly at sea, with the use of futuristic technologies.⁴² The two authors are not science-fiction novelists but experts renowned for their cutting-edge analysis of conflicts. The weapons systems they describe either already exist in certain arsenals or reflect current military trends.

At the moment, we are witnessing the adoption of a tougher stance by States in many areas of tension across the world’s seas. These growing tensions, combined with rapid growth in naval power and States’ aggressive deployment to disputed areas, is exacerbating the risk of incidents and even open hostilities around kinetic flashpoints. The Persian Gulf, the Baltic Sea or the South China Sea could be the scene of the twenty-first century’s first major regional conflict. Due to globalization, a conflict in one of these interdependent maritime spaces would inevitably have repercussions on the economies of multiple nations and on the lives of countless people, both near and far. In addition to these risks, there are many other situations involving the use of force at sea: trafficking, terror attacks and, as always, piracy, which show no signs of stopping.

Faced with these threats, humanitarian actors have little experience and few means to respond at sea. Meanwhile, the protagonists of war at sea do not have a sufficient knowledge of the applicable rules. Of course, even more so than on land, the speed of technical and strategic change in maritime operations necessitates continuous reflection on how to ensure that the law keeps pace with a shifting reality. However, none of the current evolutions in tactics or technologies challenges the relevance of the general principles of IHL at sea. It is first and foremost the duty of naval tacticians, engineers and fighters to learn and apply the existing law. They may need its protection again soon.

40 See, for example ICRC, “Indonesia: Naval Officers Discuss Law of War at Sea”, 21 November 2016, available at: www.icrc.org/en/document/indonesia-naval-law-war-sea-maritime.

41 See International Institute of Humanitarian Law, “Naval Operations and the Law”, available at: www.iihl.org/naval-operations-and-the-law/.

42 Peter W. Singer and August Cole, *Ghost Fleet: A Novel of the Next World War*, Mariner Books, Boston, MA, and New York, 2015.



Interview with Ambassador Ong Keng Yong

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Singapore, and former Secretary-
General of the Association of
Southeast Asian Nations (ASEAN)***

Ambassador Ong Keng Yong is the Executive Deputy Chairman of the S. Rajaratnam School of International Studies at the Nanyang Technological University in Singapore. Concurrently, he is Ambassador-at-Large at the Singapore Ministry of Foreign Affairs, non-resident High Commissioner to Pakistan and non-resident Ambassador to Iran. He also serves as Chairman of the Singapore International Foundation. Mr Ong served as Secretary-General of the Association of Southeast Asian Nations, based in Jakarta, Indonesia, from January 2003 to January 2008. In this interview, the Ambassador reflects on some issues of particular concern with regard to war and security at sea in the region of Southeast and East Asia.

Keywords: South China Sea, ASEAN, Southeast Asia, war, security, sea.

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* This interview was conducted on 16 June 2017 by Vincent Bernard, Editor-in-Chief, and Ellen Policinski, Managing Editor of the Review.

The topic of war and security at sea is increasingly becoming more important considering the latest trends and maritime operations carried out by States. It seems to be especially important in the region of Southeast Asia. Tell us about the current situation in the South China Sea, and provide our readers with an overview of the region, the territorial disputes and the players involved.

Maritime security is a particularly important topic for Southeast Asia because of its specific geography. There is more sea than land in this region. The South China Sea is the dominant body of water where the Association of Southeast Asian Nations [ASEAN] as the sole regional inter-governmental organization is extensively involved in the political-security cooperation, economic integration and socio-cultural development of its ten member States. The South China Sea alone encompasses an area of more than 3.6 million square kilometres, whereas the total landmass of Southeast Asian countries is approximately 4.4 million square kilometres.

The South China Sea is a very important maritime route, central to international trade in the region. Due to its location on the crossroads between two oceans – the Pacific and the Indian – the sea connects countries in Europe, the Middle East and South Asia with Southeast and East Asia. A lot of trade and maritime activities between the East and the West rely on the South China Sea. Very often, one can hear experts asserting that the South China Sea is a critical part of the international oil and gas business. In fact, China, Japan and South Korea depend heavily on oil imports from the Persian Gulf, and all the oil tankers sail through the South China Sea.

Additionally, the United States has been present in the region following the end of World War II. The United States has developed defence treaty relations with Japan, South Korea, the Philippines and Thailand. Thousands of US companies actively interact with their Southeast and East Asian counterparts, and the region gathers large numbers of American professionals, students and tourists. The importance of the South China Sea to the United States lies in its value as a significant link in East–West trade. It is also a key component of the overarching US military and strategic presence in Asia.

Apart from the United States, there is a substantial European presence in the region. Historically, the sea was a significant factor for Europeans arriving to Southeast Asia for trade purposes. Today, with global trade, European business people and investors regularly come to Southeast Asia. ASEAN member States have built on these links with the United States and Europe. Hence, developments in Southeast Asia, especially concerning the South China Sea and security, have always attracted international attention. Southeast Asia and ASEAN can be described as being prominently on the radar screen of people in international affairs, particularly in the business of buying and selling goods and services between the East and the West.

The South China Sea is also known today for various territorial disputes between several countries, the bone of contention being reefs, shoals, underwater features and small islands. Claimants from Southeast Asia include four member

States of ASEAN, namely Brunei, Malaysia, the Philippines and Vietnam, as well as China and Taiwan. The Chinese government submitted a map of the South China Sea to the relevant committee of the United Nations [UN] in 2009, with a “nine-dash line” showing the area claimed by China. Since then, there have been moments of tension as standoffs at sea have occurred between the competing claimants. Subsequently, under the provisions of the 1982 UN Convention on the Law of the Sea [UNCLOS], the Philippine government submitted its case to an arbitral tribunal over the objection of China. The tribunal delivered its decision in mid-2016, which China did not accept.

The fact that both regional and extra-regional players are involved in Southeast Asia serves to emphasize the strategic importance of the region, particularly the South China Sea. In your opinion, what is at stake here? Can you talk a little more about that geostrategic importance?

In the past few years, tensions in the South China Sea have increased as the contending parties have been very active in asserting their respective claims. Geopolitically, we also see an open contestation between the United States and China over the future of US military and strategic roles in Southeast and East Asia. In maintaining their presence, the US Navy and US Air Force traverse the South China Sea, which entails going in and out of the area claimed by China in its nine-dash-line map.

The United States sees China’s statements and interpretations as a reflection of the growth of its economic and political influence. China is the number two economy in the world today, and the perception is that China wants the rich natural resources in the South China Sea. US analysts see China as aiming to increase its presence and role in the region while minimizing that of the United States. Additionally, there is an ongoing debate as to whether the United States is part of the Asia-Pacific region. Former US president Barack Obama has stated that the United States is actually an Asia-Pacific nation and that it has every interest and intention in staying in East and Southeast Asia. In recent months, the new Trump administration has reaffirmed that the United States is committed to existing policy towards East and Southeast Asia.

As a result of China’s economic growth, the Chinese market has become a major source of support for all ten ASEAN economies. In fact, all ASEAN member States have China as their largest trading partner. In some Chinese intellectual circles, it is perceived that the prominent US presence in Southeast Asia hampers the healthy development of China’s relations with regional countries. There is an underlying concern that tensions between China and the United States could intensify. An issue of particular importance is that more often than not, Southeast Asian countries have to be very careful in managing their foreign policy with the United States and China in such a manner so that neither side feels less endorsed than the other. Obviously, this complicates diplomacy in the region.

How do you see these tensions impacting the population? What would be the consequences for the economy, and how would it impact the civilian population if there were to be an escalation of tensions in the region?

Most of the people in Southeast Asia have become used to the presence of the United States, its companies and its organizations, as well as other external actors such as those from Europe, Australia, Canada, China, India, Japan, South Korea, Russia and New Zealand. Due to its geography and tropical position, Southeast Asia is a zone of frequent natural disasters. As a result, US disaster relief operations are quite common. For example, one sees US aircraft carriers, naval ships and planes responding quickly to any natural disaster such as the consequences of a typhoon or tsunami. Southeast Asians do not see the US presence and role in the region as strictly oriented towards business, politics or military interests. For the last seven decades, due to the quick action of US forces in disaster response situations, many people have become accustomed to the idea that the first on the scene would be a US naval ship, plane or disaster relief team.

Southeast Asians have become much more open, cosmopolitan and comfortable in seeing countries such as the United States, China, Japan, Russia or India interacting with their governments. The region is multi-religious, multi-lingual and multi-ethnic. Over the last several decades, especially after the end of the Vietnam War in 1975, Southeast Asian countries have seen steady internal and external development. ASEAN has also become more visible in promoting regional cooperation, both among its member States and with non-Southeast Asian countries. For instance, the East Asia Summit brings together all the big powers in a yearly meeting with ASEAN member States.

In general, the fifty years since ASEAN was founded in 1967 have been relatively peaceful and prosperous for Southeast Asians. To that end, the only open discord that we have seen in the past few years is this contest in the South China Sea. It brought some of the disputes that have been festering for decades under the surface to the top of the agenda. However, I believe ASEAN has tried its best to diffuse tension and to manage as much as it can the potential big-power competition and rivalry in the region.

In the news, we hear a lot about types of conduct used by States involved in territorial disputes in the South China Sea, such as freedom of navigation operations, island-building, the use of maritime militias and similar tactics that increase tension in the region. What implications does this type of State behaviour have for international law? What role does ASEAN play, as a regional organization?

All ASEAN member States, apart from Cambodia (a signatory), have ratified UNCLOS, which is an important international convention for Southeast Asia considering the region's geography. The member States say that they follow UNCLOS, international law and a rules-based regime to manage their relations with other countries, big and

small. In case of any dispute in the South China Sea, UNCLOS will be the existing legal instrument to be consulted. The Philippines has resorted to arbitration under UNCLOS to find answers for its dispute with China in the South China Sea. In practical terms, ASEAN has conducted negotiations with China and other big countries on a variety of issues, and international conventions, law and practices have been referred to and used where mutual consent is obtained.

Over the past five decades, the region has developed a positive culture of peace and cooperation. When it was first established, ASEAN counted five members: Indonesia, Malaysia, the Philippines, Thailand and Singapore. These five countries have then slowly, steadily and systematically brought the rest of Southeast Asia into the organization, which now entails cooperation in many different areas, stretching over more than thirty different sectors and domains.

The populations and governments in Southeast Asia are open to cooperation with one another, and with others interested in ASEAN, peace and economic development. They are familiar with international law and the rule of law. ASEAN has organized numerous meetings and negotiations, followed by agreements and the signing of action plans. Consequently, abiding by the rules and norms that member States have concluded or settled is not strange. It is part of what is to be ASEAN.

The organization has a number of important understandings and agreements with China. In 2002, ASEAN and China concluded a Declaration on the Conduct of Parties in the South China Sea [DOC]. Recently, they have been talking about carrying out discussions on a Code of Conduct [COC], the adoption of which is envisaged in the DOC. This will determine how both sides conduct themselves in the South China Sea. This approach is based on ASEAN's belief that the rule of law and a rules-based regime should always apply.

You mentioned the tribunal that was set up last year under UNCLOS, which issued an arbitral decision on a case between the Philippines and China. How did that decision affect relations in the South China Sea, and in your view what role should international tribunals such as this one play in these sorts of territorial disputes?

Since the arbitral decision, China's relations with the Philippines remain positive because the Philippines is not using the decision to pursue the dispute further. In fact, the Philippines has stated publicly that it does not want to conduct its relations with China by enforcing the arbitral decision. The two countries have decided to find a way around the problem and resolve the dispute on their own, under a bilateral agreement. The subsequent action taken by the Philippines and China can be seen as a validation of the process under UNCLOS, since it led the parties in dispute to find a suitable outcome together.

ASEAN member States have different public reactions to the arbitral decision. What is important is that the situation has calmed down. In my opinion, for all those not directly involved in the dispute, the preference is to

defer to the position of the Philippines. Going forward, I believe ASEAN member States will leave it to China and the Philippines to resolve the dispute. For the organization, there is the DOC and work is being carried out on the COC. ASEAN subscribes to the settlement of dispute by peaceful means without the threat or use of force in accordance with relevant international rules and procedure, and its role is to continue pushing for the peaceful resolution of disputes.

How do you see the role of the International Committee of the Red Cross [ICRC] and other humanitarian actors in the region? Regarding the situation of the South China Sea, but also in broader terms, do they have a role to play?

The ICRC has always been well represented in Southeast Asia. With many natural disasters striking the region, the ICRC has been active and has responded quickly. More importantly, the ICRC represents international law. In its dialogue with governments, it has tried to inform them on what international obligations each country should uphold. The ICRC has the capacity to help ASEAN in substantively understanding international law better and respecting it. Therefore, apart from helping ASEAN member States when there is a humanitarian need, the ICRC also supports the training of officials and the development of capacity and capability to maintain and follow international humanitarian law [IHL].

In fact, the ICRC not only undertakes to build the capacity of ASEAN member States for appreciation and understanding of IHL, but also how to follow up on where there is more work to be done. For example, we need to legislate in some cases, develop national statutes to cover a certain area that has not been well managed or where there is a particular vacuum. The ICRC offers support for the statutory and practical capacity of Southeast Asia.

Over the years, the ASEAN member States have developed mechanisms on disaster management such as the ASEAN Coordinating Centre for Humanitarian Assistance. Before that, ASEAN leaders concluded the ASEAN Agreement on Disaster Management and Emergency Response. The required logistics and ASEAN's ability to manage disasters and IHL can be attributed to the ICRC's good practices and its continued hard work to create a convergence of the philosophy and practices of our respective governments and policy-makers.

Some say that the conflict in the South China Sea is inevitable and that the positions between disputing States are irreconcilable. How would you address this claim?

As a diplomat, I feel that we should all work together and try to find a way to reconcile differences between the parties in dispute. We realize the importance of the ASEAN geography and the geopolitical position of the South China Sea. We accept that big powers will continue to come into the region to try and make

their presence felt, or to try and establish specific relationships with individual ASEAN member States. To that end, we have utilized the ASEAN platform to pursue meaningful cooperation with the big countries interested in Southeast Asia. The positive outcome of such cooperation has further encouraged ASEAN to continue its efforts in this regard.

In the past few years, we have seen tensions rising from time to time between China and some ASEAN member States over the South China Sea issues. However, no diplomatic ties were severed, and relations built between China and Southeast Asian countries persisted. I do not think any Southeast Asian country would resort to aggressive military action.

I see China and the United States having very intensive diplomatic exchanges. Their economic ties are very strong, although not always easy to handle. I do not think anybody wants to go to war and destroy everything that has been achieved in the last fifty years. While Japan has its own dispute with China, it has approached the situation in the South China Sea sensitively. In the overall scheme of things, the important thing is to uphold the rule of law, iron out the differences between States and maintain peace.

I feel that this idea of the inevitability of war may be overstated. ASEAN member States and the non-Southeast Asian countries will want to find a way to avoid open conflict. Everyone knows that it will not be good for the region, for our respective economies, and generally it will rupture the good way in which we have managed our differences and diversity in the region for the past five decades. Of course, there will be continuing arguments and a lot of noise. I am optimistic that ASEAN and its partners will not return to the circumstances of the 1960s which gave birth to ASEAN.

The updated ICRC Commentary on the Second Geneva Convention: Demystifying the law of armed conflict at sea

**Bruno Demeyere, Jean-Marie Henckaerts,
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Abstract

Since their publication in the 1950s and 1980s respectively, the Commentaries on the Geneva Conventions of 1949 and their Additional Protocols of 1977 have become a major reference for the application and interpretation of those treaties. The International Committee of the Red Cross, together with a team of renowned experts, is currently updating these Commentaries in order to document developments and provide up-to-date interpretations of the treaty texts. Following a brief overview of the methodology and process of the update as well as a historical background to the Second Geneva Convention, this article addresses the scope of applicability of the Convention, the type of vessels it protects (in particular hospital ships and coastal rescue craft), and its relationship with other sources of international humanitarian law and international law conferring

* The authors wish to acknowledge that this article summarizes the key findings of the new Commentary and as such reflects the input of many experts involved in the drafting and review of the Commentary.

protection to persons in distress at sea. It also outlines differences and commonalities between the First and the Second Conventions, including how these have been reflected in the updated Commentary on the Second Convention. Finally, the article highlights certain substantive obligations under the Convention and how the updated Commentary addresses some of the interpretive questions they raise.

Keywords: international humanitarian law, Second Geneva Convention, updated Commentary, law of the sea, treaties conferring protection to persons in distress at sea, International Committee of the Red Cross, protection of wounded, sick and shipwrecked, non-international armed conflict, obligation to search and collect casualties at sea, hospital ships, coastal rescue craft.



A contemporary interpretation of humanitarian law

The 1949 Geneva Conventions and their 1977 Additional Protocols have passed the test of time in many situations of armed conflict over their respective almost seventy and forty years of applicability. They still constitute the bedrock of international humanitarian law (IHL) and provide fundamental rules protecting persons who are not, or are no longer, taking a direct part in hostilities. These persons include wounded and sick members of armed forces, the shipwrecked, prisoners of war, and civilians. Furthermore, the Conventions foresee the protection of specific categories of persons, such as women and children, the elderly and displaced persons.

In the years following the adoption of the 1949 Geneva Conventions and their 1977 Additional Protocols, the International Committee of the Red Cross (ICRC) published a series of Commentaries that were primarily based on the negotiating histories of these treaties and on prior practice.¹ While these Commentaries undoubtedly retain their historic value, the ICRC decided in 2011 to embark, together with a number of renowned external experts, on an ambitious project to update the Commentaries, seeking to reflect the significant developments in the application and interpretation of the Conventions and their Additional Protocols in the intervening years.

The updated Commentaries preserve the format of the original Commentaries, providing an article-by-article analysis of each of the provisions of

¹ See Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 2: *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987.

the Conventions and Additional Protocols. Benefiting from decades of practice and legal interpretation by States (as reflected, for example, in military manuals, national legislation and official statements), courts and scholars, as well as from research done in the ICRC Archives (reflecting practices witnessed first-hand by the ICRC in past armed conflicts), however, they do so in a more detailed manner than the original Commentaries. The new Commentaries not only include the ICRC's current interpretations of the law where they exist, but also indicate where there are divergent views and highlight issues not yet settled.

To achieve this level of detail and nuance, an elaborate drafting process was put in place. Besides authoring updated commentaries to one or more articles of the Second Geneva Convention (GC II), contributors (consisting of ICRC staff lawyers and, importantly, external authors) also read and commented on drafts of updated commentaries on other provisions. Additionally, an Editorial Committee including senior ICRC and non-ICRC lawyers reviewed the updated Commentary on GC II as a whole.² Finally, a group of over forty peer reviewers representing a large geographic diversity and with significant subject-matter expertise, including naval experts, provided insightful comments and suggestions, greatly contributing to the richness of the analysis found in the final product. After the completion of the updated Commentary on the First Geneva Convention (GC I) in March 2016, the online launch of the updated Commentary on GC II on 4 May 2017 constituted the second milestone of this important project.³

The authors of the updated Commentary on GC II followed the same methodology as used for the updated Commentary on GC I. They used the rules of treaty interpretation set out in the Vienna Convention of the Law of Treaties, in particular Articles 31–33, to reflect as accurately as possible the current application and interpretation of GC II. The contributors looked at the ordinary meaning of the terms used in the provisions, their context, the object and purpose of the treaty, and the preparatory work. Additionally, the authors looked at other relevant rules of international law. Since GC II was drafted, many other relevant branches of international law, such as international human rights law and international criminal law, have developed significantly. It is of particular relevance to the topic of armed conflict at sea to assess the impact of the 1982 UN Convention on the Law of the Sea (UNCLOS)⁴ as well as a series of treaties adopted under the auspices of the International Maritime Organization (IMO), conferring protection to persons in distress at sea. A treaty must be “interpreted and applied within the framework of the entire legal system prevailing at the time

2 The Editorial Committee for the updated Commentary on the Second Geneva Convention consists of Liesbeth Lijnzaad and Marco Sassòli as non-ICRC members, and Philip Spoerri and Knut Dörmann as ICRC members.

3 The full version is available online at: ihl-databases.icrc.org/ihl/full/GCII-commentary (all internet references were accessed in July 2017). A hard copy of the updated Commentary on the Second Geneva Convention will be published by Cambridge University Press by January 2018.

4 United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994) (UNCLOS).

of the interpretation”.⁵ The updated Commentary therefore takes account of how these other fields of law have developed over time, and makes reference to them where relevant.

After this brief overview of the background, scope and methodology of the project to update the Commentaries,⁶ this article first situates GC II in its historical context, before addressing the applicability of the Convention and its relationship to other sources of international law. It further describes some of the commonalities and differences between GC I and GC II and their updated Commentaries, as well as highlighting some of the main issues dealt with in the updated Commentary on GC II, including the obligation of parties to an armed conflict to take all possible measures to search for and collect the wounded, sick, shipwrecked and dead at sea, as well as the rules in GC II regulating the protection of hospital ships and coastal rescue craft.

Historical background of the Second Geneva Convention⁷

Naval battles have been fought for several thousand years. Yet, when the first Geneva Convention of 1864 was adopted, conferring protection on wounded and sick members of the armed forces, its rules only applied to warfare on land. The eventual inclusion of victims of warfare at sea in humanitarian treaty law was achieved only several decades later through a separate treaty on warfare at sea.⁸ The distinction thus established in the protection of victims of armed conflict between warfare on land and warfare at sea was maintained in 1949 by the adoption of two different Conventions to apply on land and at sea respectively.

The Geneva Convention of 1864 embodied the principle that members of the armed forces who are *hors de combat* must be protected and cared for regardless of their nationality. It would take roughly forty years before States were ready to extend this principle to armed forces at sea. A proposal by the ICRC to include a paragraph in the 1864 Convention stipulating that similar provisions relating to maritime warfare “could be subject of a later Convention” never made it into the final text.⁹ Two years later, the Battle of Lissa (1866) in the Adriatic

5 International Court of Justice, *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (The Namibia Case)*, 21 June 1971, para. 53.

6 For a more detailed description, see the introduction to the updated Commentary: ICRC, *Commentary on the Second Geneva Convention*, Cambridge University Press, 2017 (ICRC Commentary on GC II), paras 1–66. See also Lindsey Cameron, Bruno Demeyere, Jean-Marie Henckaerts, Eve La Haye and Heike Niebergall-Lackner, “The Updated Commentary on the First Geneva Convention – A New Tool for Generating Respect for International Humanitarian Law”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015, pp. 1210–1214; Jean-Marie Henckaerts, “Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the Twenty-First Century”, *International Review of the Red Cross*, Vol. 94, No. 888, 2012.

7 See ICRC Commentary on GC II, above note 6, Introduction, paras 79–96.

8 Hague Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, 29 July 1899 (entered into force 4 September 1900).

9 Article 11 of the draft submitted by the Comité International de Secours aux Militaires Blessés to the 1864 Conference, available in the ICRC Archives under ACICR, A AF 21-3b.

Sea once more reminded States of the need to provide for the protection of wounded, sick, shipwrecked and dead members of the armed forces at sea.¹⁰ Prompted by the needless deaths caused by the lack of care and protection for the sick, wounded and shipwrecked during that battle, a conference in 1868 adopted fifteen “Additional Articles relating to the Conditions of the Wounded in War”. These articles addressed issues such as the protection of boats that collect the shipwrecked and wounded, hospital ships and the status of medical personnel. However, the reticence of the major naval powers prevented these articles from entering into force.¹¹

In line with the ICRC’s repeated calls to adapt the 1864 Geneva Convention to the conditions of warfare at sea, the First Hague Peace Conference of 1899 adopted Hague Convention III, drawing inspiration from the Additional Articles of 1868. Hague Convention III, which entered into force in 1900, was the first treaty to protect victims of armed conflict at sea.¹² It was revised in 1907 in light of the new Geneva Convention of 1906 governing land warfare, resulting in the 1907 Hague Convention X on maritime warfare.¹³ This convention would remain the governing treaty for the protection of members of armed forces at sea until the adoption of GC II in 1949.

At the International Conference of the Red Cross in 1934, the ICRC was given a mandate to convene a Commission of Experts “to consider in what respect the modification of the Hague Convention of 1907 would appear to be desirable and possible”.¹⁴ Convened in Geneva in 1937, the Commission adopted a Draft Revised Maritime Convention, to be considered for adoption by States at the next Diplomatic Conference.¹⁵ Owing to the outbreak of the Second World War, the Diplomatic Conference foreseen for 1940 never took place. After the end of that war, the 1937 Draft Convention served as a basis for the drafting of the Second Geneva Convention of 1949. The revisions made in the years leading up to 1949 were heavily influenced by the experience of the Second World War,

10 Pierre Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima*, ICRC and Henry Dunant Institute, Geneva, 1985, pp. 190–192.

11 ICRC Commentary on GC II, above note 6, Introduction, para. 84. For an overview of the preparation of and debates during and after the 1868 Diplomatic Conference, see P. Boissier, above note 10, pp. 215–225; J. Galloy, *L’inviolabilité des navires-hôpitaux et l’expérience de la guerre 1914–1918*, Sirey, Paris, 1931, pp. 30–47; Christophe Lueder, *La Convention de Genève au point de vue historique, critique et dogmatique*, E. Besold, Erlangen, 1876, pp. 159–198; J. Pictet (ed.), *Commentary on the Second Geneva Convention*, above note 1, pp. 5–10.

12 ICRC Commentary on GC II, above note 6, Introduction, para. 86. For more details, see *Proceedings of the Hague Peace Conferences: The Conference of 1899*, Oxford University Press, Oxford, 1920, pp. 31–44.

13 ICRC Commentary on GC II, above note 6, Introduction, para. 88. For more details, see *Proceedings of the Hague Peace Conferences: The Conference of 1907*, Vol. 3, Oxford University Press, Oxford, 1920, pp. 305–322. See also J. Galloy, above note 11, pp. 70–90.

14 ICRC Commentary on GC II, above note 6, Introduction, para. 91. For the full text of that resolution, see *Report Concerning the Revision of the Tenth Hague Convention of 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906*, 1937, adopted by a Commission of Naval Experts and presented to the 16th International Conference of the Red Cross, London, June 1938 (Document No. 2a) (Naval Expert Report), p. 1, available at: https://library.icrc.org/library/docs/CDDH/CL_1938/CL_1938_DOC02_ENG.pdf.

15 ICRC Commentary on GC II, above note 6, Introduction, para. 91. For a detailed overview of all the steps that were undertaken, see Naval Expert Report, above note 14, pp. 1–8.

which was unparalleled in scope and in the suffering and casualties caused among both combatants and civilians.¹⁶

Applicability of the Second Geneva Convention and relationship to other sources of international law

GC II applies in the first place in case of an international armed conflict that takes place wholly or partly at sea.¹⁷ Pursuant to Article 3 common to the four Geneva Conventions, fundamental protections also apply in the event of a non-international armed conflict at sea. While the meaning of the term “sea” is central to determining the applicability of GC II, the latter does not contain a definition of this term. It is commonly understood that the term “sea” is used to distinguish the scope of application of GC II from that of GC I, which applies on land. To avoid a protection gap between the two Conventions, the term “sea” should be interpreted broadly. Thus, for the purpose of determining who deserves the protection of GC II, the term “sea” comprises not only saltwater areas such as the high seas, exclusive economic zones, archipelagic waters, territorial waters and internal waters, but also other bodies of water such as lakes and rivers.¹⁸

Once wounded, sick and shipwrecked members of the armed forces are put ashore, GC II ceases to apply and these persons immediately benefit from protection under GC I.¹⁹ This principle applies regardless of which “branch” of the armed forces a person belongs to: a member of the air force who is shipwrecked at sea is protected by GC II, as much as a member of the navy who is wounded on land is protected by GC I.

Although persons cannot be simultaneously protected under GC I and GC II, they can benefit from the parallel application of GC II and the Third Convention (GC III). When wounded, sick or shipwrecked members of the armed forces are cared for by enemy medical personnel or on hospital ships of the enemy force, they “fall into enemy hands” and thus become prisoners of war, protected under GC III.²⁰ Until their recovery, and as long as they remain at sea, they continue to be protected under both GC II and GC III. Wounded and sick prisoners of war who are put ashore are protected simultaneously by GC I and GC III. Once they are recovered, they remain protected under GC III until their final release and repatriation.²¹

16 ICRC Commentary on GC II, above note 6, Introduction, paras 76, 92.

17 *Ibid.*, Art. 4, paras 935–936.

18 *Ibid.*, Art. 12, paras 1374–1376.

19 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 4.

20 *Ibid.*, Art. 16.

21 See ICRC Commentary on GC II, above note 6, Art. 16, para. 1577.

Provisions of the Fourth Convention (GC IV) are also relevant in the event of an armed conflict at sea, for the protection of wounded, sick and shipwrecked civilians. GC IV requires, for example, that parties to the conflict assist the shipwrecked and protect them against pillage and ill-treatment, as far as military considerations allow.²² It also mandates the respect and protection of specially provided vessels on sea used to transport wounded and sick civilians, the infirm and maternity cases.²³

Moreover, Additional Protocol I, applicable to international armed conflicts, supplements GC II. It provides several definitions relevant to the wounded, sick and shipwrecked at sea.²⁴ The Protocol also extends the protection of GC II to all civilians who are wounded, sick or shipwrecked,²⁵ and to other medical ships and craft than those mentioned in GC II.²⁶ Additional Protocol II, applicable to non-international armed conflicts, complements the provisions of Article 3 of GC II. For example, it prescribes the search for and collection of the wounded, sick and shipwrecked, and their protection against pillage and ill-treatment.²⁷

Finally, it should be mentioned that customary humanitarian law also applies to warfare at sea. In this regard, special mention must be made of the 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo Manual),²⁸ which, in its own words, is a “contemporary restatement – together with some progressive development – of the law applicable to armed conflicts at sea” and which “has been drafted by an international group of specialists in international law and naval experts”. At the time of writing this Commentary, the San Remo Manual is, for the most part, still a valid restatement of customary and treaty international law applicable to armed conflicts at sea. It has been argued, however, that it may be time to consider updating parts of the Manual.²⁹

In parallel to these IHL sources, GC II also interacts with other sources of international law regulating activities at sea. This includes the 1982 UNCLOS. The outbreak of an armed conflict at sea does not terminate or suspend the applicability of most provisions of UNCLOS; they remain in operation and apply simultaneously to GC II during an armed conflict.³⁰ This complementarity is reflected in the updated Commentary on GC II. The term “warship”, for example, used several

22 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 16.

23 *Ibid.*, Art. 21.

24 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 8.

25 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 22.

26 *Ibid.*, Art. 23.

27 *Ibid.*, Art. 8.

28 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995.

29 For further details, see ICRC Commentary on GC II, above note 6, Introduction, para. 115.

30 *Ibid.*, para. 48. Some UNCLOS provisions are exercised “subject to this Convention and to other rules of international law”; see e.g. Art. 2(3). This includes GC II, and it is thus possible that the applicability of individual UNCLOS rules that include such a clause is temporarily suspended. ICRC Commentary on GC II, above note 6, Introduction, para. 49.

times in GC II, must be interpreted based on the definition provided for in Article 29 of UNCLOS.³¹

There are also a number of treaties adopted under the auspices of the IMO, in particular the Safety of Life at Sea Convention³² and the Maritime Search and Rescue Convention.³³ With regard to those IMO treaties that do not expressly limit their scope of application by exempting warships, the question arises to what extent and how they apply during an armed conflict that takes place wholly or partly at sea. No clear answer to this question currently exists. Arguably, these IMO treaties are “multilateral law-making treaties” that, based on the International Law Commission’s 2011 Draft Articles on the Effect of Armed Conflicts on Treaties,³⁴ belong to the categories of treaties that may remain in operation during armed conflict, also when this takes place at sea.³⁵

Commonalities and differences between the First and Second Geneva Conventions

GC II seeks to protect the wounded, sick and shipwrecked members of the armed forces at sea. Similar to the other Geneva Conventions, this is premised on the fundamental principle of respect for the life and dignity of the individual, even, or especially, during armed conflict. This means that victims of armed conflict must in all circumstances be respected and protected; they must be treated humanely and cared for without any adverse distinction based on sex, race, nationality, religion, political opinion or any other similar criteria.³⁶

Certain articles common to all four Geneva Conventions are central to the application of the Conventions and to the protections provided therein. For example, common Article 1 deals with the obligation to respect and ensure respect for the Conventions in all circumstances. Common Articles 2 and 3 deal with the scope of application of the Conventions, respectively for international and for non-international armed conflicts. The updated Commentary on GC I was an important milestone partly because it included updated commentaries on these articles common to all four Conventions. Nevertheless, even for these common articles, the different contexts to which the Conventions apply have warranted some contextualization in the updated Commentary on GC II, dealing with warfare at sea.

31 *Ibid.*, Art. 14, para. 1520.

32 International Convention for the Safety of Life at Sea, 1874 UNTS 3, 1 November 1974 (entered into force 25 May 1980).

33 International Convention on Maritime Search and Rescue, 1403 UNTS, 27 April 1979 (entered into force 22 June 1985).

34 United Nations, International Law Commission, Report of the International Law Commission on the Work of Its Sixty-Third Session, *Yearbook of the International Law Commission*, Vol. 2, Part 2, A/66/10, 2011.

35 See ICRC Commentary on GC II, above note 6, Introduction, paras 51–59.

36 *Ibid.*, Art. 12, paras 1417–1424, 1437–1441.

Contextualization of the updated commentaries on the common articles

Contextualization was sometimes prompted by the existence of complementary rules of international law, outside of IHL, that regulate activities at sea. For example, the updated commentary on Article 2 of GC I notes that the threshold to trigger an international armed conflict is low: “Even minor skirmishes between the armed forces, be they land, air or naval forces, would spark an international armed conflict and lead to the applicability of humanitarian law.”³⁷ This means that any armed interference in a State’s sphere or sovereignty, be it on land, in the air or at sea, may constitute an international armed conflict within the meaning of Article 2.³⁸ This passage is maintained in the updated commentary on Article 2 of GC II. However, it is elaborated that UNCLOS foresees the innocent passage of foreign ships in the territorial sea of another State, which may include warships. The updated Commentary specifies that such passage does not constitute an international armed conflict.³⁹

Some contextualization was also necessary in the updated commentary on common Article 3, regulating non-international armed conflict. The fact that GC II applies at sea entails some practical challenges and raises questions as to how certain provisions are to be applied. For example, one of the questions the updated Commentary addresses is whether detention in the context of a non-international armed conflict can take place at sea.⁴⁰ Article 22 of GC III requires prisoners of war to be interned on land. This applies in international armed conflict, whereas for non-international armed conflict, there is no rule that specifically addresses this issue. However, the updated commentary on Article 3 concludes that, in principle, detention in a non-international armed conflict should also take place on land.⁴¹ Indeed, “the entire system of detention laid down by the Conventions, and in which the ICRC plays a supervisory role, is based on the idea that detainees must be registered and held in officially recognized places of detention accessible, in particular, to the ICRC”.⁴² Furthermore, if detention in the context of a non-international armed conflict were to take place at sea, the conditions of such detention might be such as to violate the requirement of humane treatment, particularly in cases of prolonged detention.⁴³

A further example where the different contexts of warfare on land and warfare at sea warranted the updated commentary on common Article 3 to be contextualized for GC II relates to the right to a fair trial. Common Article 3

37 ICRC, *Commentary on the First Geneva Convention*, Cambridge University Press, Cambridge, 2016, Art. 2, para. 237.

38 ICRC Commentary on GC II, above note 6, Art. 2, para. 259.

39 *Ibid.*

40 *Ibid.*, Art. 3, para. 741.

41 *Ibid.*

42 Jelena Pejic, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and other Situations of Violence”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, p. 385. See also ICRC Commentary on GC II, above note 6, Art. 3, para. 741.

43 ICRC Commentary on GC II, above note 6, Art. 3, para. 580.

prohibits “the passing of sentences and the carrying out of executions without previous judgments pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.⁴⁴ In practice, it seems highly unlikely that a trial at sea can fulfil the minimum fair trial guarantees. To stand trial, therefore, persons would normally have to be transferred to land.⁴⁵ Still, the circumstances of being at sea may be relevant when assessing the more specific rights stemming from the right to a fair trial. More concretely, for example, the right to be tried within a reasonable time, which is also pertinent in the context of a non-international armed conflict, may require taking into consideration the exceptional circumstances of being at sea.⁴⁶

Distinctive features of the protective scope of the Second Convention

Further to these examples relating to the application and interpretation of the common articles in the updated Commentary on GC II, there are certain substantive differences between GC I and GC II. These differences relate to the persons and objects protected under the respective Conventions.

Protection of the shipwrecked

While the basic protection provided for in both Conventions is the same, the scope of persons covered by that protection in GC II is adapted to warfare at sea. The Convention protects not only the wounded and sick, but also the shipwrecked. Thus, the text of common Article 3 is worded slightly differently in GC II compared to the other three Conventions, and this has been reflected in the updated Commentary.⁴⁷ Whereas in GC I, GC III and GC IV reference is made only to the “wounded and sick”, GC II consistently refers to the “wounded, sick and shipwrecked”. For the purpose of common Article 3, a “shipwrecked” person is someone who, as a result of hostilities or their direct effects, is in peril at sea or in other waters and requires rescue. A person would also qualify as shipwrecked where, for example, hostilities adversely affect the ability of those who would normally rescue them to do so in fact. It should be noted that a person in such situations must not commit any hostile acts.⁴⁸

Likewise, Article 12, which establishes the general obligation for States to respect and protect in all circumstances, refers to the “wounded, sick and shipwrecked” in GC II, whereas in GC I it refers only to the “wounded and sick”.⁴⁹

44 Common Art. 3 to the Geneva Conventions.

45 ICRC Commentary on GC II, above note 6, Art. 3, para. 696.

46 *Ibid.*, Art. 3, para. 710.

47 *Ibid.*, Art. 3, paras 772–775.

48 *Ibid.*, Art. 3, para. 774.

49 Note, however, that for legal purposes there is no difference between wounded and sick. *Ibid.*, Art. 12, para. 1378.

Protection of hospital ships and coastal rescue craft

Logically, the difference between GC I and GC II also extends to the objects that are protected. While ambulances and other land-based medical transports are protected under GC I,⁵⁰ medical transports used on water are protected under GC II in equal measure. Recognizing an important means by which its obligations may be implemented, GC II affords protection to hospital ships⁵¹ and coastal rescue craft,⁵² as well as to ships chartered for the transport of medical equipment⁵³ and to medical aircraft.⁵⁴

The operation of hospital ships constitutes one way in which parties to the conflict can carry out their obligation to protect and care for the wounded, sick and shipwrecked at sea. To be able to fulfil this function, hospital ships enjoy special protection “at all times”, and they may neither be attacked nor captured.⁵⁵ The hospital ship’s personnel and crew are likewise accorded special protection, owing to the vital role they play in the ship’s performance of its humanitarian functions.⁵⁶

In order to benefit from special protection under GC II, hospital ships must have been “built or equipped ... especially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them”.⁵⁷ It follows that hospital ships may not serve any other than the said humanitarian purpose, and that they lose their protection if they are used to commit acts harmful to the enemy.⁵⁸ As noted in the updated commentary on Article 22, it is their exclusively humanitarian function of impartially providing assistance to protected persons that justifies their special protection,⁵⁹ but parties to the conflict have the right to control and search hospital ships to verify that their use conforms to the provisions of GC II.⁶⁰ This far-reaching right has been inserted by States into the Geneva Conventions in order to counter the possibility that an enemy’s hospital ship may be abused to further military operations.

At present, only a small number of States have military hospital ships, which are not only expensive to operate and maintain but also difficult to protect against attack.⁶¹ The updated commentaries on Articles 33, as well as Articles 18 and 22, point out that one option available to parties seeking to comply with their obligations to respect and protect the shipwrecked, wounded and sick is to transform a merchant vessel into a hospital ship.⁶² It is important to note that

50 GC II, Art. 35.

51 *Ibid.*, Arts 22, 24.

52 *Ibid.*, Art. 27.

53 *Ibid.*, Art. 38.

54 *Ibid.*, Art. 39.

55 *Ibid.*, Art. 22(1).

56 *Ibid.*, Art. 36.

57 *Ibid.*, Art. 22(1).

58 *Ibid.*, Art. 34(1).

59 ICRC Commentary on GC II, above note 6, Art. 22, para. 1927.

60 GC II, Art. 31(1).

61 ICRC Commentary on GC II, above note 6, Art. 22, para. 1928.

62 See *ibid.*, para. 1945; Art. 33, para. 2336; Art. 18, para. 1677.

once a merchant vessel has been transformed into a hospital ship by a party to the conflict, it may not “be put to any other use throughout the duration of hostilities”.⁶³

GC II regulates a variety of aspects pertaining to hospital ships. Two issues in particular have become topical since 1949. First, Article 34(2) refers, as an example of an “act harmful to the enemy” (which may lead to a loss of protection), to the requirement that “hospital ships may not possess or use a secret code for their wireless or other means of communication”. Thus, in principle, communications to and from hospital ships may never be encrypted, and must be sent in the open. However, due to developments in communication technology, most prominently the use of satellites, encryption is now so common that it is unavoidable as an available technology. As a result, the rule has been challenged in a number of military manuals. This development leads the updated Commentary to conclude that “there is, therefore, a certain trend in international practice whereby the use of satellite communications does not constitute a violation of paragraph 2, even if messages and data are transmitted using encryption”.⁶⁴

The second topical issue pertains to whether hospital ships may be armed, in particular whether they may be armed to the level of being able to defend themselves against incoming attacks (as opposed to relying on other vessels, in particular warships, to defend them). In principle, the arming of hospital ships with weapons other than purely deflective means of defence (such as chaffs and flares) or light individual weapons could be considered an act harmful to the enemy, leading to a loss of protection.⁶⁵ Thus, in order to maintain their specially protected status under IHL, the Commentary considers that a party to the conflict may not mount such weapons on a hospital ship.⁶⁶

In addition, GC II affords protection to small craft used by the State or by officially recognized search and rescue organizations.⁶⁷ To qualify for protection under Article 27, coastal rescue craft must be employed by a State that is party to the conflict or by lifeboat institutions of a party to the conflict. In the latter case, these institutions must be “officially recognized” for the craft to be protected. This means that the institution in question must have been approved or authorized by a government authority or other public body to perform coastal rescue functions.⁶⁸

Coastal rescue craft have long rendered assistance to those in distress at sea and might be the only vessels available for this purpose to the vast majority of States, which do not have hospital ships.⁶⁹ Yet, owing to their small size and speed, at the time of the adoption of GC II, rescue craft were considered difficult to identify and were often suspected of engaging in intelligence-gathering for the

63 GC II, Art. 33.

64 ICRC Commentary on GC II, above note 6, Art. 34, para. 2403.

65 *Ibid.*, Art. 34, para. 2378.

66 *Ibid.*, Art. 35, paras 2419–2421.

67 GC II, Art. 27.

68 ICRC Commentary on GC II, above note 6, Art. 27, para. 2194.

69 *Ibid.*, paras 2149, 2151.

enemy.⁷⁰ As explained in the updated commentary on Article 27, this generated a reluctance among States to grant them any special protection. The compromise embodied in GC II is to give small craft special protection, but more limited than that afforded to hospital ships. Compared with the eleven articles dedicated to hospital ships, only one deals with coastal rescue craft, namely Article 27.

Coastal rescue craft that satisfy the conditions for protection may not be attacked, captured or otherwise prevented from performing their humanitarian tasks. This protection extends “so far as operational requirements permit”.⁷¹ By contrast, the protection afforded to hospital ships is stronger. They “may in no circumstances be attacked or captured, but shall at all times be respected and protected”.⁷²

Hence, operational considerations by a reasonable commander may justify interference with rescue craft by, *inter alia*, preventing them from performing their humanitarian tasks in a given sea area. Since the reasonableness will, of course, depend on the prevailing circumstances, it is impossible to define the terms in an abstract manner.⁷³ In this context, it is important to emphasize that this provision cannot be read in isolation from the rules of Additional Protocol I regulating the conduct of hostilities. Thus, coastal rescue craft may only be the object of an attack if they qualify as a “military objective” in the sense of IHL.

Finally, there is no mention in GC II of the status of the crew of coastal rescue craft.⁷⁴

With respect to the marking of hospital ships and coastal rescue craft, it is not constitutive of their protection but merely signals their protected status to the parties to the conflict. According to Article 43, all surfaces of the ship or craft shall be white, and one or more dark red crosses shall be displayed on each side of the hull and on the horizontal surfaces. These traditional marking methods, presupposing close physical proximity to allow for visual confirmation of the marking, might not suffice to ensure the proper identification of protected vessels in view of contemporary techniques of naval warfare, such as long-fire and submarine capabilities. It is therefore significant that Article 43 encourages the parties to the conflict to conclude special agreements on the “most modern methods available to facilitate the identification of hospital ships”.⁷⁵ As noted in the updated commentary on Article 43, there is no reason why such agreements could not also be concluded for coastal rescue craft.⁷⁶ Such agreements could be critical to ensure that protected vessels are effectively identified by parties to the conflict and given the protection to which they are entitled in order to be able to carry out their humanitarian work.

70 *Ibid.*, Art. 27, paras 2150, 2159.

71 GC II, Art. 27(1).

72 *Ibid.*, Art. 22(1).

73 See ICRC Commentary on GC II, above note 6, Art. 27, para. 2206.

74 See *ibid.*, Art. 27, para. 2152, and the commentary on Article 36, Section C.2.d.

75 GC II, Art. 43(8).

76 See ICRC Commentary on GC II, above note 6, Art. 43, para. 2766.

Substantive obligations under the Second Geneva Convention

Further to the central obligation on the parties to an armed conflict that takes place at sea to respect and protect the wounded, sick and shipwrecked, and to treat them humanely in all circumstances, GC II sets out a number of additional obligations intended to ensure that this core obligation is fulfilled. These include the obligation to take all possible measures to search for and collect the wounded, sick, shipwrecked and dead at sea.

To achieve the protective purpose of GC II, it is paramount that the parties to the armed conflict, after each engagement, take all possible measures to search for and collect casualties. The parties might be the only actors sufficiently close to the victims to search for and collect them.⁷⁷ Article 18 thus requires the parties, after each engagement and without delay, to take all possible measures to search for and collect the wounded, sick, shipwrecked and dead at sea, without discriminating between their own and enemy personnel.⁷⁸ The good faith interpretation and implementation of this provision is of critical importance in order to achieve the objectives of GC II.

The obligation to “take all possible measures” is an obligation of conduct to be carried out with due diligence.⁷⁹ All possible measures must be taken “after each engagement” and “without delay”. In this respect, Article 18 differs from the parallel provision in GC I, which requires its obligations to be carried out “at all times, and particularly after an engagement”.⁸⁰ As the updated commentary on Article 18 explains, the different wording reflects the fact that the conditions of warfare at sea, compared to those on land, might make it impossible to carry out search and rescue activities “at all times”.⁸¹

What constitutes “possible measures” in any given case is inherently context-specific. Each organ of the “party to the conflict” – the entity to which the obligation applies – has an obligation, at its own level, to assess in good faith which measures are possible.⁸²

Moreover, the updated commentary on Article 18 takes into account the fact that advances in technology and scientific knowledge may influence what measures a party to the conflict can, in practice, take in any given case. Advances in methods of naval warfare since 1949 have resulted in ever longer-distance attack capabilities. A vessel that has launched a weapon from a considerable distance against an enemy warship or aircraft might not be able to implement “without delay” any of the obligations contemplated on the basis of Article 18, since it is not physically present in the vicinity of the casualties. Still, that vessel remains under an obligation to consider what measures are possible

⁷⁷ *Ibid.*, Art. 18, para. 1617.

⁷⁸ *Ibid.*, Art. 18, para. 1618.

⁷⁹ *Ibid.*, Art. 18, para. 1645.

⁸⁰ GC I, Art. 15.

⁸¹ ICRC Commentary on GC II, above note 6, Art. 18, para. 1653.

⁸² *Ibid.*, Art. 18, paras 1629–1633.

in light of the circumstances. This includes considering whether it is possible to take measures such as disclosing the geographic location of the attacked vessel or aircraft with as much precision as possible, not only to its land-based authorities but also to enemy and neutral vessels or impartial humanitarian organizations capable of conducting search and rescue operations.⁸³ In this regard, the availability of new technology such as satellites and unmanned aerial platforms can enable a more accurate assessment of the number and location of the shipwrecked, wounded, sick and dead without requiring physical proximity to the attacked vessel or aircraft.⁸⁴

The commentary on Article 18 also describes certain advances in technology and scientific knowledge pertinent to the obligation to search for the dead at sea. There have been considerable developments in underwater technology since 1949 that permit locating and retrieving dead bodies at sea, including remotely operated vehicles with cameras. Moreover, scientific research in marine taphonomy has led to enhanced understanding of the factors that affect human remains in water. The fact that bodies cannot be seen with the naked eye immediately after an engagement no longer means that none can be recovered.⁸⁵ The extent to which a party has access to such technology and knowledge may therefore affect the interpretation of the “possible measures” which that party can take in relation to the search for the dead.⁸⁶

The research for the updated Commentary identified a potential dilemma when it comes to the dead at sea: once a warship sinks with enemy members of the armed forces on board, is the enemy still obliged to take all possible measures to search for and collect them? Or does the vessel regain its sovereign immunity, meaning that only the power to which the vessel belongs has the right to retrieve the dead bodies? On this point, the Commentary has reached the conclusion that sunken warships and other ships that sink with their crews constitute war graves, which must be respected. These vessels regain their entitlement to sovereign immunity once they have sunk.⁸⁷

As a measure to comply with both Articles 12 and 18, a party to the conflict “may appeal to the charity” of neutral vessels to help with the rescue effort, as set out in Article 21. The updated commentary on Article 21 notes that, in some situations, the assistance afforded by neutral vessels might be the best or only way of ensuring that as many wounded, sick, shipwrecked or dead persons as possible can be collected. The use of the word “may” in Article 21 implies that making such an appeal is optional. However, there may be cases in which a party may have to make an appeal in order for it to comply with its obligations, such as where it is unable to carry out a rescue itself.⁸⁸

83 *Ibid.*, Art. 18, para. 1646.

84 *Ibid.*, Art. 18, para. 1645.

85 *Ibid.*, Art. 18, para. 1686.

86 *Ibid.*, Art. 18, para. 1687.

87 *Ibid.*, Art. 18, para. 1688.

88 *Ibid.*, Art. 18, para. 1637; Art. 21, para. 1863.

Once collected, the wounded, sick and shipwrecked must receive “adequate care” as soon as possible.⁸⁹ This includes providing the medical care and attention required by their condition, as well as other forms of non-medical care, such as provision of food, drinking water, shelter, clothing, and sanitary and hygiene items. The parties are furthermore required to record information that can assist in the identification of the wounded, sick, shipwrecked and dead, and to forward this information to the power on which they depend. This is crucial so that families can be appraised of the fate of their loved ones. Specific obligations pertaining to the dead include respectful and honourable treatment, burial, and respect for their resting place.⁹⁰

With regard to the position of neutral States (i.e., States not party to the international armed conflict), GC II contains a number of provisions regulating their obligations vis-à-vis the persons protected by the Convention. First, when they receive or intern such persons in their territory, they shall apply the provisions of GC II by analogy.⁹¹ Secondly, when such persons are taken on board neutral warships or military aircraft, or are landed in a neutral port with the consent of the local authorities, the Convention stipulates that “where so required by international law” they shall be so guarded that they cannot again take part in operations of war.⁹² In view of the scarce and conflicting State practice and literature on this topic, the interpretation of the precise contours of the term “where so required by international law” has proven to be one of the most complex issues the updated Commentary has had to deal with.⁹³ Undesirable as this may be from the perspective of legal certainty, ultimately, States seem to have retained their freedom of interpretation on this point.⁹⁴

Conclusion

Out of the four Geneva Conventions, the Second is the one that probably used to be the least well-known, and that is generally considered to be the most “technical”. The updated Commentary on GC II has been written with the benefit of experience and knowledge accrued over the nearly seventy years that have passed since the initial Commentary was published. This experience and knowledge was acquired both in real-life battlefield situations and through the publication of military manuals and scholarly articles. Thus, this Commentary attempts to demystify the Convention’s alleged difficulty by filling a critical gap in legal scholarship. By so doing, the updated Commentary provides an important guidance tool for a wide audience, including navies and their commanders and military lawyers, international and national courts, governments and academics.

89 *Ibid.*, Art. 18, paras 1674–1681.

90 See GC II, Arts 19 and 20, the latter of which equally deals with burial at sea.

91 See Art. 4.

92 GC II, Arts 15 and 17. A similar rule appears in Art. 40(3).

93 ICRC Commentary on GC II, above note 6, Art. 15, paras 1548–1554; Art. 17, paras 1605–1611.

94 *Ibid.*, Art. 17, paras 1605, 1611.

In comparison with armed conflicts on land, the past decades have not seen many armed conflicts take place at sea (or in other waters). This does not, however, justify complacency. In the event of an armed conflict that takes place wholly or in part at sea, the provisions of GC II must already be known and their contemporary meaning understood. This understanding must be ensured in peacetime, including through prevention activities such as the training of armed forces and especially naval forces. The Commentary constitutes an easily accessible tool which allows a better understanding of the legal obligations to protect wounded, sick and shipwrecked members of the armed forces at sea.

The updated Commentary on GC II was the second in a series of updated Commentaries to be published by the ICRC in the years to come. Currently, research is ongoing with respect to the protection of prisoners of war (GC III) and the protection of civilians in time of war (GC IV). Updated Commentaries will continue to be published consecutively on these Conventions, as well as on their Additional Protocols I and II, over the coming years.

War at sea: Nineteenth-century laws for twenty-first- century wars?

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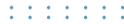
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Abstract

While most law on the conduct of hostilities has been heavily scrutinized in recent years, the law dealing with armed conflict at sea has been largely ignored. This is not surprising. There have been few naval conflicts since 1945, and those that have occurred have been limited in scale; none has involved combat between major maritime powers. Nevertheless, navies have tripled in number since then, and today there are growing tensions between significant naval powers. There is a risk of conflict at sea. Conditions have changed since 1945, but the law has not developed in that time. Elements of it, especially that regulating economic warfare at sea, seem outdated and it is not clear that the law is well placed to regulate so-called "hybrid" warfare at sea. It seems timely to review the law, to confirm that which is appropriate and to develop that which is not. Perhaps a new edition of the San Remo Manual would be timely.

Keywords: naval warfare, conduct of hostilities at sea, sea control, economic warfare, power projection, maritime hybrid warfare, San Remo Manual.

* Originally drafted as a shorter contribution to a projected debate on the law governing the conduct of hostilities at sea, this paper has benefited greatly from comments provided by the editorial team of the *Review* and anonymous reviewers, for which the author is most grateful.



In the past quarter of a century, the *lex specialis* for armed conflict has been subjected to intense public, official, judicial and academic attention, becoming one of the most intensely scrutinized areas of public international law today. Much of this examination resulted from a combination of usage and abuse followed by due process in relation to breaches committed in a range of armed conflicts since the early 1990s. Most certainly, the jurisprudence of the various international tribunals has contributed a great deal to its interpretation. Extensive research into State practice has also been conducted under the auspices of the International Committee of the Red Cross (ICRC), for its Customary Law Study, which remains a “live” project.¹

One element of the *lex specialis* has been largely overlooked, however. The law regulating the conduct of hostilities in naval war – the law of armed conflict (LOAC) applicable at sea – has attracted little general attention or focused scrutiny. There have been very few instances of armed conflict at sea, and those that have occurred have not brought seriously into question the detailed rules regulating it. There have been no naval cases dealt with by the international tribunals and, compared with the law regulating armed conflict on land, in the air and even in cyberspace, that applied at sea has failed to attract very much academic analysis.² Finally, the ICRC did not research practice in naval warfare during its study into customary international humanitarian law.³ Its stated reason for not doing so was that it believed international humanitarian law (IHL) applied at sea had already been adequately covered during work carried out in the early 1990s under the auspices of the International Institute of Humanitarian Law (IIHL) in Sanremo, resulting in the publication of the *San Remo Manual on*

1 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study). The ICRC Customary Law Database is kept updated at: www.icrc.org/en/war-and-law/treaties-customary-law/customary-law (all internet references were accessed in May 2017).

2 It would be wrong to claim that it has received no attention at all. The most significant and notable concentration of scholarship has been conducted under the auspices of the US Naval War College in Newport, Rhode Island, within the Stockton Center for the Study of International Law. Its extensive “Blue Book” International Law Studies series is an essential source of scholarly and professional opinion on the subject and is now openly available online at: www.usnwc.edu/departments-/international-law.aspx.

3 It is important to clarify the terminology, not least because there is a tendency today to regard the law of armed conflict (LOAC) as synonymous with international humanitarian law (IHL). Although the debate on overlaps and distinctions between the LOAC and IHL falls outside the scope of this paper, it is important to state what the LOAC addresses and what it does not. The law that is the focus of this paper is that which regulates the conduct of hostilities at sea. Traditionally known as the “law of war and neutrality at sea”, it is now more commonly referred to as the “law of armed conflict applicable at sea”. This paper does not deal with the application of IHL at sea and will not address that subject (which derives from Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, 12 August 1949 (entered into force 21 October 1950) (GCII), and related instruments).

International Law Applicable to Armed Conflicts at Sea (San Remo Manual or SRM).⁴

This lack of attention prompts a question about whether or not a review of the LOAC applicable at sea is necessary. In providing an initial answer, this paper's objective is merely to start a debate on a subject that has been confined to the margins of dialogue by force of circumstance. No firm legal solutions are suggested, as these would require significant engagement with experts from around the world, in both the law and the naval operations it is meant to regulate. Nevertheless, how such engagement might be achieved may be a sensible issue briefly to address.

Before moving forward to the application of the law, some explanation of naval roles and functions will be useful to assist those unfamiliar with them. Some historical background is also important for providing perspective and explaining context. The paper starts, therefore, by placing naval war roles in the wider naval operational context. It then outlines the occurrence of armed conflict at sea since 1945 and provides a cursory assessment of the potential characteristics of war at sea in the future. The current law on the conduct of hostilities is then briefly described before two particular forms of naval warfare are singled out for detailed comment: traditional economic warfare and the novel challenge of so-called "hybrid warfare". Comment is then made on how the current law measures up in relation to them, before a suggestion is presented regarding how a review of the law might be conducted.

Naval roles

Navies do not exist simply to fight wars at sea with other navies. Indeed, since the Second World War very few have been engaged in armed conflict at sea. Their capacity for warfighting has served mostly as a means of deterring war rather than actively engaging in it. Effective deterrence requires equipment, manpower, and frequent training and exercises to maintain operational capability and effectiveness. All the major navies in the world have been developed with combat operations against other navies as the principal consideration. As naval wars have been a rare occurrence since 1945, it is not surprising that these expensive and sophisticated forces have been utilized by governments for other purposes. They have not been idle.

Naval operations can be categorized under three headings: "benign", "constabulary" and "military". Constabulary and military operations both involve the application of force, but neither benign nor constabulary operations involve combat. While benign and constabulary operations are not the focus of this

4 ICRC Customary Law Study, above note 1, p. xxx. See also Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995 (San Remo Manual). It should be noted that while the IIHL is located in Sanremo (one word) in Italy, the manual is invariably referred to as being associated with "San Remo" (two words).

paper, a brief explanation of each will be useful before the discussion moves on to the military functions of navies.⁵ Later in the paper, the overlap between military and constabulary roles will become relevant to the discussion of hybrid warfare.

Benign operations

Benign operations deserve brief explanation, if only to satisfy the reader's curiosity. They do not involve either the threat or the actual application of coercive force; the "benign" label says it all. In the early modern period, navies famously engaged in exploration, the charting of the seas and other voyages of scientific discovery; today they still conduct hydrographic surveying, including to provide data for the compilation of navigational charts. Search and rescue, salvage, disaster relief and explosive ordnance disposal are notable additional examples of naval activities that provide assistance and a service to the maritime community. They entail helping communities and individuals cope with the challenges generated by the sea and its environment. Fascinating though these operations are, they will attract no further mention in this paper.

Constabulary operations

Constabulary operations entail law enforcement, both domestic and international, the former particularly within territorial waters and the latter principally on the high seas – with significant overlap between the two. Prior to 1945, the domestic law-related functions of navies were largely confined to enforcing law within three nautical miles of their own coasts. The enforcement of inshore fisheries regulations, for example, and the protection of the State from threats to its health and integrity through the enforcement of quarantine, customs and fiscal regulations, were primarily naval functions. Some States developed civilian-manned agencies for such tasks (e.g., coastguards), but it was principally navies that were routinely employed for that purpose.⁶

On the high seas, navies exercised exclusive flag State jurisdiction over their own States' merchant ships and other civilian vessels. They also engaged in anti-piracy operations, ensuring that the seas were free for safe and secure trading activities. This was a naval function with a long history dating back many

5 This is the way that operations have been categorized by the British Royal Navy (RN); see Defence Council, *BR 1806 British Maritime Doctrine*, 2nd ed., Stationery Office, London, 1999, pp. 57–58. Other navies have admittedly departed slightly from this formula. See, for example, Royal Australian Navy Sea Power Centre, *Australian Maritime Doctrine*, Defence Publishing Service, Canberra, 2000, p. 57; Maritime Concepts and Doctrine Centre, *Indian Maritime Doctrine*, INBR 8, Ministry of Defence (Navy), Mumbai, 2009, p. 91. For a leading academic treatment, see Geoffrey Till, *Seapower: A Guide for the Twenty-First Century*, 2nd ed., Routledge, Abingdon, 2009, which discusses both military tasks and "maintaining good order at sea".

6 Interestingly, the US Coastguard traces its origins to before those of the US Navy. For a discussion of different navy/coastguard arrangements, see *ibid.*, pp. 314–319.

centuries.⁷ During the nineteenth century, the suppression of slavery became a further significant role for navies.⁸ Both anti-piracy and anti-slavery operations remain potential naval functions today, although the former has been more in evidence recently than the latter.⁹

Since 1945, naval constabulary functions have increased substantially, principally as a consequence of maritime jurisdictional changes ushered in through the Third United Nations (UN) Conference on the Law of the Sea, between 1974 and 1982. The resultant 1982 UN Convention on the Law of the Sea (UNCLOS)¹⁰ led to substantial increases in both the extent and nature of coastal State jurisdiction, most notably through the extension of territorial seas from three to twelve nautical miles, the creation of contiguous zones beyond the territorial sea, and the introduction of the exclusive economic zone extending to 200 nautical miles from the coast. Each of these zones has caused the domestic coastal law enforcement task to increase, especially in relation to the enforcement of resource management arrangements.

Also, under UN auspices, the last fifty years have witnessed the development of maritime economic embargo operations, which are one means of enforcing economic sanctions imposed by the UN Security Council. The first such operation was not initiated until the mid-1960s,¹¹ but UN maritime embargos became a more common resort after the Cold War ended, with operations mounted in the Mediterranean (including the Adriatic), the Middle East and Haiti.¹²

- 7 Grotius makes reference in his “Defence of Chapter V of *Mare Liberum*” to Julius Caesar’s involvement in countering piracy; see David Armitage (ed.), *Hugo Grotius’ The Free Sea*, Liberty Fund, Indianapolis, 2004, p. 129. A notable early nineteenth-century example of naval action against pirates was that ordered by President Thomas Jefferson and conducted by the US Navy (USN) against the Barbary Pirates; see Robert Turner, “President Thomas Jefferson and the Barbary Pirates”, in Bruce Elleman, Andrew Forbes and David Rosenberg (eds), *Piracy and Maritime Crime: Historical and Modern Case Studies*, Naval War College Newport Papers No. 35, Newport, RI, 2011.
- 8 For a recent comprehensive treatment of this subject, see Peter Grindal, *Opposing the Slavers: The Royal Navy’s Campaign against the Atlantic Slave Trade*, I. B. Tauris & Co., London, 2016. The USN was also employed in suppressing the slave trade, despite slavery itself remaining lawful in its own southern States until the Civil War. Congress outlawed the slave trade in 1808, and a West African USN squadron was established in 1821 to suppress it. See Craig Symonds, *The US Navy: A Concise History*, Oxford University press, Oxford, 2016, pp. 37–38.
- 9 Although navies are currently doing little to suppress slavery, it is of growing concern at sea, in particular with slave crews in fishing vessels engaged in illegal, unregulated and unreported fishing. See the website of Human Rights at Sea, at: www.humanrightsatsea.org.
- 10 UN Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994).
- 11 This was mounted by the British navy off the Mozambique port of Beira between 1966 and 1975 to enforce economic sanctions against the white minority-ruled British colony of Rhodesia, which had illegally declared its independence from Britain. The operation was authorized by UNSC Res. 217, 20 November 1965. The author himself served on the “Beira Patrol”, but see Richard Mobley, “The Beira Patrol: Britain’s Broken Blockade against Rhodesia”, *Naval War College Review*, Vol. 55, No. 1, 2002. It is incorrect to describe this law enforcement operation as a “blockade”; see the discussion immediately below.
- 12 James Kraska and Raul Pedrozo, *International Maritime Security Law*, Martinus Nijhoff, Leiden and Boston, MA, 2013, pp. 903–923.

It is important here to distinguish maritime embargo operations from what may appear at first sight to be a very similar naval operation – belligerent blockade. Constabulary UN maritime economic embargo operations are emphatically not a modern form of belligerent blockade, which is a method of economic warfare (discussed in more detail below). The UN Charter is very clear in this regard – while it mentions “blockade”, it does so deliberately in Article 42, dealing with military sanctions, and not in Article 41, which explicitly addresses “measures not involving the use of armed force” to enforce economic sanctions. Blockade and embargo operations have very different purposes, are conducted in different ways – one is an act of war (blockade) and the other a constabulary operation (maritime embargo) – and have completely different legal bases.¹³

Additional high seas constabulary operations include responses to illicit drugs trafficking and for the safety of maritime navigation.¹⁴ Maritime crime is increasing; navies have an important function to perform in response.¹⁵

The majority of navies are engaged in constabulary operations to some degree. Indeed, for many today it is their principal employment. They require minimum levels of force to be used at all times, the primary legal basis today being human rights law.¹⁶

Military operations

Naval doctrine supported by the study of naval history has generally identified three distinct forms of naval operation mounted against an opposing belligerent. All such naval operations can be located under one of the following three headings: sea control/sea denial, power projection, and economic warfare.¹⁷ Each deserves some explanation. Indeed, it is impossible fully to understand naval power, its strategic value or its tactical application without an appreciation of these.

Navies traditionally exerted their influence in war by projecting power ashore (through shore bombardment or by landing troops in amphibious operations, for example) and by applying economic pressure on opposing belligerents through the interdiction of their trade via commerce raiding and blockade. Navies can only undertake such operations if they are secure and have

13 This distinction has admittedly been difficult for some to discern, but see Rob McLaughlin, *United Nations Naval Peace Operations in the Territorial Sea*, Martinus Nijhoff, Leiden and Boston, MA, 2009, pp. 129–152.

14 For these constabulary operations on the high seas, two conventions are of some importance: the Vienna Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988 (entered into force 1 March 1992), together with its Protocol of 2005; and the Vienna Convention on the Suppression of the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1988 (entered into force 11 November 1990). See also J. Kraska and R. Pedrozo, above note 12, pp. 801–858, 531–540.

15 *Ibid.*, pp. 1–5.

16 Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford University Press, Oxford, 2016, p. 91.

17 Different analysts may produce different ways of describing and ordering these “military” operations. This categorization is the author’s preferred way of doing so, born of a lengthy period employed as a naval analyst on the Naval Staff within the UK’s Ministry of Defence, including the period during which he was the lead author for the RN’s maritime strategic doctrine.

sufficient control of the sea to conduct them. Navies fight other navies to secure such control of the sea so that they are able to mount either power projection or economic warfare operations against the enemy. They fight for sea control and at the same time seek to deny their opponent control of the sea for its own purposes. Sea control and sea denial are opposite sides of the same coin.

A notable historical example, the battle of Trafalgar in 1805, involved two rival fleets (the British on the one hand and the combined French and Spanish on the other) fighting for control of the sea. The British needed sea control in order freely to apply economic pressure on France through the interdiction of shipping bound for the continent. They also sought to deny the French control of the sea to prevent them launching an invasion of Britain itself. Viewed from the French and Spanish perspective, the aim was to deny the Royal Navy's (RN) ability to disrupt their trade, but also to achieve sufficient control of the sea to allow for a French invasion of Britain. The significance of the battle was not the fighting on the day but the strategic consequences that British tactical victory delivered. The ultimate function of navies has been to project power ashore in order to influence events on land or to interfere with the enemy's trade, thereby undermining its ability to sustain its war effort. Obtaining sea control is the necessary precursor for these.¹⁸

In the age of sail, surface fleets fought surface fleets for sea control. In the early twentieth century, however, following the emergence of effective sea denial technologies (sea mines and submarines armed with torpedoes), powerful surface fleets could no longer be assured of dominance at sea. By the outbreak of the Second World War, aircraft had further complicated the achievement of sea control. Since then, both shore-based and ship-borne missiles have caused surface forces yet more sea control difficulties.¹⁹

Julius Caesar's and William of Normandy's invasions of Britain in 55 BC and 1066 were each major amphibious assaults; there is nothing new about "naval power projection". The traditional shore bombardment and amphibious landing retain their utility, but modern manifestations of power projection are far more varied and extensive. Naval forces can launch long-range attacks using both aircraft launched from carriers and land-attack missiles launched from surface warships or submarines. The big-gun battleships that were dominant in the early twentieth century gave way to aircraft carriers during the Second World War as the capital ship of choice for major naval powers, with the more ambitious subsequently procuring nuclear-powered submarines. While such warships may have originally been developed principally for sea control and sea denial operations, they are today frequently employed as powerful platforms for long-range power projection. The cruise missile, capable of reaching targets hundreds of miles inland, is routinely the weapon used by the more sophisticated naval forces when deployed to apply persuasive force against States. It has been a

18 Nicholas Roger, *The Command of the Ocean: A Naval History of Britain 1649–1815*, Allen Lane, London, 2004, especially pp. 542–544.

19 Martin Van Creveld, *Technology and War: From 2000BC to the Present*, Brassey's, London, 1991, pp. 204–216; Max Boot, *War Made New: Technology, Warfare and the Course of History, 1500 to Today*, Gotham Books, New York, 2006, pp. 241–267.

prominent feature of past attacks against targets in Iraq and Afghanistan, for example, and sea-launched attacks on Syria today are naval power projection involving both missiles and ship-launched aircraft (these days both manned and unmanned).

Economic warfare at sea was a distinctive feature of general naval warfare from the sixteenth century until the Second World War. It consisted of a combination of commerce-raiding and blockade operations to prevent an enemy benefiting from maritime trading activities, especially in goods (contraband) that were likely to enhance its ability to continue waging war. There has been scant employment of this type of operation in the past seventy years because there has not been a general naval war during that period. Economic warfare is addressed in much more detail below.

Armed conflict at sea since 1945

The most recent period of major naval war was between 1939 and 1945. Historically, the naval conflicts then, in the Atlantic and Mediterranean and in the Pacific theatre, were the most recent in a long line of general and great-power naval wars stretching back to the sixteenth and seventeenth centuries. Some significant examples of these included the series of Anglo-Dutch wars between 1652 and 1674, the Seven Years War of 1756–63, the American Revolutionary War of 1775–84, the French Revolutionary and Napoleonic Wars from 1792 to 1815, the Anglo-American naval war of 1812, and the Russo-Japanese War of 1904–05.²⁰ All were struggles for power of an imperial nature in the era of maritime empires, which stretched from the early seventeenth to the mid-twentieth century.²¹ These wars had potentially global impact, with navies frequently utilizing the extent of the free oceans to carry on their conflicts, especially in relation to the interdiction of trade. It was these wars that influenced the development of the laws of war and neutrality at sea.

While there has been no general naval war since 1945, there have been at least a dozen armed conflicts with naval dimensions worth mentioning. The Arab–Israeli wars which commenced in 1948 included the 1956 Anglo-French

20 There are numerous works covering these naval wars but, for example, see James Jones, *The Anglo-Dutch Wars of the Seventeenth Century*, Longman, London and New York, 1996; Daniel Baugh, *The Global Seven Years War 1754–1763*, Routledge, London and New York, 2011; Andrew Lambert, *The Challenge: Britain Against America in the Naval War of 1812*, Faber & Faber, London, 2012; Alfred Mahan, *The Influence of Sea Power upon the French Revolution and Empire 1793–1812*, 2 vols, Sampson Lowe, Marston & Co., London, 1892; Julian Corbett, *Maritime Operations in the Russo-Japanese War 1904–1905*, 2 vols, Naval Institute Press, Newport, RI, 2015; Paul Halpern, *A Naval History of World War I*, UCL Press, London, 1994; Correlli Barnett, *Engage the Enemy More Closely: The Royal Navy in the Second World War*, Hodder & Staughton, London, 1991.

21 Arguably, the age of empires (including maritime-based empires) came to an end in the middle of the twentieth century. See Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of Difference*, Princeton University Press, Princeton, NJ, and Oxford, 2010, especially Ch. 13, pp. 413–433; Michael Mann, *The Sources of Social Power*, Vol. 3: *Global Empires and Revolution 1890–1945*, Cambridge University Press, Cambridge, 2012.

amphibious assault on the Suez Canal Zone in Egypt, and continue today with the conflict between Israel and the Palestinians, which recently featured the Israeli naval blockade of Gaza.²² The Korean War (1950–53) included the September 1950 amphibious assault by UN forces at Inchon.²³ The Vietnam War (1955–75) included various naval operations, with substantial US involvement following the August 1964 Tonkin Gulf incident and concluding with the *Mayaguez* incident in May 1975. In between, naval operations included the provision of naval support from the sea and extensive riverine operations.²⁴ The Indo-Pakistan War (1971) lasted a mere thirteen days but included submarine attacks on surface warships and an Indian blockade of the East Pakistan/Bangladesh coast in the Bay of Bengal.²⁵ Between 1971 and 1974, the “Troubles” in Northern Ireland arguably crossed the threshold into non-international armed conflict in the early 1970s and, perhaps surprisingly to some, involved a significant naval element in 1972 when substantial British military reinforcements were landed into the province from RN amphibious shipping.²⁶ The Battle of the Paracels lasted just two days in January 1974 and involved the armed forces of the People’s Republic of China and Vietnam. The outcome was Chinese control over the islands, still a source of dispute in the South China Sea today.²⁷ In stark contrast, the Iran–Iraq War (1980–88) was a long-drawn-out conflict, the naval dimension of which lasted from 1984 to 1987. It was initiated by Iraqi attacks on Iranian oil facilities on Kharg Island, and included attacks on neutral shipping and an Iranian blockade of the Iraqi coast.²⁸ The Falklands/Malvinas War (April–June 1982) was fundamentally a maritime campaign involving classic sea-control and sea-denial operations coupled with power projection through amphibious assault. A number of surface warships were sunk, with the Argentine cruiser *General Belgrano* and the British destroyers *Sheffield* and *Coventry* being prominent casualties.²⁹ The Sri Lankan Civil War (1983–2009) had a notable naval dimension, with the Tamil Tigers deploying forces at sea (an unusual capability for an armed non-State

22 Keith Kyle, *Suez: Britain’s End of Empire in the Middle East*, I. B. Tauris, London, 2003. In relation to the Gaza blockade, see *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011 (Palmer Report), available at: www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.

23 James Patterson, *Grand Expectations: The United States, 1945–1974*, Oxford University Press, Oxford, 1996, pp. 218–219.

24 Stanley Karnow, *Vietnam: A History*, Guild Publishing, London, 1983, pp. 366–373, 687.

25 James Goldrick, *No Easy Answers: The Development of the Navies of India, Bangladesh, Pakistan and Sri Lanka 1945–1996*, Papers in Australian Maritime Affairs No. 2, Royal Australian Navy Maritime Studies Programme, Lancer Publishers, New Delhi, 1997, pp. 68–103.

26 See Steven Haines, “Northern Ireland 1968–1998”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, p. 126.

27 See Toshi Yoshihara, “The 1974 Paracels Sea Battle: A Campaign Appraisal”, *Naval War College Review*, Vol. 68, No. 2, 2016.

28 See Ronald O’Rourke, “The Tanker War”, *US Naval Institute Proceedings*, Vol. 114, No. 5, 1988, available at: www.usni.org/magazines/proceedings/1988-05/tanker-war.

29 Sir Lawrence Freedman, *The Official History of the Falklands Campaign*, 2 vols, Routledge, London, 2005.

actor in a non-international armed conflict).³⁰ The Gulf of Sidra Action in 1986 involved air and sea forces of Libya and the US Sixth Fleet and resulted in the sinking of two Libyan warships.³¹ Both of the Gulf Wars against Iraq (1990–91 and 2003) had naval dimensions, with coalition forces defeating Iraqi naval forces and conducting landings in Kuwait and Southern Iraq.³² Finally, of interest is the Kosovo armed conflict in 1999 between the North Atlantic Treaty Organization (NATO) Alliance members and Serbia – although the most significant observation is to do with naval inactivity. A naval blockade of the Montenegrin port of Bar was considered within NATO because there was a fear that Serbia might be resupplied with war materiel by neutral vessels through Bar. The Kosovo operation was mounted without a UN Security Council resolution authorizing NATO’s intervention. For that reason, there was certainly no possibility of putting a UN maritime embargo in place to prevent ships entering Bar. Having considered blockade as an option, the Alliance rejected the idea, however. While this decision not to employ a blockade may seem irrelevant in terms of State practice, the reasons for not doing so included a belief within some NATO capitals that, while the Alliance was engaged in an armed conflict, this method of naval warfare was not a lawful option and would be too controversial.³³

These post-1945 conflicts have all been markedly limited in their naval scope, with none having strategic naval influence beyond the immediate region of the core conflict. Only three (the Battle of the Paracels, the Falklands/Malvinas War and the Gulf of Sidra Action) were principally maritime conflicts at the operational level.³⁴ In the others, the main operational-level focus was on land campaigns, with the naval dimensions being clearly subordinate. These armed conflicts were certainly not global in scope, and none had the characteristics of the notable naval wars of the maritime imperial era. Economic warfare has not figured as a major component, although belligerent blockades have been imposed, including, for example, the Indian blockade of Bangladesh in the Bay of Bengal in 1971, the blockade of Haiphong Harbour in 1972 during the Vietnam War, and the controversial Israeli blockade of Gaza. There was also the serious interference

30 Justin Smith, *Maritime Interdiction in Counterinsurgency: The Role of the Sri Lankan Navy in the Defeat of the Tamil Tigers*, unpublished Masters Thesis, US Naval Postgraduate School, Monterey, June 2010, available at: calhoun.nps.edu/bitstream/handle/10945/5346/10Jun_Smith_Justin.pdf?sequence=1.

31 Alessandro Silj, “The Gulf of Sidra Incident: March–April 1986”, in *The International Spectator: Italian Journal of International Affairs*, Vol. 28, No. 1, 1993.

32 See Iain Ballantyne, *Strike from the Sea: The Royal Navy and the US Navy at War in the Middle East 1949–2003*, Pen and Sword Maritime, Barnsley, 2004.

33 The author was serving in the UK Ministry of Defence at the time and was consulted by the director of naval operations. He suggested blockade as an option, in the absence of a UN Security Council resolution allowing for the possibility of a UN maritime embargo operation – caused by a likely Russian veto in the Council.

34 The “operational level” is the level of command at which campaigns are planned in order to achieve strategic objectives. In many instances, the maritime element of a campaign will be manifestly subordinate to the land or air element – as were the naval operations during the two Gulf Wars. In other cases, the principal focus at the operational level will be maritime, as it was during the British campaign to recover the Falkland/Malvinas Islands in 1982. Since 1945, the vast majority of naval/maritime contributions to military campaigns have been subordinate to other, principally land-based elements.

with shipping during the so-called “Tanker War” phase of the Iran–Iraq war. Two of the conflicts were non-international (Sri Lanka and Northern Ireland), but there were also non-international features of the Vietnam War and the Indo-Pakistani War of 1971, which saw East Pakistan (Bangladesh) break away from West Pakistan. The recent naval activities of the Tamil Tigers in Sri Lanka, in particular, have served as a reminder that civil wars (or non-international armed conflicts) can involve the bringing to bear of naval influence. It is worth stressing here that no post-1945 war has involved the principal naval powers in major and sustained combat operations against each other.

Compliance with the law during these naval engagements was mixed, with the Falklands/Malvinas War being largely compliant, while the Iran–Iraq “Tanker War” certainly breached the rules on the interdiction of shipping.³⁵ The Israeli conduct of the Gaza blockade operation was tactically compliant with the *jus in bello*, albeit controversial and resulting in a UN enquiry.³⁶ All other engagements raised legal issues, but none in a manner or to an extent that seriously challenged the existing law. While there has clearly been some evidence of practice resulting from these recent wars, this has not caused any discernible trend towards customary development of the law.³⁷ Nor has there been any demand for new conventional law. The status quo is a comfortable place for States to occupy, especially when they are not being challenged by circumstance.

Potential for naval war in the twenty-first century

What is the potential for naval war in the future? Even if prediction is difficult, it would be naive to dismiss the possibility altogether. On the basis of what has occurred since 1945, there would certainly appear to be some potential, even if recent past evidence suggests it is likely to be brief, lower-intensity and geographically limited. Equally, the absence of general naval war suggests that it may now be a feature of the past rather than something to contemplate in the future. Such general wars require two ingredients. First, there is the need for navies to be capable of engaging at that level. Second, it would require an international security situation that would give rise to it. It is worth saying something about both.

35 Mention of the 1982 conflict in the South Atlantic must not pass without some comment on exclusion zones declared by the British, in one instance seemingly establishing what one distinguished international lawyer has described as an unlawful “free-fire zone” (a description with which this author agrees), although this did not result in any unlawful action. See Wolff Heintschel von Heinegg, “How to Update the San Remo Manual on International Law Applicable to Armed Conflict at Sea”, *Israel Yearbook on Human Rights*, Vol. 36, 2006, pp. 144–145.

36 See Palmer Report, above note 22.

37 One shift that did occur was in relation to the encryption of communication employed by hospital ships, which is prohibited under Article 34(2) of GC II but which proved problematic during the 1982 Falklands/Malvinas War. As a consequence of that, Rule 171 of the San Remo Manual permits the use of encryption for the purpose of effecting the humanitarian mission of such vessels but asserts a ban on their use of encrypted communications to pass intelligence or to gain any other military advantage.

There are three times as many navies today than there were at the end of the Second World War.³⁸ Not all are capable of high-intensity and sustained operations at significant distance from their home waters, but an increasing number are. A useful hierarchy of navies currently in use places each in one of eight categories based on an assessment of size, reach, combat capability and general utility.³⁹ The single remaining “major global force projection navy” is that of the United States. Below it are a growing number of medium-ranked, well-developed navies, whose force structures are predicated principally on the need to engage in combat operations. These include the second-rank navies of China, France, India, Japan, Russia and the United Kingdom, and third-rank navies like those of Australia, Brazil, Canada, Italy, Germany, Singapore and South Korea, together with those of Denmark, Norway and Sweden. The majority of the world’s navies are in ranks four to six, and while they are less capable, it has been combat capability that has driven their force development. Only seventh-ranking “constabulary navies”, capable of law enforcement operations within their own States’ offshore jurisdictional zones, and eighth-ranking “token navies” fail to deploy effective combat capability. Nevertheless, the lower-ranked navies, with limited combat capacity, still possess potential for low-intensity applications of force that could cross the armed conflict threshold. Given the proliferation of navies and the range of States in politically unstable regions of the globe, it is perhaps surprising that there have so far been so few conflicts at sea.

Of the more than 160 navies currently operating, only the US Navy (USN) has the capability to operate globally in the true sense. It has no peer competitor and is unlikely to face one for decades to come. Those navies that might aspire to compete at that level (perhaps the Chinese and Russian) fall well short at present and would take some time to reach it. Even so, the USN does not enjoy the dominance and full command of the oceans that the collective naval power of the British Empire did during the nineteenth-century *Pax Britannica*.⁴⁰ It is even doubtful that it could adequately defend its own trade globally from concerted submarine attack.

If that sounds surprising, one might reflect on some figures from the Second World War, focusing on just one of the powers involved, to give some impression of how its naval forces coped with the conflict. Overall, the combined British Empire navies deployed a total of almost 885 significant warships (battleships, battle cruisers, aircraft carriers, cruisers, destroyers and submarines)

38 The principal reference book on the world’s navies listed fifty-six navies in 1950; see Raymond Blackman, *Jane’s Fighting Ships 1949–50*, McGraw Hill, New York, 1949. The volume covering the period 2016–17 lists just over 160; see Stephen Saunders and Tom Philpott (eds), *Jane’s Fighting Ships 2016–17*, 116th ed., Jane’s Information Group, London, 2016.

39 In descending order, they are: major global force-projection navies; medium global force-projection navies; medium regional force-projection navies; adjacent force-projection navies; offshore territorial defence navies; inshore territorial defence navies; constabulary navies; and token navies. See Steven Haines, “New Navies and Maritime Powers”, in Nicholas Roger, *The Sea in History*, Vol. 4: *The Modern World*, Boydell and Brewer, Martlesham, 2016, pp. 88–89.

40 For a recent study of British naval dominance, see Barry Gough, *Pax Britannica: Ruling the Waves and Keeping the Peace before Armageddon*, Palgrave Macmillan, Basingstoke, 2014.

during the Second World War, of which 278 (31%) were lost to enemy action.⁴¹ The losses alone, then, amounted to around the same number of significant warships currently possessed by the USN. During the Battle of the Atlantic in the 1940s, the Allied navies (including the USN after US entry as a belligerent in December 1941) had around 300 destroyers available for convoy escort duty. The British Empire alone lost 153 destroyers to enemy action while defending transatlantic shipping.⁴²

Technology has developed since then, with faster, more powerful and far more capable warships fitted with advanced sensors and weapon systems. Without conducting operational analysis around the subject, it would be difficult to predict both force requirements for defensive economic warfare, given current maritime trade volumes, and the likely losses that defensive forces would face. Nevertheless, with submarine technology also vastly improved and with quantity having a quality of its own when it comes to convoy escort tasking, it is difficult indeed to imagine a re-run of the sort of campaign that was fought in the North Atlantic between 1940 and 1943. In the 1930s and 1940s, the design, development and construction of new warships took a matter of mere weeks or months. Today's equivalent vessels take years from drawing board to operational deployment, and the sort of rapid force generation possible during the Second World War would now be impossible to achieve. The strategically vital battle – for both sides – in the Atlantic theatre in the middle of the last century represented an extreme manifestation of warfare at sea, with the focus on threats to shipping. The Pacific theatre saw a greater concentration of naval power than the Atlantic and was more about the projection of power from sea to shore. Both theatres witnessed extremes in terms of sea control and denial operations, with the war against submarines being the focus in the Atlantic, while the maritime air war dominated the Pacific theatre. While prediction is fraught with difficulty, it seems unlikely that a global great-power naval war on that scale will occur again, no matter what combinations of naval powers are ranged against each other. The end of empires does appear to have brought an end to conflict between the major powers, with none having occurred since 1945. Why might that be?

There seem to be a number of reasons: an increased number of international organizations, including the impact of the UN; the rapidity/immediacy of international communications and the fundamental changes it has ushered in as far as international political and diplomatic practice are concerned; and the positive effect of nuclear weapons, which seem to have had a calming and beneficial influence on great-power relations, reducing the tendency for them to resort to force against each other. If the major powers today did engage in war, then it is fair to say that general naval war would be a likely feature. This would have potentially catastrophic economic consequences, with a considerable risk of

41 The combined British Empire navies were the Royal Navy (by far the largest), the navies of Australia, Canada, New Zealand and India, and the South African Naval Forces.

42 Figures from the website Naval History, available at: www.naval-history.net/WW2aBritishLosses10tables.htm.

a halt to globalization through the disruption to oceanic trade. There would likely be considerable international diplomatic effort to avoid it.⁴³ It is difficult to imagine international order breaking down to the extent that the world becomes embroiled in another global conflict.

This is not to say that there will not again be war at sea having some of the characteristics of the naval war in the 1940s. If a significant and sustained naval war were to occur between combat-capable naval powers, it is even possible that aspects of economic warfare could return to the oceans. Nevertheless, on the balance of probability, future armed conflicts at sea seem most likely to be limited geographically and almost certainly to be confined to a single region or even locality. Obvious potential flashpoints currently are in the South and East China Seas, in proximity to the Korean Peninsula, in the Gulf, in the Eastern Mediterranean and in parts of Africa (although few African navies are equipped for sustained naval confrontation, regardless of the potential for bloody conflict ashore). One should also be conscious of the unpredictable occurring in regions not thought of as being at high risk – and over time, of course, new tensions will undoubtedly emerge in places that are currently relatively benign.

The conduct of naval hostilities: The established law

The existing law on the conduct of hostilities at sea is a part of the broader body of the LOAC, with most of the rules applied at sea reflecting those applied in other environments. The basic principles of military necessity, humanity, distinction and proportionality and the rules on precautions in attack most certainly apply at sea as they do elsewhere.⁴⁴ The principles regulating weapons are also identical, with new weapons for use at sea subject to Article 36 weapons review in common with those deployed on land or in the air.⁴⁵ A notable feature of the law applied at sea is that it allows for warships to disguise themselves, including by wearing a false flag until the point at which they launch an attack, although such “ruses of war” are probably not as significant as they once were (and will not be addressed further as the topic falls outside the scope of this article).

43 None of these reasons are the subject of this paper, and the nuclear dimension will undoubtedly be contested by those who regard nuclear weapons as a threat rather than a guarantor of security. The value of nuclear weapons in this respect is, of course, controversial. The author takes the view that nuclear weapons have been beneficial in deterring great-power war, but certainly acknowledges that others will disagree profoundly. Importantly, the legality of the actual use of such weapons, many of which are sea-launched (the ultimate in power projection terms), is not the subject of this paper.

44 See the chapter on “Basic Principles of the Law of Armed Conflict”, in UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004 (UK Manual), pp. 21–26.

45 “Article 36” being a reference to the provision in Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 36, requiring such reviews. Although not all States are party to AP I, the requirement for legal reviews is more than simply a requirement of treaty law. Indeed, the United States, which is not party, has long conducted such reviews to ensure the legality of weapons being procured.

In common with all laws regulating war, those dealing with the conduct of war at sea were entirely of a customary nature until the middle of the nineteenth century. The development of the relevant treaty law occurred in the eighty-year period between 1856 (the Paris Declaration⁴⁶) and 1936 (the London Protocol on Submarine Warfare⁴⁷), with the bulk of it emerging from the Hague Conference of 1907.

There were eight naval conventions agreed that year, although only five of them remain extant:⁴⁸

- Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships;⁴⁹
- Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines;⁵⁰
- Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War;⁵¹
- Hague Convention (XI) relative to Certain Restrictions with regard to the Exercise of Capture in Naval War;⁵² and
- Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War.⁵³

Attempts to develop the law conventionally since 1907 have had minimal effect, the only treaty of current relevance being the 1936 London Protocol on Submarine Warfare. This was the final act in the process set in train to outlaw unrestricted submarine warfare following the First World War. It determined that submarines were subject to the same economic warfare rules as surface warships. If applied, it would have had the effect of virtually ruling out the use of submarines for commerce raiding on practical grounds. They would have found it almost invariably impossible to conduct visit and search, or the seizure or lawful destruction of enemy merchant ships and others carrying contraband. Once war broke out in 1939, the protocol was generally ignored.

46 Declaration Respecting Maritime Law, Paris, 16 April 1856.

47 Procès-verbal relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, London, 6 November 1936.

48 Hague Convention (VI) relative to the Legal Status of Enemy Merchant Ships at the Outbreak of Hostilities has fallen into desuetude; Hague Convention X is now covered by GC II, and Hague Convention (XII) relative to the Establishment of an International Prize Court did not enter into force – see Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed., Oxford University Press, Oxford, 2007, p. 67.

49 Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, The Hague, 18 October 1907 (entered into force 26 January 1910).

50 Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, The Hague, 18 October 1907 (entered into force 26 January 1910).

51 Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907 (entered into force 26 January 1910) (Hague Convention IX).

52 Hague Convention (XI) relative to Certain Restrictions with regard to the Exercise of the Right to Capture in Naval War, The Hague, 18 October 1907 (entered into force 26 January 1910).

53 Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907 (entered into force 26 January 1910).

Since 1936, there has been no substantial conventional development of the law, despite naval power having changed in important respects.⁵⁴ Operations have also been affected by fundamental changes to the general maritime legal environment and in the nature of ocean governance ushered in by conventional developments in the law of the sea. While that regulates the relations of States in peacetime, it also affects the areas within which naval armed conflict could legitimately be waged. The post-UNCLOS extensions and enhancements in coastal State jurisdiction mean that the seas are not as “free” as once they were. This was well recognized as UNCLOS was moving towards ratification, with calls then to review the law of naval warfare.⁵⁵

Once the Cold War was over, the IIHL in Sanremo, supported by the ICRC, initiated its project to produce a contemporary restatement of the international law applicable to armed conflict at sea. The results were published in 1995 as the San Remo Manual.⁵⁶ The project’s methodology was rigorous and thorough, involving a series of meetings of the leading scholars on the subject as well as representatives of many of the world’s navies – and all the major naval powers were represented, albeit informally.

The San Remo Manual’s influence is significant, and for very good reason. Both the USN and the British Ministry of Defence have quoted the SRM rules in their manuals dealing with the LOAC.⁵⁷ The SRM was used in its entirety as the “first draft” of the “Maritime Warfare” chapter in the UK’s *Manual of the Law of Armed Conflict* (UK Manual).⁵⁸ It was quoted by Israel in support of its conduct of the blockade of Gaza, following the May 2010 attempt by a flotilla of neutral vessels to enter the territory.⁵⁹ In subsequent enquiries into that incident, the

54 The diplomatic conference that negotiated AP I did not have the purpose of reforming the law regulating naval operations and was careful to avoid becoming seized of naval issues (see AP I, Art. 49(3)), although it admittedly did have some influence on naval conduct in hostilities. There have also been no protocols added to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983), to do with specifically naval weapons – its Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, 10 October 1980 (and the 1996 Amendment to it), did not deal with sea mines.

55 Natalino Ronzitti, “The Crisis in the Law of Naval Warfare”, in Natalino Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff, Dordrecht, Boston, MA, and London, 1988, especially the section on “The Theatre of Naval Operations”, pp. 13–41 (which includes some comment on the effects of AP I).

56 See San Remo Manual, above note 4.

57 US Navy, *The Commander’s Handbook on the Law of Naval Operations*, July 2007 (USN Handbook), available at: www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf; UK Manual, above note 44.

58 The current author was one of the joint authors of that chapter, together with Professor Vaughan Lowe QC (then the Chichele Chair of Public International Law at the University of Oxford), Miss Elizabeth Wilmshurst (then the deputy legal adviser in the Foreign and Commonwealth Office) and Commodore Jeff Blackett (then the chief naval judge advocate).

59 See, for example, www.abc.net.au/lateline/content/2010/s2914517.htm, quoting Israeli government spokesman Mark Regev in an interview to the Australian Broadcasting Corporation in which he cites the San Remo Manual, on 31 May 2010. The Israeli Ministry of Foreign Affairs has also relied on both the USN Handbook and the UK Manual as containing authoritative statements on blockade; see: www.mfa.gov.il/mfa/aboutisrael/state/law/pages/gaza_flotilla_maritime_blockade_gaza-legal_background_31-may-2010.aspx.

SRM was again relied upon.⁶⁰ Most recently, the editors of a guide to human rights law applications in armed conflict have relied on a combination of the SRM and the UK Manual in their own “Maritime Warfare” chapter.⁶¹ There is, therefore, strong evidence that the SRM is widely regarded as a reliable statement of the LOAC to be applied at sea.

One does need to be circumspect in assuming that the San Remo Manual is definitive of the law, however. Its Foreword describes it as “a contemporary restatement of the law, together with some progressive development, which takes into account recent State practice, technological developments and the effects of related areas of the law”.⁶² It is neither conventional law nor a codification of customary law, but it very clearly relies on both. It is authoritative, in so far as it is the product of a rigorous process of review, but that authority is limited by the fact that States were not officially represented in the process of consultation, with all officials contributing in their “personal” capacities. Not all of its rules are invariably accepted. For example, while the UK Manual’s “Maritime Warfare” chapter relied heavily on the SRM, the rules were modified to reflect the UK’s position.⁶³ Nor is the SRM declaratory of customary law. One might be forgiven for assuming that it is; the ICRC Customary Law Study deliberately excluded any practice in naval warfare, because “this area of law was recently the subject of a major restatement, namely the San Remo Manual”.⁶⁴ Nevertheless, it is appropriate to regard the SRM as a basic statement of the extant law. This is convenient for the purposes of this paper, which alludes to the SRM rules and thereby avoids lengthy reference to conventional sources and historic practice.

A comprehensive review of the law would require an examination of all SRM rules and their conventional and customary antecedents. This paper does not attempt that. It examines only two aspects of naval warfare, which are regarded as particularly challenging from a legal point of view: economic warfare and hybrid warfare.

Economic warfare at sea

Naval economic warfare and the law regulating it were developed largely during the seventeenth and eighteenth centuries, the classic period of European maritime

60 See, for example, Palmer Report, above note 22.

61 Daragh Murray *et al.* (eds), *Practitioners’ Guide to Human Rights Law in Armed Conflict*, Oxford University Press, Oxford, 2016, pp. 289–303. The editorial team that produced this guide consists of a distinguished group of leading UK-based experts on both international human rights law and the LOAC/IHL; their reliance on the San Remo Manual is indicative of its status as a reference on the extant LOAC applicable at sea.

62 San Remo Manual, above note 4, p. ix (emphasis added).

63 The present author has previously provided a full account of the differences between the San Remo Manual and the UK Manual and the reasoning behind them, in Steven Haines, “The United Kingdom’s Manual on the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared”, *Israel Yearbook on Human Rights*, Vol. 36, 2006.

64 ICRC Customary Law Study, above note 1, p. xxx.

imperial rivalry. A normative regime evolved through practice that allowed belligerents to target each other's trade while at the same time respecting that of neutrals. It provided for the interdiction of the opposing belligerent's merchant trade on the high seas and on the imposition of belligerent blockade off an enemy's coast and ports. Belligerent trade could be carried in hulls registered with neutral powers as well as the belligerents' own. Procedures were developed to allow for visit and search of all shipping to check for contraband. Not all enemy goods were contraband; their status depended on their likely contribution to the enemy's war effort. Belligerents gained the right to stop and search merchant ships of all registrations on the high seas to check their cargoes. Genuinely neutral trade, non-contraband and private goods would be allowed to proceed, regardless of the flag under which they were being transported. Enemy ships, those carrying contraband and others either resisting stop and search or attempting to breach a blockade were subject to seizure as prizes of war. A remarkable body of "prize law" evolved, through the jurisprudence of prize courts convened in belligerent States, to confirm or deny the legitimacy of ship and cargo seizures.⁶⁵ In 1856, with the Paris Declaration, the methods of economic warfare achieved recognition in conventional law. This remains extant today and forms the basis of the current international law regulating commerce-raiding and blockade operations.⁶⁶

The Paris Declaration rules were not uncontroversial and, in the late nineteenth century through to the First World War, naval interests were in tension with the commercial interests that favoured free trade and regarded the freedom of the seas as essential for it. This tension surfaced in particular in debates within Britain between naval and commercial lobbies whose rival views were reflected in the policies of the main political parties. On the one hand were free-trade Liberals; on the other were navally inclined Tories. The former wished to maintain maximum freedom of uninterrupted movement on the high seas, while the latter wished to retain as much flexibility as possible to apply economic pressure at sea.⁶⁷ This is not the place to rehearse these debates, but in important respects they became moot once general naval war broke out in 1914 (and again

65 Donald Petrie, *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail*, Naval Institute Press, Annapolis, MD, 1999. See also Edward Roscoe, *A History of the English Prize Court*, Lloyd's, London, 1924; Thomas Holland, *A Manual of Naval Prize Law*, HMSO, London, 1888; Richard Hill, *The Prizes of War: The Naval Prize System in the Napoleonic Wars 1793–1815*, Sutton, Stroud, 1998.

66 See the text and commentary in A. Roberts and R. Guelff, above note 48, pp. 47–52; N. Ronzitti, above note 55; H. Fujita, "Commentary", in Natalino Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff, Dordrecht, Boston, MA, and London, 1988, pp. 66–75.

67 See the discussion of debates within *The Naval Review* (the professional journal of RN officers) on the subject in Steven Haines, "Law, War and the Conduct of Naval Operations", in Peter Hore (ed.), *Dreadnought to Daring: 100 Years of Comment, Controversy and Debate in The Naval Review*, Seaforth Publishing, Barnsley, 2012, pp. 299–315; the recent excellent study of the consequences of the 1856 Paris Declaration in Jan Lemnitzer, *Power, Law and the End of Privateering*, Palgrave Macmillan, Basingstoke, 2014; and the revisionist account of British naval planning in Nicholas Lambert, *Planning Armageddon: British Economic Warfare and the First World War*, Harvard University Press, Cambridge, MA, 2012.

in 1939). While the legal rules were promulgated and in force, naval operations, especially the actions of submarines, pushed the law to one side as the strategic stakes rose to existential levels. The law proved incapable of preventing unrestricted submarine warfare (attacks on merchant ships without warning) and the process of belligerent visit and search was marginalized. The 1936 London Protocol was swept aside as the Battle of the Atlantic got under way.

Following the end of the Second World War, and until 1990, the Cold War maritime confrontation between NATO and Warsaw Pact naval forces in the North Atlantic suggested serious potential for future attacks on shipping. The Alliance's need to maintain vital sea lines of communications between Europe and North America meant that the major navies involved remained focused on the prospect of economic warfare. The Soviet naval threat caused Western navies to prepare for a defensive campaign in response – including naval control of shipping and convoying.⁶⁸ A considerable naval control-of-shipping organization existed within NATO to organize a convoying system. Since 1990, however, these arrangements are no longer exercised in the way they once were.

There is now no particular focus on offensive economic warfare. British doctrine is telling in this regard. In the first edition of *British Maritime Doctrine* (1995), operations against enemy merchant shipping were hinted at under “Operations against Enemy Forces”, although the volume contained no substantial treatment of economic warfare.⁶⁹ The second edition (1999) omitted even the suggestion that shipping would be subject to interdiction by RN.⁷⁰ Nor was economic warfare a feature of the third edition (2004).⁷¹ There has been no revival of economic warfare in RN doctrine in the years since. The dominant role of navies now is power projection.

It is now almost thirty years since the Cold War confrontation in the North Atlantic, and over seventy since the most recent economic warfare campaign reached its conclusion with the defeat of Germany. Although, in historical terms, a few decades is a relatively brief period, time is certainly passing and it is worth asking if economic warfare at sea is any longer relevant. Three questions come to mind:

- While such warfare has always been a feature of general great-power war at sea in the modern era, is it likely to be so in future?

68 The author, himself a seagoing naval officer during the last twenty years of the Cold War, spent time on exercise in warships playing the role of convoy escort. Many of the RN's frigates and destroyers that were in service at that time were originally procured specifically for convoy escort duties. NATO chartered merchant vessels to play the role of the convoys.

69 Directorate of Naval Staff Duties, *BR 1806: The Fundamentals of British Maritime Doctrine*, HMSO, London, 1995, p. 95.

70 Defence Council, above note 5. The draft was subjected to comprehensive scrutiny by the range of relevant naval directorates in the Ministry of Defence and by the staff of the Commander-in-Chief Fleet. While it would have been perfectly understandable for naval traditionalists to criticize the deliberate omission of economic warfare, none did so.

71 Defence Council, *BR 1806: British Maritime Doctrine*, 3rd ed., TSO, London, 2004.

- Would a sustained attack on commercial shipping any longer be regarded as permissible from a moral and normative (as distinct from strictly legal) perspective?
- If economic warfare were to occur, would the existing law governing it be compatible with contemporary circumstances?

Are frequent and sustained naval conflicts, during which trade is the object of attack, consigned to history? The fundamental changes in the international system that have occurred since the Second World War (and since the end of the Cold War in particular) render it unlikely but cannot rule it out altogether, especially over time. The recent absence of the sort of conflict required for the law on economic warfare to be applied in the manner it was intended is not a powerful enough reason for dispensing with that law altogether. If it might occur in future, there ought to be sound law in place to regulate it.

Both World Wars of the twentieth century witnessed considerable naval campaigns against commercial shipping, with civilian crews becoming frequent casualties of war. This was even then controversial, especially in relation to unrestricted attacks on shipping. It seems unlikely, given shifts in attitudes to war and civilian casualties in recent years, that it would be generally regarded as acceptable for warships deliberately to target civilian-manned merchant ships on the high seas today. While no such concerns prevented attacks on merchant ships in the Second World War – and would probably not prevent them in the future – legal, ethical and moral restraints might make a difference. The possibility of post-conflict justice, which has become more likely in recent years, would hopefully be an increasingly powerful factor enhancing the law's restraining influence. That will be more likely if the law itself makes sense in relation to the conditions in which it will be expected to function. Unfortunately, the current law seems less than ideal, for two important practical reasons: one to do with the evolved structure of the international commercial shipping industry, and the other with the manner in which the goods are now shipped globally. The first reason raises issues at the maritime strategic level; the second is of naval tactical concern.

From the early nineteenth century until the middle of the twentieth century, most shipping was formally associated with the major maritime powers, especially those with colonies overseas, and was defended by the navies those powers possessed.⁷² By the twentieth century, there had developed an almost symbiotic relationship between navies and merchant fleets, with the trade being

72 Formal ship registrations did not emerge until the middle of the nineteenth century following the example of Britain, which established its registry in law in 1823. For this reason, there is a dearth of reliable data on the size of States' merchant fleets and the nationality of merchant ships. Nevertheless, the navies of the major maritime powers traditionally had a significant role to play in protecting their own trade, with the neutrality or belligerency of merchant vessels having become recognized in the laws of naval warfare by the eighteenth century. By the Second World War, the two largest merchant fleets were those of the United States and Britain, neither of which are now ranked in even the top ten of merchant flags. See John Mansell, *Flag State Responsibility: Historical Developments and Contemporary Issues*, Springer, Berlin, 2009, pp. 13–23.

defended by navies generating the imperial wealth that rendered major fleets of warships affordable. Merchant ships flagged in a maritime power had crews which tended to consist of subjects of the flag State (although the seagoing community has always had a significant international character). They also carried goods, a substantial proportion of which would be destined for the ports of that State. As a result, identifying “enemy” and “neutral” shipping in time of war was relatively straightforward and there was a good chance that the cargo being carried had some connection with the State in which the ship was registered.

This is no longer the case. The international shipping industry is now profoundly international in all respects, and goods transported around the globe are carried in vessels registered in States that have never been – and are never likely to be – classed as major “maritime powers”. Open registries carry most global trade today, and they would almost certainly have neutral status in time of war between great powers.⁷³ Defensive measures taken by maritime powers through naval control of shipping and the mustering of vessels into convoys for protection provided by the State’s naval forces are now no longer as feasible as once they were.

A commerce-raiding operation would need to cope with merchant shipping, the bulk of which would be neutrally registered. Global maritime trade has more than quadrupled in the past fifty years – and continues to grow – while the number of warships that would be available to defend against attacks on shipping has reduced markedly. Since 1970, for example, the RN has reduced to a quarter of its then size.⁷⁴ Compared to the hundreds of escorts the RN was able to deploy in the Second World War, the twenty currently available render an effective defensive economic warfare campaign impossible to mount. Despite the proliferation of navies and the still impressive size of the USN in particular, there are quite simply insufficient warships to engage in either offensive or defensive economic warfare of the sort witnessed in the most recent general naval war, especially given the substantially increased volume of maritime trade. Strategic decisions to wage war have to take into account the military capacity to do so.

At the tactical level, it is also difficult, if not impossible, to imagine the belligerent right of visit and search functioning in the context of twenty-first-century shipping. Even if a visit and search policy was adopted, it would be impossible to establish whether or not a general cargo vessel was carrying contraband in the manner that this was achievable in the past. The bulk of general cargo is these days transported in containers (which did not exist before the mid-1950s). These are transported in ships that have been growing in size

73 The leading open registries, in descending order of size, are Panama, Liberia, the Marshall Islands, Malta, Bahamas, Cyprus, Antigua and Barbuda, St. Vincent, the Cayman Islands and Vanuatu. See Institute of Shipping Economics and Logistics (Bremen), *Shipping Statistics and Market Review*, Vol. 56, No. 7, 2012.

74 For trade figures, see Martin Stopford, *Maritime Economics*, 3rd ed., Routledge, London and New York, 2009, pp. 38–39. For naval statistics over time, see *Jane’s Fighting Ships*, Jane’s Information Group, London, various editions.

ever since containers first had an impact on global trade in the late 1960s.⁷⁵ It is genuinely difficult to imagine how a warship would exercise the right of visit and search in relation to an 18,000-container-capacity vessel whose master had no idea what was being carried in the containers embarked on his ship. The very large container ships will certainly be bound for certain specialist cargo-handling ports – the major container terminals – capable of taking vessels of that size and handling the numbers of containers involved. Ships’ masters could certainly not react to an order to berth in any port in order to facilitate a search of their cargo (and containers are deliberately stacked to make them inaccessible at sea for security reasons). Container ship operations are largely computerized. All information is computer-based: contents, weight, location of stowage, order of loading and unloading, etc. The searching of such ships by boarding parties from warships is simply not feasible. The law that provides for visit and search operations has been rendered unsuitable by the containerization of a substantial proportion of trade.⁷⁶ Importantly, it is these sorts of vessels that would be most likely to carry goods of a nature to be classed as contraband. The characteristics of the contemporary shipping industry make it difficult to imagine how the law relating to contraband would be enforced, either through effective interdiction at sea or through the application of the law of prize – including in proceedings in prize courts.

It is no exaggeration to state that the law regulating the conduct of economic warfare at sea is almost entirely unsuited to contemporary conditions. In the event of a return to general naval war and economic warfare at sea in the future, the law that is supposed to regulate and mitigate its worst effects is most unlikely to prove fit for purpose. The danger is that it will, as a consequence, simply be ignored and brought into disrepute. This presents a further disturbing prospect. Given the extent to which the current law governing the conduct of hostilities at sea is dominated by rules to do with economic warfare, there is a serious risk that the entire body of that law could be undermined. The possibility, however remote, of a complete breakdown in the normative framework for the conduct of hostilities in a major war at sea should be of deep concern. All of those with a desire to see the law respected and complied with need to be aware of this potentially catastrophic state of affairs.

75 For a fascinating account of the history of the shipping container and its impact on global trade, see Marc Levinson, *The Box: How the Shipping Container made the World Smaller and the World Economy Bigger*, Princeton University Press, Princeton, NJ, and Oxford, 2006.

76 Clearly, these comments would not apply to other types of vessels carrying bulk or liquid cargoes. However, these have also become much larger since the Second World War. The deliberate and systematic sinking of very large container ships, tankers and other bulk carriers would be profoundly controversial and economically disastrous for shipping and insurance companies. For a comprehensive treatment of the post-war development of merchant ships and the merchant shipping industry, see Alastair Couper (ed.), *The Shipping Revolution: The Merchant Ship*, Conway Maritime Press, London, 1992; Alan Branch, *Elements of Shipping*, 8th ed., Routledge, Abingdon, 2007.

Hybrid warfare at sea

While the risk of a general naval war between major maritime powers – and of a consequential return to traditional economic warfare – is considered to be low, there can be little doubt that conflict at sea will continue to occur in some form. Hostilities involving navies in combat with other navies must not be ruled out. In important respects, however, the end of the Cold War seems to have ushered in a new phase or generation of armed conflicts that have proved particularly challenging from both military and legal perspectives.⁷⁷ A particular feature of these conflicts on land has been the increase in those of a non-international character, which have predominated. As demonstrated above, these have not resulted in significant naval engagement between parties (the only one that did being in Sri Lanka, involving the Sri Lankan navy and the Tamil Tigers). One important reason for this is that naval forces are generally too expensive and sophisticated to be deployed by non-State actors, most of which would experience significant challenges mounting effective maritime operations. Nevertheless, the sea cannot be divorced from the land entirely, not least because even predominantly naval wars have ultimately been about resolving issues to do with the political control of territory and communities ashore. Wars on land can result in conflict extending seawards.

The predominance of non-international armed conflicts in recent years has resulted in asymmetries becoming more marked, as non-State armed groups operating against the regular forces of States are forced into the use of low-intensity forms of conflict, including insurgency. Asymmetric, hybrid and mixed forms of conflict involving methods that are difficult to combat, employed by forces whose identity can be profoundly ambiguous, are now a frequent challenge for regular forces. Distinguishing between combatants and civilians can be virtually impossible, especially when armed groups operate within communities to conceal their presence and their activities prior to the mounting of carefully targeted attacks. In conflict on land today, someone who appears to be a civilian may not be revealed as a participant in conflict until he or she acts. The motives of those involved may be ambiguous as well. Criminal gangs use methods similar to those employed by those fighting for political purposes, and they do so at similar intensity. The methods employed by drug cartels in Mexico, for example, led to a criminal insurgency that presented particular challenges to the authorities trying to combat them.⁷⁸ The sorts of conflicts that result have the potential to confuse those trying to counter them. Is the law enforcement (or constabulary) paradigm the defining approach to the application of force in such circumstances, or is it the more permissive LOAC approach? Is there a legitimate role for private

77 For an interesting collection on the characteristics of contemporary armed conflict, see Hew Strachan and Sibylle Scheipers (eds), *The Changing Character of War*, Oxford University Press, Oxford, 2011. Interestingly, however, this otherwise comprehensive volume has nothing to say about war at sea.

78 John Sullivan and Adam Elkus, “Plazas for Profit: Mexico’s Criminal Insurgency”, *Small Wars Journal*, 26 April 2009, available at: www.smallwarsjournal.com.

companies deploying combat veterans on security operations? These two questions have become commonplace in conflict zones on land.

The issues raised are becoming increasingly relevant in the maritime sense as well.⁷⁹ The experience with Somali-based piracy, with well-organized pirate groups operating in accordance with sound “business plans”, has demonstrated the potential for criminal activity at sea to pose serious threats to security. Pirate operations have been conducted by experienced mariners turned pirate, and it is entirely conceivable that similar threats could materialize involving groups having political rather than financial motives. One of the difficulties experienced with counter-piracy operations has been that pirate vessels are often not revealed as such until they launch an attack on vulnerable shipping. This presents problems not unlike those experienced by forces attempting to counter insurgencies ashore, in which the identification of the enemy is by no means a straightforward process. The identity of vessels at sea can be as ambiguous as the identity of armed groups ashore. An important feature of the efforts to protect shipping off the coast of Somalia and in the Gulf of Aden has been the deployment of private security companies, contracted by shipping companies to provide defence on board their merchant ships transiting through the region. Navies do not have a monopoly of the use of legitimate force at sea in constabulary operations, where the principles of self-defence allow for necessary and proportionate force.

Following the outlawing of privateering by the 1856 Paris Declaration, the legitimate application of force on the high seas in time of war became the preserve of navies.⁸⁰ In recent years, however, that monopoly has been effectively removed. Civilian-manned coastguards are being added to the equation through their increasingly routine involvement in constabulary operations. The more capable coastguard cutters are sufficiently similar in design and capability to warships that, if manned by naval personnel, they would be classified as such. Warships have a particular status in international law and are endowed with powers that other ships do not possess. They are defined in Article 29 of UNCLOS and, strictly speaking, State-owned and -operated coastguard cutters are not warships. They are, however, able to operate lawfully in similar ways to warships if they are conducting counter-piracy operations on the high seas in accordance with Article 107 of UNCLOS. If a constabulary operation escalated and, through the use of force, exceeded the threshold for armed conflict, coastguards could easily find themselves engaged in armed conflict at sea. With a recent proliferation of coastguards and the likelihood of tensions at sea caused by a variety of issues initially demanding constabulary responses, there seems to be a growing risk of coastguards becoming involved in the early or lower-intensity stages of armed conflict.

States do not only deploy coastguards, however. There are now also quasi-official “militia” forces operating in coastal waters in particular. For example, the

79 Andrew Palmer, *The New Pirates: Modern Global Piracy from Somalia to the South China Sea*, I. B. Taurus, London and New York, 2014, in particular the chapter on “Pirate Operations”, pp. 163–204.

80 Declaration Respecting Maritime Law, above note 46.

Iranian “Navy of the Army of the Guardians of the Islamic Revolution”, or “Revolutionary Guards’ Navy”, operates in unconventional ways in the waters of the Gulf. Its legal status and that of the maritime forces it deploys is not entirely clear. To quote one Iranian defector, “It’s something like the Communist Party, the KGB, a business complex, and the Mafia.”⁸¹ It has managed seriously to embarrass both the USN and RN by seizing patrol boats operating in international waters close to the Iranian coast. It exists side by side with the more traditional Islamic Republic of Iran Navy. A similar example of maritime hybridity is provided by the forces of the Peoples’ Republic of China. It has a traditional navy (the Peoples’ Liberation Army Navy, or PLAN) as well as a coastguard force and a maritime militia, the latter made up of civilian-manned fishing vessels that are also deployed by the State to assist in asserting sovereignty in disputed areas and to interfere with other States’ fishing vessels, especially in the South China Sea.⁸² Chinese coastguard vessels, which are ostensibly deployed on constabulary tasks, are effectively operating as warships in all but name, while claiming civilian status.⁸³

What is the dividing line between “constabulary” action and military applications of force? The use of coastguards and other civilian-manned vessels in aggressive operations injects ambiguity into a situation such that, if the defensive response is mounted by a traditional naval force applying military force, it risks being portrayed as the aggressor in a propaganda campaign waged to scale an international moral high ground.⁸⁴ Hybrid warfare implies the use of various methods to “win”, including the use of propaganda and manipulation of the media. A warship in an exchange of fire with a civilian-manned coastguard cutter will almost certainly experience difficulties justifying its use of force in the international sense.

At what point does the action of a coastguard or maritime militia vessel constitute an “armed attack”? Can an attack by a coastguard vessel be an armed attack if the vessel is entirely civilian-manned? Is a civilian-manned vessel merely being used as part of a hybrid effort to confuse and confound an opponent and to inject ambiguity into naval operations? Is it any longer possible in these sorts of circumstances to distinguish clearly between military and civilian and between constabulary and military applications of force at sea? Should the law on the conduct of hostilities at sea begin to develop in ways that might accommodate the hybrid characteristics of contemporary conflict?

81 See Council on Foreign Relations. “Iran’s Revolutionary Guards”, 14 June 2013, available at: www.cfr.org/iran/irans-revolutionary-guards/p14324.

82 See, for example, Steven Stashwick, “Crying Wolf? Contrary to Reports, No Dredges at Scarborough Shoal Yet”, *The Diplomat*, 8 September 2016, available at: <http://thediplomat.com/2016/09/crying-wolf-contrary-to-reports-no-dredges-at-scarborough-shoal-yet/>.

83 The author has engaged in talks on maritime security cooperation with authorities in China and Japan, and his PLAN interlocutors have always been very clear in the distinction they make between China’s warships and the vessels deployed by the Chinese coastguard.

84 For an interesting and well-informed analysis of hybrid warfare at sea from a US Navy perspective by a former NATO Supreme Allied Commander Europe, see Adm. J. Stavridis, “Maritime Hybrid Warfare is Coming”, available at: navalinstitute.com.au/maritime-hybrid-warfare-is-coming/.

It is, of course, easier to pose these sorts of questions than to answer them. It would be even more difficult to develop the law adequately to accommodate the variety of sea-borne forces that are emerging, or the activities in which they may become involved. Nevertheless, irregular maritime forces do need to be considered in a LOAC context. They create the potential for a nexus between constabulary and military operations at sea. They also raise very serious questions about the wisdom of separating military and constabulary functions to the extent of maintaining separate institutions – navies and coastguards – to deal with each separately. If a hybrid situation is fluid to the extent that the law enforcement/armed conflict threshold is frequently breached – in either direction – is it appropriate for the two maritime operational functions to be divided institutionally? While such a division may have worked in the later stages of the era of maritime imperial competition, in a new era in which ambiguity is the order of the day, and in which human rights considerations are also being applied, there would seem to be a need for legal issues to be thought through afresh.

The sorts of questions alluded to here have been posed time and again in relation to operations on land, with the answers debated at length. They are only now emerging as serious issues in the naval context, but they are doing so to the extent that it is now time for some consideration to be given to the relevance of the existing LOAC to contemporary and future hybrid conflict at sea. The existing LOAC deals principally with traditional forms of naval war that were common until the middle of the twentieth century. It was never developed to cope with the challenging circumstances of contemporary low-intensity conflict.

Challenging the existing law

There is no better or more convenient summary of the existing law governing the conduct of hostilities at sea than the 183 rules contained in the San Remo Manual. They represent what the experts who produced the manual believed the law of naval warfare to be on the eve of the twenty-first century. For reasons of brevity in this paper it is entirely appropriate, therefore, to make reference to the SRM rather than to the various recognized sources of the law. Its contents are organized as follows:

- Part I (Rules 1–13) contains general provisions;
- Part II (Rules 14–37) covers regions of operations;
- Part III (Rules 38–77) contains basic rules and target discrimination;
- Part IV (Rules 78–111) deals with methods and means of warfare;
- Part V (Rules 112–158) outlines measures short of attack – interception, visit, search, diversion and capture; and
- Part VI (Rules 159–183) covers protected persons, medical transports and medical aircraft.

For the purposes of this paper, Part VI dealing with humanitarian issues, together with a total of thirty-five rules dealing with aircraft and air operations, will be put aside and not considered further here.

An examination of the remaining rules within the SRM reveals that there is little focus on sea-control/sea-denial operations. When navies have fought navies, they have usually (though not invariably) done so in conditions in which the application of the principle of distinction in targeting has not been especially problematic; the seas were not heavily populated areas filled with civilian objects. This may no longer be so obviously the case. Sea use has increased substantially in recent years, and there are far more vessels and installations and far more people in evidence. Nevertheless, the application of the principle of distinction at sea is far less problematic than its application in built-up areas ashore. Much of the general law regulating armed conflict also applies at sea, and there is little need for additional naval-specific regulation. On weapons law, the SRM includes the regulations for sea mines and torpedoes because they are naval-specific weapons. There are no SRM rules dealing with power projection because the rules for it are identical to those on targeting applied on land – and once a military force has landed from sea, the law of land warfare applies to its activities.⁸⁵

Most notably, the conduct of economic warfare has generated a significant body of legal regulation and the rules on the conduct of operations against merchant shipping occupy a substantial proportion of the SRM. There are forty rules in total dealing with these operations – on visit and search, on blockade, on contraband, etc. – and they seem almost to dominate the manual, with all other topics having a much less prominent position.

While the SRM is a very valuable reference, it is not regarded universally as a clear and unambiguous statement of the law. When the UK utilized the manual as a starting point for its own treatment of the subject, for example, it subsequently modified seventeen of the rules and excluded ten.⁸⁶ Those subjects with which the UK Manual took issue were: the applicability of the law of armed conflict (SRM Rule 1); the areas of naval warfare (SRM Rule 11); neutrality (SRM Rule 13d); the “24 Hour Rule” (SRM Rule 21); notice of passage (SRM Rule 26); the notification of mining in neutral exclusive economic zones and in the waters above neutral continental shelves (SRM Rule 35); and ruses of war and perfidy (SRM Rule 111). The UK’s decision not merely to repeat the SRM rules word for word suggests that there is some scope for reviewing their content. It is the

85 Hague Convention IX clearly deals with naval power projection, but its provisions are not included in the San Remo Manual. The Convention has not been a success and was not complied with during the two subsequent World Wars. AP I has a bearing on this subject today, especially Articles 35, 40, 41 and 59, dealing with basic rules, quarter, enemy combatants *hors de combat*, and non-defended localities respectively.

86 For a summary table of SRM rules and their treatment in the UK Manual, see S. Haines, above note 63, p. 98. The present author’s choice of this comparison with the San Remo Manual, and his position on the rules quoted, is no mere coincidence, given his role in the production of the UK Manual. For further suggestions, see also W. H. von Heinegg, above note 35.

existing content of the SRM dealing specifically with economic warfare, however, for which a review is considered especially necessary.⁸⁷ For hybrid warfare, which is not addressed at all in the extant law, it would certainly seem to be timely to consider the relationship between maritime constabulary and military operations and to consider how the principle of distinction should be applied at sea in circumstances involving interaction between warships, coastguard vessels and other “militia” and similar vessels of profoundly ambiguous status. It may well be possible to argue that the law is capable of being applied in the “messy” circumstances of hybrid warfare and that little change is necessary. Nevertheless, it is almost certainly worth exposing the issues raised to informed debate – if only to reject any substantive change to the existing law. Any debate needs to involve both informed lawyers and experienced naval operators for the practical application of the law to be fully and adequately addressed.

Concluding comments

This paper has only skimmed the surface of its subject, merely hinting at issues that deserve to be raised. The San Remo Manual is a good summary of the law as it stands, which is for the most part the law that existed during the Second World War. Those legal specialists and naval officers who produced the SRM as the Cold War was ending were cautious in their approach and recommended no radical change. Given the circumstances prevailing then, their approach was justified and understandable, especially when one accepts that the process neither involved States nor led to their formal endorsement of the outcome. Thirty years ago, with two major maritime power blocs confronting each other in the North Atlantic, it was considerably more difficult to imagine a world without general great-power war having substantial naval aspects. An attack on trade was a very real consideration in that context. It would have been irresponsible then to have thrown caution to the wind in order to come up with a radical overhaul of the law. The result today, however, is that the rules reflected in the SRM, in looking backwards to the past rather than at the present or even the future, now risk being ignored or even held in contempt if they prove unworkable when needed most. That would be most unfortunate.

Armed conflict at sea certainly remains likely, especially given the current rivalries in evidence today. The South and East China Sea disputes, China’s enhanced naval ambitions and the resurgence of Russian naval power are all undoubtedly significant indicators of the potential for armed confrontation (and there are others). There are more navies capable of engaging in some form of maritime conflict than at any time in history; their proliferation has been a marked feature of the second half of the twentieth century. The possibility that

87 Despite its other reservations, the UK accepted the bulk of the economic warfare rules within the San Remo Manual. It is the author’s view that it was mistaken in doing so but had to accept that they be included in the UK Manual (for which the author chaired the Editorial Board) as a matter of UK policy.

the major maritime powers are unlikely to wage war against each other in the future does not mean that conflict at sea is to be relegated to history. Clearly, it will occur and rules need to be in place to regulate it.

It has been suggested that two issues in particular deserve serious review. First, economic warfare at sea would appear to be impossible to conduct using the current range of rules. The substantial changes to the shipping industry since the Second World War have certainly not been matched by changes to the law dealing with the interdiction of maritime trade. While it is possible that economic warfare, a distinctive feature of war in the era of maritime imperial rivalry, may no longer be likely, it cannot be ruled out altogether. That being the case, there is a need for legal rules to be in place that would be realistic given contemporary and future conditions.

Second, there is an emerging and growing need to at least encourage those with a knowledge of current naval operations – in war and peace – to consider the direction, potential, characteristics and legal consequences of non-traditional forms of maritime conflict. These are not addressed at all in the existing law. The initial question to be posed has to do with the extent to which the existing law would cope with the new challenges that these forms of war may pose. It is possible that the existing rules could be applied successfully, albeit with some difficulty, and it is important to stress that the argument here is for a review of how the law might cope with new circumstances, not necessarily for the drafting of new law for them.

While the law most certainly requires updating, realistically there is probably little prospect of new conventional law to satisfy that need. Convening a major international conference with the intention of overhauling the LOAC applicable at sea would be a daunting diplomatic challenge that would be unlikely to attract all the major maritime powers. Even if a conference was convened, obtaining formal agreement for new rules acceptable to all would require considerable effort, the most likely result being little formal progress.

A practical alternative approach might be to repeat the Sanremo process to produce a new, revised edition of the SRM. It has been the first point of reference on the law for almost a quarter of a century, but a great deal has changed in that time which is not reflected in its text. While its review would not represent a full solution because a new edition would lack formal State endorsement, “soft-law” approaches to the development of international rules have become an interesting and widely adopted means of influencing practice in recent years. If a new SRM was produced using wide consultation involving participants from all of the major maritime powers, it may lead to progressive adoption of the result. Obtaining the informal support of all major maritime powers would certainly not be a mere formality and would require the convening power of a body like the UN or the ICRC, with the clear support of those maritime powers with a major interest.

The limited purpose of this paper is to provoke a debate about the adequacy of the law. The issue is raised and the challenge is laid down. It will be interesting to see where it leads.

The difficulties of conflict classification at sea: Distinguishing incidents at sea from hostilities

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Abstract

Incidents at sea between warships and military aircraft often involve more than provocative actions – they may be aggressive and can sometimes result in death and destruction. In view of the low threshold of a resort to armed force by one State against another that would bring an international armed conflict into existence, it is rather difficult to determine whether incidents at sea remain below that threshold. Similar, albeit less difficult problems arise with regard to forceful measures taken by States against foreign merchant vessels. Here it is important to clearly distinguish between law enforcement at sea and the exercise of belligerent rights.

Keywords: international armed conflict, resort to armed force, warships, military aircraft, merchant vessels, incidents at sea, harassment, law enforcement at sea, exercise of belligerent rights, visit and search, capture.

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Introduction

The sea is a special environment. For good reasons, the ships of all States enjoy freedom of navigation and other well-established rights, because their economies

are highly dependent upon the use of the world's oceans. At the same time, coastal States enjoy various rights in the sea areas off their coasts, which they may enforce against foreign vessels, including by a use of proportionate force. Moreover, some coastal States have territorial and maritime claims that conflict or overlap with the claims of other States, and they are prepared to assert those claims by the use of their navies, coast guards or other State vessels. Again, such assertions may include aggressive operations sometimes amounting to what seems to be a use of force against the flag State of the vessels affected. It goes without saying that, at sea, there is an increased potential for tension and conflict.

Interference with foreign vessels or inter-State confrontations are not necessarily the rule, but they occur repeatedly. Hence, the question arises of whether and to what extent operations at sea qualify merely as "incidents at sea", or as a use of force by one State against another State bringing an international armed conflict into existence. The present paper is an endeavour to provide criteria for an operable and reasonable distinction. It should be emphasized that although dealing with the concept of use of force, the paper merely addresses the *jus in bello*, not the *jus ad bellum*. Hence, the legality of the conduct under scrutiny according to any applicable international legal regime other than the *jus in bello* lies outside the paper's scope. Finally, the paper is based on the premise that a State's use of force against a foreign merchant vessel is presumed to be legal and, therefore, does not trigger the flag State's right of self-defence.¹

The present paper aims at a distinction between incidents at sea and situations that may trigger an international armed conflict. It will address the following questions: (1) Which State conduct directed against foreign warships and military aircraft qualifies as a use of force? (2) Does a use of force against merchant vessels² or civil aircraft bring an international armed conflict into existence? (3) Can the use of civilian government agencies for purposes other than law enforcement qualify as a use of force bringing an international armed conflict into existence?

Distinction between international armed conflict and incidents at sea according to the updated ICRC Commentary of 2016

The position of the International Committee of the Red Cross (ICRC) regarding the definition of "international armed conflict" and its distinction from incidents at sea may be summarized as follows. The Commentary on Article 2 common to the four Geneva Conventions starts from the premise that the "determination of the existence of an armed conflict within the meaning of Article 2(1) must be based

1 For a discussion of the *jus ad bellum* and for the contrary view, see Tom Ruys, "Armed Attack" and Article 51 of the UN Charter: Evolutions in Customary Law and Practice, Cambridge University Press, Cambridge, 2010, pp. 204 ff.

2 The term "merchant vessel" as used here applies to all vessels that are not State ships – i.e., cargo ships, cruise ships, yachts etc. which are not used for exclusively governmental, non-commercial purposes.

solely on the prevailing facts demonstrating the *de facto* existence of hostilities between the belligerents, even without a declaration of war”.³ The characterization of a given situation by governments is irrelevant. Hence, an international armed conflict exists as soon as one or more States resorts to armed force against another State,⁴ in particular when “classic means and methods of warfare ... come into play”.⁵ An international armed conflict may also come into existence “even if the armed confrontation does not involve military personnel but rather non-military State agencies such as paramilitary forces, border guards or coast guards”.⁶ For the purpose of common Article 2(1), any use of force, irrespective of its intensity or duration, suffices;⁷ as long as the “situation objectively shows for example that a State is effectively involved in military operations or any other hostile actions against another State, neutralizing enemy military personnel or assets, hampering its military operations or using/controlling its territory, it is an armed conflict”.⁸

While the ICRC thus defines the concept of “international armed conflict” in a broad manner, it is not necessarily prepared to consider incidents at sea as a use of force bringing an international armed conflict into existence. One may not be prepared to accept the ICRC’s reliance on an “objectivized belligerent intent”. This, however, is without relevance for the purposes of this paper, which deals not with *ultra vires* actions or actions resulting from mistakes but with actions that are either directed or endorsed by the respective government.

In sum, the ICRC seems to provide a clear and operable distinction between situations of international armed conflict and incidents at sea. However, in view of recent events it is worth taking a closer look at the conduct of States at sea.

Use of force against foreign warships and military aircraft

Use of traditional means and methods of warfare

According to the position taken here, the ICRC’s position is correct insofar as a State’s use of traditional methods and means of warfare against another State’s

3 ICRC, *Commentary on Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva, 12 August 1949, 2nd ed., 2017 (online version) (ICRC Commentary on GC II), Art. 2, “Application of the Convention”, para. 233.

4 *Ibid.*, para. 235, 240, *inter alia* referring to the *Tadić* judgment.

5 *Ibid.*, para. 247.

6 *Ibid.*, para. 248. See also para. 251: “Even if armed conflicts under Article 2(1) generally imply the deployment and involvement of military means, there might be situations in which the use of force by other State officials or persons qualified as ‘agents’ of a State would suffice. However, only the use of force by the *de jure* or *de facto* organs of a State, but not by private persons, will constitute an armed conflict.”

7 *Ibid.*, paras 258 ff. In this context, the ICRC recognizes the position of some States, which have considered that an international armed conflict triggering the application of the Geneva Conventions had come into existence after the capture of just one member of their armed forces (para. 260). See also paras 264 ff., where the ICRC rejects the position according to which an international armed conflict requires a certain intensity and duration.

8 *Ibid.*, para. 263.

warships or military aircraft⁹ is concerned. There is no requirement of the target State responding by also resorting to a use of force. The most recent case of an international armed conflict – although of a short duration – having come into existence by the unilateral use of traditional means of warfare against a foreign warship is the sinking of the *Cheonan*.¹⁰

On 26 March 2010, the South Korean warship *Cheonan* was hit by a torpedo, broke in half and sank. Forty-six South Korean sailors died. While the Democratic People's Republic of Korea (DPRK) denied responsibility, a multinational Joint Investigation Group concluded that the torpedo had been manufactured in the DPRK. A Multinational Combined Intelligence Task Force found that the torpedo had been launched from a DPRK submarine. The latter finding was confirmed by a Special Investigation Team established by the United Nations (UN) Command Military Armistice Commission, which considered the evidence to be “so overwhelming as to meet the ... standard of beyond reasonable doubt”.¹¹ Still, the Republic of Korea did not respond by using force against DPRK warships or against DPRK territory. The ICC prosecutor, relying on the findings of the International Criminal Tribunal for the former Yugoslavia, the ICRC and legal writings, concluded that the “resort to armed force between States’ in the form of the alleged launching of a torpedo into the *Cheonan* ... created an international armed conflict under customary international law”.¹² This finding of the existence of an international armed conflict is undoubtedly correct because a torpedo is a traditional means of warfare and the target was another State's warship.

Distinguishing “incidents at sea” from a use of force

The distinction between a resort to armed force, which brings into existence an international armed conflict, and measures which remain below that threshold is more complicated when States resort to a conduct that does not involve the use

9 According to the UN Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3, 297, 10 December 1982, Art. 29, “warship” is defined as “a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline”. For a discussion of those elements, see Wolff Heintschel von Heinegg, “Warships”, *Max Planck Encyclopedia of Public International Law*, available at opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e443?rskey=nrBmY2&result=4&prd=EPIL (all internet references were accessed in March 2017). According to Rule 1(x) of the *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Program on Humanitarian Policy and Conflict Research, Harvard University, 2013 (HPCR Manual), “military aircraft” means “any aircraft (i) operated by the armed forces of a State; (ii) bearing the military markings of that State; (iii) commanded by a member of the armed forces; and (iv) controlled, manned or preprogrammed by a crew subject to regular armed forces discipline”.

10 For the factual findings see International Criminal Court, Office of the Prosecutor, *Situation in the Republic of Korea: Article 5 Report*, June 2014 (Article 5 Report), pp. 4, 10 ff, available at: www.icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf.

11 Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2010/398, 23 July 2010, p. 7.

12 Article 5 Report, above note 10, p. 12.

of traditional methods and means of warfare but that nevertheless may be considered aggressive or amounting to physical coercion – i.e., violence. The following cases show the varying degree of provocative conduct at sea that may or may not qualify as a use of force for the purpose of determining the existence of an international armed conflict. It needs to be emphasized that these cases are referred to solely for the purposes of illustrating the issues at stake. They may not be understood as an assessment of the legality of the respective conduct.

Examples of incidents involving warships and military aircraft

On 12 February 1988, USS *Yorktown* and USS *Caron* conducted freedom of navigation operations¹³ in the Black Sea approximately 7 to 10 nautical miles off the Crimean peninsula, within the territorial sea of (at the time) the Soviet Union. Soviet warships transmitted warnings to terminate the alleged violation of the “State borders of the Soviet Union” and then rammed the US warships, which were damaged, albeit not severely.¹⁴

On 1 April 2001, a US Navy EP-3E reconnaissance aircraft was harassed¹⁵ by People’s Liberation Army Navy fighter aircraft at about 70 nautical miles off Hainan island, in international airspace. The harassment resulted in an accidental collision of a Chinese F-8II jet fighter and the EP-3E. While the Chinese aircraft crashed into the sea with the pilot lost, the US crew made an emergency landing of their damaged aircraft onto Hainan island. They were detained for eleven days.¹⁶

In 2014, forty incidents involving Russian military aircraft occurred in the Baltic Sea area, some of which were of a “more aggressive or unusually provocative nature, bringing a higher level risk of escalation”.¹⁷ In October of that year, Sweden conducted a search for a suspected Russian submarine in the sea areas off Stockholm.¹⁸

In March 2015, Russian fighter jets used two NATO warships in the Black Sea as simulated targets in training exercises.¹⁹ A similar incident occurred in the Black Sea on 12 April 2016, when a Russian military aircraft conducted simulated

13 For the US Freedom of Navigation Program, see US Department of State, “Maritime Security and Navigation”, available at: www.state.gov/e/oes/ocns/opa/maritimesecurity/.

14 For the facts and an assessment, see William J. Aceves, “Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea”, *International Law Studies*, Vol. 68, 1995. See also John H. Cushman Jr., “2 Soviet Warships Reportedly Bump U.S. Navy Vessels”, *New York Times*, 13 February 1988, available at: www.nytimes.com/1988/02/13/us/2-soviet-warships-reportedly-bump-us-navy-vessels.html.

15 “Harassment” is defined as “repeated, deliberate and intimidating activities intended to discourage, impede and disrupt”. See NATO Glossary, AAP-06(2014), 2014, p. 2-H-1, available at: wcnjk.wp.mil.pl/pplik/file/N_20130808_AAP6EN.pdf.

16 See Shirley A. Kan, “The EP-3 Incident and U.S. Interests”, in Shirley A. Kan *et al.* (eds), *China-U.S. Aircraft Collision Incident of April 2001: Assessment and Policy Implications*, Congressional Research Service, October 2001, pp. 1 ff.

17 Thomas Frear, Łukasz Kulesa and Ian Kearns, “Dangerous Brinkmanship: Close Military Encounters Between Russia and the West in 2014”, policy brief, European Leadership Network, November 2014, p. 3.

18 “Russia Baltic Military Actions ‘Unprecedented’ – Poland”, *BBC News*, available at: www.bbc.com/news/world-europe-30429349.

19 Ian Kearns, “Avoiding War in Europe: The Risks from NATO-Russian Close Military Encounters”, Arms Control Association, November 2015, available at: www.armscontrol.org/ACT/2015_11/Features/Avoiding-War-in-Europe-The-Risks-from-NATO-Russian-Close-Military-Encounters#notes.

attacks on USS *Donald Cook*. In April 2016, a Russian jet harassed a US Air Force surveillance aircraft over the Baltic Sea, conducting a dangerous manoeuvre that came within 50 feet of the US aircraft's wings.²⁰

On 17 June 2016, Japanese military aircraft intercepted²¹ two Chinese fighter jets over the East China Sea. Allegedly, the Japanese aircraft released infrared jamming shells and locked their fire-control radar on the Chinese aircraft.²²

Provocative/aggressive conduct or resort to armed force?

According to the ICRC Commentary, “even minor skirmishes between the armed forces, be they land, air or naval forces, would spark an international armed conflict and lead to the applicability of humanitarian law”.²³ This does not, however, mean that any form of physical coercion by a warship or military aircraft against foreign warships or military aircraft will qualify as a use of force resulting in an international armed conflict.²⁴ Arguably, the intentional ramming of a foreign warship, which occurred in the Black Sea in 1988, is an act of violence by the use of a traditional means of warfare – i.e., a warship. Seemingly, there is no difference between shots being fired and ramming because both are designed, or may reasonably be expected, to cause damage or even injury and death. The ICRC is seemingly not willing to share this conclusion, because the Commentary refers to numerous maritime incidents that involved various degrees of physical coercion, including the use of guns, and that are not considered as having created a situation of international armed conflict.²⁵ However, in none of the cases quoted was physical coercion applied against a foreign warship. Therefore, the situations referred to merely qualified as measures enforcing coastal States' rights under the law of the sea or the applicable domestic law. Moreover, the ramming was undertaken with a view to hampering another State's military operations at sea, which, according to the ICRC Commentary, is a military operation bringing into existence an international armed conflict, if it is endorsed by the State concerned.²⁶ Nevertheless, it would seem odd to hold that the ramming, which is also referred to as the “Black Sea bumping incident”, initiated an international armed conflict between the U.S. and the Soviet Union because neither of the two States would have publicly drawn that conclusion. Obviously, the ramming, although an act of violence, did not pass the threshold necessary for qualifying as a use of military force.

20 Andrew Tilghman, “Russian Fighter Jet Taunts U.S. Military Aircraft over Baltic Sea”, *Military Times*, 18 April 2016, available at: www.militarytimes.com/story/military/2016/04/18/russian-fighter-jet-taunts-us-surveillance-aircraft-over-baltic-sea/83188528/.

21 Air interception is “an operation by which aircraft effect visual or electronic contact with other aircraft.” See NATO Glossary, above note 15, p. 2-A-9.

22 Sam LaGrone, “Chinese and Japanese Fighters Clash Over East China Sea”, *USNI News*, 5 July 2016, available at: <https://news.usni.org/2016/07/05/chinese-japanese-fighters-clash-east-china-sea>.

23 ICRC Commentary on GC II, para. 259.

24 For the exclusion of *ultra vires* actions or actions resulting from mistakes, see *ibid.*, para. 263.

25 *Ibid.*, para. 249.

26 *Ibid.*, para. 263.

Neither did the 2001 EP-3 incident trigger an international armed conflict – at least insofar as the damage inflicted to the aircraft is concerned. Supposedly, the Chinese aircraft were on an official mission aimed at harassing the US aircraft. The Chinese conduct resulted in severe damage to the EP-3 and the loss of a Chinese pilot. Seemingly, the use of force was sufficient to have initiated an international armed conflict between the United States and the People’s Republic of China (PRC). However, the Chinese acts did not amount to armed conflict because they were the result of a mistake. Obviously, the harassment, albeit seriously dangerous, was not designed to damage or down the US aircraft. As rightly emphasized in the ICRC Commentary, the existence of an international armed conflict is not determined by acts “done in error” or by “situations that are the result of a mistake or of individual *ultra vires* acts, which – even if they might entail the international responsibility of the State to which the individual who committed the acts belongs – are not endorsed by the State concerned”.²⁷ These findings are without prejudice to whether the detention of the EP-3 crew following the emergency landing on Hainan island can be considered as having brought into existence an international armed conflict.

In contrast, an unconsented-to military operation in the territory of another State that is undertaken with the approval of the flag State “should be interpreted as an armed interference in the [coastal State’s] sphere of sovereignty and thus may be an international armed conflict under Article 2(1)”.²⁸ Accordingly, the intentional presence of a foreign submarine operating submerged in the internal waters of another State without that State’s consent could qualify as a use of force bringing into existence an international armed conflict. This situation should not be confused with a mere violation of Article 20 of the 1982 UN Convention on the Law of the Sea (UNLCOS) by a foreign submarine not navigating on the surface and not showing its flag.

It follows from the foregoing that certain military operations against foreign warships or military aircraft do not constitute a use of force, although they are provocative or aggressive in nature because they are neither intended nor expected to directly result in damage or injury. The same holds true if they in fact, but mistakenly, result in damage or injury. State practice provides sufficient evidence that there are certain actions which are to be strictly avoided because they have the potential of escalating a given situation, but which do not as such bring an international armed conflict into existence.

In 1972, the Soviet Union and the United States concluded an agreement aimed at the prevention of incidents at sea.²⁹ In 1989, the two States concluded a

27 *Ibid.*, para. 263.

28 *Ibid.*, para. 259.

29 Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, signed Moscow, 25 May 1972 (entered into force 25 May 1972) (US–USSR Agreement); Protocol to the Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, signed Washington, 22 May 1973 (entered into force 22 May 1973) (US–USSR Protocol); both available at: www.state.gov/t/isn/4791.htm.

similar agreement on the prevention of dangerous military activities.³⁰ On 9/10 November 2014, the United States and the PRC concluded a Memorandum of Understanding on Rules of Behaviour for the safety of air and maritime encounters.³¹ All these agreements are more or less identical with regard to the following military operations that are to be avoided:³²

- Simulation of attack by aiming guns, missiles, fire-control radars, torpedo tubes, or other weapons in the direction of military vessels or military aircraft encountered;³³
- Except in cases of distress, the discharge of signal rockets, weapons, or other objects in the direction of military vessels or military aircraft encountered;
- Illumination of the navigation bridges of military vessels or military aircraft cockpits;
- The use of a laser in such a manner as to cause harm to personnel or damage to equipment onboard military vessels or military aircraft encountered;
- Aerobatics and simulated attacks in the vicinity of vessels encountered;
- The unsafe approach by one Side's small craft to another Side's vessels; and
- Other actions that may pose a threat to the other Side's military vessels.³⁴

Unless required to maintain course and speed under the rules of the road,³⁵ ships operating in proximity to each other “shall remain well clear to avoid risk of collision” and shall avoid manoeuvring “in a manner which would hinder the evolution of the formation” of foreign ships.³⁶ Furthermore,

[s]hips engaged in surveillance of other ships shall stay at a distance which avoids the risk of collision and also shall avoid executing maneuvers embarrassing or endangering the ships under surveillance. Except when required to maintain course and speed under the Rules of the Road, a surveillant shall take positive early action so as, in the exercise of good seamanship, not to embarrass or endanger ships under surveillance.³⁷

30 USSR–US Agreement on the Prevention of Dangerous Military Activities of 12 June 1989 (entered into force 1 January 1990), *International Legal Materials*, Vol. 28, No. 4, 1989.

31 Memorandum of Understanding between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China regarding the Rules of Behavior for Safety of Air and Maritime Encounters, reprinted in Office of the Secretary of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2016*, 26 April 2016, Appendix III, pp. 110 ff., available at: www.defense.gov/Portals/1/Documents/pubs/2016%20China%20Military%20Power%20Report.pdf. See also Annex II of the Memorandum of Understanding, “Rules of Behavior for Safety of Surface-to-Surface Encounters”, pp. 117 ff.

32 *Ibid.*, Section VI ii, p. 118.

33 See also USSR–US Protocol, above note 29, Article II.

34 For a critical assessment, see Pete Pedrozo, “The U.S.–China Incidents at Sea Agreement: A Recipe for Disaster”, *Journal of National Security Law and Policy*, Vol. 6, No. 1, 2012.

35 In the maritime context, the rules of the road are laid down in the International Regulations for Preventing Collisions at Sea.

36 US–USSR Agreement, above note 29, Article III(1) and (2).

37 *Ibid.*, Article III(4).

Although dangerous and to be avoided under the respective agreements, manoeuvring in close proximity to other vessels and harassment or illumination of foreign warships and military aircraft do not qualify as a use of force bringing an international armed conflict into existence. The same holds true for the locking on of a fire-control radar, although the target ship or aircraft would most probably be entitled to consider the situation an imminent attack or hostile intent triggering its right of self-defence (and then an international armed conflict). The latter situation, as well as simulated attacks on foreign warships or military aircraft, shows how difficult it is to clearly distinguish between mere harassment and an imminent use of force/armed attack. However, the existence of an imminent armed attack is relevant for the *jus ad bellum* only – i.e., for the exercise of the right of self-defence according to Article 51 of the UN Charter. For the determination of the existence of an international armed conflict, there must in fact be a resort to a use of military force; an imminent or allegedly imminent use of force or armed attack does not suffice.

In view of the above findings, the ICRC may consider an amendment or modification of its Commentary on common Article 2, which *inter alia* holds that an international armed conflict exists “when a situation objectively shows for example that a State is effectively involved in military operations or any other hostile actions against another State, ... hampering its military operations”.³⁸ Of course, during an armed conflict such conduct will qualify as a contribution to the enemy’s military action or a participation in the hostilities. In times of peace, however, the mere hampering of another State’s military operations not involving a use of force beyond the threshold of harassment will hardly bring an international armed conflict into existence.

Enforcement measures against foreign warships and military aircraft?

The ICRC Commentary holds that,

under international law applicable at sea, States may, in certain circumstances, lawfully use force against a vessel owned or operated by another State, or registered therein. This may be the case, for example, when coast guards, suspecting a violation of their State’s fisheries legislation, attempt to board such a vessel but meet with resistance.³⁹

This seems to suggest that, according to the law of the sea, a coastal State may take enforcement measures not only against fishing and merchant vessels but also against foreign State ships, including warships.

However, as far as foreign warships or other State ships enjoying sovereign immunity are concerned, the law of the sea does not provide the coastal State with enforcement rights. The only provision recognizing a coastal State’s right to take measures against foreign warships is Article 30 of

38 ICRC Commentary on GC II, para. 263.

39 *Ibid.*, para. 249.

UNCLOS.⁴⁰ This provision does not explicitly provide a right to use forceful means to compel a foreign warship to leave the territorial sea, although such a vessel would no longer benefit from the right of innocent passage.⁴¹ In this context it is important to bear in mind that the continuing presence in the territorial sea of a foreign warship which has not complied with a demand to leave may be considered a use of force not only under the *jus ad bellum*, but also under international humanitarian law.⁴² If the intentional but unconsented-to presence of foreign armed forces in another State's land territory is considered a use of force bringing into existence an international armed conflict, there would be no reason to treat the non-innocent passage of a foreign warship differently, if the coastal State has required it to leave the territorial sea. After all, the territorial sea is part of the territory of the coastal State.⁴³ The fact that foreign ships, including warships, enjoy the right of innocent passage would not justify the conclusion that different criteria apply at sea. At first glance, this would not hold true for those parts of the territorial sea forming part of an international strait. Although UNCLOS defines the concept of transit passage,⁴⁴ it is silent on the coastal State's rights with regard to passage that is not expeditious or in normal mode or otherwise contrary to the law of the sea. Seemingly, the coastal State has no right to require the respective ship to leave, or to take enforcement action with a view to terminating transit passage that is not in compliance with the law of the sea. It is, however, important to note that the special rules applying to international straits are without prejudice to the legal status of the sea area, which continues to be territorial sea and, thus, part of the coastal State's territory.⁴⁵ Hence, it could be held that a warship which is engaged in transit passage not in conformity with the law of the sea may be required to leave. If it does not comply, the same rules as those applicable to the territorial sea apply.

If one is not prepared to consider a non-innocent passage of a foreign warship in the territorial sea, including an international strait, a use of force because there is no prohibition of passage that is not in compliance with Articles 19 and 38 of UNCLOS,⁴⁶

40 Article 30 of UNCLOS provides: "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately."

41 For an assessment of the presence of foreign submarines in the territorial sea, see James Kraska, "Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters", *Columbia Journal of Transnational Law*, Vol. 54, No. 1, 2015, available at: <http://jtl.columbia.edu/putting-your-head-in-the-tigers-mouth-submarine-espionage-in-territorial-waters/>.

42 See ICRC Commentary on GC II, para. 245: "[...] an unconsented-to invasion or deployment of a State's armed forces on the territory of another State – even if it does not meet with armed resistance – could constitute a unilateral and hostile use of force by one State against another, meeting the conditions for an international armed conflict under Article 2(1)."

43 UNCLOS, Art. 2.

44 *Ibid.*, Art. 38.

45 *Ibid.*, Art. 34(1).

46 Any activity of a foreign warship which is not in compliance with Article 19 of UNCLOS would not constitute a violation of the territorial sovereignty of the coastal State, but would merely entail the coastal State's right under Article 30 of UNCLOS to require the vessel to leave the territorial sea immediately. In other words, the territorial sovereignty is *ab initio* limited by the right of passage, including non-innocent passage. In case of non-innocent passage, the only remedy available to the coastal State is the right to require the warship to leave the territorial sea immediately.

then an international armed conflict will only come into existence if the coastal State uses its armed forces to compel the warship to leave the territorial sea or strait.

A use of force against foreign warships or military aircraft in the sea areas and the above airspace beyond the outer limit of the territorial sea will most likely qualify as a use of force and bring an international armed conflict into existence. An illustrative example is the case of USS *Pueblo*.

USS *Pueblo* was the second ship in the Auxiliary General Environmental Research (AGER) programme of the United States.⁴⁷ The AGER programme was established in 1965 for the purpose of collecting signals intelligence. AGER operations, which were conducted in coordination with the National Security Agency within the Pacific Command, were also intended to “determine Soviet reaction to a small unarmed naval surveillance ship deployed in Soviet naval operating areas, and to test the effectiveness of this type of ship acting alone”.⁴⁸ The secondary mission of USS *Pueblo* was “to search for and record any signals emanating from” the DPRK.⁴⁹ Before her deployment, the *Pueblo* was armed with two 50-calibre machine guns. “Orders to PUEBLO specifically forbade her to approach closer than 13 miles to the North Korean coast.”⁵⁰ On 22 January 1968, a DPRK submarine chaser circled the *Pueblo* at close range, followed by three DPRK patrol boats. The exact position of the *Pueblo* at that point in time was, and continues to be, a contested issue between the United States and the DPRK. According to the DPRK government, the *Pueblo* was 7.1 nautical miles offshore;⁵¹ according to the US Department of State, she “was seized slightly more than fifteen miles from the nearest land”.⁵² After several warnings by the DPRK warships that remained unheeded, the DPRK vessels opened fire at the *Pueblo* and eventually she was boarded and taken to Wonsan in the DPRK. One sailor had died; the remaining eighty-two officers and personnel were removed from the ship and taken to Pyongyang, where they were detained until their repatriation on 23 December 1968. According to the DPRK, USS *Pueblo* “was seized ... in the territorial waters of the [DPRK]”, and committed “grave acts of espionage ... against the [DPRK] after having intruded into the territorial waters of the [DPRK]”.⁵³

Leaving aside the issue of the exact location of USS *Pueblo*, it is safe to hold that she was not operating within the territorial sea of the DPRK because, in 1968, the 12-nautical-mile breadth of the territorial sea was not yet

47 The USS *Pueblo* is therefore also known as *AGER-2*.

48 Court of Inquiry to Inquire into the Circumstances relating to the Seizure of the USS *Pueblo* (*AGER-2*) by North Korean Naval Forces, which Occurred in the Sea of Japan on 23 January 1968, and the Subsequent Detention of the Vessel and the Officers and Crew, Summary Report, 9 April 1969 (*Pueblo Report*), p. 34, available at: www.jag.navy.mil/library/investigations/pueblo%20basic%20pt%202.pdf.

49 The secondary mission and mission objectives of USS *Pueblo* are laid down in a formerly secret but now declassified document (DOCID: 4121723).

50 *Pueblo Report*, above note 48, p. 36.

51 See US Department of State, telegram, 8 February 1968, reproduced in “Contemporary Practice of the United States Relating to International Law”, *American Journal of International Law*, Vol. 62, No. 3, 1968, pp. 756–757.

52 *Ibid.*

53 The document is reprinted in *American Journal of International Law*, Vol. 63, No. 3, 1969, pp. 684–685.

generally recognized.⁵⁴ Accordingly, the *Pueblo*'s presence either 7.1 or approximately 15 nautical miles off the DPRK coast can under no circumstances be considered unlawful or a use of force, which would have entitled the DPRK to take enforcement measures. Hence, an international armed conflict only came into existence when the DPRK ships opened fire. Arguably, that international armed conflict lasted until 23 December 1968, the date of the release and repatriation of the crew and personnel.

Use of force against foreign merchant vessels and civil aircraft

In order to trigger an international armed conflict, a use of armed force need not be directed against another State's military forces or military equipment and infrastructure. For the purposes of common Article 2(1), an international armed conflict may also be triggered by a use of force against another State's "territory, its civilian population and/or civilian objects, including (but not limited to) infrastructure".⁵⁵ However, in the maritime context law enforcement measures involving a use of force taken against foreign merchant vessels will regularly not bring into existence an international armed conflict between the coastal State and the respective flag States, unless the measures extend to the territorial sea of a State other than the coastal State. That said, as stated in the ICRC Commentary, it "cannot be excluded ... that the use of force at sea is motivated by something other than a State's authority to enforce a regulatory regime applicable at sea. Depending on the circumstances, such a situation may qualify as an international armed conflict."⁵⁶ Hence, it is important to clearly distinguish between, on the one hand, maritime law enforcement under the law of the sea, which benefits from a – rebuttable – presumption of legality and which is not considered a resort to a use of force against the flag State or an exercise of belligerent rights; and, on the other, a resort to force at sea outside the law enforcement paradigm.

The law of the sea

UNCLOS and other multilateral and bilateral treaties⁵⁷ contain provisions entitling States to take enforcement measures against foreign merchant vessels. In view of the

54 See UN Department of the Law of the Sea, *Law of the Sea Bulletin*, No. 15, May 1990, p. 29. Claims in (1960) and in 1969: 3 nm: (22) 28; 4 nm: 3; 6 nm: (10) 13; 9 nm: 1; 10 nm: 1; 12 nm: (13) 42; 130 nm: 1; 200 nm: (1) 5. The mere fact that between 1960 and 1969 the number of claims to a 12 nm territorial sea increased from thirteen to forty-two is not sufficient evidence of a general State practice because during the same period, claims to a 3 nm territorial sea increased from twenty-two to twenty-eight. Accordingly, it is safe to conclude that a 3 nm territorial sea, as recognized by the United States in 1968, was considered as being in accordance with customary international law, whereas claims to a 12 nm territorial sea or beyond were not (yet) generally recognized.

55 ICRC Commentary on GC II, para. 246.

56 *Ibid.*, para. 249.

57 See, for instance, the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, UN Doc. LEG/CONF.15/21, 1 November 2005; UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN Doc. E/CONF.82/16, 20 December 1988, reprinted in *International Legal Materials*, Vol. 28, No. 2, 1989.

limited space available, it suffices to refer to the contribution in this volume by Rob McLaughlin on law enforcement at sea and the peacetime standards for the use of force.⁵⁸ For the purposes of this paper it suffices to mention that the coastal State's rights to enforce its domestic civil or criminal law are limited to the internal waters, the territorial sea and, where applicable, the archipelagic waters. Within the contiguous zone, the coastal State may only enforce its customs, fiscal, immigration or sanitary laws.⁵⁹ Within the exclusive economic zone (EEZ), enforcement measures may only be taken within the safety zone around artificial islands, installations and structures,⁶⁰ or in the exercise of the coastal State's sovereign rights enjoyed in the EEZ.⁶¹ On the high seas, measures against foreign ships may be taken only on the basis of Articles 105, 110 or 111 of UNCLOS.⁶²

Accordingly, any action, in particular any use of force, against a foreign vessel will violate the exclusive jurisdiction of the respective flag State, if none of the said provisions provide a legal basis. The same holds true if the force used is disproportionate.⁶³ It is, however, open to doubt whether a use of force against a foreign merchant vessel can be considered as bringing an international armed conflict into existence only because there is no legal basis. After all, merchant vessels, while subject to the sovereignty of the flag State, cannot be assimilated to territory (no "swimming territory"). Accordingly, disproportionate or otherwise illegal measures, including disabling fire (i.e., shots into the rudder or bridge) or the sinking of a foreign merchant vessel, cannot be considered a use of force by a State against the flag State.⁶⁴ This may, however, be different if the measures are taken not against individual ships only but against the entire merchant fleet of

58 See Rob McLaughlin, "Law Enforcement at Sea: The Applicable Legal Framework", in this issue of the *Review*.

59 UNCLOS, Art. 33.

60 *Ibid.*, Art. 60.

61 *Ibid.*, Art. 73.

62 For a comprehensive analysis, see Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*, Hart, Oxford and Portland, OR, 2014; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, Cambridge, 2009.

63 For a disproportionate use of force see, *inter alia*, International Tribunal for the Law of the Sea, *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, para. 155: "use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law."

64 For a similar but more cautious approach, see ICRC Commentary on GC II, para. 249: "In the naval context, under international law applicable at sea, States may, in certain circumstances, lawfully use force against a vessel owned or operated by another State, or registered therein. This may be the case, for example, when coast guards, suspecting a violation of their State's fisheries legislation, attempt to board such a vessel but meet with resistance. The use of force in the course of this and other types of maritime law enforcement operations is regulated by legal notions akin to those regulating the use of force under human rights law. In principle, such measures do not constitute an international armed conflict between the States affiliated with the vessels, in particular where the force is exercised against a private vessel. It cannot be excluded, however, that the use of force at sea is motivated by something other than a State's authority to enforce a regulatory regime applicable at sea. Depending on the circumstances, such a situation may qualify as an international armed conflict."

another State.⁶⁵ Still, it should not be forgotten that, particularly in view of the widespread use of so-called “flags of convenience”, it is virtually impossible to determine that a State has resorted to a use of force against another State’s merchant fleet.

Law enforcement or exercise of belligerent rights?

The ICRC Commentary is rather cryptic as regards a “use of force at sea ... motivated by something other than a State’s authority to enforce a regulatory regime applicable at sea”.⁶⁶ Unfortunately, the respective paragraph provides neither a clarification nor a reference to a situation that could be considered as triggering an international armed conflict by the use of force against foreign merchant vessels. As seen, the lack of a legal basis or the disproportionate nature of the force used will scarcely suffice to qualify as a resort to a use of force against the flag State.

In this context, it may be worthwhile to consider a situation in which a State captures the merchant ships of a single flag State only. At first glance, this may be but yet another example of unlawful conduct rather than an inter-State use of force or a conduct triggering an international armed conflict, in particular if the affected merchant vessels are not sunk. However, under the law of naval warfare, belligerent acts are not limited to attacks. They also include the exercise of so-called prize measures taken against enemy and neutral merchant vessels or civil aircraft.⁶⁷ For the purposes of this paper, prize measures against neutral merchant vessels and civil aircraft can be discarded because maritime neutrality requires the existence of an international armed conflict.

Arguably, an international armed conflict may come into existence by an exercise of prize measures directed against the merchant vessels of only one specific State. By such conduct the State exercising prize measures implicitly qualifies the affected flag State as an enemy and the capture of the flag State’s vessels could be considered an exercise of belligerent rights rather than mere maritime law enforcement. In theory, the distinction between an exercise of belligerent rights and maritime law enforcement may be possible. In practice, however, it is rather difficult because the respective measures – visit, search, capture – are more or less identical. Hence, visit, search and capture of the merchant vessels of a single flag State will not as such suffice to justify the conclusion that a State has transited from law enforcement to belligerency; such a conclusion will be possible only if further factors come into play. For instance,

65 Although it exclusively defines a *jus ad bellum* concept, it may be recalled that “an attack by the armed forces of a State on the ... marine and air fleets of another State” is considered an “act of aggression”. See Article 3(d) of the Definition of Aggression annexed to UNGA Res. 3314 (XXIX), UN Doc. A/RES/29/3314, 14 December 1974.

66 ICRC Commentary on GC II, para. 249.

67 See Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, Part V, paras 112–158; HPCR Manual, above note 9, Section U (Rules 134–146).

the respective State may have established a prize court that is to judge the legality of a capture under the law of naval warfare as distinguished from the peacetime rules of the law of the sea. There may be official government statements, according to which the measures are designed to bring down the flag State's economy. In other words, the determination of whether a State has resorted to an exercise of belligerent rights is dependent upon the circumstances ruling at the time. There is no established or agreed-upon objective criterion that would enable States to clearly distinguish between maritime law enforcement and belligerency at sea.

Use of civilian state agencies for purposes other than law enforcement

The situations referred to above have in common a use of force or aggressive conduct by warships and military aircraft. There are, however, some recent incidents in which States have made use not of their navies or air forces but of their civilian law enforcement agencies, such as their coast guard, which seemingly were not limited to conducting traditional maritime law enforcement operations. In the East and South China Seas in particular, the bordering States have used their coast guard or other vessels to assert their territorial claims to islands, rocks and reefs.⁶⁸ In some instances, the coast guard vessels of two States were engaged in dangerous manoeuvres, including the ramming of ships, and other aggressive operations, including the use of deadly force against foreign fishermen.

The coming into existence of an international armed conflict does not depend upon armed confrontations involving the regular armed forces of two or more States. As rightly stated in the ICRC Commentary, an international armed conflict also comes into existence through armed confrontations involving "non-military State agencies such as paramilitary forces, border guards or coast guards. Any of those could well be engaged in armed violence displaying the same characteristics as that involving State armed forces."⁶⁹ However, the mere fact that coast guards are used for purposes that may no longer be considered as traditional maritime law enforcement will hardly suffice to justify the conclusion that an international armed conflict has come into existence. After all, the identification of tasks that State organs or agencies are entrusted with is part of the sovereign prerogative that is not limited by international law, including

68 See Dan Parsons, "South China Sea Dispute Shaping Up as Coast Guard Showdown", *National Defense Magazine*, June 2014, available at: www.nationaldefensemagazine.org/articles/2014/6/1/2014june-south-china-sea-dispute-shaping-up-as-coast-guard-showdown; Bonnie S. Glaser, "Conflict in the South China Sea", Council on Foreign Relations, Contingency Planning Memorandum Update, 7 April 2015, available at: www.cfr.org/report/conflict-south-china-sea; "China's Coast Guard Cause Most South China Sea Clashes, US Report Finds", *CNBC*, 6 September 2016, available at: www.cnn.com/2016/09/06/chinas-coast-guard-cause-most-south-china-sea-clashes-us-report-finds.html. See also James Kraska and Michael Monti, "The Law of Naval Warfare and China's Maritime Militia", *International Law Studies*, Vol. 91, 2015, available at: <http://stockton.usnwc.edu/ils/vol91/iss1/13/>.

69 ICRC Commentary on GC II, para. 248.

international humanitarian law. In the same vein, there is no rule of international law prohibiting States from asserting territorial claims by resorting to conduct that is perceived of as less aggressive than the deployment of naval forces. For an international armed conflict to come into existence, the conduct of coast guards or other civilian law enforcement agencies must by necessity qualify as a resort to force against another State. Accordingly, the same criteria distinguishing maritime law enforcement and “harassment”, on the one hand, from a resort to force at sea, on the other, apply.

Concluding remarks

The grand battles between navies belong to the past. Direct hostilities between navies, as in the case of the *Cheonan*, may still occur, but for the time being they will be the exception rather than the rule. Of course, many of the situations and incidents referred to in this paper could have escalated into direct military confrontations between the States involved. The fact that some coastal States have shown, and continue to show, an increasingly aggressive conduct vis-à-vis the vessels of other States is undoubtedly worrying and detrimental to international (maritime) security. This does not concern international humanitarian law, however, as long as the conduct does not qualify as a resort to force by one State against another State. As we have seen, not every confrontation at sea results in an international armed conflict. Although aggressive in nature or legally doubtful, most maritime operations, worrying as they may be, remain within the paradigm of incidents at sea.

Authorizations for maritime law enforcement operations

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Abstract

Although there are areas of uncertainty and overlap, authorizations for maritime law enforcement operations are beholden to a different regime from that which governs the conduct of armed conflict at sea. This article seeks to briefly describe five regularly employed authorizations for maritime law enforcement operations at sea: flag State consent, agreed pre-authorization, coastal State jurisdiction, UN Security Council resolutions, and the right of visit.

Keywords: maritime law enforcement, law of the sea, jurisdiction at sea.

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Introduction

In March 2016, the Argentinian Coast Guard fired upon a Chinese fishing vessel allegedly engaged in illegal fishing within the Argentinian Exclusive Economic Zone (EEZ). The incident led to the use of direct fire to halt the delinquent

vessel, which ultimately sank.¹ That the use of force in maritime law enforcement (MLE) operations results in the sinking of a vessel is unusual; that this level of force is routinely employed in MLE, however, is not. And whilst the ultimate outcome – firing at or into a delinquent vessel – is an act that straddles both MLE and naval warfighting, the legal bases that govern these two maritime operations regimes are radically different. This article seeks to outline the legal bases for MLE operations.

MLE comprises those actions – including investigation and prosecution – taken to enforce all applicable laws regarding conduct or consequences on, under and over international waters, and in waters subject to the jurisdiction of the State carrying out those enforcement activities. MLE therefore presupposes authorizations for law enforcement agents and authorized vessels² to deal with other vessels (and the people and cargoes within) – including, in many situations, foreign vessels and nationals – by taking action at sea (and subsequently, ashore) in order to enforce the relevant laws. MLE may be employed either where the breach of law is committed at sea, or where the reach of the State extends to apprehension at sea for an offence committed “ashore” or elsewhere. An example of the former situation is apprehension of a vessel in a coastal State’s EEZ for illegal fishing,³ an example of the latter is a situation where the relevant States have cross-vested jurisdiction to each other to halt a vessel suspected of carrying a person subject to an arrest warrant for a terrorist act committed ashore.⁴ The

- 1 See “Argentina Coast Guard Sinks Chinese Fishing Vessel Illegally in South Atlantic”, *ABC News*, 16 March 2016, available at: www.abc.net.au/news/2016-03-16/argentina-coast-guard-sinks-chinese-fishing-vessel/7250208 (all internet references were accessed in June 2017); “Argentina Coast Guard Sinks Chinese Fishing Boat”, *The Diplomat*, 16 March 2016, available at: <http://thediplomat.com/2016/03/argentina-coast-guard-sinks-chinese-fishing-boat/>.
- 2 A general definition of “authorized vessels” is those official State vessels, including warships, coast guard cutters, marine police vessels and other specifically identified State vessels on non-commercial service, which are authorized to engage in MLE operations on behalf of their State. The 1982 UN Convention on the Law of the Sea (UNCLOS) contains no single definition, but the category is iteratively definable by tracing the definitional thread evident in (*inter alia*) Articles 29 (definition of warship), 31 (responsibility for damage caused by a warship or other government ship on non-commercial service), 32 (immunities), 95–96 (immunities of warships and ships on government non-commercial service on the high seas), 107 (ships entitled to seize other vessels on account of piracy), 110 (right of visit), 111 (hot pursuit), 224 (enforcement with respect to Part XII, which deals with protection and preservation of the marine environment), 236 (sovereign immunity in the context of Part XII) and 298(b) (disputes concerning military and law enforcement activities).
- 3 See, for example, UNCLOS, Art. 73. A further illustration is provided by a recent series of incidents involving the Republic of Korea and the Peoples Republic of China: “Appalling: Shots on Chinese Fishing Vessels by R. O. Korea Coast Guards”, *South China Sea Bulletin*, Vol. 4, No. 11, 2016, available at: [http://dspace.xmu.edu.cn/bitstream/handle/2288/127434/South%20China%20Sea%20Bulletin%20Vol.%204.%20No.11%EF%BC%88November%201,%202016\).pdf?sequence=1&isAllowed=y](http://dspace.xmu.edu.cn/bitstream/handle/2288/127434/South%20China%20Sea%20Bulletin%20Vol.%204.%20No.11%EF%BC%88November%201,%202016).pdf?sequence=1&isAllowed=y); “Chinese Fishing Boats Sink a Korean Coast Guard Vessel”, *Korea Herald*, 9 October 2016, available at: www.koreaherald.com/view.php?ud=20161009000240; Gabriel Samuels, “China ‘Very Dissatisfied’ after South Korean Coast Guard Fires Machine Guns at Chinese Fishing Boats”, *The Independent*, 5 November 2016, available at: www.independent.co.uk/news/world/asia/china-south-korea-fire-fishing-boats-response-a7398186.html.
- 4 For example, in accordance with the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Protocol), Article 4(7), adding a new Article 3ter to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention): “Article 3ter: Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally transports another person on board a ship

purpose of this article is to focus upon this legal framework – applicable to “routine” MLE – in order to provide a sketch of what lays on the “other” side of the dividing line between MLE and international humanitarian law (IHL) at sea (the law of naval warfare), to the extent that this line is capable of detailed delimitation. To this end, the analysis deals quite selectively and in brief with only one component of the legal framework applicable to MLE: the main legal bases for MLE action.

MLE – as with other forms of policing – is a highly interventionist process. Basic MLE authorizations generally include powers to undertake actions such as signalling, stopping and boarding suspect vessels; searching suspect vessels, and the people and cargo in such vessels; detaining or arresting people in suspect vessels, and/or the suspect vessel itself; seizing items on suspect vessels; directing or steaming suspect vessels, and the people and cargo in those vessels, to a coastal State port or similar place for investigation; the conduct of that investigation; and subsequent prosecution or imposition of other forms of administrative action or sanction.⁵ MLE therefore requires that a number of preconditions be in place before conducting operations. Where the focus of MLE is upon interference with foreign vessels for law enforcement purposes, these preconditions include that: (a) the coastal State has enacted a law that applies to the conduct which the MLE agent is using as the basis for their actions in relation to a particular suspect vessel;⁶ (b) the coastal State has authority to regulate that conduct in the maritime zone where the suspect vessel is located;⁷ (c) the MLE agent is

knowing that the person has committed an act that constitutes an offence set forth in article 3, 3bis or 3quater or an offence set forth in any treaty listed in the Annex, and intending to assist that person to evade criminal prosecution.’ See International Maritime Organisation, *Adoption of the Final Act and any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference: Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, LEG/CONF.15/21, 1 November 2005, available at: www.unodc.org/tldb/pdf/Protocol_2005_Convention_Maritime_navigation.pdf.”

- 5 See, for example, UNCLOS, Arts 73, 110, 111. These authorizations and powers are also often specifically enumerated in national legislation domesticating UNCLOS and other associated international law – for example, section 50 of Australia’s 2013 Maritime Powers Act (Commonwealth, available at: www.legislation.gov.au/Details/C2013A00015) specifically details a non-exhaustive list of “maritime powers” for MLE agents:

Maritime powers may be exercised only in accordance with Part 2 and include the following:

- (a) boarding and entry powers;
- (b) information gathering powers;
- (c) search powers;
- (d) powers to seize and retain things;
- (e) powers to detain vessels and aircraft;
- (f) powers to place, detain, move and arrest persons;
- (g) the power to require persons to cease conduct that contravenes Australian law.

- 6 See, for example, Rob McLaughlin, “The Continuing Conundrum of the Somali Territorial Sea and Exclusive Economic Zone”, *International Journal of Marine and Coastal Law* Vol. 30, No. 2, 2015.

- 7 For example, in *MV Saiga (No. 2)*, the International Tribunal for the Law of the Sea (ITLOS) determined (*inter alia*) that Guinea’s application of “customs” laws in its EEZ, but beyond the contiguous zone (in which such customs law enforcement is permissible), was invalid, and thus that the hot pursuit, arrest and prosecution that followed were also invalid in accordance with UNCLOS. ITLOS, *The M/V Saiga (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, 1 July 1999, paras 110–152, available at: www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf. Another example is found in the *Arctic Sunrise* arbitration, where the Permanent Court of Arbitration

authorized under their coastal State's law to take MLE action against that suspect vessel, in relation to that suspected breach, in that maritime zone;⁸ and (d) there is no legal limitation (for example, a constitutional limitation of jurisdiction to a narrowly defined concept of "territory") to the application of the coastal State's law to the vessel and people that are the target of the coastal State's MLE action.⁹

It is therefore fundamental to recognize from the outset that MLE is at one level simply a routine peacetime policing operation (or, as is often referred to in the maritime domain, a "constabulary" operation) in that the determination of jurisdiction and authority is a necessary first inquiry. In other words, there is no role for IHL in routine MLE. That said, as other contributions in this issue of the *Review* well illustrate, there are multiple points at the fringes of MLE where IHL can and does come into play, and some of these will be noted in the final section of this article.

Outline

As noted above, limitations of space and reader tolerance, and the availability of excellent scholarship on the myriad aspects of MLE,¹⁰ dictate that the aim of this article is restricted to a brief, selective and necessarily summative description of the threshold matter of possible legal bases for MLE action. There are, consequently, two limitations on the scope of this article that must be clearly acknowledged up front.

(PCA) dealt with the validity of Russian MLE action taken by reference to a decreed 3-nm warning zone around the Prirazlomnaya platform, and the validity or otherwise of this action when assessed against the UNCLOS Article 60(5) authorization for 500-metre "safety zones" around such installations. PCA, *The Arctic Sunrise (Netherlands v. Russia)*, Case No. 2014-02, Merits Award, 14 August 2015, paras 202–220, available at: www.pccases.com/web/sendAttach/1438.

8 See for example, R. McLaughlin, above note 6, pp. 312–314.

9 Such a situation might arise where, for example, a seizure for piracy is challenged on the jurisdictional basis that the statute creating the offence of piracy is in some way generally limited by a jurisdictional reference to the statute applying in "the territory" of the State – see, for example, High Court of Kenya, *R v. Mohamud Mohamed Hashi and Eight Others*, Misc. Appl. 434, 2009; later overturned in Court of Appeal of Kenya, *AG of Kenya v. Mohamud Mohamed Hashi and Eight Others*, Civil Appeal 113, 2011, both cases available at: www.unicri.it/topics/piracy/database/.

10 See, for example: D. P. O'Connell, *The International Law of the Sea*, ed. Ivan Shearer, Vol. 2, Clarendon Press, Oxford, 1982, Ch. 28; Craig Allen, "Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives", *International Law Studies*, Vol. 81, 2006; Stuart Kaye, "Threats from the Global Commons: Problems of Jurisdiction and Enforcement", *Melbourne Journal of International Law*, Vol. 8, No. 1, 2007. Excellent monographs relating to MLE include Cameron Moore, *ADF on the Beat: A Legal Analysis of Offshore Enforcement by the Australian Defence Force*, Ocean Publications, Wollongong, 2004; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, Cambridge, 2009; Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford University Press, Oxford, 2011; James Kraska and Raul Pedrozo, *International Maritime Security Law*, Martinus Nijhof, Leiden, 2013; Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, Hart, Oxford, 2014. National doctrine publications dealing specifically with MLE include Australian Defence Force, *Australian Maritime Jurisdiction*, ADFP 06.1.2, 28 June 2010, available at: www.defence.gov.au/adfwc/Documents/DoctrineLibrary/ADFP/ADFP%2006.1.2.pdf; US Navy/US Marine Corps/US Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, July 20017 (US Commander's Handbook), Ch. 3, available at: http://usnwc.libguides.com/ld.php?content_id=2998109; German Navy, *Commander's Handbook: Legal Bases for the Operations of Naval Forces*, 2002, Part I, available at: http://usnwc.libguides.com/ld.php?content_id=2998104.

The first is that there are, of course, several other vital matters that would need to be addressed in any comprehensive elaboration of the MLE legal authorities framework: self-defence and use of lethal force in MLE, as distinguished from use of force for MLE purposes outside immediate self-defence;¹¹ the requirement for clear elucidation of rights, powers and obligations for MLE agents in national laws;¹² the appropriate domestication of offences in national law;¹³ the right of hot pursuit (a key MLE power);¹⁴ the interaction of law enforcement and human rights at

- 11 See, for example, ITLOS, *Saiga*, above note 7, para. 156: “It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, the appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered”; Australian Defence Force, above note 10, para 8.32:

The requirements for firing at or into vessels may be considered to be as follows:

- a. The action must be a last resort. It must be absolutely necessary evidenced by patiently exhausting all less forceful means available, including warning shots, unless an urgent threat to life demands otherwise.
- b. The action must follow an explicit warning that shots are to be fired into the vessel.
- c. That all efforts are made to ensure that life is not endangered. Any appreciable risk to life would render the use of direct fire unlawful. A death would not necessarily render the action unlawful in itself provided that the risk of death from direct fire was extremely unlikely and mitigated against.

See, in general, Ivan Shearer, “Problems of Jurisdiction and Law Enforcement against Delinquent Vessels”, *International and Comparative Law Quarterly*, Vol. 35, No. 2, 1986.

- 12 See, for example, the US Drug Trafficking Vessel Interdiction Act (DTVIA), which was specifically designed to facilitate prosecution of those involved in the use of semi-submersibles to traffic drugs. Boarding such semi-submersibles in order to secure evidence was extremely dangerous for US MLE agents, as those in control of the submersibles, upon interdiction, scuttled the vessels. The DTVIA – leveraging the apparent vessel without nationality status of these submersibles – created the offence of operating such vessels, thus empowering US MLE agents to act against this particular drug trafficking *modus operandi* with reduced risk to life. See US Code, Title 18, § 2285(a); Brian Wilson, “Submersibles and Transnational Criminal Organisations”, *Ocean and Coastal Law Journal*, Vol. 17, 2011; J. Kraska and R. Pedrozo, above note 10, pp. 590–598.
- 13 For example, the challenge faced by a number of States during counter-piracy operations off the coast of Somalia, where apprehended pirates were not able to be prosecuted in the apprehending jurisdiction because of an absence of, or incomplete implementation of, the offence of piracy within that State’s law. See UNSC Res. 1819, 2010, op. para. 2: “[The Security Council c]alls on all States, including States in the region, to criminalize piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law.” See, generally, Tullio Treves, “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia” *European Journal of International Law*, Vol. 20, No. 2, 2009; Douglas Guilfoyle, “Counter-Piracy Law Enforcement and Human Rights”, *International and Comparative Law Quarterly*, Vol. 59, No. 1, 2010; Ilja van Hespem, “Developing the Concept of Maritime Piracy: A Comparative Legal Analysis of International Law and Domestic Criminal Legislation”, *International Journal of Marine and Coastal Law*, Vol. 31, No. 2, 2016. Some States, for example, had legislated an offence of piracy without the attached universal jurisdiction, thus allowing prosecution of pirates in that State’s jurisdiction only where there was a nexus to that State, such as the flag of the pirate vessel or pirated vessel, or where a pirate or victim held that State’s nationality. In such situations, whilst that State’s MLE agents (in this case, most often navies) could board pirate vessels and detain pirates, they were ultimately required either to release them or to transfer them to another jurisdiction which had the appropriate offence of universal jurisdiction in place within its domestic law.
- 14 UNCLOS, Art. 111, “Right of Hot Pursuit”. For an excellent study of the right of hot pursuit prior to its fuller elaboration in UNCLOS, see Nicholas Poulantzas, *The Right of Hot Pursuit in International Law*, Sijthoff, Leiden, 1969.

sea;¹⁵ and the series of cases and incidents that have defined the limits of use of force in MLE,¹⁶ are but some examples.

The second limitation is that although MLE is fundamentally a policing activity, the sources of authority for MLE operations are significantly wider than those traditionally understood from, and grounded in, criminal or administrative law and offences. Indeed, one of the complicating factors affecting MLE much more pervasively than policing ashore is this venue-enabled myriad of sources of legal authority – noting, of course, that implementation of an international MLE authority still requires appropriate incorporation in national law in order to appropriately empower a State’s MLE agents.

With these two limitations in mind, the article will therefore progress in line with the following structure. First, the final section of this introductory part will provide definitions or descriptions of a number of key terms and concepts, as these are a necessary adjunct to any elaboration of the authorizations for MLE operations. Following this, the second part of the article will outline a series of legal authorizations for MLE, commencing with the “default rule” of flag State consent, and then progressing through four of the most significant exceptions to this rule – exceptions that are themselves independent bases for MLE operations, but which do not hinge around the generally applicable requirement for case-by-case flag State consent. These independent bases are: pre-existing approvals; coastal State jurisdiction; certain United Nations (UN) Security Council resolutions; and the right of visit. The third part of the article will briefly outline a number of challenging issues regarding the interface between MLE and IHL at sea that repay further consideration.

Some key terms and concepts

Prior to embarking upon any substantive analysis of the authorizations for MLE operations, it is important to define a number of key terms and concepts. The first term that requires brief definition is “maritime zone”. For the purposes of

15 See, for example, Brian Wilson, “Human Rights and Maritime Law Enforcement”, *Stanford Journal of International Law*, Vol. 52, 2016; Seunghwan Kim, “Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context”, *Leiden Journal of International Law*, Vol. 30, No. 1, 2017.

16 For example, the key “triptych” of cases and incidents comprised by *I’m Alone*, *Red Crusader* and *MV Saiga*, along with more recent cases such as *Guyana/Suriname*, *Arctic Sunrise*, and the *South China Sea Arbitration (Philippines v. PRC)*. See *SS I’m Alone (Canada v. United States)*, 3 RIAA 1609, 1935; “Claim of the British Ship ‘I’m Alone’ v. United States”, *American Journal of International Law*, Vol. 29, No. 2, 1935; Gerald Fitzmaurice, “The Case of the *I’m Alone*” *British Yearbook of International Law*, Vol. 17, 1936; *Danish Memorial, 15 November 1961*, UK National Archives File TS 58/577; *Danish Memorial, 12 January 1962*, UK National Archives File TS 58/577; *Memorial Submitted by the Government of the United Kingdom of Great Britain and Northern Ireland – Anglo-Danish Commission of Inquiry: Case Concerning Incidents Affecting the British Trawler “Red Crusader”*, UK National Archives File TS 58/577; *Investigation of Certain Incidents Affecting the British trawler Red Crusader: Report of 23 March 1962 of the Commission of Enquiry Established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on 15 November 1961*, 3 RIAA 521, 23 March 1962, pp. 521–539; D. H. N. Johnson, “Notes: Law of the Sea”, *International and Comparative Law Quarterly*, Vol. 10, No. 3, 1961.

this article, “maritime zone” refers to an area of oceanspace that is subject to one or more of the regimes set out in the 1982 UN Convention on the Law of the Sea (UNCLOS), or afforded by customary international law.¹⁷ It is vital to recognize at the outset that the rights and obligations particular to, and as balanced between, the coastal State on the one hand, and flag States on the other, differ between maritime zones.

The second term it is necessary to define is “international waters”. Whilst this term is not employed in UNCLOS, it provides a useful shorthand term encapsulating all areas of oceanspace not amenable to claims of full sovereignty. Internal waters, territorial seas and archipelagic waters are all “national” or “sovereign” waters in that – when claimed – the coastal State “owns” these waters and exercises full sovereignty over them, noting of course that there are certain international caveats that also apply (such as the right of innocent passage). Seaward of all territorial sea outer limits, however, coastal States may claim certain sovereign rights – such as fiscal, immigration, sanitary and customs (FISC) enforcement rights in the contiguous zone,¹⁸ resource-related rights in the EEZ and the continental shelf, and the right to take action against piracy on the high seas¹⁹ – but not sovereignty over the waters themselves. These areas outside “national waters” – that is, contiguous zones, EEZs and the high seas – can thus be conveniently referred to collectively as international waters.²⁰

Next, for the purposes of this article, “coastal State” is defined as a State which has a sea coast and which holds jurisdiction in those maritime zones over which it has sovereignty or sovereign rights (as the case may be), and which it has validly claimed/declared adjacent to its coast. The specific scope and nature of the sovereignty exercisable in each coastal State’s maritime zones differs in accordance with the type of zone and the specific issue in question.²¹ Additionally, in all maritime zones apart from internal waters, passage rights for vessels from other States exist as part of the international legal regime governing that zone. These rights extend from innocent passage in territorial seas and archipelagic waters (and certain types of straits²²), through a range of transit

17 See, for example, D. P. O’Connell, “The Juridical Nature of the Territorial Sea”, *British Yearbook of International Law*, Vol. 45, 1971, on the emergence and customary international law status of the territorial sea. See also International Court of Justice, *North Sea Continental Shelf Cases*, Merits Judgment, 20 February 1969, *ICJ Reports 1969*, pp. 70–78 – the essence of the judgment, in relation to this point, is that whilst the existence of the concept of the continental shelf was considered to have by then become part of customary international law, certain methods of delimitation between competing continental shelf claims had not.

18 UNCLOS, Art. 33(1).

19 Note that whilst the provisions on piracy apply – on their face – to the high seas (being that oceanspace outside all EEZ claims), UNCLOS Article 58 operates to import these high seas authorizations into all parts of EEZs seaward of the outer limits of territorial seas.

20 Some national doctrine publications employ this shorthand term – for example, US Commander’s Handbook, above note 10, § 1.6.

21 See, *inter alia*, UNCLOS, Arts 2(1) (territorial sea), 21 (laws and regulations relating to innocent passage), 24 (duties), 25 (rights of protection), 27–28 (criminal and civil jurisdiction), 33 (contiguous zone) and 55 (EEZ).

22 See UNCLOS, Arts 17–21, 45, 52

regimes for straits and archipelagos, to freedom of navigation in other maritime zones.

Finally, the concept of “flag State” is critical when analyzing MLE. The term “flag State” denotes the State of registration/nationality of a vessel. In accordance with UNCLOS (particularly Articles 91–94²³) and customary international law, all ships “shall sail under the flag of one State only”. Land-locked States may also be flag States.²⁴ The designation of a “flag” – the nationality of the vessel – serves a number of MLE-related purposes. First, it delineates which State has primary responsibility for implementing the duties set out in UNCLOS Article 94 and in other applicable international law, including regulating the conduct of the vessel and setting the requisite conditions for compliance with the wide range of international rights and obligations that pertain to vessels. In its *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, the International Tribunal for the Law of the Sea (ITLOS) observed that:

While the nature of the laws, regulations and measures that are to be adopted by the flag State is left to be determined by each flag State in accordance with its legal system, the flag State nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations.²⁵

The second purpose fulfilled by the designation of a flag State is that this nationality provides the primary jurisdiction applicable to the vessel; it is generally the law of the flag State that applies to regulating, investigating and prosecuting conduct within and (in many cases) by that vessel. A third purpose of the designation of a flag State is to provide an appropriate jurisdiction to which MLE requests regarding the vessel may be directed – for example, in certain situations, a request by a foreign warship to be permitted to board the vessel (often referred to as flag State consent²⁶ – see below). There is, however, one important caveat to note with respect to the UNCLOS Article 91 requirement that there must “exist a genuine link between the State and the ship” in order for the grant of nationality to be effective. This phrase has been interpreted, in the *MV Saiga (No. 2)* case, as follows:

23 UNCLOS also contains other, context-specific references to the duties and enforcement powers of flag States – for example, Article 217 in relation to pollution.

24 UNCLOS, Arts 69, 90.

25 ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, para. 138.

26 See, for example, European Court of Human Rights (ECtHR), *Medvedyev and Others V. France*, Application No. 3394/03, Judgment, 29 March 2010, *ECHR 2010-III*, available at: www.echr.coe.int/Documents/Reports_Recueil_2010-III.pdf. Para. 10 states:

In a diplomatic note dated 7 June 2002, in response to a request from the French embassy in Phnom Penh, the Cambodian Minister for Foreign Affairs and International Cooperation gave his government’s agreement for the French authorities to take action, in the following terms:

“The Ministry of Foreign Affairs and International Cooperation presents its compliments to the French embassy in Phnom Penh and, referring to its note no. 507/2002 dated 7 June 2002, has the honour formally to confirm that the royal government of Cambodia authorises the French authorities to intercept, inspect and take legal action against the ship Winner, flying the Cambodian flag XUDJ3, belonging to ‘Sherlock Marine’ in the Marshall Islands.”

The need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.²⁷

This interpretation was reiterated in the 2014 case of the *MV Virginia G*, where ITLOS again noted that the requirement for “a genuine link between the flag State and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships”.²⁸

Potential legal bases for exercising maritime law enforcement authorities

There are a range of authorities that allow MLE agents to stop, board and search a suspect vessel, and – in many but not all cases – to take some follow-on action depending upon a valid grant of jurisdiction. However, these authorities are strictly limited to their purpose, and must be correctly executed, for whether they are based in specific flag State consent or are a departure from the general rule that exclusive jurisdiction is vested in the flag State of a vessel legally entitled to fly the flag of that State, they are fundamentally bound by the limitations inherent and unique to each of these legal bases. This part of the article will first outline this general rule, and then discuss a series of four “exceptions” to this general rule, which provide authorization for MLE operations in the absence of case-by-case flag State authorization.

The “default rule”: Flag State consent

The primary jurisdiction over a vessel resides with its flag State. This means that the flag State can give permission to the MLE agents of another State to board a vessel claiming that flag State’s nationality.²⁹ States may also contract between them to set

27 ITLOS, *The MV Saiga (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Admissibility and Merits, Judgment, 1999, para. 83.

28 ITLOS, *MV Virginia G (Panama/Guinea-Bissau)*, Jurisdiction, Admissibility and Merits, Judgment, 14 April 2014, para. 110.

29 See, for example, the new Article 8bis(5) introduced by the SUA Protocol of 2005 (set out in Article 8(2) of that Protocol), which clearly reinforces the requirement for flag State consent. See, generally, Robert Reuland, “Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction” *Vanderbilt Journal of Transnational Law*, Vol. 22, 1989; Rosemary Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, Martinus Nijhof, Leiden, 2004, Chs 1, 3. The issue of flag State consent to boarding was to some extent challenged in the early days of the Proliferation Security Initiative, when certain US officials appeared to float the idea that international law could accept non-consented boardings where the issue at stake was WMD – see, for example, John Bolton, “‘Legitimacy’ in International Affairs: The American Perspective in Theory and Operation”, Remarks to the Federalist Society, Washington, DC, 13 November 2003, available at: <https://2001-2009.state.gov/t/us/rm/26143.htm>. Bolton remarked that “[w]here there are gaps or ambiguities in our authorities, we may consider seeking additional sources for such authority, as circumstances dictate. What we do not believe, however, is that only the Security Council can grant the

conditions as to the nature and content of requests, and the timelines of responses.³⁰ In assessing whether any exception to this general rule exists, it is vital that the precise nature of the legal obligation or authorization is established. At this point it is important to remember, however, that these arrangements relate to peacetime MLE operations; under the law of naval warfare, there is no requirement for belligerents to seek flag State consent when employing those law of armed conflict means and methods which authorize stop, board and search powers against neutral vessels, such as blockade and visit and search.³¹

An example is illustrative of this default rule. Whilst the international community has undertaken – in accordance with UNCLOS Article 108, and as further refined in Article 17 of the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UN Drug Convention) – to “co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas”, this authorization does not obviate the requirement to seek flag State consent prior to conducting a counter-narcotics boarding in international waters, unless separate arrangements for such consent have been made between the relevant States (see below).³²

The facts in the European Court of Human Rights (ECtHR) case of *Rigopoulos v. Spain* (1999) offer a case study of how a situation in which flag State consent is required might progress. On 23 January 1995, in accordance with Panamanian consent combined with Article 17(3) and (4) of the UN Drug Convention, the *Archangelos*, a vessel flying the Panamanian flag and suspected to be trafficking cocaine, was stopped on the high seas (approximately 3,000 nautical miles from the Canary Islands). A team from the Spanish Customs vessel *Petrel I* boarded the *Archangelos*, and there was an “exchange of fire with several members of the crew who had barricaded themselves into the engine room”. Ultimately, the vessel was brought under Spanish control and subjected to Spanish jurisdiction. Whilst the legal reason for the MLE operation was enforcement of a general authorization to cooperate in the suppression of drug trafficking by sea, in accordance with both UNCLOS and the UN Drug Convention, the operation would nevertheless not have been possible without the initial consent of the flag State – Panama.³³

authority we need, and that may be the real source of the criticism we face.” Also see, generally, Michael Byers, “Policing the High Seas: The Proliferation Security Initiative”, *American Journal of International Law*, Vol. 98, 2004, p. 527 *inter alia*.

30 For example, the Agreement between the Government of the United States of America and the Government of the Republic of Croatia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials, 2005 (US–Croatia Shipboarding Agreement), Art. 4(3)–(4), available at: www.state.gov/t/isn/trty/47086.htm. Article 4(4) (b), for instance, states that “[t]he requested Party shall answer through its Competent Authority requests made for the verification of nationality and authorization to board and search within four (4) hours of the receipt of such written requests”.

31 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995 (San Remo Manual), Rule 118.

32 See generally, Rob McLaughlin, “Towards a More Effective Counter-Drugs Regime in the Indian Ocean”, *Journal of the Indian Ocean Region*, Vol. 12, No. 1, 2016.

33 ECtHR, *Rigopoulos v. Spain*, Appl. No. 37388/97, Decision, 12 January 1999, *ECHR 1999-II*, p. 439, available at: www.echr.coe.int/Documents/Reports_Recueil_1999-II.pdf.

Where flag State consent is sought to board a vessel, the requesting State is generally required to detail the reasons for the boarding request, and what “follow-on” actions it may wish to take. Where the flag State does not give consent to the boarding (noting that silence, in the absence of a pre-existing agreement to any other effect, is interpreted as the absence of consent), the requesting State – in the absence of another legal basis – must desist. If, however, the flag State grants the request to board, it should ensure that understandings are in place with respect to issues such as responsibility or liability for damage to the vessel or cargo during any boarding or search, or injuries suffered during the boarding.³⁴ One recent recapitulation of the primacy of this “default rule” is provided by Article 8*bis* of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its Protocol of 2005, which clearly reinforces the requirement for flag State consent, whilst simultaneously setting out some of the “safeguards” that apply to immunize the boarding State from liability under flag State law where that boarding State has acted within the limits of the consent.³⁵

Some States exercise the right to board a vessel flagged by another State based on consent given by the master of the vessel, who grants this authority on behalf of the flag State. However, not every flag State grants masters of vessels flying their flag this authority.³⁶ Another claimed, and by some States routinely exercised, right is the “Approach and Assist Visit” (AAV),³⁷ a non-MLE-focused opportunity for information exchange between a vessel master and a boarding team, where the boarding team’s presence on board the vessel is at the consent/

34 See, for example, US–Croatia Shipboarding Agreement, Art. 13, “Claims”:

1. Injury or Loss of Life. Any claim for injury to or loss of life of a Security Force Official of a Party while carrying out operations arising from this Agreement shall normally be resolved in accordance with the laws of that Party.
2. Other Claims. Any other claim submitted for damage, harm, injury, death or loss, asserted to have resulted from an operation carried out by a Party under this Agreement may be submitted to the boarding Party or the flag State Party, and the claim shall be processed in accordance with the domestic law of the Party in which the claim is submitted and in a manner consistent with international law.
3. Consultation. If any damage, harm, injury, death or loss is suffered as a result of any action asserted to have been taken by the Security Force Officials of one Party in contravention of this Agreement, including action taken on unfounded suspicions, or if any improper, disproportionate or unreasonable action is asserted to have been taken by a Party, the Parties shall, without prejudice to any other legal recourse which may be available, consult at the request of either Party with a view to resolving the matter and deciding any questions relating to compensation or payment.

35 SUA Protocol, Art. 8.

36 E. Papastavridis, above note 10, pp. 63–66. See also US Commander’s Handbook, above note 10, § 3.11.2.5.2: “A consensual boarding is conducted at the invitation of the master ... of a vessel that is not otherwise subject to the jurisdiction of the boarding officer. ... The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority. A consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction per se. The scope and authority of a consensual boarding may be subject to conditions imposed by the master and may be terminated by the master at his discretion.”

37 See, for example, “HMS Monmouth Conducts Maritime Approach and Assist Operations”, *Combined Maritime Forces*, 24 March 2013, available at: <https://combinedmaritimeforces.com/2013/03/24/hms-monmouth-conducts-maritime-approach-and-assist-operations/>.

invitation of the master, not the flag State. However, where the ultimate goal of the boarding State is search, potential seizure and/or prosecution, it is accepted best practice – as identified in treaties such as the SUA Convention – to request permission to board from the flag State rather than the master. This is not least because the absence of appropriate flag State consent must (except in those exceptional situations noted below) bring into question the authority and jurisdiction of the boarding State to take any action, and may well open the boarding State (and its MLE agents, should they come within flag State jurisdiction) to legal consequences.

Exception 1: Treaty/agreement-based pre-existing boarding approvals

The pre-existing approvals “exception” is, in fact, merely a function of flag State consent rather than an international law caveat upon flag State consent.³⁸ A flag State may pre-authorize MLE agents of another State to board a vessel with the flag State’s nationality without having to first receive permission. However, such approval is often limited to a specific set of situations, as opposed to being a general grant of approval in all situations. For example, State A and State B may agree, via a treaty or other legal instrument, that they can each halt, board and search the other State’s vessels in international waters, where there is a reasonable suspicion that the vessel is trafficking illicit drugs³⁹ or illicit weapons of mass destruction (WMD) materials.⁴⁰ The agreement may specify, for example, that this can be done without seeking flag State consent. Alternatively, the agreement may specify that a request for flag State consent must still be made, but that if no response is received after a set time limit (for example, four hours), then flag State consent is deemed to have been granted. States may also

38 See, for example, the eleven ship-boarding agreements settled between the United States and a number of major flag States, available at: www.state.gov/t/isn/c27733.htm.

39 See Agreement Concerning Co-Operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, 2003 (UN Drug Convention), Art. 16, “Boarding”, available at: www.state.gov/s/l/2005/87198.htm. The Agreement states: “When law enforcement officials of one Party encounter a suspect vessel claiming the nationality of another Party, located seaward of any State’s territorial sea, this Agreement constitutes the authorisation by the claimed flag State Party to board and search the suspect vessel, its cargo and question the persons found on board by such officials in order to determine if the vessel is engaged in illicit traffic, except where a Party has notified the Depositary that it will apply the provisions of paragraph 2 or 3 of this Article.”

40 For example, Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, 2004. Article X(6) of the Supplementary Arrangement (available at: www.state.gov/t/isn/trty/32859.htm), which remained unaltered by the Amendment to the Supplementary Arrangement, provides that “[i]f there is no response from the requested Party within two (2) hours of its receipt of the request, the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel’s documents, questioning the persons on board, and searching the vessel to determine if it is engaged in illicit traffic”.

agree between themselves a more general grant of authorizations, as is the case with a 1998/99 agreement between the United States and Costa Rica:

V. Operations Seaward of the Territorial Sea

1. Whenever US law enforcement officials encounter a suspect vessel flying the Costa Rican flag or claiming to be registered in Costa Rica, located seaward of any State's territorial sea, this Agreement constitutes the authorization of the Government of the Republic of Costa Rica for the boarding and search of the suspect vessel and the persons found on board by such officials.

If evidence of illicit traffic is found, US law enforcement officials may detain the vessel and persons on board pending expeditious disposition instructions from the Government of the Republic of Costa Rica.⁴¹

The non-MLE-based issue of interdiction of vessels in national self-defence

Many States assert a right to board a foreign flagged vessel, without first gaining flag State consent, if this is necessary in national self-defence in accordance with UN Charter Article 51. A classic scenario is the “floating bomb”, where a hijacked vessel has been turned into an explosive device of significant destructive power, and is being steamed towards a concerned State's port. If the vessel is in the territorial sea, there is no question that it can be interdicted, as the vessel is clearly perpetrating a threat of force in violation of both the UN Charter and the regime of innocent passage.⁴² Indeed, there is a strong argument that a coastal State could interdict such a vessel in its contiguous zone (12–24 nm), given that the importation of the explosive device will inevitably constitute a customs offence.

The more difficult issue is whether the coastal State may interdict the threat vessel even further out to sea – for example, at 70 nm from the coast, in order to neutralize the threat vessel before it enters a heavily trafficked sea lane. There is no doubt that many States claim this right;⁴³ further, as a practical matter, the same processes and procedures utilized in MLE may in fact be used in such situations – halting and boarding, search and seizure, detention and arrest. However, such action will generally be focused upon disruption of the deleterious conduct rather than intended prosecution, and thus is not predominantly a MLE matter. Further, the applicable international legal regime is more properly that

41 Agreement between the United States of America and Costa Rica Signed at San Jose, 1 December 1998, and Amending Protocol Signed at San Jose, 2 July 1999, available at: www.state.gov/s/l/treaty/tias/120164.htm.

42 UNCLOS, Art. 19(2)(a); whether it also constitutes an “armed attack” is a more problematic question which is beholden to the wider query as to whether non-State actors may perpetrate armed attacks that enliven Article 51, and the associated issues of scale and gravity that often accompany that debate.

43 See, for example, the arrangements in Part IIIAAA of the Australian Defence Act of 1903 (Commonwealth) in relation to the “offshore area”, available at: www.legislation.gov.au/Details/C2016C00955.

concerned with national security, UN Charter Articles 2(4) and 51, and a range of associated rules of international law; this “exception” will therefore not be further discussed in this article.

Exception 2: A coastal State’s jurisdiction in relation to its own internal waters, archipelagic waters, territorial sea, contiguous zone, EEZ or continental shelf

As is well established in both UNCLOS⁴⁴ and customary international law, coastal States may assert and enforce their jurisdiction in those maritime zones in which they hold either sovereignty or sovereign rights. A coastal State’s jurisdiction is generally at its greatest closest to its baselines, attenuating to seaward as an authorized vessel enters more distant maritime zones. For example, in internal waters, a crime committed on a foreign (non-sovereign immune⁴⁵) vessel can be within the jurisdiction of the coastal State even if it is entirely self-contained within the vessel; the Coastal State may also seek to execute civil process against a vessel within internal waters on the basis of foreign claims.⁴⁶ However, in archipelagic waters or the territorial sea, the coastal State may only intervene – subject to additional caveats – where there is a breach of innocent passage, or where the consequences of the crime committed on the foreign vessel extend to that coastal/archipelagic State.⁴⁷ However, the coastal State may not generally seek to execute any civil proceedings against a foreign vessel (unless related to a vessel that has just left that coastal State’s internal waters).⁴⁸

Similarly, in the contiguous zone – a band of international waters extending no more than a further 12 nm seaward from the outer limit of the territorial sea (a claimable maritime zone that is in practice effective between 12 and 24 nm from that coastal State’s baselines) – that coastal State retains “prevent” and “punish” jurisdiction in relation to an outbound foreign vessel that has breached (in that coastal State’s national waters), or is suspected to be intending to breach (inbound into those national waters), a relevant coastal State fiscal, immigration, sanitary or customs (the FISC powers) law. Beyond 24 nm, however, these

44 UNCLOS, Arts 2 (internal waters, territorial sea and archipelagic waters), 8 (internal waters), 27–28 (criminal and civil jurisdiction), 33 (contiguous zone), 49 (archipelagic waters), 56 (EEZ), 77 (continental shelf), 78 (high seas).

45 Sovereign immune vessels are those vessels – warships and State vessels on non-commercial service, including coast guard, marine police and customs vessels – which are authorized to, and which are, carrying out the orders of their sovereign. See, *inter alia*, UNCLOS, Arts 29–32, 58, 95–96, 102, 107, 110–111.

46 This issue formed the backdrop to the unsuccessful bid by Ghanaian authorities to execute civil process on behalf of a US court order to the benefit of a private US commercial entity against the State of Argentina, by arresting the Argentine Navy sail training vessel *ARA Libertad* whilst it was alongside in a Ghanaian port. The dispute was submitted to ITLOS, which determined that the *Libertad* was a warship and thus entitled to sovereign immunity (UNCLOS, Art. 32), and that, consequently, such civil orders could not be executed against her, including in a third State’s internal waters. ITLOS, *ARA Libertad Case (Argentina v. Ghana)*, Case No. 20, Order, 15 December 2012, available at: www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/published/C20_Order_151212.pdf.

47 UNCLOS, Art. 27.

48 *Ibid.*, Art. 28.

powers cease (unless a valid hot pursuit has commenced).⁴⁹ Additionally, however, the contiguous zone is also a part of that coastal State's EEZ (extending out to 200 nm from the baselines) and thus MLE action against illegal fishing activity in the 12–24 nm band of oceanspace is also permitted – but this is because it is part of the EEZ, not because it is (simultaneously) the contiguous zone.

On the high seas – which for fisheries purposes comprise that oceanspace seaward of all EEZs – States enjoy a caveated freedom to fish,⁵⁰ and coastal State MLE vessels must not interfere with this activity unless empowered to do so under an international agreement that applies over such areas (such as where a specific regional or sub-regional fisheries arrangement is in force over the adjacent high seas).⁵¹ A coastal State may also take MLE action against a vessel or platform engaged in unlicensed drilling for oil/gas on the coastal State's continental shelf⁵² (as was the contested claim in the *Guyana/Suriname* arbitration⁵³), but may not do so beyond this zone, unless authorized in accordance with the specific arrangements flowing from Part XI of UNCLOS, as this is an area – known as “the Area” – subject to that specific regime.⁵⁴

In most cases, consequently, the existence of coastal State jurisdiction in relation to a given maritime zone negates the normal requirement to gain flag State consent prior to taking MLE action in relation to that vessel. This is because in these situations, the coastal State has an independent jurisdiction related to its own territory, maritime zones and rights. This standard does not apply to warships or government vessels operating on government non-commercial service, which remain at all times sovereign immune; the proper coastal State response to a delinquent sovereign immune vessel (for example, a warship fishing in the territorial sea and thus breaching innocent passage) is to “require” it to desist and depart.⁵⁵

49 *Ibid.*, Art. 33.

50 *Ibid.*, Arts 87(1)(e), 116–120.

51 See, for example, the jurisdiction exercisable beyond the outer limits of EEZs in accordance with the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, in force as of 11 December 2001, Art. 3, “Application”, available at: www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm. The Agreement states: “Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention.”

52 Which may extend, in certain cases, to no more than 350 nm from that coastal State's baselines: see UNCLOS, Art. 76.

53 PCA, *Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration between: Guyana and Suriname*, Award, 17 September 2007, available at: www.pcacases.com/web/sendAttach/902.

54 UNCLOS, Art. 1(1)(1): “‘Area’ means the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”

55 *Ibid.*, Art. 30.

Exception 3: Certain UN Security Council resolutions

UN Security Council resolutions are a further exception to the default rule requiring flag State consent for MLE operations that involve stopping and boarding a vessel in international waters. These resolutions can provide legal authority under international law to confront maritime challenges, and such regimes often complement land-based responses. Security Council resolutions addressing MLE-type interdiction operations are generally tethered to Chapter VII of the UN Charter, and decisions taken by the Security Council in accordance with this Chapter are binding on all UN member States. However, it is only when the Security Council employs certain specific indicators and phrases (see below) that the requirement for implementing MLE agents to seek flag State consent prior to halting, boarding, searching and potentially diverting a vessel is negated. Some of these indicators and phrases are universal, such as references to acting under Chapter VII. Others, however, are seemingly unique to mandatory Security Council MLE authorizations (see below).⁵⁶ Security Council Chapter VII practice includes a wide range of resolutions focusing on the maritime environment, including in relation to piracy, proliferation and migration.

There are essentially two types of mandatory, MLE-based regimes that the Security Council has employed when utilizing its Chapter VII powers: sanctions enforcement and the recent Mediterranean-focussed counter-people-smuggling UNSC Res. 2240 (2015). There is a further example – the authorization to extend international counter-piracy efforts into the Somali territorial sea⁵⁷ – but this authorization, albeit referencing Chapter VII, was fundamentally pre-conditioned on the consent of the accepted representative of the coastal State (the Transitional Federal Government). This type of Security Council Chapter VII MLE authorization is actually a product of coastal State consent, and thus will not be further examined under this “exception”.

Mandatory UN Security Council Chapter VII sanctions regimes

When the Security Council implements a mandatory sanctions regime, or authorizes some other form of interdiction regime, States may sometimes provide

56 See, generally, Rob McLaughlin, “United Nations Security Council Practice in relation to Use of Force in No-Fly Zones and Maritime Exclusion Zones”, in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford, 2015, Ch. 11.

57 UNSC Res. 1816, 2008, op. para. 7:

[The Security Council] decides that for a period of six months from the date of this resolution, States cooperating with the TFG [Transitional Federal Government] in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

- (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
- (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.

vessels and personnel trained in MLE to implement those sanctions. Such sanctions regimes are mandated at the required level via well-settled phrases and words.⁵⁸ The archetypal example is found in UNSC Res. 665 (1990), in relation to the sanctions regime imposed on Iraq following its invasion of Kuwait:

Having decided in resolution 661 (1990) to impose economic sanctions under Chapter VII of the Charter of the United Nations ...

1. [The Security Council c]alls upon those member states cooperating with [Kuwait] which are deploying maritime forces to the area to *use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping*, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions relating to such shipping laid down in resolution 661 [emphasis added] ...

The effect of such authorizations is, essentially, to empower those States contributing to the interdiction regime to engage in “international MLE”, employing those same tactics, techniques and procedures that MLE agents routinely use in dealing with delinquent vessels in national MLE. Importantly, this includes – in pure MLE situations such as sanctions enforcement in the absence of a concurrent armed conflict⁵⁹ – those same limitations on the use of force as apply when executing national MLE tasks. The approach of individual States to ensuring sufficient authorization in national law for their MLE agents to exercise international MLE authorizations varies; for some it is a customary, executive or prerogative matter of law, whilst others have legislated specifically for such situations. Australia, for example, has created a specially tailored “international decision authorization” trigger for the exercise of MLE-focused “maritime powers”, permitting employment of these statutorily enumerated MLE powers once this authorization is formally triggered in accordance with this domestic regime.⁶⁰ Section 8 of the 2013 Maritime Powers Act defines the “international decision” trigger thus: “*international decision* means a decision

58 Rob McLaughlin, “United Nations Mandated Naval Interdiction Operations in the Territorial Sea?”, *International and Comparative Law Quarterly*, Vol. 51, No. 2, 2002.

59 As was not the case with respect to Libya, where mandatory UN Security Council sanctions under UNSC Res. 1973 (2011) were implemented by NATO at the same time as NATO maritime forces were engaged in IHL-governed operations in relation to Libya – see, *inter alia*, Martin Fink, “UN-Mandated Maritime Arms Embargo Operations in Operation Unified Protector”, *Military Law and the Law of War Review*, Vol. 50, No. 1–2, 2011.

60 See, *inter alia*, the Maritime Powers Act of 2013 (Commonwealth), § 12:

When international agreements and decisions apply. An international agreement or international decision applies to a vessel, installation or aircraft at a particular time if:

- (a) the agreement or decision provides for the exercise of powers by Australia in relation to the vessel, installation or aircraft at that time; and
- (b) either:
 - (i) the agreement or decision is prescribed by the regulations; or
 - (ii) the Minister has approved the exercise of powers under the agreement or decision in relation to the vessel, installation or aircraft, and the approval has not lapsed.

made by: (a) the Security Council of the United Nations; or (b) another international body that, under international law, makes decisions that are binding on its members”.

At this point, it is important to note that not all Security Council Chapter VII mandatory sanctions regimes provide a full exception to the default rule concerning flag State consent. For example, the sanctions established by UNSC Res. 1718 (2006) subsequent to Democratic People’s Republic of Korea (DPRK) nuclear tests – although mandated under Chapter VII of the UN Charter – did not go so far as those relating to (for example) Iraq, and did not provide an authorization for boarding DPRK WMD-transporting vessels in international waters, in the absence of flag State consent:

Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41, [the Security Council] ...

8. Decides that: ...

(f) In order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all Member States are called upon to take, *in accordance with their national authorities and legislation, and consistent with international law*, cooperative action including through inspection of cargo to and from the DPRK, as necessary [emphasis added].

This form of Chapter VII-“lite” authorization does not overcome the requirement for Flag State consent with respect to boarding suspected sanctions-breaching vessels in international waters.

UNSC Res. 2240

The second type of MLE-focused authority the Security Council has employed to obviate the requirement (in a narrow set of circumstances) to first gain flag State consent for boarding is evident in UNSC Res. 2240 (2015), dealing with migrant flows in the Mediterranean Sea:⁶¹

Affirming the necessity to put an end to the recent proliferation of, and endangerment of lives by, the smuggling of migrants and trafficking of persons in the Mediterranean Sea off the coast of Libya, and, for these specific purposes, acting under Chapter VII of the Charter of the United Nations, [the Security Council] ...

7. Decides, with a view to saving the threatened lives of migrants or of victims of human trafficking on board such vessels as mentioned above, to authorise, in

61 See, *inter alia*, Brian Wilson, “The Mediterranean Migrant Crisis: Key Considerations for the UN Security Council”, *Harvard National Security Journal* (online), 2015, available at: <http://harvardnsj.org/wp-content/uploads/2015/10/Harvard-NSJ-The-Mediterranean-Migrant-Crisis-Wilson.pdf>.

these exceptional and specific circumstances, for a period of one year from the date of the adoption of this resolution, Member States, acting nationally or through regional organisations that are engaged in the fight against migrant smuggling and human trafficking, to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya, *provided that such Member States and regional organisations make good faith efforts to obtain the consent of the vessel's flag State prior to using the authority outlined in this paragraph*;

8. Decides to authorise for a period of one year from the date of the adoption of this resolution, Member States acting nationally or through regional organisations to seize vessels inspected under the authority of paragraph 7 that are confirmed as being used for migrant smuggling or human trafficking from Libya, and underscores that further action with regard to such vessels inspected under the authority of paragraph 7, including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith [emphasis added].

This authorization clearly permitted those MLE forces engaged in responding to the Mediterranean migrant crisis to board vessels without flag State consent, and indeed to assert sufficient jurisdiction over them in order to take follow-on action, provided that the necessary prior “good faith efforts to obtain the consent of the vessel’s flag State” had been made.

Exception 4: The right of visit

Article 110 of UNCLOS provides an important and very powerful set of authorizations for MLE in international waters: the “right of visit”.⁶² The right of visit – as an MLE power which is not to be confused with the law of naval warfare regime of visit and search – is generally exercised by sending a seaboat with a boarding team (or in some situations by fast-roping from a helicopter) to the suspect vessel, so that the authorized MLE agents can then board the vessel and carry out the necessary inquiries or inspections associated with that specific Article 110 purpose.

The key elements of the right of visit are that:

- (a) only authorized vessels may exercise the right;
- (b) MLE agents are not required to seek flag State consent prior to conducting a right of visit boarding; however, the right of visit is only available in five specified circumstances, and cannot be used outside those circumstances (being situations of piracy, the slave trade, unauthorized broadcasting, vessels without nationality, or where the vessel, “though flying a foreign flag

62 UNCLOS, Art. 110, “Right of Visit”.

or refusing to show its flag, ... is, in reality, of the same nationality as the warship”);

- (c) the authority to engage in “follow-on” MLE actions and assertions of jurisdiction is separate from the authority to exercise the right of visit. Some of the circumstances enumerated in Article 110 include a follow-on authority to prosecute, whilst others do not confer any authority for follow-on actions beyond confirming (or not) the relevant suspicion; and
- (d) the right of visit does not apply to sovereign immune vessels (warships and State vessels used only on government non-commercial service, as per UNCLOS Articles 95 and 96) – that is, the right of visit cannot be used to justify the boarding of a sovereign immune vessel.

In exercising the right of visit, it is thus essential to recall that each of the five grounds for using the right of visit (as noted at (b) above) carries with it different requirements and permissions in terms of exercising follow-on MLE jurisdiction. A short summary of said requirements is illustrative of these differences and nuances.

The first right of visit authorization relates to *piracy*, and the rules in UNCLOS on jurisdiction after a piracy boarding are more detailed than those for most other aspects of Article 110.⁶³ The crime of piracy is one of “universal jurisdiction”, which means that any State which apprehends a pirate may prosecute that pirate regardless of whether there was any national or vessel of the apprehending State involved in the piracy, provided it has the relevant domestic law in place to allow it to do so.

The second head of power arises where *the ship is engaged in the slave trade*, empowering MLE agents to board and detain a vessel and its crew in international waters on the basis of such a suspicion. UNCLOS also contains a separate provision – Article 99 – which prohibits the transport of slaves and establishes that any slave who takes “refuge on board any ship, whatever its flag, shall ipso facto be free”. Whilst the MLE boarding authority targeting vessels suspected of being engaged in the slave trade is clear, the separate issue of jurisdiction to prosecute is not as well settled. The simplest answer is that the flag State retains this jurisdiction; however, this will to some extent depend upon the other obligations which that flag State has adopted, and the way in which it defines and distinguishes (or not) between “slavery”, “trafficking in people” and other forms of compulsory labour, debt bondage and forced movement of people. Indeed, some of these manifestations of bondage are subject to other international instruments which create “prosecute or extradite” obligations amongst the States Parties, but not universal jurisdiction.⁶⁴ While some States consider that elements

63 *Ibid.*, Arts 100–107.

64 For example, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000, Art. 3(a), states: “‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the

of the 1926 Slavery Convention and the 1956 Supplementary Convention are now applicable to all States as customary international law, this is not universally agreed.⁶⁵ Additionally, the jurisdictional authorizations laid down in these conventions – which mandate close cooperation so as to ensure the practice is stamped out, and reflect an obligation to prevent and punish – are not considered by all States to necessarily be the same as the universal jurisdiction which applies in relation to piracy.

As with piracy, the jurisdictional arrangements for situations in which *the ship is engaged in unauthorized broadcasting and the flag State of the authorized vessel has jurisdiction under Article 109*⁶⁶ are reasonably well enumerated within UNCLOS. The follow-on jurisdictions available on the basis of this authorization are then set out in Article 109: Article 109(2) defines “unauthorised broadcasting”, and Article 109(4) then acts to limit the right of visit, in relation to unauthorized broadcasting, to only the authorized vessels of a State which has the jurisdiction to prosecute the unauthorized broadcasting vessel. Article 109(3) then enumerates those States that have this authority to prosecute. The effect, however, is that a State with a single national on board a vessel engaged in unauthorized broadcasting gains MLE jurisdiction over not only its own national, but also over other people on board the vessel, and the vessel itself.⁶⁷

A powerful, often utilized, but still debated Article 110 authorization is that which allows an MLE agent to board another vessel where they reasonably suspect that *the ship is without nationality*. States are naturally opposed to the idea that a vessel might hold no nationality – that is, not be subject to a regulating and responsible flag State – because this would imply that there is no jurisdiction applicable over that vessel. The modern view, consequently, is that a vessel without nationality is subject to the jurisdiction of all States.⁶⁸ The US

purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

65 Principle 2 of the *Princeton Principles on Universal Jurisdiction* (2001, available at: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf) certainly takes the view that the crime of slavery is subject to universal jurisdiction:

1. For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.
2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.

It is important – for the purposes of jurisdictional scope and offence/elements of offences characterization and analysis – to recall that slavery as a crime in general international law (and subject to routine MLE jurisdiction) can to some extent be differentiated from slavery as a war crime, and slavery as a crime against humanity.

66 UNCLOS, Art. 109, “Unauthorized Broadcasting from the High Seas”.

67 See, generally, J. C. Woodliffe, “The Demise of Unauthorised Broadcasting from Ships in International Waters”, *International Journal of Estuarine and Coastal Law*, Vol. 1, 1986.

68 See, generally, Angeline Lewis, “Flag Verification on the High Seas: Understanding Requirements for Masters and Commanders”, *International Journal of Marine and Coastal Law*, Vol. 30, 2015; Allyson Bennett, “That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act”, *Yale Journal of International Law*, Vol. 37, 2012; Charles Fritch, “Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction over the Illicit

Commander's Handbook on the Law of Naval Operations describes the reasoning as follows:

Vessels that are not legitimately registered in any one nation are without nationality and are referred to as “stateless vessels”. They are not entitled to fly the flag of any nation and, because they are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations. Accordingly, stateless vessels may be boarded upon being encountered in international waters by a warship or other government vessel and subjected to all appropriate law enforcement actions.⁶⁹

It should be noted that US statutes, case law and MLE doctrine tend to use the concepts of “vessel without nationality” and “stateless vessel” interchangeably.⁷⁰

Some States have legislated for specific instances of the power to deal with vessels without nationality. One example is the US Drug Trafficking Vessel Interdiction Act (DTVIA), which deems semi-submersibles to be vessels without nationality and thus subject to US jurisdiction. Australia has also incorporated a specific power to deal with vessels without nationality within the Maritime Powers Act of 2013.⁷¹ However, not all States agree as to the ultimate extent of the jurisdiction that can be asserted; additionally, those found on board a vessel without nationality will also in most cases still have claim to the protection of a State of nationality based on their citizenship. In summary, however, a vessel may generally be treated by MLE agents as being without nationality, and thus boarded without the contextually impossible requirement to seek the consent of an unidentified or unidentifiable flag State, when:

- (a) the master of the vessel fails, upon request, to make a valid claim of registry;
- (b) the claim of registry is denied by the State whose registry is claimed;

Narcotics Trade and the Ninth Circuit’s Unnecessary Nexus Requirement”, *Washington University Global Studies Law Review*, Vol. 8, No. 4, 2009; Ted McDorman, “Stateless Fishing Vessels, International Law and the UN High Seas Fisheries Conference”, *Journal of Maritime Law and Commerce*, Vol. 25, No. 4, 1994; Anna van Zwanenberg, “Interference with Ships on the High Seas”, *International and Comparative Law Quarterly*, Vol. 10, No. 4, 1961.

69 US Commander’s Handbook, above note 10, § 3.11.2.3

70 See, for example, *ibid.*, § 3.11.2.4 (“vessels assimilated to statelessness”). In terms of judicial dealings, see, for example, US Court of Appeals, *United States v. Cortes*, 588 F.2d 106 (5th Circuit), 1979, p. 109, per Justice Rubin.

71 Maritime Powers Act, 2013 (Commonwealth), § 21:

Vessels without nationality

- (1) An authorising officer may authorise the exercise of maritime powers in relation to a vessel if:
 - (a) the vessel is not flying the flag of a State; or
 - (b) the officer suspects, on reasonable grounds, that the vessel:
 - (i) has been flying the flag of more than one State; or
 - (ii) is flying the flag of a State that it is not entitled to fly; or
 - (iii) is not entitled to fly the flag of any State.

Meaning of vessels without nationality authorisation

- (2) An authorisation under subsection (1) is a *vessels without nationality authorisation*.

- (c) the master of the vessel makes a claim of registry that is not confirmed by that State; or
- (d) the vessel is a “stateless vessel” in the manner described in the British Palestine Mandate case of the *Asya*⁷² – that is, the vessel claims the nationality of a State not recognized by the boarding/apprehending State.

UNCLOS also allows that one further type of vessel may be defined as a vessel without nationality in that Article 92 provides that where a vessel sails under two or more flags, and swaps them according to convenience, it may be “assimilated to a ship without nationality”.⁷³

As a practical MLE matter, the right of visit includes, as a minimum, the authority to board a vessel encountered in international waters, without flag State consent, where that vessel is not flying a flag to indicate its claimed nationality. Often, such nationality may be readily and quickly confirmed by an inspection of vessel documents or through consultation with the claimed flag State; however, this is not always the case, particularly if the flag State is difficult to contact, or the vessel is of a size where the flag State does not require it to carry or display formal indicia of registration.

The final Article 110 head of power arises when *though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the authorized vessel*. This final ground of authority for the right of visit is quite narrow. In essence, this authority arises in the following situation: an authorized vessel of State A encounters a vessel, in international waters, that is flying the flag of State B. However, based on information held by State A, the MLE agents reasonably suspect that the vessel flying a State B flag is actually of State A nationality – the vessel may, for example, be suspected of flying a State B flag in order to make the State A MLE agents believe they have no jurisdiction over that vessel, and therefore cannot stop and board it. In this situation, the MLE agents of State A may board the vessel to determine whether it is truly a State B vessel or is in fact a State A vessel attempting to hide its actual nationality. If the vessel is a State A vessel, State A can then take further MLE action against that vessel, as it is clearly within State A’s jurisdiction. If, however, the vessel truly is a State B vessel, then UNCLOS Article 110(3) permits State B to request compensation from State A on behalf of that vessel.

72 UK Privy Council, *The Asya (Molvan v. The Attorney-General, Palestine)*, UKPC 42, 1948. See also William Bishop Jr, “Molvan v. Attorney General for Palestine” *American Journal of International Law*, Vol. 42, No. 4, 1948.

73 UNCLOS, Art. 92, “Status of Ships”:

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

Some issues for further consideration regarding the interface between maritime law enforcement and IHL at sea

As noted at the outset of this article, there are a range of issues that continue to present significant interpretive challenges to identifying and defining the “dividing line” between situations where the applicable legal regime is the MLE regime, and often very similar situations that ought properly to be assessed in accordance with the application of IHL at sea. This is a critical vulnerability when analyzing the use of force at sea, for – as noted previously – the legal authorizations for interference with the vessels of other States differ greatly between these two regimes. The status of “maritime militia” fishermen and fishing vessels where they engage in activities subject to both MLE responses (such as illegal fishing)⁷⁴ and IHL responses (such as acting as an auxiliary if an armed conflict is under way, which is most problematic when combined with the special protection afforded to coastal fishing vessels under the law of naval warfare),⁷⁵ is one such issue. Another concern is the extent to which MLE vessels

74 See, for example, James Kraska and Michael Monti, “The Law of Naval Warfare and China’s Maritime Militia”, *International Law Studies*, Vol. 91, 2015; Andrew Erickson and Conor Kennedy, “Countering China’s Third Sea Force: Unmask Maritime Militia before They’re Used Again”, *The National Interest*, 6 July 2016, available at: <http://nationalinterest.org/feature/countering-chinas-third-sea-force-unmask-maritime-militia-16860>; Andrew Erickson and Conor Kennedy, “China’s Maritime Militia: What It Is and How to Deal with It”, *Foreign Affairs*, 23 June 2016, available at: www.foreignaffairs.com/articles/china/2016-06-23/chinas-maritime-militia; James Kraska, “China’s Maritime Militia Upends Rules on Naval Warfare”, *The Diplomat*, 10 August 2015, available at: <http://thediplomat.com/2015/08/chinas-maritime-militia-upends-rules-on-naval-warfare/>; “South China Sea: Courting Trouble”, *The Economist*, 16 July 2016, available at: www.economist.com/news/china/21702069-region-and-america-will-now-anxiously-await-chinas-response-unappointed-tribunal; Bill Hayton, *The South China Sea: The Struggle for Power in Asia*, Yale University Press, New Haven, CT, 2014, Chs 3, 4; Rob McLaughlin and Hitoshi Nasu, “The Law’s Potential to Break – Rather than Entrench – the South China Sea Deadlock?”, *Journal of Conflict and Security Law*, Vol. 21, No. 2, 2015.

75 See, *inter alia*, San Remo Manual, above note 31. The indicia of “formal incorporation” into a State’s maritime militia or auxiliary forces are unexplored, noting that San Remo Manual Rule 13(h) defines such status as follows: ‘auxiliary vessel means a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service’. However, coastal fishing vessels have long been considered to have a special status and a right to non-interference during armed conflict at sea. See *ibid.*, Rule 47: “The following classes of enemy vessels are exempt from attack: ... (g) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection.” See also US Supreme Court, *The Paquete Habana*, 175 US 677, 1900, *inter alia* at p. 689, per Justice Gray: “The doctrine which exempts coast fishermen, with their vessels and cargoes, from capture as prize of war, has been familiar to the United States from the time of the War of Independence.” Similarly, at p. 708:

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that, at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy, nor when military or naval operations create a necessity to which all private interests must give way.

such as coast guard cutters, and even “private” vessels acting under State orders, can be considered to be conducting “military” activities,⁷⁶ thus opening the characterization of their use of force to assessment in terms of the common Article 2 threshold for international armed conflicts. A third matter relates to the continued relevance – or desuetude – of the concept of insurgency at sea, and the consequences this holds for transforming an MLE matter (piracy) into an IHL matter.⁷⁷ Similarly, the parallel operation of routine MLE in the same geographic space in which armed conflict at sea is also taking place (by, for example, neutrals in relation to each other, or between belligerents and neutrals in non-armed-conflict-related contexts, or through the parallel implementation of both an MLE activity such as UN Security Council sanctions enforcement against Iraq, and an IHL activity such as visit and search during the armed conflict phase of operations in 2003⁷⁸) requires attention. And these are but a few of the situations where the legal dividing line between MLE and IHL remains under-explored.⁷⁹

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

The question that arises is whether all fishing activity in the South China Sea meets this “coastal” requirement, or whether some activity could be described more accurately – in line with the reasoning of Justice Gray above – as “deep sea” or “high sea” in nature.

- 76 See, for example, PCA, *In the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People’s Republic of China*, Case No. 2013-19, Award, 12 July 2016, para. 1161, available at: <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>. “On the basis of the record set out above, the Tribunal finds that the essential facts at Second Thomas Shoal concern the deployment of a detachment of the Philippines’ armed forces that is engaged in a stand-off with a combination of ships from China’s Navy and from China’s Coast Guard and other government agencies. ... Although, as far as the Tribunal is aware, these vessels were not military vessels, China’s military vessels have been reported to have been in the vicinity. In the Tribunal’s view, this represents a quintessentially military situation, involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another.”
- 77 For example, the case of the *Santa Maria* in January–February 1961, where the Portuguese dissidents who seized the vessel claimed the status of insurgents engaged in (or seeking to commence) an armed conflict (revolution) against the Salazar dictatorship – a status that has a long history in the law of war as exempting its claimants from characterization as pirates. See, *inter alia*, “Part IV: Piracy”, *American Journal of International Law Supplement*, Vol. 26, 1932; Ferenc Vali, “The Santa Maria Case” *Northwestern University Law Review*, Vol. 56, 1961–1962; Leslie Green, “The Santa Maria: Rebels or Pirates”, *British Yearbook of International Law*, Vol. 37, 1961; *Whiteman’s Digest of International Law*, Vol. 4, Department of State Publication 7825, US Government Printing Office, Washington, DC, April 1965, pp 665–666; David Raby, “Transatlantic Intrigues: Humberto Delgado, Henrique Galvao and the Portuguese Exiles in Brazil and Morocco”, *Portuguese Journal of Social Science*, Vol. 3, No. 3, 2004. See also the response to questions by Mr. C. Ian Orr-Ewing, Civil Lord of the Admiralty, House of Commons Debates, Vol. 633, 24 January 1961, cols 32–35, available at: <http://hansard.millbanksystems.com/commons/1961/jan/24/>.
- 78 David Letts and Rob McLaughlin, “Law of Naval Warfare”, in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, Abingdon, 2016, p. 268. See, generally, Rob McLaughlin, *United Nations Naval Peace Operations in the Territorial Sea*, Martinus Nijhoff, Leiden, 2009.
- 79 On the analogous and similarly vexed issue of use of force at sea in terms of the MLE–UN Charter Article 2 (4) delineation conundrum, see Patricia Jimenez Kwast, “Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award”, *Journal of Conflict and Security Law*, Vol. 13, No. 1, 2008.

Conclusion

Maritime law enforcement operations are fundamentally policing operations. They are governed by “peacetime” legal regimes (such as UNCLOS, the UN Drug Convention, and the SUA Convention and its Protocols of 1988 and 2005) and employ “peacetime” powers, jurisdictions and authorizations (including in relation to the use of force).

These MLE powers, jurisdictions and authorizations are comprehensive, routine and fairly well enumerated in international law, and to the untrained eye can represent a rough facsimile of many aspects of the law of naval warfare; however, MLE must at all times be differentiated from the law of naval warfare. This can on occasion be difficult, as many of the practical actions involved in MLE are also employed in armed conflict at sea – halting, boarding and searching vessels, and seizing cargoes, for example, are key enablers both in MLE and in the law of naval warfare regimes of blockade, and visit and search.

Similarly, it is at all times important to maintain clear distinctions between similarly named regimes – the MLE “right of visit” is a very different legal authority from the law of naval warfare regime of “visit and search”, despite the fact that both are premised upon (different) legal authorizations that obviate the need to seek and secure flag State consent prior to boarding. Additionally, it is not unusual for an MLE authorization to exist concurrently with a law of naval warfare authorization, such as when the UN Security Council sanctions enforcement regime in relation to Iraq operated in parallel with a visit and search regime during the 2003 armed conflict between the United States and its coalition allies, and Iraq; this was also (less conclusively) the situation in relation to Libya in 2011. However, despite the apparent availability of – and need for – clear delineations between the two paradigms, there are a number of customary rules (such as the effect of the law of war status of “insurgent”, and the modern IHL concept of “direct participation in hostilities”, upon the MLE issue of piracy) and emerging challenges (such as the implications of “maritime militias”) that render such demarcations quite difficult. These points of permeability warrant urgent analysis from both the MLE and law of naval warfare perspectives.

The duty to rescue at sea, in peacetime and in war: A general overview

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Abstract

The duty to rescue persons in distress at sea is a fundamental rule of international law. It has been incorporated in international treaties and forms the content of a norm of customary international law. It applies both during peacetime and during wartime, albeit with the necessary adjustments to take into account the different circumstances. States are also under the duty to provide search and rescue services. This article discusses the content and limitations of these provisions and assesses their potential to ensure the protection of human lives at sea. Furthermore, the article suggests that reference to the right to life, as protected in international human rights law, may be useful in further safeguarding human life and ensuring compliance by States with their duties.

Keywords: duty to rescue, right to life, shipwrecked, SOLAS, SAR.

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Introduction

The sea is inherently dangerous for human beings. Maritime incidents are still common, causing the loss of many lives despite the reduction in the number of

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ship losses.¹ What is more, deaths and injuries concern all people at sea, be they seafarers, passengers, migrants or others. Not even modern seagoing vessels are immune from accidents, as the death of thirty-two people in the incident involving the cruise ship *Costa Concordia* has shown.² Even more dangerous are substandard vessels, often registered under flags of convenience and used by reckless owners to maximize commercial gain.³ These vessels become particularly dangerous if they are used to smuggle migrants, as numerous incidents that have happened in the Mediterranean Sea have demonstrated. Migrants have died on a daily basis in the Mediterranean Sea.⁴ In an instance that became famous, a small inflatable rubber dinghy, with seventy-two persons on board, was stranded for fifteen days in the Mediterranean before being washed ashore in Libya. During those days, the dinghy was approached by a military helicopter, a large military vessel and various other craft, none of which proceeded to rescue those on board.⁵ As a result of this lack of assistance, only ten people survived out of the six dozen initially on the dinghy.

In this context, the duty to rescue those in danger of being lost at sea is paramount. Part of the threat to human life is being addressed by measures aimed at ensuring the safety of vessels. However, their implementation is far from complete, and in any case, there will always be risks due to the elements or the human factor. People in distress at sea can only be saved by efforts undertaken by other people, be they State officials on board rescue vessels or masters and crews of private vessels. Solidarity towards fellow seafarers has therefore been transposed into legal norms and has constituted the basis of the duty to rescue.

There is no doubt that the duty to rescue is one of the best-established principles of the international law of the sea, maritime law and international humanitarian law (IHL). There are, however, still a number of open issues that need to be addressed, including the scope of the duty, the subjects bound by it and the still unresolved issue of disembarkation. This article proposes to analyze

- 1 International Chamber of Commerce, “Reduction in the Number of Ship Losses”, available at: www.ics-shipping.org/shipping-facts/safety-and-regulation/reduction-in-the-number-of-ship-losses (all internet references were accessed in March 2017).
- 2 BBC News, “Costa Concordia: What Happened”, 10 February 2015, available at: www.bbc.co.uk/news/world-europe-16563562.
- 3 On 30 March 2017, fifty-four substandard vessels were detained by member States of the Paris Memorandum of Understanding on Port State Control; see Paris MoU, “Current Detentions”, available at: www.parismou.org/detentions-banning/current-detentions.
- 4 The year 2016 has been one of the deadliest, with 5,096 persons dead and missing in the Mediterranean Sea, a significant increase compared to the 3,771 persons dead and missing in 2015. See UNHCR, *Mediterranean: Dead and Missing at Sea, January 2015 –31 December 2016*, available at: <https://data2.unhcr.org/en/documents/download/53632>.
- 5 The facts of the case are summarized in Tineke Strik, *Lives Lost in the Mediterranean Sea: Who Is Responsible?*, report prepared for the Parliamentary Assembly of the Council of Europe (PACE), 29 March 2013, available at: https://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf. An articulate discussion of the ships that came into contact with the dinghy can be found in Charles Heller, Lorenzo Pezzani and Situ Studio, *Report on the “Left-To-Die Boat”*, Forensic Architecture, May 2014, available at www.forensic-architecture.org/wp-content/uploads/2014/05/FO-report.pdf. Following the PACE inquiry, a number of cases were brought in front of European judges concerning the responsibility of the flag States of the vessels involved in the case. It remains to be seen whether national judges will have jurisdiction and will decide the cases in the merits.

the duty to rescue during peace and during war. It will first address this duty in the context of the laws of peace, in particular international treaties that apply to the maritime space. It will then turn to the applicability of the duty to rescue during armed conflict, devoting particular attention to the scope of the duty and exceptions to it. On the basis of this analysis, it will discuss the relationship between the duty to rescue, as it emerges from the law of the sea, maritime law and IHL, on the one hand, and the right to life, as deriving from human rights law, on the other, before concluding with some final observations and a call for better enforcement of existing duties concerning rescue of people at sea.

The duty to rescue in peacetime

Treaty and customary law

The duty to save life at sea is spelled out in Article 98 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),⁶ which provides as follows:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

This provision contains two separate obligations, addressed to two groups of States: the duty of flag States to oblige masters of vessels flying their flag to rescue people at risk of being lost at sea, and the duty of coastal States to establish and maintain search and rescue services.

The duty to rescue is further clarified in a number of international maritime law treaties, including the Convention for the Safety of Life at Sea (SOLAS

⁶ United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994). UNCLOS is currently ratified by 167 States and the European Union.

Convention),⁷ the International Convention on Maritime Search and Rescue (SAR Convention),⁸ and the International Convention on Salvage.⁹

The duty of flag States is based on the well-established duty to save life at sea. This duty dates back to past centuries¹⁰ and has been inserted into international treaties since the beginning of the twentieth century. Article 98(1) of UNCLOS repeats the content of Article 12(1) of the 1958 Convention on the High Seas,¹¹ which in turn was based on the draft articles prepared by the International Law Commission (ILC). The latter proposal drew upon¹² duties found under Article 11 of the 1910 International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea (1910 Salvage Convention)¹³ and Article 8 of the 1910 International Convention for the Unification of Certain Rules of Law related to Collision between Vessels.¹⁴

Already in 1956, the ILC considered that its draft articles codified custom,¹⁵ and it is today generally accepted that Article 98(1) of UNCLOS reflects customary international law.¹⁶ Its incorporation into many international and national legal instruments could also testify to its status as one of the general principles of law mentioned in Article 38(1)(c) of the Statute of the International Court of Justice.¹⁷

7 International Convention for the Safety of Life at Sea, 1184 UNTS 278, 1 November 1974 (entered into force 25 May 1980), as amended. The SOLAS Convention currently has 163 States Parties, the combined merchant fleets of which constitute approximately 99.14% of the gross tonnage of the world's merchant fleet. The 2004 amendments concerning provisions on rescue were not accepted by Finland, Malta and Norway. According to the provisions of Article VIII(b)(vi)(2)(bb) of the SOLAS Convention, the amendments came into force on 1 July 2006, but they do not bind the States that have not accepted them. However, Norway has successively withdrawn its objection to the amendments and is now bound by them.

8 International Convention on Maritime Search and Rescue, 1405 UNTS 118, 27 April 1979 (entered into force 22 June 1985), as amended. The SAR Convention currently has 109 States Parties, the combined merchant fleets of which constitute approximately 80.75% of the gross tonnage of the world's merchant fleet. The 2004 amendments were not accepted by Malta and Norway. According to the provisions of Article III(2)(b) of the SAR Convention, the amendments came into force on 1 July 2006, but they do not bind the States that have not accepted them. However, Norway has successively withdrawn its objection to the amendments and is now bound by them.

9 International Convention on Salvage, 1953 UNTS 165, 28 April 1989 (entered into force 14 July 1996).

10 Emer de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, Vol. 1, London, 1758, p. 170.

11 Convention on the High Seas, 450 UNTS 82, 29 April 1958 (entered into force 30 September 1962).

12 Second Report on the Regime of the High Seas by Mr. J. P. A. François, Special Rapporteur of the ILC.

13 International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, UKTS 4 (1913), Cd. 6677, 23 September 1910 (entered into force 1 March 2013).

14 International Convention for the Unification of Certain Rules of Law related to Collision between Vessels, [1930] ATS 14, 23 September 2010 (entered into force 1 March 1913).

15 ILC, Articles concerning the Law of the Sea with Commentaries, *Yearbook of the International Law Commission*, 1956, Vol. 2, p. 281.

16 Richard Barnes, "The International Law of the Sea and Migration Control", in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff, 2010, p. 134; Guy S. Goodwin-Gill, *The Refugee in International Law*, Oxford University Press, Oxford, 1996, p. 278; Bernard H. Oxman, "Human Rights and the United Nations Convention on the Law of the Sea", *Columbia Journal of Transnational Law*, Vol. 36, Nos 1–2, 1998, p. 415; Myron Nordquist, Satya N. Nandan and Shabtai Rosenne (eds), *The United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 3, Martinus Nijhoff, Leiden and Boston, MA, 1985.

17 Tullio Scovazzi, "Human Rights and Immigration at Sea", in Ruth Rubio-Marín (ed.), *Human Rights and Immigration*, Oxford University Press, Oxford, 2014, p. 225.

The scope of the duty and the actors bound by it

The territorial scope of the duty to assist people in distress at sea includes all maritime zones. Article 98 of UNCLOS is found in Part VII (High Seas), but also applies to the exclusive economic zone, on the basis of the cross-reference in Article 58(2). As for the territorial sea, while UNCLOS does not contain analogous wording, the duty to save life at sea can be inferred from the reference to assistance in the case of distress found in Article 18(2) of UNCLOS.¹⁸ Contrary to UNCLOS, the SOLAS Convention explicitly applies to vessels in all maritime zones.¹⁹

The duty to render assistance applies both in the case of collision between two vessels and in cases where a vessel receives information that one or more persons are in danger of being lost at sea because their vessel is endangered or has sunk. This duty applies to all persons in distress, without distinction.²⁰ The nationality of the vessels or of the persons, their legal status and the activity in which they are engaged are irrelevant.²¹ The fact that the persons are engaged in an unlawful activity should not make any difference to the duty to rescue. Also, the fact that the persons to be saved are migrants should not in any way hinder their right to be saved.²² Regrettably, it would seem that States and masters of ships have sometimes been less willing to proceed to the rescue of vessels transporting migrants and refugees. This distinction, however, is contrary to applicable law.

While UNCLOS refers only to the obligation of States, the duty to rescue applies both to States and to masters of ships. Under Article 10(1), of the International Convention on Salvage, “[e]very master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea”. Regulation 33.1 of the SOLAS Convention, meanwhile, provides that:

The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so.

The duty to save life at sea applies both to military and other State-owned vessels and to private vessels. Article 98 of UNCLOS is a general provision that does not

18 *Ibid.*, p. 226; B. H. Oxman, above note 16, p. 414; John E. Noyes, “The Territorial Sea and Contiguous Zone”, in Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, Oxford, 2015, p. 104; M. Nordquist, S. N. Nandan and S. Rosenne (eds), above note 16, pp. 176–177.

19 SOLAS Convention, Ch. 5, Regulation 1.1.

20 Chapter 2.1.10 of the SAR Convention provides that “[p]arties shall ensure that assistance is provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.” See also SOLAS Convention, Regulation 33.1.

21 T. Scovazzi, above note 17, p. 225; R. Barnes, above note 16, p. 134.

22 Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea, IMO Doc. MSC/Circ.896/Rev.1, 12 June 2001.

distinguish between warships and other State-owned vessels, on the one hand, and other vessels, on the other. As a consequence, the duties contained in Article 98 apply to all ships, including warships. Contrary to the general approach followed by UNCLOS, maritime law conventions providing for the duty to rescue, such as the 1910 Salvage Convention and the 1989 International Convention on Salvage, explicitly exclude warships from their scope.²³ It would, however, appear excessively restrictive to consider that the duty to rescue applies only to commercial vessels. In the first place, this is because of the duty's underlying purpose: ensuring that persons at risk of being lost at sea may be saved. Secondly, it is because States are also bound by the duty to save life at sea, as Article 98(2) of UNCLOS clarifies. In fact, it would be absurd, not to say counterproductive, to demand that States put in place search and rescue services having the aim of going to the rescue of ships in distress, and at the same time not to oblige their warships, who may be near the vessel in distress, to offer assistance. Nor does such an exception emerge from a reading of UNCLOS as a whole. While UNCLOS contains a number of rules providing for the immunity of warships from the jurisdiction of third States in the territorial sea,²⁴ exclusive economic zone²⁵ and high seas,²⁶ it does not contain any general exception applicable to warships, like those contained in the salvage treaties examined above. Furthermore, in cases where the drafters of UNCLOS desired to exclude the applicability of provisions to warships, they have done so expressly, as in the case of Article 236 of UNCLOS relating to the inapplicability to warships of the provisions of the Convention relating to the protection of the marine environment.

In light of the foregoing, instances in which warships and State vessels do not comply with their duty to save life at sea are to be particularly condemned,²⁷ and will give rise to international responsibility of the State. Furthermore, while during wartime a warship may be excused from complying with the duty to rescue if it is involved in an engagement,²⁸ during peacetime there is no such exception. If indeed an exception were applicable, it should have been included in the general provisions contained in Article 98 of UNCLOS, under the principle that exceptions to legal rules cannot be presumed. Finally, it should be noted that warships have to take special care, when engaged in law enforcement or other operations at sea, to avoid incidents and safeguard human life.²⁹ Lack of care,

23 1910 Salvage Convention, Art. 14; International Convention on Salvage, Art. 4.

24 UNCLOS, Art. 32.

25 *Ibid.*, Art. 95, as applicable to the exclusive economic zone according to Art. 58(2).

26 *Ibid.*, Art. 95.

27 An instance in which warships did not comply with their duty to save life at sea that received a lot of attention from media and from international institutions was the case of the so-called "left-to-die boat". See note 5 above.

28 See the section on "The Duty to Rescue in War", below.

29 A duty to ensure the safety of persons on board intercepted vessels is incorporated in, among others, Article 9(1)(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 UNTS 507, 15 November 2000 (entered into force 28 January 2004); and Article 8bis(10)(a)(i) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 UNTS 201, 10 March 1988 (entered into force 1 March 1992), as modified by the 2005 Protocol.

resulting in a maritime casualty, will generate responsibility for the State and the persons involved.³⁰

Exceptions

The only exception to the duty to rescue life at sea, as provided in UNCLOS, is the necessity not to endanger the rescuing vessel, its crew and its passengers.³¹ The SOLAS Convention, however, seems to admit other grounds for not going to the rescue of a ship in distress. Regulation 33.1 provides that:

If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress and, taking into account the recommendation of the Organization, to inform the appropriate search and rescue service accordingly.

The SOLAS Convention, in the text just quoted, therefore provides three exceptions to the duty to rescue, identified by the words “unable”, “unreasonable” and “unnecessary”. The first concerns cases in which a ship is unable. This may be due to the weather conditions, or the conditions of the vessel. The second concerns cases in which it is unreasonable to expect the vessel to proceed to the rescue. The difference between this and the first case resides in the degree to which the external or internal impediment affects compliance with the duty. While in the case of an “unable” vessel, the impossibility should be objective and total, in the case of “unreasonableness” it might be objectively possible to go to the rescue but, in light of the actual circumstances of the vessels involved and the weather conditions, it would be unreasonable to expect the master of the requested vessel to proceed to the rescue operation. This exception, therefore, comes very close to the one provided in UNCLOS, as a threat to the rescuing vessel, its crew and its passengers would render unreasonable the imposition of a duty to rescue. Finally, the third exception concerns cases in which it is unnecessary for a vessel to proceed to the rescue. This might be either because another vessel, which is closer, has already taken the duty to rescue, or because the distance between the rescuing vessel and the endangered vessel is such that the former would not reach the latter in time.

Commercial considerations should not play any role in the determination of the capacity of the vessel to rescue persons in distress at sea. In fact, a rescuing

30 This principle is illustrated by the case involving the *Kater I Rades*, which resulted in the condemnation of the master of an Italian warship that, through dangerous manoeuvres, had caused the sinking of the vessel *Kater I Rades*. See the decision of the Italian Court of Cassation of 10 June 2014, n. 24527. For a commentary on the case, see Tullio Scovazzi, “Il respingimento di un dramma umano collettivo e le sue conseguenze”, in Amedeo Antonucci, Irini Papanicolopulu and Tullio Scovazzi (eds), *L’immigrazione irregolare via mare nella giurisprudenza italiana e nell’esperienza europea*, Giappichelli Editore, Torino, 2016.

31 UNCLOS, Art. 98(1).

vessel may have to divert from its route to go to the rescue of another vessel. Furthermore, it may have to alter its route, once persons in distress have been saved, so as to disembark them in a place of safety, which may be different from the rescuing vessel's next port of call. In both cases, vessels may experience delays in their time schedule, which will have an economic cost for commercial vessels, or may be hindered from carrying out their activities, as in the case of fishing vessels. Indeed, it would appear that in some cases vessels have shrank away from their duties so as not to experience economic loss.³² This behaviour is unacceptable on both ethical and legal grounds and is contrary to duties deriving from the international legal instruments mentioned above.

Ensuing duties

Once persons in distress are saved, there are two duties incumbent upon the master of the ship which has saved them. The first is to treat these people humanely, in conformity with obligations arising under human rights treaties.³³ Humane treatment is mandated, taking into account the practical limitations encountered on board vessels, such as lack of space and the need to avoid the spreading of diseases.³⁴ The second is to deliver these people to a place of safety, an issue that will be discussed below in the context of search and rescue operations.

Search and rescue duties

The second duty incorporated in Article 98 of UNCLOS requires coastal States to establish, operate and maintain adequate and effective search and rescue services, if necessary collaborating with neighbouring States.³⁵ UNCLOS does not define these terms, but a definition is included in the SAR Convention, according to which "search" is "[a]n operation, normally co-ordinated by a rescue co-ordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress",³⁶ while "rescue" is "[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety".³⁷ The SOLAS Convention provides that:

32 Martin Davies, "Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea", *Pacific Rim Law & Policy Journal*, Vol. 12, No. 1, 2003.

33 Resolution 167(78) of the IMO Maritime Safety Committee's Guidelines on the Treatment of Persons Rescued at Sea, IMO Doc. MSC 78/26/Add.2, 20 May 2004 (IMO Rescue Guidelines), para. 5.1.2, provides that shipmasters should "do everything possible, within the capabilities and limitations of the ship, to treat the survivors humanely and to meet their immediate needs".

34 Regulation 33.6 of the SOLAS Convention provides that "[m]asters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship".

35 Article 98(2) of UNCLOS reflects Article 12 of the Convention on the High Seas. Interestingly, the draft articles produced by the ILC did not contain any reference to the duty of the coastal State to provide search and rescue services. The text of Article 12 of the Convention on the High Seas was based upon a Danish proposal during the First United Nations Conference on the Law of the Sea, UN Doc. A/CONF.13/C.2/L.36. See also Chapter 2.1.1 of the SAR Convention.

36 SAR Convention, Regulation 1.3.1.

37 *Ibid.*, Ch. 1.3.2.

Each Contracting Government undertakes to ensure that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around their coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary, having regard to the density of the seagoing traffic and the navigational dangers and shall, so far as possible, provide adequate means of locating and rescuing such persons.³⁸

Search and rescue services, therefore, aim at locating persons in distress at sea and ensuring that they are aided, either by State-owned vessels that go to sea for this purpose, such as those of the coast guard, or by other vessels navigating in the area and acting in compliance with Article 98(1) of UNCLOS. In this regard, Regulation 2.1.1 of the SAR Convention provides that “[o]n receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided”.

One of the main issues that arises with respect to the duty to provide search and rescue services concerns the identification of which State, among a number of neighbouring States, should provide such assistance in a given case. In more than one instance, States have disagreed on this point, thus causing unnecessary, and in some cases fatal, delays to rescue operations.³⁹ Clarification of the duty to coordinate with neighbouring States was therefore one of the main tasks of the negotiators of the SAR Convention. Under this treaty, States are requested to agree on SAR regions,⁴⁰ in order to provide “adequate shore-based communication infrastructure, efficient distress alert routing, and proper operational co-ordination to effectively support search and rescue services”.⁴¹ Furthermore, “[p]arties having accepted responsibility to provide search and rescue services for a specified area shall use search and rescue units and other available facilities for providing assistance to a person who is, or appears to be, in distress at sea”.⁴²

Disembarkation

Cooperation among States is particularly strained when it comes to the last phase of the rescue operation, disembarkation. “Rescue”, in fact, implies that the people assisted should be delivered “to a place of safety”.⁴³ While a ship may

38 SOLAS Convention, Ch. V, Regulation 7.1.

39 See, for example, the case of the Cap Anamur incident, described in Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, Cambridge, pp. 214–216.

40 SAR Convention, Ch. 2.1.4.

41 *Ibid.*, Ch. 2.1.3.

42 *Ibid.*, Ch. 2.1.9.

43 *Ibid.*, Ch. 1.3.2.

temporarily be considered a place of safety,⁴⁴ people saved will eventually have to be disembarked on dry land. Hypothetically, there are a number of options concerning disembarkation: this could happen in the next port of call of the rescuing ship, on the land nearest to the place where the rescue has occurred, at a destination indicated by the people rescued themselves, or at another place where these people could receive assistance. In practice, however, it may be difficult to find a State that will allow the rescuing vessel to disembark rescued people in its ports, in particular if these people are likely to apply for asylum within the State.

Two general principles regulate disembarkation. The first, deriving from the sovereignty exercised by States over their territory, provides that there is no right of entry into a State's ports. Accordingly, a vessel that wants to disembark people rescued at sea into the ports of a State must have the consent of that State for entering into the port.⁴⁵ The second principle, and an important limitation to disembarkation options, is the *non-refoulement* principle, which prohibits persons from being returned to the boundaries of States where their life or freedom would be threatened or where they might be subject to torture or other inhuman or degrading treatment. Initially developed with respect to refugees,⁴⁶ the principle now applies to any person who might suffer a violation of his or her right to life or freedom from torture.⁴⁷

When, following the rescue of people at sea, the rescuing vessel has to deliver them to a State, a dispute may arise concerning the State that should accept these people. This is particularly likely in the case of assistance to migrants by sea, as States are often unwilling to assume their responsibilities to rescue vis-à-vis migrants and asylum-seekers, and may prefer to close their ports to rescuing vessels, as the case of the *Tampa*⁴⁸ vessel has demonstrated.

The SAR Convention, as amended in 2004, purports to clarify the duties of States, providing that:

Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships'

44 According to Resolution 167(78) of the IMO Rescue Guidelines, above note 33, a "place of safety" is "a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination."

45 R. Barnes, above note 16, p. 118.

46 Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954), Art. 33.

47 European Court of Human Rights (ECtHR), *Chahal v. The United Kingdom*, Application No. 22414/93, Judgment (Grand Chamber), 15 November 1996, para. 74; ECtHR, *Hirsi Jamaa and Other v. Italy*, Application No. 27765/09, Judgment (Grand Chamber), 23 February 2012, para. 114.

48 Among the many scholarly writings on the *Tampa* case, see Cecilia Baillet, "The Tampa Case and Its Impact on Burden Sharing at Sea", *Human Rights Quarterly*, Vol. 25, No. 3, 2003; Matteo Fornari, "Soccorso di profughi in mare e diritto d'asilo: Questioni di diritto internazionale sollevate dalla vicenda della nave Tampa", *Comunità Internazionale*, Vol. 57, 2002; Penelope Mathew, "Australian Refugee Protection in the Wake of the Tampa", *American Journal of International Law*, Vol. 96, No. 3, 2002.

intended voyage, provided that releasing the master of the ship from the obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the [Inter-Governmental Maritime Consultative] Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effective as soon as reasonably practicable.⁴⁹

At close reading, however, the text does not answer the fundamental question: in which State should the people rescued at sea be disembarked? The provision assumes that relevant States will coordinate and, while the State responsible for the SAR zone has primary responsibility, this responsibility relates only to “ensuring such co-ordination and co-operation occurs”. However, the text is silent as to what criteria should apply in the case that no agreement is reached, and avoids clearly stating that, absent agreement, people saved should be disembarked in the State responsible for the SAR zone.⁵⁰

An assessment of the duty to rescue in peacetime

In concluding our examination of rules concerning rescue during peacetime, it emerges that the complex of rules pertaining to rescue of people in distress during peacetime represents a well-articulated whole, which tries to address the diverse phases of a rescue operation and the various actors – States, masters, crews – involved in them. The duty to rescue is certainly one of the oldest rules of the international law of the sea and one that undoubtedly constitutes part of customary law,⁵¹ and is thus applicable to all States, independently from their being parties to the treaties that spell it out.

All the same, the duty to rescue, as currently framed, presents three significant limitations: lack of enforcement of existing legal obligations; the legal uncertainty surrounding States’ and masters’ duties following rescue; and the possibility of facing criminal charges.

Lack of enforcement derives from a number of circumstances, which can in turn be grouped under three separate issues. In the first place, there is a generalized issue with the enforcement of international standards in the case of ships flying flags

49 SAR Convention, Ch. 3.1.9; similar text was inserted in the revised Regulation 4.1.1 of the SOLAS Convention. See Patricia Mallia, *Migrant Smuggling by Sea*, Martinus Nijhoff, Leiden and Boston, MA, 2010, pp. 100–101.

50 As mentioned in above note 8, the SAR Convention has currently 109 States Parties, the combined merchant fleets of which constitute approximately 80.75% of the gross tonnage of the world’s merchant fleet. This means that most vessels are bound by the SAR Convention. However, Malta has not accepted the 2004 amendments (*ibid.*).

51 See above notes 16 and 17 and accompanying text.

of convenience.⁵² While sailing on the high seas, these vessels are under the exclusive jurisdiction of the flag State.⁵³ If the flag State, as often happens, is unable or unwilling to enforce existing standards, then any violation of these standards will go unpunished.⁵⁴

Moreover, international law duties are not always translated into domestic law duties. While some States have incorporated the duties provided by UNCLOS, the SOLAS Convention and other treaties into their national laws,⁵⁵ others have not.⁵⁶ Incorporation is particularly important, as it is often accompanied by sanctions for non-compliance with the duty.⁵⁷ Lack of incorporation will therefore result in masters of vessels and other individuals concerned not being under the duty, as a matter of domestic law, to rescue people in distress at sea. Furthermore, given their dissuasive force, lack of sanctions for breach of the duty to rescue will frustrate the aim of the provisions on this duty. Eventually, lack of incorporation into the domestic legal system will result in lack of competence by domestic courts, thus leading to the inadmissibility of claims relating to the violation of the duty to rescue in front of these courts.

The lack of jurisdiction of domestic judges brings us to the third issue concerning enforcement: the lack of a competent judicial authority. As has been mentioned, national judges may not be competent to consider cases of breach of the duty to save life at sea. Furthermore, there does not seem to exist any international judge that would address these cases.⁵⁸ UNCLOS provides for a complex system of compulsory dispute settlement, but this envisages almost exclusively inter-State disputes.⁵⁹ Within this system, a claim for lack of assistance should be brought by one State, possibly the State of nationality of the persons requiring assistance, against another State, likely to be the flag State or the coastal State. Since international law provides duties for both the State and

52 “Flags of convenience” is a term that is not included in UNCLOS or other maritime law treaties, but is widely used in practice. It refers to cases in which ships are registered in, and fly the flag of, States with which they do not present any link (ownership etc.).

53 UNCLOS, Art. 92. The limited exceptions to the exclusivity of the jurisdiction of the flag State provided in UNCLOS and other treaties do not seem applicable in the case of non-compliance with the duty to rescue people in distress.

54 M. Davies, above note 32, pp. 125–126.

55 Italy has introduced rules on the duty to rescue in its Code of Navigation. According to Article 489 of the Code, it is compulsory to provide assistance to vessels in distress at sea, provided that assistance is possible without seriously endangering the rescuing vessel, its crew or its passengers. Masters are required to render assistance in all cases in which it may be reasonably expected that the operation will succeed and unless they have knowledge that assistance is being rendered by others, in conditions more appropriate or similar to those in which they would normally operate.

56 It should be mentioned here that this may be a duty under international instruments, such as Article 10(2) of the International Convention on Salvage, which requests States to “adopt the measures necessary to enforce” the duty to render assistance.

57 This is true, for example, in the case of Italy. Article 1185 of the Code of Navigation provides that the masters of national or foreign vessels, floating devices or aeroplanes who fail to render assistance shall be punished with reclusion for up to two years, which may rise to six years in the case of injury to persons and up to eight years in the case of death.

58 With the possible exception of human rights courts, as will be discussed in the section of this article on “The Relationship between the Duty to Rescue and the Right to Life”.

59 UNCLOS, Part XV.

the master of a vessel, this action could be based on one of two separate grounds. The first would be violation of the flag State's duty to oblige the master to save life, which might take the form of lack of enforcement against masters that have not complied with this duty. The second would be a violation of the coastal State's duty to have in place and operate search and rescue facilities. However, in a pragmatic light, it appears extremely unlikely that a State will risk jeopardizing its relationship with another State for the sake of prosecuting the master of a vessel that has not complied with the duty to save life at sea. Victims of maritime incidents will therefore not have any tool to dissuade shipmasters from not complying with their duty.

The second issue with the existing regime relates to the legal uncertainty surrounding States' and masters' duties following rescue, and is closely tied to the issue of disembarkation. The main difficulty faced by masters and States in search and rescue operations pertains not so much to the moment of the rescue, but rather to the time immediately afterwards, and concerns the fate of the persons who have been saved by a vessel. As has been seen, the SAR Convention requests that these people be delivered to "a place of safety". The disembarkation of rescued people is often a matter of urgency, because the vessel that has saved them may be overcrowded, may not have the necessary food and facilities to host them, and may also have an interest in not delaying its voyage any further. The uncertainty still left by international treaties concerning identification of the State that should accept disembarkation in its ports hinders the full applicability of the duty to rescue.

Finally, another issue that adversely affects rescue operations and may impinge upon the willingness of masters and crews to proceed to the rescue of migrants and asylum-seekers at sea is the possibility of facing criminal charges. In some instances, the master and crew of a vessel that has saved people at sea and has successively disembarked them in the port of a State other than the State of nationality of the people saved have been charged with violating Italian domestic law rules on the prohibition of illegal migration, as the case of the *Cap Anamur*⁶⁰ illustrates. Even if charges are eventually dropped or the master and crew are finally declared innocent, bringing charges against them is likely to affect their right to liberty and will most probably produce negative economic consequences, as their arrest and detention pending trial will most likely result in loss of wages and possibly the loss of the job. It would be desirable that States amend their criminal legislation so as to make sure that no criminal charges may be levied against people who have complied with one of the fundamental duties under the law of the sea.

60 The German vessel *Cap Anamur*, after having saved thirty-seven people in the Mediterranean, had to moor for twenty-one days on the high seas close to the outer limit of Italian territorial waters, before being allowed to call at an Italian port. The crew of the *Cap Anamur*, after being arrested for facilitating the illegal entry of migrants into Italian territory, were eventually released; see Tribunale di Agrigento, Judgment of 7 October 2009. On the case and the decisions by Italian judges, see Marco Cottone, "Alcune notazioni in materia di reati connessi all'immigrazione clandestina via mare", in Amedeo Antonucci, Irini Papanicolopulu and Tullio Scovazzi (eds), *L'immigrazione irregolare via mare nella giurisprudenza italiana e nell'esperienza europea*, Giappichelli Editore, Torino, 2016, p. 85.

The duty to rescue in war

Although UNCLOS regulates uses of the sea during peacetime, there is no reason to consider that the duty to save life at sea does not apply during wartime as well. On the contrary, a number of elements support the continued validity of the duty in war. Application of this duty during wartime, however, suffers some significant limitations, dictated by military necessity.

Treaty and customary law

The enduring duty to save life at sea during wartime is demonstrated, in the first place, by the fact that international treaties provide for the duty to rescue also during wartime. Article 11(1) of the 1910 Salvage Convention states that “[e]very master is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to everybody, *even though an enemy*, found at sea in danger of being lost”.⁶¹ Reference to “an enemy” in the article can only be construed as implying that the duty to rescue applies also in the case of war, as in peacetime there would be no enemies. While the reference to “enemies” was not kept in subsequent treaties, this was due to the fact that subsequent treaties were designed to regulate maritime activities during peacetime.⁶²

Humanitarian law also purports to protect those who are at risk of being lost at sea. The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II)⁶³ contains a number of provisions for the safety of the shipwrecked. Article 12 of GC II provides that the shipwrecked “shall be respected and protected in all circumstances”, thus entailing both the duty to spare them and the duty to ensure that the rights of protected persons are safeguarded.⁶⁴ *Inter alia*, it is

61 Emphasis added. While it is generally considered that the 1910 Salvage Convention has been superseded by the 1989 International Convention on Salvage, it can be argued that the 1910 Convention has still remained in force in the part that concerns the duty to rescue life at sea during wartime, since the 1989 Convention does not contain any provisions to this effect and therefore seems not to have addressed the issue. See Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 59(1)(b).

62 See the comments of Special Rapporteur Francois that “les mots ‘même ennemie’ paraissant dans le texte de la Convention de Bruxelles, ont été supprimés eu égard au fait que les règles élaborées par la Commission du droit international à ce sujet se réfèrent exclusivement au temps de paix”: Second Report on the Regime of the High Seas, UN Doc. A/CN.4/42, 10 April 1951, p. 81.

63 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, 12 August 1949 (entered into force 21 October 1950).

64 Jann K. Kleffner, “Protection of the Wounded, Sick and Shipwrecked”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 325; Natalino Ronzitti, *Diritto internazionale dei conflitti armati*, 5th ed., Giappichelli, Torino, 2014, p. 298. Recent State practice seems to support the customary character of this norm: see Steven Haines, “Who is Shipwrecked?”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 775.

prohibited to target the shipwrecked while they are at sea, unless they engage in hostile acts.⁶⁵ While GC II does not provide any definition of “shipwrecked”, Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I),⁶⁶ defines them as “persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility”.⁶⁷ This provision further adds that “[t]hese persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol”. Furthermore, GC II provides for the special protection of hospital ships,⁶⁸ as well as “small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations”, although, in the latter case, protection applies only to the extent that “operational requirements permit”.⁶⁹

Specific duties concerning search for the shipwrecked are contained in Article 18 of GC II, which provides that:

After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.⁷⁰

The duty to search for and collect the shipwrecked is addressed to all belligerents, without distinction, and applies to any person at sea, independent of whether the person is a belligerent, a civilian belonging to one of the parties to the conflict, or a citizen of a neutral State. It reflects a rule of customary international law.⁷¹

Limitations

Under Article 18 of GC II, the duty to rescue encounters two limitations. The first, introduced by the phrase “[a]fter each engagement”, limits temporally the

65 British Military Court for The Trial of War Criminals, *The Peleus Trial*, 17–20 October 1945, available at: <https://casebook.icrc.org/case-study/british-military-court-hamburg-peleus-trial>.

66 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978).

67 Article 12 of GC II further clarifies that “the term ‘shipwreck’ means shipwreck from any cause and includes forced landings at sea by or from aircraft”. A different issue, and one which is not addressed in this article, is the status of these people once they have been rescued, and the guarantees that they may enjoy under humanitarian law, for example as civilians or as prisoners of war.

68 GC II, Arts 22, 24.

69 *Ibid.*, Art. 27; Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, para. 47(b). The restriction is due to the special nature of these crafts: see Wolff Heintschel von Heinegg, “The Law of Armed Conflict at Sea”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd edition, Oxford University Press, Oxford, 2013, p. 539.

70 This provision is based upon Article 16 of Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 18 October 1907 (entered into force 26 January 1910).

71 W. Heintschel von Heinegg, above note 69, p. 481.

applicability of the duty. This is at variance with the similar provision in Article 15 (1) of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) and is due to the special conditions of naval warfare.⁷²

The second limitation is implied by the phrase “all possible measures”. Rescue may become “impossible” due to the necessity to ensure the safety and security of the rescuing vessel. This limitation, as has been seen, applies also in time of peace. During wartime, however, this limitation acquires a broader significance, as it includes, apart from objective limitations (the space and provisions available on board), the need to safeguard the vessel against attack. This is especially true for submarines, which need to surface to engage in search and rescue activities, thus becoming particularly vulnerable to enemy attacks. The legal and ethical dilemmas posed by the duty to rescue and the opposed duty to safeguard the integrity of the ship are illustrated by two emblematic World War II cases.

The first involved an Italian submarine, the *Cappellini*, under the command of Commander Todaro. On 16 October 1940, the *Cappellini*, after having sunk the *Kabalo*, a Belgian vessel, proceeded to rescue survivors, even towing one of the launches and navigating on the surface for three days, until it reached Santa Maria in the Azores.⁷³ This is an emblematic case of compliance with the rules concerning search and rescue of the shipwrecked during wartime. It might even be considered that Commander Todaro went beyond what was required of him, since towing a launch implies sailing on the surface and being subject to attacks by enemy forces.⁷⁴

The second concerns the so-called Laconia Order given by Grand Admiral Karl Dönitz, which prohibited rescue measures. Although the wording of the Order was ambiguous, it was generally interpreted to require German commanders to abstain from rescue operations and, more arguably, to kill survivors after military engagements. During the Nuremberg trial, Dönitz, refusing to admit that the Order obliged members of the German Navy to kill survivors, defended the Order in the following terms:

For example, I had a report from a commander that, because he had remained too long with the lifeboats and thus had been pursued by the escorts perhaps – or probably – summoned by wireless, his boat had been severely attacked by depth charges and had been badly damaged by the escorts – something which would not have happened if he had left the scene in time – then naturally I pointed out to him that his action had been wrong from a military point of view. I am also convinced that I lost ships through rescue. Of course I cannot

72 Commentary on GC II, p. 132, according to which “the words ‘after each engagement’ were better suited to the special conditions prevailing at sea”.

73 Arturo Faraone, “Diritto umanitario e guerra navale”, in Irini Papanicolopulu and Tullio Scovazzi (eds), *Quale diritto nei conflitti armati?*, Giuffrè Editore, Milano, 2006, pp. 76–77.

74 When asked why he had risked being attacked to save the shipwrecked of the *Kabalo*, Commander Todaro explained that it was due to the “two thousand years of civilization” that he felt compelled him. *Ibid.*, p. 77.

prove that, since the boats are lost. But such is the whole mentality of the commander; and it is entirely natural, for every sailor retains from the days of peace the view that rescue is the noblest and most honorable act he can perform. And I believe there was no officer in the German Navy – it is no doubt true of all the other nations – who, for example, would not consider a medal for rescue, rescue at personal risk, as the highest peacetime decoration. In view of this basic attitude it is always very dangerous not to change to a wartime perspective and to the principle that the security of one’s own ship comes first, and that war is after all a serious thing.⁷⁵

This statement prompts a number of considerations. Firstly, the fact that Dönitz denied that the Order had any such content shows that any order to kill the shipwrecked would be unlawful under IHL. Secondly, this statement pays tribute to the customary character of the duty to save life at sea during peacetime. At the same time, it seems to reject the duty’s applicability during wartime, or at least to subordinate its applicability to military considerations, such as the desire not to endanger the safety of military vessels during wartime – particularly in the case of submarines, which, having to emerge to perform rescue operations, would be particularly vulnerable.

The circumstances in which the Order was given may partly support Dönitz’s view that performing rescue operations during wartime may endanger military vessels and submarines.⁷⁶ However, although countermeasures are allowed under international law, the violation of the rules that prohibit targeting of vessels engaged in the rescue of the shipwrecked could not have justified violation of the rules concerning the duty to rescue. Reprisals against “wounded, sick and shipwrecked persons [and] the personnel, the vessels or the equipment protected” by GC II are prohibited both under IHL⁷⁷ and under general international law.⁷⁸

As is well known, the Nuremberg Tribunal considered the Laconia Order ambiguous and refused to condemn Dönitz for having deliberately ordered the killing of survivors.⁷⁹ In addition, while the Tribunal considered that the Order “deserve[d] the strongest censure”, in light of the fact that the United Kingdom and the United States had also engaged in unrestricted submarine warfare, it concluded that “the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare”.⁸⁰ This conclusion is rather ambiguous and, to the modern reader, unsatisfactory. On one hand, in

75 *Trial of the Major War Criminals before the International Military Tribunal. Nuremberg 14 November 1945–1 October 1946*, Vol. 13, Nuremberg, 1948, republished by William Hein, Buffalo, New York, 1995, p. 276.

76 The Laconia Order was issued after German vessels attempting to rescue the survivors of the *RMS Laconia* were attacked by an American aircraft.

77 GC II, Art. 47.

78 Draft Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res. 56/83, 12 December 2001, Art. 50(1)(c).

79 International Military Tribunal, Judgment, 1 October 1946, in *Trial of the Major War Criminals before the International Military Tribunal*, William S. Hein, Buffalo, NY, and New York, 1995, p. 313.

80 *Ibid.*

fact, the Nuremberg Tribunal seems to recognize that abstention from rescuing shipwrecked members of the armed forces of an enemy is a violation of IHL. On the other hand, lack of punishment for this violation is problematic, as it diminishes the value of the Tribunal's findings. The fact that punishment was withheld, most likely due to the *tu quoque* argument,⁸¹ does not help either, as it would seem to justify, in practice if not in law, behaviour that is contrary to the duties of navies during warfare.

Rescue by neutral vessels and rescue beyond the conduct of hostilities

While Article 18 of GC II applies to belligerents, it should be considered whether a similar duty may also apply to neutral vessels. In this respect, Article 21 of GC II provides as follows:

The Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.

Vessels of any kind responding to this appeal, and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection and facilities to carry out such assistance.

They may, in no case, be captured on account of any such transport; but, in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed.

This provision includes two separate aspects. On one hand, there is the appeal to neutral vessels to take care of the wounded, sick and shipwrecked. On the other, a special protection is granted to any vessel that engages in such activities, in line with the general protection enjoyed by means used for the treatment of the wounded, sick and shipwrecked under customary international law.⁸² The language used in this provision, which mentions the possibility of an “appeal to the charity of commanders” rather than a legal duty, might be considered as entailing that neutral vessels are under no duty to save the shipwrecked.⁸³ This conclusion would, however, run contrary to the existence of a general duty to rescue, which has been discussed in the previous section.⁸⁴ As a consequence, the

81 The Tribunal referred to “an order of the British Admiralty announced on the 8th May, 1940, according to which all vessels should be sunk at sight in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war”; *ibid.*

82 GC II, Art. 12.

83 In this sense see, the 1960 ICRC Commentary on GC II, p. 151 (“The provision is nevertheless optional. ... [S]uch vessels are not bound to give the assistance requested”).

84 In this sense, see the 2017 Commentary on GC II, para. 1872: “This is not to say that the response to an appeal to their charity is necessarily left entirely to the commanders’ discretion. Several sources of international law, outside international humanitarian law, contain obligations to rescue persons in distress at sea.”

duty to rescue the shipwrecked applies *both* to the parties to the conflict and to neutral vessels, in so far as this is mandated by the rules of peacetime international law discussed above. It is therefore preferable to understand the hortatory language of Article 21 of GC II as related to the limitations placed on the duty to rescue by the necessity to ensure the integrity and safety of the rescuing vessel. If there is an armed conflict at sea, in fact, the danger of being targeted or sunk may in extreme cases prevent the applicability of the duty to rescue, as codified in Article 98 of UNCLOS.

Articles 18 and 21 of GC II both seem to envision the need to rescue arising following an engagement in the context of an armed conflict. However, it may also happen that a warship which is on mission in the context of an armed conflict but which is not, at the critical moment, engaged in any armed action becomes aware of a ship that is in distress not due to an armed attack, but for any other reason. This has happened, for example, during fighting in Libya, when migrants and refugees continued taking to the sea to look for safety, and where more than once they encountered military vessels.⁸⁵ In these circumstances, it is submitted, the general duty to save life at sea applies, and the warship has to stop and rescue those in distress. Failure to do so, for example by claiming adherence to the mission, would run contrary to the general duty under UNCLOS and the SOLAS Convention, the continuing applicability of which has also been recalled by the Security Council,⁸⁶ and the “considerations of humanity” that must apply both during peace and during war.⁸⁷ Lack of assistance will entail the responsibility of the flag State of the warship.⁸⁸

In conclusion, it can be safely accepted that the duty to rescue applies during armed conflict. It applies both to belligerent States and their vessels, with respect to the vessels and members of the armed forces of an enemy, and to neutral States and vessels. The only exception to the rule would appear to be the necessity to safeguard the rescuing vessel and its crew. However, in light of the peculiar circumstances existing during wartime, this condition can be interpreted more broadly than during peacetime, to include not only cases in which the rescuing vessel would not be in a condition to rescue the survivors, but also those cases in which, were it to do so, it could be harmed by the enemy or, in the case of a neutral vessel, by one of the belligerents.

The relationship between the duty to rescue and the right to life

Having ascertained the existence and content of a duty to rescue during peace and during war, it is worth noting that the enforcement of this right may be problematic

85 See T. Strik, above note 5.

86 UNSC Res. 2240 (2015), 9 October 2015, preambular para. 10.

87 International Court of Justice (ICJ), *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, *ICJ Reports 1949*, p. 22.

88 Cour d’Appel de Paris, *Arret*, 24 June 2014, Dossier No. 2014/00670.

and that the best assistance towards such enforcement may come from the use of human rights norms and institutions, where they exist. Indeed, the duty to rescue people in distress at sea can be considered as another side of the right to life, which every individual enjoys under human rights law.⁸⁹ The right to life is codified in various human rights treaties – for example, Article 6 of the International Covenant on Civil and Political Rights (ICCPR)⁹⁰ and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁹¹

According to the relevant provisions of international instruments, States owe human rights duties, both negative and positive, to individuals under their “jurisdiction”.⁹² This expression has been interpreted to include individuals that are under the *de jure* or *de facto* jurisdiction of States.⁹³ On the one hand, *de jure* jurisdiction could be defined as the power, conferred upon a State by a legal rule, to legislate and enforce laws, and to adjudicate legal disputes. The customary or conventional origin of the rule and the basis of jurisdiction – territorial, personal or other – do not matter in this respect.⁹⁴ *De facto* jurisdiction, on the other hand, includes all those situations in which a State *acts* using its power, and is often linked to the extraterritorial exercise of jurisdiction.⁹⁵ Here, the relevant issue for determining the existence of “jurisdiction” is the actual exercise of legislative or enforcement power by a State, rather than an abstract right to do so. The exercise of power will usually take the form of control over a territory,⁹⁶ control over the premises or the vessel where an individual happens to be,⁹⁷ or control over the person itself, when the applicant is under the “continued and

89 For a discussion of different points of view on the relationship between the right to life and the duty to rescue, see Efthymios D. Papastavridis, “Is There a Right to Be Rescued at Sea? A Skeptical View”, *QIL – Questions in International Law*, Zoom-in 4, 2014, available at: www.qil-qdi.org/wp-content/uploads/2014/06/03_LOS_Papastavridis_FINAL.pdf; Seline Trevisanut, “Is There a Right to Be Rescued at Sea? A Constructive View”, *QIL – Questions in International Law*, Zoom-in 4, 2014, available at: www.qil-qdi.org/wp-content/uploads/2014/06/02_LOS_Trevisanut_FINAL.pdf.

90 International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976).

91 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, 4 November 1950 (entered into force 3 September 1953).

92 ICCPR, Art. 2(1); ECHR, Art. 1.

93 See ECtHR, *Al-Skeini and Others v. United Kingdom*, Application No. 55721/07, Judgment (Grand Chamber), 7 July 2011, para. 136; see also, for application of these principles at sea, ECtHR, *Hirsi Jamaa*, above note 47, para. 81. The Human Rights Committee (HRC) seems to have in mind the same distinction when it differentiates between “power” and “effective control”; see HRC General Comment 31, 2004, para. 10.

94 ECtHR, *Hirsi Jamaa*, above note 47, para. 75.

95 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004; ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order, 15 October 2008, para. 109.

96 Control over a territory, as applied by the ECtHR, includes military occupation (ECtHR, *Cyprus v. Turkey*, Application No. 25781/94, Judgment, 10 May 2001, para. 90; ECtHR, *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, Judgment (Grand Chamber), 23 March 1995, para. 62) and cases in which a State provides support to a separatist regime (ECtHR, *Ilaşcu and Others v. Moldova and the Russian Federation*, Application No. 48787/99, Judgment (Grand Chamber) 8 July 2004).

97 ECtHR, *Al-Skeini*, above note 93, para. 136.

uninterrupted control exercised by” the State’s agents.⁹⁸ If applied to the special circumstances of the sea, it can be maintained that States exercise *de jure* jurisdiction over persons on board vessels that fly their flag⁹⁹ and persons on structures that are located in their territorial sea, exclusive economic zone and continental shelf,¹⁰⁰ while they exercise *de facto* jurisdiction not only when the individuals are transferred to a vessel flying the flag of that State, but also when they undertake police enforcement measures against a foreign vessel and crew.¹⁰¹ In addition, it is important to note that it is not even necessary that the State vessel and the vessel on which the individuals find themselves enter into contact, as long as it can be maintained that the latter vessel is under the *de facto* control of the former vessel.¹⁰²

The text of international instruments such as the ICCPR and ECHR refers to “deprivation” of life. This could be interpreted to mean that the only duty of States is not to kill individuals wilfully. However, these instruments have been interpreted in a way that has broadened the duties of States vis-à-vis individuals to include not only negative duties, but also positive duties.¹⁰³ Negative obligations require the State to abstain from taking human life. Positive obligations include both substantial obligations and procedural obligations.¹⁰⁴ From a substantial point of view, the right to life requires the State to take measures to ensure that those at risk of losing their life be assisted, and to take all necessary measures towards this end.¹⁰⁵ From a procedural point of view, States are required to investigate instances in which an individual has lost his or her life, so as to punish the culprit and avoid similar instances occurring in the future.¹⁰⁶

98 ECtHR, *Hirsi Jamaa*, above note 47, para. 80.

99 See, among many other cases, ECtHR, *Banković and Others v. Belgium and 16 Other Contracting States*, Decision (Grand Chamber), 12 December 2001, para. 59; ECtHR, *Marković and Others v. Italy*, Decision (Grand Chamber), 14 December 2006, para. 49; ECtHR, *Assanidze v. Georgia*, Decision (Grand Chamber), 8 April 2004, para. 137; ECtHR, *Medvedyev and Others v. France*, Application No. 3394/03, Judgment (Grand Chamber), 29 March 2010, para. 65.

100 European Court of Justice, *Salemink v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Case No. C-347/10, Judgment, 2012, para. 35.

101 ECtHR, *Hirsi Jamaa*, above note 47, para. 80; ECtHR, *Medvedyev*, above note 99, paras 66–67.

102 For a more detailed discussion, see Urfan Khaliq, “Jurisdiction, Ships and Human Rights Treaties”, in Henrik Ringbom (ed.), *Jurisdiction over Ships*, Martinus Nijhoff, Leiden and Boston, MA, 2015, p. 324; Efthymios Papastavridis, “European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?”, in Malgosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications*, Martinus Nijhoff, Leiden, 2013, p. 117; Irini Papanicolopulu, “A Missing Part of the Law of the Sea Convention: Addressing Issues of State Jurisdiction over Persons at Sea”, in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction*, Martinus Nijhoff, The Hague, 2014, p. 387.

103 HRC, *Baboeram et al. v. Suriname*, Communications Nos 146/1983 and 148-154/1983, Decision, 1985; Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Judgment, 29 July 1988.

104 Silvia Borelli, “Positive Obligations of States and the Protection of Human Rights”, *INTERRIGHTS Bulletin*, Vol. 15, No. 4, 2006.

105 ECtHR, *Osman v. United Kingdom*, Application No. 87/1997/871/1083, Judgment (Grand Chamber), 28 October 1998.

106 ECtHR, *McCann and Others v. United Kingdom*, Application No. 18984/91, Judgment, 27 September 1995.

Positive duties, both substantial and procedural, are particularly relevant in the case of people at risk of losing their lives at sea. In the case of people taking to sea, in fact, loss of life is a real risk. States should take measures to at least minimize the phenomenon, if not avoid it. Measures may include legislative measures, requiring masters of ships flying the State's flag to proceed to the rescue of those in distress at sea¹⁰⁷ and providing for the creation and management of search and rescue facilities and their coordination with each other and with those of neighbouring States. They may also include operative measures for the implementation of search and rescue facilities and the disembarkation of people rescued. From a procedural point of view, States having jurisdiction over the individuals whose right to life is at issue are required to investigate allegations that vessels flying their flag or vessels that have been contacted by them and have been asked to go to the rescue of persons in danger of being lost at sea have not gone to the rescue of people in distress.

In all cases in which a State has omitted any of the above-mentioned actions, and provided that there is a court or tribunal that has jurisdiction, the State can be charged with having failed to comply with its obligations under human rights law. The consequence is that, in those instances in which there are international tribunals competent for determining compliance with a human rights treaty,¹⁰⁸ the State may also be sued in front of the competent tribunal. This possibility, which has not been used until today, has the potential to help enforce international duties of the States, with a positive repercussion on duties of individuals as well. Human rights litigation is therefore an option that should be made use of by individuals.

Recourse to human rights mechanisms presents some difficulties, however. Apart from procedural issues, including the need to previously exhaust domestic remedies,¹⁰⁹ two main problems may hinder individuals in getting access to international justice. The first issue is practical, and concerns the difficulties of providing evidence. When a vessel in distress is not rescued, the usual conclusion is that the vessel will sink, and that the people on board will die and will thus not be able to testify as to a lack of assistance from any other vessel.¹¹⁰

107 Duties of States concerning behaviour of vessels flying their flag are duties of due diligence, as has been recently clarified in International Tribunal for the Law of the Sea, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, paras 127–129.

108 International tribunals with jurisdiction to examine alleged violations of human rights exist only at the regional level in the European, American and African continents. These are the ECtHR, established under the ECHR; the Inter-American Court of Human Rights, established under the American Convention on Human Rights, 1144 UNTS 144, 22 November 1969 (entered into force 18 July 1978); and the African Court on Human and Peoples' Rights, established under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Doc. OAU/LEG/EXP/AFCHPR/PROT (III), 10 June 1998 (entered into force 25 January 2004). There is no similar tribunal for the Asian continent; furthermore, not all States belonging to America and Africa are parties to the treaties establishing the regional courts.

109 ECHR, Art. 35(1); African Charter on Human and Peoples' Rights, 1520 UNTS 245, 27 June 1981 (entered into force 21 October 1986), Art. 56(5).

110 Modern technologies may be of assistance here, as they may provide evidence, for example, of the location of the endangered vessel and that of other vessels nearby. See C. Heller, L. Pezzani and S. Studio, above note 5.

The second hurdle that must be overcome in human rights litigation is the need to establish that the individuals whose right to life was at issue were under the jurisdiction of the defendant State. While the concept of jurisdiction has been progressively expanded to include both *de jure* and *de facto* exercise of power over individuals, there is still the need to prove that individuals were, somehow, either under the *de jure* jurisdiction of a State or under the *de facto* control of State organs. In a case in which a vessel navigating on the high seas is not rescued by other passing vessels, it would be difficult to establish a sufficiently strong link between the vessel in need and the potentially rescuing vessel that would reach the threshold of jurisdiction under human rights law. Furthermore, if the vessel were a private vessel, it would still be necessary to establish the requisite jurisdictional link between it and the flag State. Finally, in cases where a coastal State does not intervene to rescue a vessel in distress off its coast, for example in its SAR zone, there is the need for an extensive application of the concept of jurisdiction.

Finally, it is worth noting that the duty to rescue, as provided for in the law of the sea and maritime law instruments, presents both advantages and disadvantages if compared to the right to life under human rights treaties. Starting from the latter, while human rights violations may be brought, at least in some cases, in front of international tribunals, this is not the case for the law of the sea and maritime law instruments. The only option to litigate a violation of the duty to rescue under UNCLOS or the SOLAS Convention, for individuals, is to make use of national tribunals. Turning to the advantages, the duty to rescue, imposed on States under the law of the sea and maritime law, goes beyond what is required by States under the right to life. While duties deriving from the right to life apply to States only when there is an individual within their jurisdiction, the duty to rescue applies also in cases in which there is no control – *de facto* or *de jure* – of the State over the individual. In conclusion, the best option would be to combine duties under the law of the sea and human rights law, so as to ensure maximum protection to people in distress.¹¹¹

Concluding remarks

The duty to rescue people in distress at sea, a time-honoured rule of international law, is as applicable today as ever, during both peacetime and wartime. People taking to the sea continue to be exposed to maritime perils, and these perils may increase exponentially when unsafe practices are taken up, as in the case of migrants and refugees taking to the sea to look for a brighter future. It is therefore still necessary to uphold the universal character of this duty and its applicability to all vessels who navigate at sea, and to all coastal States,

111 The point is made in Irini Papanicolopulu, “Human Rights and the Law of the Sea”, in David Attard, Malgosia Fitzmaurice and Norman Martinez (eds), *IMLI Manual on International Maritime Law*, Vol. 1: *The Law of the Sea*, Oxford University Press, Oxford, 2014.

independently of a vessel's flag or the legal condition or circumstances of the persons involved.

Nonetheless, compliance with the duty to rescue is far from complete and universal. A number of factors have been identified as leading to poor implementation of this duty. The principal factor is lack of enforcement by flag States over their vessels that do not provide rescue, as well as the practical difficulties facing anyone who wishes to bring a case concerning violation of the duty to rescue. In addition, particular strain has been put upon the duty to rescue by the number of sea migrants and refugees that take to the sea.

These circumstances, however, should not bring about a dilution of the principle. In order to enforce the duties of States, one option could be to make use of human rights tribunals, capitalizing on the close link between the duty to rescue under the law of the sea and maritime law, on the one hand, and the right to life under human rights treaties, on the other. In cases in which this is not possible, litigation in front of domestic courts remains the only option, albeit one that might be hard to pursue, particularly in cases involving warships and other State vessels. It remains to be seen whether national and international tribunals will take up the challenge and will promote adherence to the duty to rescue by States and masters of vessels.

Restrictions on the use of force at sea: An environmental protection perspective

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Abstract

The restrictions on the use of force at sea exist in different branches of international law: the law of the sea and environmental law, mainly applicable during peacetime, and international humanitarian law (IHL), as the law applicable in times of armed conflict. Different rules from these areas must be compared and analyzed to determine the common principles applicable to restricting the use of force at sea for the purposes of environmental protection. Taking into account the particular problems of protecting the marine environment in the context of the use of force, the law of the sea and international environmental law should be applied to restrict means and methods of using force at sea during armed conflict. The detailed concepts and approaches in the law of the sea and environmental law may complement IHL, and the precautionary principle of international environmental law should be triggered to address the lacunae in IHL protecting the marine environmental during armed conflict.

Keywords: use of force at sea, environmental protection, restrictions, IHL, UNCLOS.



The use of force at sea has existed extensively in both wartime and peacetime. It has not only caused human casualties and property damage, but has also had an impact on the environment. The use of force at sea involves three elements: the use of force as such, the sea, and impacts on the environment. It is therefore regulated by three areas of law: international humanitarian law (IHL), the international law of the sea, and international environmental law. However, each of these areas of law has its own distinct requirements and restrictions regarding the environmental impacts of the use of force at sea, which are not necessarily consistent with each other and have left some gaps to be filled for a better protection of the environment in the context of the use of force at sea.

The contexts of State use of force at sea include armed conflict at sea and maritime law enforcement. Each has different legal bases. This article begins with an analysis of the impacts of the use of force at sea on the environment and goes on to clarify the legal norms, standards, approaches and mechanisms relevant to these impacts, before analyzing the requirements and restrictions imposed by different areas of international law. The article then highlights the legal frameworks on the use of force at sea, concluding that they do not include sufficient protection of the environment. Few provisions in IHL, international environmental law or the law of the sea explicitly address environmental protection during use of force at sea, and these bodies of law remain somewhat imperfect for dealing with marine environment protection. Moreover, laws applicable during war and peace are not mutually exclusive, and their intersection brings both opportunities and complexities. Consequently, a combination of precautions taken by all bodies of law is necessary but insufficient – the rules still need to be improved and clarified.

There remain three key gaps. First, a number of discrepancies exist in the legal frameworks applicable to the use of force at sea. IHL alone cannot offer enough protections for the marine environment during the use of force at sea, and whether and to what extent international environmental law and the law of the sea continue to apply and provide protection during armed conflict is a matter of debate. Second, there are some principles common to IHL, the law of the sea and international environmental law that may be invoked to address issues of marine environment protection in the context of the use of force; however, these may have somewhat different meanings in each area of law. It is therefore crucial to interpret relevant principles. Third, the question of which means and methods of using force at sea should be explicitly prohibited or restricted by international law still needs to be clarified. In the last part of this article, for each of the gaps in law discussed, the article clarifies the applicability of the United Nations Convention on the Law of the Sea (UNCLOS)¹ and international environment treaties on the protection of the marine environment in wartime, and presents the interpretation of the precautionary principle from international environmental law that should act as a restriction on means and methods when force is used at sea.

1 United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994).

Impacts of the use of force at sea on the environment

The use of force at sea in both wartime and peacetime may damage or otherwise affect the marine environment. The environment may be understood and defined in various ways. Broadly construed, the environment writ large may be defined as “all natural features that make up the world’s ecosystem”.² Similarly, the marine environment is comprehensive; the International Seabed Authority defines the marine environment as including

the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof.³

This definition demonstrates that the maritime environment is comprehensive and encompasses everything in the ocean space, including both physical and chemical components, non-living and living resources, marine ecosystems and ecological complexes, including diverse marine life. Such a broad definition reflects a growing belief of the international community that environmental protections should be extended to various situations involving armed conflict.⁴

The damage to the marine environment resulting from the use of force at sea is not always collateral, for the marine environment itself may become the target or victim of the use of force. In so-called “environmental warfare”,⁵ the marine environment may be changed in order to cause environmental catastrophes as a means of compromising the enemy. In the context of maritime law enforcement, when the target of the use of force is an oil tanker, liquefied natural gas carrier or chemical cargo ship, and the force is used inappropriately, the risks to the environment are no less severe than in the context of armed conflicts at sea.

The impacts on or damage to the marine environment caused by the use of force may be understood in three ways. First, the use of force may affect the intrinsic and instrumental values of the marine environment.⁶ Intrinsic value “is usually

2 John Alan Cohan, “Modes of Warfare and Evolving Standards of Environmental Protection under the International Law of War”, *Florida Journal of International Law*, Vol. 15, No. 4, 2003, p. 485.

3 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/6/A/18, 13 July 2000 (amended 22 July 2013), Regulation 1.3(c).

4 Generally accepted international rules and standards cannot be equated with customary international law. For a discussion on the identification of which provisions concerning marine pollution in UNCLOS reflect customary international law, see Joseph Ashley Roach, “Today’s Customary International Law of the Sea”, *Ocean Development & International Law*, Vol. 45, No. 3, 2014, pp. 250–251; Walter G. Sharp, “The Effective Deterrence of Environmental Damage during Armed Conflict: A Case Analysis of the Persian Gulf War”, *Military Law Review*, Vol. 137, No. 1, 1992, p. 32.

5 For further discussion on the international law of active and passive environmental warfare, see Eric Talbot Jensen, “The International Law of Environmental Warfare: Active and Passive Damage during Armed Conflict”, *Vanderbilt Journal of Transnational Law*, Vol. 38, No. 1, 2005.

6 Some scholars believe that focusing only on instrumental or intrinsic values may fail to resonate with views on personal and collective well-being with regard to nature and the environment. Relational values pertain to all manner of relationships between people and nature. See Kai M. A. Chan *et al.*, “Why Protect Nature?”

attributed to ‘natural’ components of the environment and not to, say, better sewerage systems or more beautiful lampposts”.⁷ The intrinsic value of the environment is recognized in international instruments such as the Convention on Biological Diversity, which states that the contracting parties are “[c]onscious of the intrinsic value of biological diversity”.⁸ The mere existence of the marine environment is valuable in itself, beyond any possible value generated by the interests of humankind. The impacts of the use of force at sea on the intrinsic value of the marine environment mainly consist of damaging consequences to that environment, such as water pollution and the reduction or extinction of marine life.⁹ The instrumental value of the marine environment is viewed from a human-centric perspective and thus refers to the usefulness of the marine environment to humankind. With such instrumental value, the marine environment may provide humankind with resources or become the object of scientific research. There are two ways by which the use of force at sea may affect the instrumental values of the environment. One way is to damage the living and non-living resources that are crucial to human survival, or to reduce their economic value. The other is to pollute the environment so that the population living nearby may breathe in toxic substances, be exposed to radioactive substances or suffer from a polluted food chain, for example.

Second, the use of force at sea has both immediate and long-term impacts on the environment. The damage caused by the use of force at sea will not only harm the current generation, but will also cause endless troubles for future generations. Separate from the damage to the environment caused by the use of force on land, it is more difficult to drag or clean weapons or ships containing toxic or hazardous materials once they have sunk to the depths of the sea. In this respect, the consequences of the two World Wars remain alarming. For example, it has been estimated that from 1939 to 1945, over 9,000 military, auxiliary and merchant marine vessels were sunk, and the hazards related to these shipwrecks include oil spills, chemical releases, unexploded ordnance and coral-reef degradation, altering the feeding grounds of marine life.¹⁰ After the Second World War, ships have tended to become bigger and more diverse, resulting in increasing number of tankers, gas carriers and chemical cargo ships with heavy loads. Though there have been no cases of massive pollution caused

Rethinking Values and the Environment”, *Proceedings of the National Academy of Sciences of the United States of America*, Vol. 113, No. 6, 2016, p. 1462.

7 Wilfred Beckerman and Joanna Pasek, *Justice, Posterity and the Environment*, Oxford University Press, Oxford, 2001, p. 128.

8 Convention on Biological Diversity, 1760 UNTS 79, 6 June 1992 (entered into force 29 December 1993), Preamble.

9 On valuing biodiversity, some scholars agree that monetary value can serve as a useful link between environmental problems and political decision-making processes, although the future challenge is to identify common ground for comparing monetary and intrinsic values. See Mirka Laurila-Pant *et al.*, “How to Value Biodiversity in Environmental Management?”, *Ecological Indicators*, Vol. 55, 2015, pp. 6–7.

10 See Umesh Chandra Jha, *Armed Conflict and Environmental Damage*, Vij Books India Pvt Ltd., New Delhi, 2014, pp. 41–42.

by the use of force in maritime law enforcement actions, such a possibility cannot be precluded.

Third, the impacts on the environment caused by the use of force at sea are both regional and transboundary. Those impacts will increase with the evolution of new means and methods of warfare. The physical nature and ecosystems of the sea are different from the land – the sea is characterized by fluidity – and habitats in the sea and on land differ dramatically in species composition and diversity.¹¹ The impacts of the use of force at sea are more complicated than those on land. On the one hand, the marine environment is an integrated system, the inherent fluidity of which entails that the damage to a certain marine area is very likely to affect other areas. With the combined effects of tides, ocean currents, winds, weather and other factors, the impacts of the use of force on the marine environment are inevitably diffuse, and the scope and extent are largely uncontrollable. On the other hand, targets of the use of force at sea are primarily ships and offshore platforms. When force is used against oil tankers, offshore oil platforms or chemical cargo ships, the possible spill and leakage of oil and chemicals may become major threats to the marine environment. For example, during the “Tanker War” that took place during the Iran–Iraq War of the 1980s, no fewer than 447 oil tankers were attacked in the Persian Gulf, and in 1984 alone, more than 2 million tonnes of oil spilled into the Gulf,¹² resulting in severe oil pollution and damage to marine ecosystems, coral reefs and sea grass beds.¹³ In the *Oil Platforms* case, marine pollution caused by the United States’ actions led Iran to request reparation for the costs of mounting environmental rescue operations.¹⁴

When is force used by States at sea?

The nature of the use of force at sea – armed conflict or law enforcement – is determined by the background, basis and forms of the use of force,¹⁵ rather than by the identity of the actors and their competence under domestic law. The users of force at sea consist of States, organized armed groups and private entities, mainly private military and security companies (PMSCs), pirates, smugglers and other criminals. Naval battles between States and organized armed groups are quite rare; for example, the Liberation Tigers of Tamil Eelam is probably the only

11 Richard K. Grosberg, Geerat J. Vermeij and Peter C. Wainwright, “Biodiversity in Water and on Land”, *Current Biology*, Vol. 22, No. 21, 2012, p. R900.

12 See Philippe Antoine, “International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict”, *International Review of the Red Cross*, Vol. 32, No. 291, 1992, p. 530; Hassan Partow, “Environmental Impact of Wars and Conflicts”, in Mostafa K. Tolba and Najib W. Saab (eds), *Arab Environment: Future Challenges*, Arab Forum for Environment and Development, Beirut, 2008, p. 164.

13 See Nada Al-Duaij, *Environmental Law of Armed Conflict*, Transnational Publishers, New York, 2003, p. 39.

14 See International Court of Justice (ICJ), *Oil Platforms Case (Iran v. United States of America)*, Memorial submitted by Iran, *ICJ Reports* 1993, p. 127.

15 See Permanent Court of Arbitration (PCA), *Maritime Boundary Delimitation Case (Guyana v. Suriname)*, Award, *PCA Reports* 2007, paras 442–443.

non-State armed group ever to have its own navy during a non-international armed conflict.¹⁶ The targets of the PMSCs' use of force are mainly pirates and/or armed robbers at sea. In terms of the scale of force used and the types of arms used, and in view of maritime security practice, the use of force by PMSCs and criminal gangs can hardly affect the maritime environment. From the environmental perspective, it is the use of force by States that has the greatest impact and therefore merits the most attention.

Armed conflict

Armed conflict at sea is just one of the contexts in which force is used at sea. IHL distinguishes between international and non-international armed conflicts.¹⁷ However, in contrast to the fact that in the modern era, especially after the Second World War, most armed conflicts on land have been of non-international nature, most well-known armed conflicts at sea have been conflicts between States, such as the war over the Falkland Islands/Malvinas between the United Kingdom and Argentina in 1982, the military and paramilitary activities of the United States in and against Nicaragua in 1984, the skirmish in the South China Sea between China and Vietnam in 1988, and the naval battles near Yeonpyeong Island between South Korea and North Korea in 1999 and 2002. Sometimes, armed conflicts may spread from the land to the sea, as happened during the "Tanker War" in the Persian Gulf. There have been very few, if any, armed conflicts between State and non-State actors or between non-State actors at sea.¹⁸

The threat or use of force between States is prohibited by Article 2(4) of the United Nations (UN) Charter.¹⁹ Nevertheless, force has frequently been used in various contexts, including at sea, and some forms of the use of force may be recognized as legitimate and even necessary under international law, depending on the nature of the use of force. In the contemporary international legal order, States may legitimately use force with the authorization of the UN Security Council or as a means of self-defence as permitted under Article 51 of the UN Charter, or even arguably under the "Uniting for Peace" resolutions of the UN General Assembly.²⁰ However, there have been very few cases in which force was used at sea within the framework of the UN's actions.²¹ By contrast, it has been

16 See Donald A. Donahue *et al.*, "The All Needs Approach to Emergency Response", *Homeland Security Affairs Journal*, Vol. 8, 2012, p. 2.

17 See International Committee of the Red Cross (ICRC), "How Is the Term 'Armed Conflict' Defined in International Humanitarian Law?", March 2008, available at: www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf (all internet references were accessed in August 2017).

18 See Report of the Special Rapporteur on the protection of the environment in relation to armed conflicts, UN Doc. A/CN.4/70, 3 June 2016, para. 15.

19 Charter of the United Nations, 1 UNTS XVI, 26 June 1945 (entered into force 24 October 1945), Art. 2(4).

20 See Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the U.N. Charter Paradigm*, Routledge, London and New York, 2013, pp. 59–60, 72–78.

21 A very rare example in this respect is that the United Kingdom blockaded the Port of Beira of Mozambique, pursuant to Resolution 221 of the UN Security Council, as the port was used to transport oil to support the Smith regime in Rhodesia (now Zimbabwe). Two Greek ships, *Joanna V* and *Manuela*, were visited and examined when they sought to break the blockade, and a French

rather common for States to use force at sea as a means of self-defence, at least so claimed, against armed attacks on their territory, ships or aircraft. For example, the United Kingdom resorted to the right of self-defence as the justification for its military actions during the armed conflicts over the Falkland Islands/Malvinas.²²

Law enforcement operations

Maritime law enforcement is another major factor in the discussion on the use of force at sea. Maritime law enforcement may be defined as the actions taken by qualified domestic law enforcement agencies under relevant domestic laws in order to maintain or restore public security and order at sea.²³ Force has been frequently used in such actions, and they have therefore become the main context in which force is used at sea. The enforcement of domestic laws is not permissible in all maritime zones and cannot justify the legitimacy of all actions at sea. The sovereignty of a coastal State extends to its territorial sea in accordance with UNCLOS,²⁴ while it may only exercise the control necessary to deal with specific issues in the contiguous zone, exclusive economic zone and high seas.²⁵ The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, as amended by its Protocol of 2005, explicitly recognizes that a State's maritime law enforcement officials are entitled to use force under certain circumstances,²⁶ subject to the conditions that the persons concerned have unlawfully and intentionally committed an offence within the meaning of the said Convention.²⁷ Furthermore, under Article 301 of UNCLOS, on the peaceful uses of the seas, it is only required that:

In 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.²⁸

That is to say, the threat or use of force in compliance with the principles of international law embodied in the UN Charter is also not prohibited by

tanker, *Artois*, was shot on the bow for violating the prohibition against importing oil. See UNSC Res. 221, 9 April 1966. Also see Adam Roberts and Dominik Zaum, "UN Security Council-Authorised Military Operations, 1950–2007", *The Adelphi Papers*, Vol. 47, No. 395, 2007, p. 81.

22 See John Sankey, "Decolonisation: Cooperation and Confrontation at the United Nations", in Erik Jensen and Thomas Fisher (eds), *The United Kingdom — The United Nations*, Macmillan, London, 1990, p. 114; A. Roberts and D. Zaum, above note 21, pp. 79–84.

23 See Patricia Jimenez Kwast, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award", *Journal of Conflict Security Law*, Vol. 13, No. 1, 2008, p. 54.

24 UNCLOS, Art. 2.

25 UNCLOS, Arts 33, 56, 94, 99, 105 ff.

26 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 UNTS 221, 10 March 1988 (entered into force 1 March 1992); Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21, 14 October 2005 (entered into force 28 July 2010), Art. 8bis, para. 9.

27 *Ibid.*, Art. 3bis.

28 UNCLOS, Art. 301.

UNCLOS. It was also accepted by the Arbitral Tribunal in the *Maritime Boundary Delimitation* case that in international law, force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary.²⁹ However, since the use of force is permitted only when it is unavoidable, reasonable and necessary, it is an exceptional means of maritime law enforcement rather than a regular means in general practice.

Applicable legal frameworks

States have obligations to protect and preserve the marine environment, and this has been recognized by both treaty law³⁰ and customary international law.³¹ Since the adoption of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) in 1972,³² the relationship between the use of force and the protection of the environment has been expanded, with IHL, international environmental law and the law of sea interactively improving the legal framework for the use of force at sea in relation to environmental issues. However, given the fact that treaty law in this respect is far from satisfactory, such legally non-binding “soft law” instruments as the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo Manual),³³ the *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict* (Guidelines for Military Manuals),³⁴ and international judicial and arbitration decisions regarding the environmental restrictions on the use of force should also be taken into account. These instruments have declared and clarified the extent of permissible use of force at sea, as reflected in existing or emerging principles and rules; provided important legal grounds against which the compatibility of such use of force with the requirements are to be evaluated; and evidenced existing or emerging customary law.

International humanitarian law (*jus in bello*)

IHL has included rules applicable to naval warfare almost since its beginning in the mid-nineteenth century. Since the Paris Declaration Respecting Maritime Law was

29 PCA, *Maritime Boundary Delimitation*, above note 15, para. 446.

30 See, e.g., UNCLOS, Art. 192.

31 See David Freestone, “The Conservation of Marine Ecosystems Under International Law”, in Michael Bowman and Catherine Redgwell (eds), *International Law and the Conservation of Biological Diversity*, Kluwer Law International, London, 1996, pp. 91–92; Alan Boyle, “Further Development of the 1982 Law of the Sea Convention: Mechanisms for Change”, *International and Comparative Law Quarterly*, Vol. 54, No. 4, 2005; Nilufer Oral, *Regional Co-operation and Protection of the Marine Environment Under International Law: The Black Sea*, Martinus Nijhoff, Leiden and Boston, MA, 2013, pp. 136–137.

32 Declaration of the United Nations Conference on the Human Environment, A/CONF.48/14/Rev1, 16 June 1972.

33 See San Remo International Institute of Humanitarian Law, “The San Remo Manual on International Law Applicable to Armed Conflicts at Sea”, *International Review of the Red Cross*, No. 816, 1995, pp. 583–637.

34 *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, UN Doc. A/49/323 and UNGA Res. 49/50, 9 December 1994 (Guidelines for Military Manuals).

proclaimed in 1856,³⁵ the international community has adopted a number of conventions on naval warfare. However, almost no environmental restrictions on the use of force at sea may be found in those conventions. While gradually some international humanitarian conventions and regulations came to prohibit the use of poison or poisonous arms during armed conflicts,³⁶ which has an impact on the environment, the focus was not on protecting the environment. In both treaties and customary international law, the connection between the use of force and environmental protection started to gain traction in the 1970s. In treaty law, it began with the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (ENMOD Convention),³⁷ adopted in 1976, and Additional Protocol I to the Geneva Conventions (AP I), adopted in 1977,³⁸ followed by other conventions also restricting means and methods of combat from an environmental perspective.³⁹ In customary international law, it is noted that certain environmental components have been indirectly protected against the use of methods and means of warfare since at least the 1970s,⁴⁰ and arguably such “soft law” instruments as the San Remo Manual and the Guidelines for Military Manuals⁴¹ have reflected and compiled such developments.

On the basis of IHL today, the restrictions on the use of force at sea during armed conflict designed to protect the environment may be categorized as follows. First, the marine environment is by nature a civilian object, and may not become the objective of an attack.⁴² IHL distinguishes between military and civilian objectives. Participants in armed conflicts can only attack combatants or military objectives, while civilians and civilian objects should not be the targets of attack. Article 52 (1) of AP I establishes that “[c]ivilian objects shall not be the object of attack or of reprisals”. While Article 52(2) does not define the concept of “civilian object”

35 Paris Declaration Respecting Maritime Law, British State Papers 1856, Vol. 61 (entered into force 16 April 1856), pp. 155–158.

36 For example, Hague Convention (II) with respect to the Laws and Customs of War on Land (Hague Convention II), and its Annex, Regulations concerning the Laws and Customs of War on Land, 29 July 1899, Art. 23(1), available at: <https://ihl-databases.icrc.org/ihl/INTRO/195?OpenDocument>; Hague Convention (IV) respecting the Laws and Customs of War on Land, and its Annex, Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 23(a); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925.

37 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (ENMOD Convention), 1108 UNTS 151, 10 December 1976 (entered into force 5 October 1978).

38 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 35(3).

39 For example, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 UNTS 45, 13 January 1993 (entered into force 29 April 1997) (Chemical Weapons Convention), Arts 4(10), 5(11).

40 See Alan Vaughn Lowe, “Commentary on the 1972 Bacteriological Convention”, in Natalino Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff, Dordrecht, Boston, MA, and London, 1999, p. 647; Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Martinus Nijhoff, Leiden and Boston, MA, 2004, p. 10.

41 Guidelines for Military Manuals, above note 34.

42 See AP I, Art. 8(2)(b)(iv); K. Hulme, above note 40, p. 300; Mara Tignino, “Water, International Peace, and Security”, *International Review of the Red Cross*, Vol. 92, No. 879, 2010, p. 661.

per se, it narrowly defines military objectives as objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. By the method of exclusion, any objects that are not military objectives are civilian objects. Elements of the marine environment are mostly civilian objects,⁴³ and therefore should not be subject to attack, and the restrictions in Articles 35(3) and 55(1) of AP I – general provisions governing hostilities apply to the protection of the marine environment – shall apply,⁴⁴ unless the object in question has become a legitimate military objective in one way or another.⁴⁵ Typical military objectives at sea are enemy combatants; infrastructures, buildings and military positions, and the materials and armaments kept therein; and means of military transportation and communication. If any civilian objects are used for military purposes, such as when anti-aircraft weapons are deployed on an offshore platform, they may be regarded as military objectives and thus subject to armed attack. What is more, once military objectives are located or navigating in a marine area, the area may contribute effectively to military action and its neutralization may offer a definite military advantage. Thus, it becomes a military objective.⁴⁶

Second, there are general limitations on the permissible means and methods of warfare at sea. In both international and non-international armed conflicts, any use of force at sea will inevitably affect the marine environment to some extent. It should be noted that the ENMOD Convention and AP I only prohibit environmental damage occurring in international armed conflicts, No environmental damage provision was included in Additional Protocol II to the Geneva Conventions,⁴⁷ which regulates non-international armed conflict.⁴⁸

43 See Michael Bothe, Carl Bruch, Jordan Diamond and David Jensen, “International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities”, *International Review of the Red Cross*, Vol. 92, No. 879, 2010, p. 576.

44 Articles 35(3) and 55(1) of AP I prohibit not all conditions, but those conditions attached to “long-term, widespread and severe” damage to the environment. See AP I, Arts 35(3), 55(1).

45 Besides the condition of military objectives, in the view of the committee established to review the North Atlantic Treaty Organization (NATO) military operations in the Federal Republic of Yugoslavia in 1999, Articles 35(3) and 55 of AP I only cover very significant damage. The adjectives “widespread, long-term, and severe” used in AP I are joined by the word “and”, meaning that this is a triple, cumulative standard. See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, June 2000, para. 15, available at: www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf. Meanwhile, there is a critical appraisal of the above assessment which holds that the Committee’s report shows a poor grasp of legal concepts, and deviates from well-established case law of the International Criminal Tribunal for the former Yugoslavia. See Paolo Benvenuti, “The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia”, *European Journal of International Law*, Vol. 12, No. 3, 2001, pp. 509–511.

46 M. Bothe *et al.*, above note 43, p. 576.

47 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).

48 Julian Wyatt, “Law-Making at the Intersection of International Environmental, Humanitarian and Criminal Law: The Issue of Damage to the Environment in International Armed Conflict”, *International Review of the Red Cross*, Vol. 92, No. 879, 2010, p. 612.

Article 1 of the ENMOD Convention prohibits “military or any other hostile use of environmental modification techniques having widespread, longlasting or severe effects as the means of destruction, damage or injury to any other State Party”. It appears from the text that what is prohibited is merely the intentional use of environmental modification techniques as means or methods of warfare for the purpose of destruction, damage or injury. By contrast, AP I, adopted shortly after the ENMOD Convention, prohibits not only methods or means of warfare which are intended to cause widespread, long-term and severe damage to the natural environment, but also those which “may be expected”⁴⁹ to have such effects.⁵⁰ There are, then, two significant expansions of scope of prohibition in AP I in comparison to the ENMOD Convention. One is that *any* method or means of warfare, not just environmental modification techniques, is prohibited as long as it may cause damage to the natural environment.⁵¹ The other is that even if the damage to the environment is not intended, such methods and means of warfare are nevertheless prohibited as long as they “may be expected” to have such effects.⁵² The second point reflects the principle of precautions in attack,⁵³ which is referred to by the International Committee of the Red Cross in its report submitted to the UN General Assembly in 1993 on the protection of the environment in times of armed conflict as

an emerging, but generally recognized principle of international law [whose object it is] to anticipate and prevent damage to the environment and to ensure that, where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason to postpone any measures to prevent such damage.⁵⁴

This assertion has not been contested by any States.⁵⁵ Reprisals are allowed under IHL, subject to a wide range of limitations, but attacks against the natural

49 AP I, Arts 35(3) and 55(1).

50 One line of thought focused on the obligation of “care” in Article 55(1) of AP I holds that the real gem hidden among those provisions is not the prohibition of means and methods causing widespread, long-term and severe damage in Article 35(3), but the obligation on States Parties to take care to protect the environment against such harm. See Karen Hulme, “Taking Care to Protect the Environment against Damage: A Meaningless Obligation?”, *International Review of the Red Cross*, Vol. 92, No. 879, 2010, pp. 675–676.

51 ICRC, “Additional Protocol I of 1997: Ban on the Use of Methods and Means of Warfare that Damage the Environment”, 31 January 2003, available at: www.icrc.org/en/document/1976-convention-prohibition-military-or-any-hostile-use-environmental-modification; also in Reference Materials to Accompany IUCN Statement on Armed Conflict and the Environment, UN Doc. A/CONF.151/26, Vol. 1, 12 August 1992.

52 See AP I, Art. 55(1).

53 “With respect to attacks, the following precautions shall be taken: those who plan or decide upon an attack shall: take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” See AP I, Art. 57(2)(a)(ii).

54 *Protection of the Environment in Time of Armed Conflict*, report submitted by the ICRC to the 48th Session of the UN General Assembly, 1993, available at: www.icrc.org/eng/resources/documents/report/5deesv.htm.

55 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, p. 150.

environment by way of reprisals are prohibited by Article 55(2) of AP I. The restrictive conditions of “widespread, long-term and severe damage”⁵⁶ to the natural environment reflect the principle of proportionality to a certain extent, since damage of such nature cannot be regarded as a proportionate consequence of any method or means of warfare. In accordance with Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court,⁵⁷ if an attack is launched in the knowledge that it will cause “widespread, long-term and severe damage” to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated, such an attack would constitute a war crime.⁵⁸

Third, there are general limitations on the weapons that can permissibly be used at sea. Weapons that are excessively injurious or have indiscriminate effects have long been prohibited by IHL, all the way back to Article 23(e) of Hague Convention (II) with Respect to the Laws and Customs of War on Land (Hague Convention II) in 1899,⁵⁹ which prohibits any arms, projectiles, or material of a nature to cause “superfluous injury”. However, for a long time this prohibition mainly applied to weapons having such effects on human bodies. One linkage with the protection of environment was made in the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW),⁶⁰ which incorporated Article 35(3) of AP I in its Preamble. Most weapons which are used in land war are also used at sea. The provisions above can only be seen as general limitations which are applicable at sea. While none of the Protocols to the CCW explicitly mentions the limitations on weapons with respect to environmental protection, especially not in the naval context, it is arguable that due to the inclusion of Article 35(3) of AP I in the Preamble, if the weapons prohibited by the CCW’s Protocols cause damage to the natural environment, and the damage and its consequences may be deemed to be excessively injurious or to have indiscriminate effects on human bodies, the provisions of the CCW may apply. Similar logic can be applied to biological weapons and chemical weapons, the development, production, stockpiling (and use, in case of chemical weapons) of which are prohibited by the 1972 Convention on the Prohibition of Biological Weapons⁶¹ and the 1993 Convention Prohibiting Chemical Weapons respectively.⁶²

56 Cf. Article 1(1) of the ENMOD Convention, which only prohibits the use of environmental modification techniques having “widespread, longlasting or severe effects”.

57 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Art. 8(2)(b)(iv).

58 *Ibid.*

59 See Hague Convention II, Art. 23(e).

60 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (as amended on 21 December 2001), 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983).

61 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1015 UNTS 163, 10 April 1972 (entered into force 26 March 1975), Arts 1(1) and (2).

62 Chemical Weapons Convention, Arts 1 and 9(3).

Fourth, there is a need to protect the marine environment of neutral States. There are no specific IHL treaties or provisions to protect the marine environment of States that have not engaged in hostilities (neutral States). However, Article 1 of the 1907 Convention concerning the Rights and Duties of Neutral Powers in Naval War required the belligerents to respect the sovereign rights of neutral Powers, which implies that the rights of neutral States in relation to the marine environment should also be respected by belligerents.⁶³ The traditional law of neutrality has lost much of its formal importance due to the prohibition of the resort to war in modern international law. However, the relevant principle has arguably become a customary rule of international law, as noted by the International Court of Justice (ICJ) in the *Corfu Channel* case, citing “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.⁶⁴ As discussed earlier, fluidity is inherent in the marine environment as an integrated system. Thus, even if the hostilities take place within the waters under the jurisdiction of the belligerents or on the high seas, damage to the environment may spread to the waters under the jurisdiction of a third State. In such a case, the belligerents would be responsible for the environmental damage to the third-party State.

The law of the sea

UNCLOS is the most comprehensive treaty governing legal matters relating to the sea. With respect to the use of force at sea and its implications for the environment, although Articles 19(2)(a), 39(1)(b) and 301 of UNCLOS stipulate that 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 UN Charter, Article 111 of UNCLOS implicitly permits States to use force during hot pursuit – a special form of law enforcement – but equally does not address its environmental implications. However, the protection and preservation of the marine environment played a central role in UNCLOS,⁶⁵ as evidenced by the fact that a whole part of the Convention, Part XII, was dedicated to the “protection and preservation of the marine environment”. No such terms as “threat or use of force” or “law enforcement” appear in Part XII of UNCLOS, but since all States Parties have a general obligation to protect and preserve the marine environment under Article 192 of UNCLOS, it is evident that they must comply with all relevant requirements under Part XII when they use force at sea, whether as part

63 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, USTS 545, 18 October 1907 (entered into force 26 January 1910).

64 ICJ, *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment (Merit), ICJ Reports 1949, p. 22.

65 Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level*, Martinus Nijhoff, Leiden and Boston, MA, 2007, p. 12.

of naval warfare or as a means of law enforcement. A few provisions have particular significance in this respect.

First, while all States have a negative obligation not to pollute the environment under international law, States party to UNCLOS clearly also undertake positive obligations in relation to the protection of the marine environment. All States Parties are under a general obligation to protect and preserve the marine environment under Article 192. The verbs “protect” and “preserve” clearly indicate that States Parties should take positive measures to ensure that the marine environment is protected and preserved against any possible actions that may pollute it.⁶⁶ This general positive obligation is reinforced by the requirements under Article 194(1) that States Parties “shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source”. These positive obligations, together with the requirement that “the measures taken pursuant to this Part shall deal with *all sources of pollution* of the marine environment” (emphasis added) under Article 194(3), entail that when a State uses force at sea, which may well be a source of pollution, it has a clear obligation to take all necessary measures before, during and after the use of force, to prevent, reduce and control any possible pollution of the marine environment that might be a consequence of the use of force.

Second, while the above-mentioned provisions impose obligations on States with respect to the marine environment in a general sense, Article 194(2) specifically requires States not to harm the marine environment of other countries by ensuring that activities under their jurisdiction or control do not pollute the marine environment of other countries, and pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights. Moreover, when a State exercises its right of hot pursuit under Article 111, the pursuit may continue in the exclusive economic zone or contiguous zone of another State, which means the State exercising the hot pursuit may use force within such zones. With the restrictions set forth by Article 194(2), the State exercising the hot pursuit needs to ensure that its possible use of force does not impair the environment of the coastal State, regardless of its right to hot pursuit in the zones under the jurisdiction of that State.

Third, unreasonable risk should be avoided during the use of force at sea. Article 225 of UNCLOS imposes a specific obligation of conduct on States, namely that when they exercise their powers of enforcement against foreign vessels, they “shall not ... expose the marine environment to an unreasonable risk”. This requirement appears to have two implications with respect to the use of force at sea. On the one hand, States are not prevented from exposing the marine environment to a reasonable amount of risk when they use force against foreign

66 See Jon M. Van Dyke and Sherry P. Broder, “International Agreements and Customary International Principles Providing Guidance for National and Regional Ocean Policies”, in Biliana Cicin-Sain, David L. Vander Zwaag and Miriam C. Balgos (eds), *Routledge Handbook of National and Regional Ocean Policies*, Routledge, London and New York, 2015, p. 49.

vessels in law enforcement. There is a certain degree of tolerance with respect to the environmental consequences of using force in law enforcement, which has to be measured by the proportionality between the necessity of using of force and the result of the damage. On the other hand, the requirement has a particular significance for the protection of the environment of the high seas. States may use force against foreign vessels on the high seas, while the principle of “no harm to foreign environment” would not apply to protect the marine environment of the high seas and international seabed areas that are not under the jurisdiction of any State. In this regard, Article 225 may serve to protect the high seas from unreasonable risk when the use of force is involved.

UNCLOS does not directly regulate naval warfare as such, and does not connect the conduct of hostilities at sea with environmental issues, which are limited by Articles 88 and 236 of UNCLOS. Article 88 regulates the reservation of the high seas for peaceful purposes – without a comprehensive definition of “peaceful purposes” – and Article 236 suggest that warships, naval auxiliaries and other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service, enjoy sovereign immunity and hence are not in the same position as merchant ships.⁶⁷ It suggests that environmental protection provisions may not apply during times of armed conflict. Indeed, Article 301 indicates that military activities consistent with the principles of international law embodied in the UN Charter, especially Articles 2 (4) and 51, are not prohibited.⁶⁸ Article 236 exempts warships, but as the Preamble implies that application was only contemplated during peacetime, such exemption may not entirely prevent UNCLOS from applying during armed conflict. As one observer has noted, there may be vessels involved in hostilities that do not fall within the exemption, and pollution may originate from sources other than vessels, such as an oil platform or a shore-based facility.⁶⁹

International environmental law

International environmental law is a rather new branch of international law; the UN’s Stockholm Conference on the Human Environment in 1972 is widely regarded as the moment of “birth” of modern international environmental law.⁷⁰ Given this status, this newly emerged body of law mainly consists of various

67 See UNCLOS, Art. 236.

68 *Study on the Naval Arms Race: Report of the Secretary General*, UN Doc. A/40/535, 17 September 1985, para. 188, pp. 54–55.

69 See United Nations Environment Programme (UNEP), *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law*, UNEP and Earthprint, Nairobi, 2009, p. 36; Michael N. Schmitt, “Green War: An Assessment of the Environmental Law of International Armed Conflict”, *Yale Journal of International Law*, Vol. 22, No. 1, 1997, p. 48.

70 Jutta Brunnée, “The Stockholm Declaration and the Structure and Processes of International Environmental Law”, in Aldo E. Chircop, Ted L. McDorman and Susan J. Rolston (eds), *The Future of Ocean Regime Building: Essays in Tribute to Douglas M. Johnston*, Kluwer Law International, London, 2008, p. 41; Philippe Sands, Jacqueline Peel and Ruth MacKenzie, *Principles of International Environmental Law*, Cambridge University Press, Cambridge, 2012, p. 888.

declarations and treaties. It has been estimated that there are hundreds or even thousands of environmental treaties worldwide.⁷¹ Due to the huge number of treaties, it would not be possible to analyze them one by one. Taking into account the fact that most environmental treaties mainly offer a series of principles, norms, objectives and coordinating mechanisms; that some of them have provisions similar to Article 236 of UNCLOS, which states that vessels or aircrafts owned or operated by a State are immune to the provisions regarding the protection and preservation of the marine environment;⁷² and that these treaties do not directly regulate the use of force at sea, only some fundamental principles of international environmental law that are widely accepted and frequently endorsed by State practice might be applicable to restrict the use of force at sea, and to fill the gaps in international law for the protection of the marine environment that have not already been covered by treaty or custom.⁷³

The first of these fundamental principles is the precautionary principle, similar to the IHL principle of precautions in attack, which has already been mentioned above. The precautionary principle in international environmental law was first introduced at the regional level to the regional discussion of marine environmental issues by the First Ministerial Conference on the Protection of the North Sea in 1984.⁷⁴ It was then introduced at the international level by Principle 15 of the Rio Declaration on Environment and Development (Rio Declaration) in 1992.⁷⁵ Since then, this principle has received widespread support from the international community⁷⁶ and has been adopted by many international environmental treaties, either invoked in the preamble,⁷⁷ listed as a guiding principle,⁷⁸ or provided in the operative parts as a basis for domestic

- 71 See Philippe Roch and Franz Xaver Perrez, “International Environmental Governance: The Strive Towards a Comprehensive, Coherent, Effective and Efficient International Environmental Regime”, *Colorado Journal of International Environmental Law and Policy*, Vol. 16, No. 1, 2005, pp. 5–6, claiming that “the number of environmental treaties worldwide has grown to over 500”; and Ronald B. Mitchell, “International Environmental Agreements: A Survey of Their Features, Formation, and Effects”, *Annual Review of Environment and Resources*, Vol. 28, 2003, pp. 429–430, which surveyed over 700 multilateral agreements and more than 1,000 bilateral treaties, conventions, protocols and amendments to protect the environment.
- 72 See, e.g., International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 relating thereto, 1340 UNTS 61, 2 November 1973 (entered into force 12 October 1983), Art. 3(3).
- 73 Svitlana Kravchenko, Tareq M. R. Chowdhury and Jahid Hossain Bhuiyan, “Principles of International Environmental Law”, in Shawkat Alam *et al.* (eds), *Routledge Handbook of International Environmental Law*, Routledge, London and New York, 2012, p. 43.
- 74 See Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment*, Oxford University Press, Oxford, 2002, p. 116; Simon Marr, *The Precautionary Principle in the Law of the Sea: Modern Decision Making in International Law*, Martinus Nijhoff, The Hague, London and New York, 2003, pp. 89–93.
- 75 Rio Declaration on Environment and Development, A/CONF. 151/26, 14 June 1992 (Rio Declaration).
- 76 P. Sands, J. Peel and R. MacKenzie, above note 70, p. 221.
- 77 See, e.g., the Preamble to the Convention for the Protection of the Marine Environment of the North-East Atlantic, 2354 UNTS 67, 22 September 1992 (entered into force 25 March 1998) (OSPAR Convention); and the Preamble to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2226 UNTS 208, 29 January 2000 (entered into force 11 September 2003).
- 78 See, e.g., Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1673 UNTS 57, 22 March 1989 (entered into force 5 May 1992), Art. 4(2)(a); Convention for the Protection of the Marine Environment of the North-East Atlantic, Art. 2(2)(a); UN Framework

policy-making and legislation.⁷⁹ The precautionary principle under environmental law still lacks a consistent definition, but the most widely known definition can be ascribed to Principle 15 of the Rio Declaration.⁸⁰ It states that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall be not used as a reason for postponing cost-effective measures to prevent environmental degradation.⁸¹

It appears that the precautionary principle may have satisfied the necessary elements to become a rule of customary international law,⁸² requiring that decision-makers ought, at the very least, to make themselves aware of the potential effects of what they are sanctioning, in order to be able to determine what level of environmental change or risk of change is “necessary”.⁸³

The second principle is the principle of “no harm to foreign environment”, which has already been mentioned above in the context of the law of the sea. In the *Trail Smelter* case in 1941, it was noted that “no state has the right to use or permit the use of its territory in such a manner as to cause injury ... in or to the territory of another”.⁸⁴ Later, in 1972, the Stockholm Declaration affirmed in its Principle 21 that “States have ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.⁸⁵ Moreover, “no harm to foreign environment” has been accepted as a fundamental principle by many international environmental conventions, such as the Convention on Biological Diversity, the Convention on the Prevention of the Marine Pollution by Dumping Wastes, the Convention for the Protection of the Ozone Layer, the United Nations Framework Convention on Climate Change and the Stockholm Convention on Persistent Organic Pollutants.⁸⁶ In Principle 2 of the Rio

Convention on Climate Change, 1771 UNTS 107, 9 May 1992 (entered into force 21 March 1994), Art. 3 (3).

79 See Timothy O’Riordan and James Cameron, *Interpreting the Precautionary Principle*, Routledge, London and New York, 2013, pp. 255–256; Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty*, Federation Press, New South Wales, 2005, pp. 31–32.

80 Agne Sirinskiene, “The Status of Precautionary Principle: Moving towards a Rule of Customary Law”, *Jurisprudence*, Vol. 4, No. 118, 2009, p. 351.

81 See Rio Declaration, Principle 15.

82 There have been some controversies amongst scholars in relation to the legal status of the precautionary principle in international law. See, e.g., A. Sirinskiene, above note 80, pp. 351–352.

83 Owen McIntyre and Thomas Mosedale, “The Precautionary Principle as a Norm of Customary International Law”, *Journal of Environmental Law*, Vol. 9, No. 2, 1997, p. 241. Also see Arie Trouwborst, “Prevention, Precaution, Logic and Law: The Relationship between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions”, *Erasmus Law Review*, Vol. 2, No. 2, 2009, p. 123.

84 Report of International Arbitral Awards, *Trail Smelter Case (United States v. Canada)*, UN, *International Law Report*, Vol. 3, 1941, p. 1965.

85 UNGA Res. 3281 (XXIX), 12 December 1974.

86 Convention on Biological Diversity, Art. 3; Convention on the Prevention of Marine Pollution by Dumping Wastes and other Matter, 26 UNTS 2403, 29 December 1972 (entered into force 30 August 1975), Preamble; Convention for the Protection of the Ozone Layer, 1513 UNTS 323, 22 March 1985

Declaration, this principle was not only restated but also specifically connected to armed conflict: “States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”

The third principle is the principle of prohibiting damage to the environment by using force in a particular area, the Antarctic. There are no treaties that explicitly state this, but relevant provisions of several treaties regarding the Antarctic combined definitely have this effect. The Antarctic Treaty of 1959 requires that “Antarctica shall be used for peaceful purposes only”, and that “any military measures, with the exception of use of military assets for scientific research or any other peaceful purpose, are prohibited”.⁸⁷ Therefore, any use of force for non-peaceful purposes is prohibited, regardless of its environmental consequences. This restriction may not apply to the use of force as a means of law enforcement. However, even if States may use force in law enforcement actions in the Antarctic area, they are not allowed to discharge oil, oily mixture, noxious liquid substances or any other harmful substance into the sea,⁸⁸ in the area south of 60° South latitude.⁸⁹

Comparing the legal frameworks

IHL, the law of the sea and international environmental law each have rules to restrict the use of force at sea, but the underlying rationale of each is different. However, the lack of clarity surrounding legal norms and obligations regarding environmental restrictions on the use of force at sea raises the question of marine environmental protection under IHL, the law of the sea and international environmental law, each of which is relevant for environmental protection during the use of force at sea but has significant gaps and deficiencies.

Compatibility and incompatibility

IHL, the law of the sea and international environmental law all establish some environmental restrictions on the use of force at sea. In terms of applicability to the marine environment, IHL regulates the conduct of belligerents and protects the marine environment in times of armed conflict; the law of the sea and international environmental law mainly protect the marine environment in the process of law enforcement during peacetime. Compared with the laws applicable during peacetime, IHL traditionally is a body of law that is exclusively applicable

(entered into force 22 September 1988), Preamble; UN Framework Convention on Climate Change, Preamble; Stockholm Convention on Persistent Organic Pollutants, 2256 UNTS 119, 22 May 2001 (entered into force 17 May 2004), Preamble.

87 Antarctic Treaty, 402 UNTS 71, 1 December 1959 (entered into force 23 June 1961), Art. 1.

88 Annex IV to the Protocol on Environmental Protection to the Antarctic Treaty, 30 ILM 1455, 4 October 1991 (entered into force 14 January 1998), Arts 3(1) and 4.

89 See Antarctic Treaty, Art. 6(1).

during armed conflicts and ceases to apply during peacetime.⁹⁰ Although contemporary perspectives increasingly bridge IHL and other bodies of law, applying peacetime international law during armed conflict to varying degrees, the question of their relationship (*lex specialis*) also has to be answered where they apply concurrently,⁹¹ and the extent to which the law of the sea and international environmental law offer protection during armed conflict at sea is not entirely clear.

There are certain discrepancies or even incompatibilities between IHL, on the one hand, and the law of the sea and international environmental law, on the other, with respect to their restrictions on the use of force that affects the marine environment. The problem is, however, that in most IHL treaties, even such basic concepts as “pollution of the marine environment”, as defined by Article 1(4) of UNCLOS, do not exist, and therefore IHL as a body of law lacks adequate rules to restrict pollution of the marine environment. The customary international law so far developed in this regard has only set forth some general principles, without imposing explicit environmental standards on the use of force at sea. Another way to identify the relevant rules is through the case law of international judicial bodies, but there have been no typical cases submitted to any international mechanism of settlement in which the effect on the marine environment of the use of force, either during armed conflict or as a means of law enforcement, was specifically addressed. Therefore, except for some general principles of environmental protection, the question of which specific rules should apply to and determine the limits of the use of force affecting the marine environment has not yet been clarified. After all, it is clear that IHL, the law of the sea and international environmental law should be combined to address the issues of restricting use of force at sea for the purpose of protecting the marine environment; none of them would be sufficient to deal with such issues by itself.

The applicability of the law of the sea and international environmental law during armed conflict

Since the 1990s, there has been a noticeable shift in the historic belief that laws applicable during war and peace are mutually exclusive. Contemporary perspectives increasingly bridge the two bodies of law, applying peacetime international law during armed conflict to varying degrees.⁹² As noted above, neither the ENMOD Convention or AP I proved particularly effective in preventing subsequent wartime environmental damage,⁹³ while the rules relevant to environmental protection contained in the law of the sea and international environmental law do not specifically and adequately address the problems occurring in the context of armed conflict. However, the applicability of the law

90 See Adam Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights”, *American Journal of International Law*, Vol. 100, No. 3, 2006, p. 589.

91 M. Bothe *et al.*, above note 43, p. 580.

92 *Ibid.*

93 J. Wyatt, above note 48, p. 612.

of the sea and international environmental law may build upon the existing rules in order to achieve the maximum legal protection possible for the maritime environment in the context of armed conflict.

Whether or not the law of the sea and international environmental law may be applicable to armed conflicts can be understood from the viability of relevant rules and the contextual approach. Viewed via the viability of rules, international humanitarian rules co-exist with rules of the law of the sea and international environmental law.⁹⁴ The law of the sea and international environmental law do not cease to function because of the existence of armed conflict; as indicated in the Guidelines for Military Manuals, it is a general principle of international law that “[i]nternational environmental agreements and relevant rules of customary law may continue to be applicable in times of armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict”.⁹⁵ Viewed from the contextual approach, if the rules of the law of the sea or international environmental law are to be applied in times of armed conflict, three conditions must be met: the use of force at sea has affected or impaired the environment; the application is within the scope and terms of the relevant rules, and not incompatible with the rules of IHL as the *lex specialis*; and the rules are contained in such special conventions and agreements as referred to in Article 237 of UNCLOS. While according to Article 237(1) of UNCLOS, the provisions of its Part XXII are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the principles set forth in UNCLOS, Article 237(2) requires that the specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the principles and objectives of UNCLOS. That is to say, the environmental obligations to be complied with in times of use of force at sea have two dimensions: one is the identification of obligations, requiring that the obligations derived from the law of the sea and international environmental law are compatible with each other; and the other is the implementation of obligations, requiring that the methods of implementing international environmental law are compatible with the general principles and objectives of UNCLOS. In fact, the general principles and objectives of UNCLOS are not only the bottom lines for international environmental law to deal with the protection of the marine environment, but also the minimum requirements for restricting the use of force at sea.

The definitions of some concepts in IHL depend on the law of the sea and international environmental law. Under Article 35(3) of AP I, the employment of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is

94 See Report of the Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts, A/CN.4/674, 30 May 2014, paras 5–6.

95 Guidelines for Military Manuals, above note 34, Rule 4.

prohibited under IHL. However, the term “damage” is not defined in the Protocol itself, and thus the law of the sea and international environmental law may play an informing role. The applicability of concepts and of rules should be consistent with each other. Whether the concepts in UNCLOS and international environmental treaties can be used to clarify some concepts in IHL depends on the applicability of the rules under UNCLOS and international environmental treaties to armed conflict. If such rules are inapplicable during armed conflict, the concepts contained therein cannot be used to clarify the concepts in IHL either, unless they reflect or have become part of customary international law. Even if the law of the sea may not become *lex specialis* in times of armed conflict, given the fact that such treaties as UNCLOS have been universally recognized by States, those concepts may well be used as evidence of customary rules and may be applicable in determining the damage to the marine environment in times of armed conflict. The concept of “pollution of the marine environment” – the main manifestation of damage – defined in Article 1(4) of UNCLOS, and the concepts of biological diversity,⁹⁶ substances other than oil⁹⁷ and wrecks,⁹⁸ may contribute to identifying damage to the marine environment in the context of IHL.

Common but different principles

There are some fundamental principles that may be invoked to address the issues of protecting the marine environment in the context of use of force, including the principles of necessity, precaution and proportionality, which are common to IHL, the law of the sea and international environmental law. The basic rationale is that the principles of necessity, precaution and proportionality, as legal principles, can be found in IHL and other bodies of law, and that when treaty provisions and any recognized customary international law fail to offer necessary rules to prevent environmental damage caused by the use of force at sea, these principles can play a role “in giving a legal system coherence in terms of a set of norms that express fundamental or at least important values of the system [that are overriding], so that they tend to be regarded as supplying self-sufficient justification of decisions”.⁹⁹ Meanwhile, controversies are still fierce in relation to the legal status of these principles and whether they should be treated as general or customary principles of international law.¹⁰⁰ The modalities for the exercise of

96 See Convention on Biological Diversity, Art. 2(1).

97 See Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1313 UNTS 4, 2 November 1973 (entered into force 30 March 1983), Art. 1(2).

98 See International Convention on the Removal of Wrecks, 46 ILM 694, 23 May 2007 (entered into force 14 April 2015), Art. 1(4).

99 See Neil MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press, Gloucestershire, 1978, p. 180; cited in Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law*, Hart Publishing, Oxford and Portland, OR, 2007, p. 44 (emphasis added).

100 See A. Sirinskiene, above note 80, pp. 351–352; Erik V. Koppe, “The Principle of Ambiguity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict”, *Nordic Journal of International Law*, Vol. 82, No. 1, 2013, p. 63; Michael A. Newton and Larry May, *Proportionality in International Law*, Oxford University Press, Oxford, 2014, pp. 33 ff.

these principles differ from one legal area to another. However, small differences between different legal bodies do not prevent the application of common principles, if it achieves the same result, albeit by different means, in different legal areas.

Necessity

The term “necessity” has diverse connotations under different bodies of law governing the use of force at sea. Necessity is closely related to the legality of the use of force at sea, but even the lawful use of force may still affect or impair the marine environment. Under IHL, necessity of the use of force means only that amount of force is justified which is necessary to achieve a legitimate military purpose.¹⁰¹ In the *Nuclear Weapons* Advisory Opinion of 1996, the ICJ stated that “important environmental factors ... are *properly* to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict”.¹⁰² Therefore, the marine environment may become a legitimate target of the use of force only if it is necessary to achieve a legitimate military purpose.

While the impacts of an attack on the environment should be properly taken into account in evaluating the legality of an attack in armed conflict, the principle of necessity itself is not able to offer clear guidelines for limiting the use of force for the purpose of environmental protection. Similarly, in the context of using force in law enforcement, the principle of necessity only relates to the question of whether such use of force is necessary for the purpose of law enforcement, and thus in no way justifies direct attack on the marine environment.

Since the possible negative impacts of law enforcement actions on the marine environment would usually be caused by improper or excessive use of force, they have to be measured and addressed by other principles than the principle of necessity.¹⁰³

Proportionality

The principle of proportionality applies in the circumstances in which the use of force on a legitimate object may also result in collateral environmental damage. It is very important in terms of use of force, for it serves to reduce the damage caused whenever force is used in the context of either armed conflict or law enforcement operations.

101 Cordula Droegge and Marie-Louise Tougas, “The Protection of the Natural Environment in Armed Conflict: Existing Rules and Need for Further Legal Protection”, in Rosemary Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, Martinus Nijhoff, Leiden and Boston, MA, 2014, p.94.

102 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinions, *ICJ Reports 1996*, para. 33.

103 Central to the international law of law enforcement are the general principles of necessity and proportionality. When it is necessary to use force, the force actually used must be no more than the minimum necessary in the circumstances. See Stuart Casey-Maslen and Sean Connolly, *Police Use of Force under International Law*, Cambridge University Press, Cambridge and New York, 2017, p. 354.

Proportionality comes into play when the principle of necessity has been met, but when acting in accordance with the principle of necessity, it may render necessary force unlawful.¹⁰⁴ The key concept with respect to the principle of proportionality is “threshold”. In IHL, if the expected environmental damage caused by the use of force is deemed excessive in relation to the intended military purpose, the threshold is crossed and the attack is prohibited.¹⁰⁵ In the law of the sea, the threshold is expressed as not exposing the marine environment to an unreasonable risk when States exercise their powers of enforcement against foreign vessels.¹⁰⁶ Therefore, the environmental damage caused by the use of force in the context of both armed conflict and law enforcement is tolerated only when the damage does not exceed the extent required by the purpose pursued. However, the use of proportionality cannot justify “widespread, long-term and severe damage to the environment”, which is forbidden in all cases. The principle of proportionality only applies below such a threshold.¹⁰⁷ Despite the inclusion of such expressions as “unavoidable, reasonable”¹⁰⁸ and “minimum use of force”¹⁰⁹ to restrict the methods or intensity of the force used, there are no specific and explicit rules or assessment in either conventional or customary law to determine if a certain damage is above or below the threshold.

Besides, it is not clear if the threshold is the same with respect to armed conflict and law enforcement. Assessment factors of the threshold which should be taken into account in armed conflict include the location of the civilian population and of civilian objects, the terrain, the kind of weapons to be used, weather conditions, and the specific nature of the military objectives.¹¹⁰ In maritime law enforcement, the location of the objective (whether the vessel is located in protected marine areas, or fish breeding areas), the kind of weapons to be used, the sea condition, the specific nature of the sea area (enclosed or semi-enclosed sea¹¹¹ etc.) and the type of cargo on board (oil, hazardous chemicals, radioactive substances etc.) should be considered. If the use of force against a vessel is excessive during law enforcement, the stability of the vessel will be

104 Stuart Casey-Maslen, *Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council*, Academy In-Brief No. 6, ICRC, Geneva, 2016, p. 9.

105 See Silja Vöneky, “Environment Protection in Armed Conflict”, in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2016, p. 380; Carson Thomas, “Advancing the Legal Protection of the Environment in Relation to Armed Conflict: Protocol I’s Threshold of Impermissible Environmental Damage and Alternatives”, in Rosemary Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict*, Martinus Nijhoff, Leiden and Boston, MA, 2014, p. 110.

106 See UNCLOS, Art. 225.

107 P. Benvenuti, above note 45, p. 510.

108 PCA, *Maritime Boundary Delimitation*, above note 15, para. 518.

109 ICJ, *Fisheries Jurisdiction (Spain v. Canada)*, Judgment, *ICJ Reports* 1998, para. 84.

110 See ICRC, *Exploring Humanitarian Law IHL Guide: A Legal Manual for EHL Teachers*, 5 June 2009, available at: www.icrc.org/en/publication/0960-exploring-humanitarian-law-ehl-guide-legal-manual-ehl-teachers.

111 “Enclosed or semi-enclosed sea” means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States. See UNCLOS, Art. 122.

seriously affected, and this could lead to oil or hazardous chemicals being spilled. When the foreseeable maritime environmental damages are out of proportion with the expected advantage, the use of force is above the threshold. It can also be said that the principle of proportionality may be used to evaluate the effect of the use of force afterwards. But given the different physical nature of the marine environment from the environment on land, this kind of *ex post facto* application would not be sufficient to protect the marine environment.

Precaution

The principle of precaution is pertinent to the regulation of the use of force at sea when there is no sufficient scientific evidence regarding the environmental consequences. The principle of precaution has different roles in IHL, the law of the sea and international environmental law. In IHL, this principle focuses on avoiding harm to civilian lives and related civilian objects, but does not treat the protection of the environment as a priority concern above other considerations. Article 57(2)(a)(ii) of AP I limits the choice of means and methods of attack in order to avoid and minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. In the other two bodies of law, this principle has mainly been used to address such issues as the preservation of marine biological resources and prevention of pollution from toxic and chemical substances. For example, Principle 15 of the Rio Declaration aims to protect the environment itself, and emphasizes that a lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation when threats of serious or irreversible damage exist. In this regard, the environment itself is the direct object of the principle, while the benefit of humankind, such as health, is treated as an indirect beneficiary.

Conclusion: The way forward

Applying the precautionary principle

The marine ecosystem is a self-contained and self-balanced system that is highly vulnerable to external interferences. It will take a long process for the system to recover from any major pollution, including that caused by the use of force at sea. The damage caused by pollution is difficult to eliminate and sometimes irreversible. With respect to some pollution caused by the use of force at sea – for example, when nuclear-powered ships or ships carrying nuclear weapons are sunk – the possible damage to the marine environment is highly unpredictable but potentially catastrophic. As Christof Heyns wrote in 2014:

Once a situation arises where the use of force is considered, it is often too late to rescue the situation. Instead ... all possible measures should be taken “upstream” to avoid situations where the decision on whether to pull the

trigger arises, or to ensure that all the possible steps have been taken to ensure that if that happens, the damage is contained as much as is possible.¹¹²

Therefore, given the irreversibility and unpredictability of pollution of the marine environment, the interpretation of the precautionary principle in international environmental law requires that States must, prior to any use of force, conduct environmental impact assessments with respect to such factors as the weapons to be used and the means and methods of warfare to be employed, including the chemical components and scope of effect of the weapons, and the management of the dangerous wastes to be discharged before, during and after the use of force. For example, the issue of using force against ships exists in law enforcement as well as in times of armed conflict, and in this respect, special attention must be given to nuclear-powered ships. Nowadays, not only are many military ships (such as submarines and aircraft carriers) nuclear-powered, but also the number of nuclear-powered civilian ships and platforms is increasing. In future armed conflicts at sea, the use of force against nuclear-powered military ships seems quite probable. It is also possible that nuclear-powered civilian ships and platforms may become the object of the use of force either in law enforcement actions or in times of armed conflict. Once such ships or platforms are attacked and the radioactive substance leaks or sinks, the surrounding area may be immensely polluted and the marine food chain may be severely affected. There are no specific rules regarding nuclear-powered military ships as objects in IHL. Similarly, there are no specific rules regarding nuclear-powered civilian ships and platforms as objects of law enforcement actions in the law of the sea or international environmental law. A set of precautionary rules in this respect will have to be designed in the future development of laws regarding the use of force at sea.

On the other hand, controversies on legal status notwithstanding, it is better to regard the principle of precaution with a functional recognition at the level of State practice. This means that the precautionary principle may provide qualified considerations and discourse frameworks for a State's policy or decisions governing the use of force at sea for the purpose of environmental protection, and may even have the effect of providing guidance and evaluation between States' negotiations and consultations. The need to use force at sea may also be obviated, or at least minimized, by military operations other than war such as arms control. Failure to adopt less harmful measures may lead to a violation of the principle of precaution.

Restrictions on means of using force

Due to military needs and technological innovations, military weapons are evolving all the time and their impact on the environment is not always predictable. In this

¹¹² Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, A/HRC/26/36, 1 April 2014, para. 63, p. 11.

respect, the Martens Clause¹¹³ – in sum, anything not explicitly prohibited by IHL is not automatically permissible – may play a crucial role. The Martens Clause has been treated as customary international law applicable during armed conflict, and was reaffirmed in slightly different wording by numerous treaties and conventions during the twentieth century, including the 1949 Geneva Conventions and their Additional Protocols of 1977.¹¹⁴ While many scholars make restrictive interpretations of its scope,¹¹⁵ even the most restrictive suggests that, even in cases outside the ambit of the Hague Conventions governing international armed conflict, civilian objects continue to be afforded a basic level of protection by the Martens Clause.¹¹⁶ That is to say, if any new weapons are to be used in armed conflict at sea, regardless of whether there are corresponding legal rules to prohibit or restrict such weapons, they still need to comply with the Martens Clause and the environmental obligations contained in other customary rules of international law.

Regarding weapons used in law enforcement, it is suggested that the use of toxic chemicals as weapons for law enforcement should be limited to riot control agents,¹¹⁷ and the use of firearms and ammunition that cause unwarranted injury or present an unwarranted risk is prohibited.¹¹⁸ Even though these requirements mainly concern the effects of weapons on human bodies, the underlying notions may also apply to the environmental effects of weapons: those weapons that may affect or impair the environment, including the marine environment, should not be used in law enforcement, and at the same time, necessary measures must be taken in law enforcement actions to prevent or reduce damage to environment.

Restrictions on methods of using force

International legal rules regarding methods of using force at sea must be updated. With respect to the use of force at sea in times of armed conflict, methods of naval warfare have evolved to an unprecedentedly complicated level, and this has posed new challenges to international law. The ENMOD Convention, the only special treaty to prohibit changes in the environment for military or any other

113 “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.” See Hague Convention II, Preamble.

114 Vladimir V. Pustogarov, “The Martens Clause in International Law”, *Journal of the History of International Law*, Vol. 1, No. 2, 1999, pp. 126–129; Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War?*, 3rd ed., Vol. 1, ICRC, Geneva, 2011, pp. 10–11.

115 The restrictive interpretations on the Martens Clause, see Ian Henderson, *The Contemporary Law of Targeting*, Martinus Nijhoff, Leiden and Boston, MA, 2009, pp. 29–30.

116 See Zeray Yihdego, “Darfur and Humanitarian Law: The Protection of Civilians and Civilian Objects”, *Journal of Conflict & Security Law*, Vol. 14, No. 1, 2009, p. 41; Michael Salter, “Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause”, *Journal of Conflict & Security Law*, Vol. 17, No. 3, 2012, p. 405.

117 ICRC, “Toxic Chemicals as Weapons for Law Enforcement”, 6 February 2013, available at: www.icrc.org/eng/resources/documents/interview/2013/02-06-toxic-chemical-weapons-law.htm.

118 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Art. 11(3).

hostile purposes, was adopted more than forty years ago and may not be able to adequately address such challenges. While the existing principles and rules from various areas of international law should be combined to deal with those challenges, it is also necessary to envisage a new, specifically designed convention to protect the environment, including the marine environment, from damage caused by the use of force.

With respect to the use of force in law enforcement, it has already been mentioned that States are required to take necessary measures to prevent, reduce and control pollution of the marine environment from any source. The phrase “any source” suggests that this provision covers all sources of pollution of the marine environment in a comprehensive way, including pollution resulting from the use of force in legal enforcement, regardless of the weapons used, the object or any parts of it attacked, or the degree of attack. However, it should be noted that under this clause, pollution should only be prevented, reduced and controlled, rather than being absolutely prohibited, which implies that some minor consequences for the marine environment are to be tolerated.¹¹⁹

To sum up, IHL, the law of the sea and international environmental law need to complement each other in order to better protect the marine environment. Given the sheer number of international treaties in related areas, it would be impossible to evaluate each one’s applicability to the use of force at sea. Although it is not entirely clear to what extent the law of the sea and international environmental law offer protection for the marine environment, it is important to consider their potential application during armed conflict, and this application should not go beyond the scope and terms of the relevant rules or be contrary to the special rules of IHL. The restrictions on means and methods of force used can be seen as precautionary approaches that are aimed at avoiding or minimizing damage to the marine environment. The precautionary principle and the Martens Clause should be interpreted and enhanced in order to promote the formation of an international legal regime aimed at better protecting the marine environment in the context of the use of force at sea.

119 See P. W. Birnie and A. E. Boyle, above note 74, p. 181; Robin Rolf Churchill, Alan Vaughan Lowe, *The Law of the Sea*, Manchester University Press, Manchester, 1999, p. 329.

Naval mines: Legal considerations in armed conflict and peacetime

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Abstract

The purpose of this article is to examine the key elements of the legal framework in which naval mines are used both across the spectrum of conflict and during peacetime. The article will also consider the legal issues associated with the use of mines by States in international armed conflict, and address the distinct legal issues which arise in non-international armed conflict, where the emergence of an increasing presence of non-State armed groups has been a hallmark of the late twentieth and early twenty-first centuries. The obligations placed upon States in peacetime, and under the law of neutrality, when the use and presence of naval mines is a relevant factor will also be analyzed.

Keywords: naval mines, naval warfare, armed conflict at sea, Hague Convention VIII.

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Introduction

The development of increasingly complex and lethal military technologies as part of the suite of means and methods of warfare which can be employed by military forces to achieve their objectives has been a notable feature of modern military forces. There is no sign that such development is slowing down either, as a cursory glance at the number and frequency of military industry exhibitions which are held around the globe can easily show.¹ In the naval environment, the scope of this development of technologies has included a number of seismic shifts in the types of platforms which have pre-eminence in naval operations at any particular time, as well as continual upgrading and refinement of the weapons systems which are an integral part of these platforms. For example, at the turn of the twentieth century the introduction of the dreadnought² by the British Royal Navy resulted in almost instant and complete obsolescence of the large naval platforms which existed at the time. Similarly, the threat from submarine warfare which emerged during the First World War has resulted in the need to continually develop a range of specific weapon systems and techniques that are purposely designed to counter that unique threat. Further, in the early years of the Second World War, a new and dominant threat emerged with the advances in aviation warfare, including the successful deployment of naval aviation assets through the medium of the aircraft carrier, which now remains the dominant symbol of naval power projection.

While developments in naval platforms have been stark and obvious in terms of the clear changes that have occurred in their physical characteristics, the situation in relation to weapon systems is a little less obvious. In some ways it can be considered that this is one area of naval warfare which has not really experienced the fundamental changes that have been a hallmark of many others. For example, the projectile which is fired from a warship's main gun may now be much smaller in size than before,³ but the basic design of the shell has not altered in any significant way since the earliest use of naval artillery.

1 For an indication of the size and scale of major military exhibitions, see, for example, the website for Euronaval 2016, the world meeting of naval technologies, which was held in Paris from 17 to 21 October 2016. Available at: www.euronaval.fr/58/programme (all internet references were accessed in December 2016).

2 The name "dreadnought" – "fear nothing" – refers to the first of a class of new ships that was built for the Royal Navy in the early 1900s. Subsequent fleets of battleships constructed by numerous navies derived from the dreadnought. The vessel which gave its name to this class of ships, HMS *Dreadnought*, was launched in 1906 and included revolutionary features for its time, such as vastly improved armour and greater numbers of large-calibre guns, as well as being powered by steam turbine. For a detailed analysis of the development, impact and characteristics of the dreadnought see Richard Hough, *Dreadnought: A History of the Modern Battleship*, Periscope Publishing, Penzance, 2003.

3 During the era of the battleship, the size of projectile fired from the main armament steadily increased, with the largest gun types firing projectiles of 15-inch (381 mm), 16-inch (406.4 mm) and 18-inch (457.2 mm) calibre. In modern times, the main armament of a warship includes a variety of weapon systems, but the largest guns in regular use range between 3-inch (76.2 mm) and 5-inch (127 mm) calibre. For information relating to naval guns in current use, see, for example, Royal Australian Navy, "Naval Guns", available at: www.navy.gov.au/fleet/weapons/naval-guns. The history of the Naval Gun Factory at the Washington Navy Yard provides detail on the steadily increasing size of naval guns in the early twentieth century. See Naval History and Heritage Command, *Washington Navy Yard: History of the Naval Gun Factory, 1883–1939*, available at: www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/w/washington-navy-yard-history-naval-gun-factory.html.

Similarly, in relation to naval mine warfare, the basic concept of an explosion occurring when a vessel strikes or is in the immediate vicinity of a mine is still a dominant feature of this means of naval warfare. This statement does not ignore the fact that there have been numerous developments in naval mine technologies, both in terms of offensive and defensive capabilities. Rather, the point being made is that the basic structure of the threat posed by naval mines is one area of military operations where the nature of the threat and the effect of the weapon system are largely the same as when naval mines were first developed. A contextual illustration of this point arises from the previous reference to the introduction of the dreadnought: one of the earliest British naval losses in the First World War occurred when HMS *Audacious*, a King George V-class battleship, struck a naval mine in October 1914.⁴ Despite being one of the most modern ships in the Royal Navy, the vessel was no match for a relatively simple naval mine and sank after striking the mine, without ever being involved in operations against the enemy.

The threat posed by mines is mentioned regularly in academic and military literature, but it seems to be invariably accompanied by a recognition that many navies are inadequately equipped to deal with this threat effectively. For example, in 2009 the US Navy reported that “more than a quarter-million sea mines of more than 300 types are in the inventories of more than 50 navies worldwide”.⁵ A more recent report noted that Iran has an estimated several thousand naval mines (perhaps as many as 20,000), while North Korea has 50,000, China 100,000 and Russia an estimated quarter-million.⁶

Prior to further discussion, it is necessary to consider the characteristics of naval mines. The main types of naval mines include limpet mines (although these devices are not within the scope of the present discussion, they are typically attached to a vessel’s hull by a swimmer), contact mines which may be moored to the ocean floor, drift mines, floating contact mines, remote-controlled mines and magnetic/acoustic/pressure mines. Naval mines with special characteristics include those that are delivered by air, mines with torpedo propulsion, vertical rising mines, hydrostatic depth control mines and “daisy-chain” mines (a mining technique that involves two or more mines being joined together by a length of cable so that when a ship passes between them, the mines all strike the vessel; this technique might have particular application in non-international armed conflict, where the potential use of maritime improvised explosive devices by non-State armed groups is perhaps most likely).⁷

4 See James Goldrick, *Before Jutland: The Naval War in Northern European Waters, August 1914–February 1915*, Naval Institute Press, Annapolis, MD, 2015, pp. 156–158.

5 US Navy, “21st Century U.S. Navy Mine Warfare: Ensuring Global Access and Commerce”, Program Executive Office for Littoral and Mine Warfare, Expeditionary Warfare Directorate, June 2009, p. 8.

6 Sydney J. Freedberg Jr, “Sowing the Sea with Fire: The Threat of Sea Mines”, *Breaking Defense*, 30 March 2015, available at: <http://breakingdefense.com/2015/03/sowing-the-sea-with-fire-how-russia-china-iran-lay-mines-and-how-to-stop-them/>.

7 See Scott C. Truver, “Taking Mines Seriously: Mine Warfare in China’s Near Seas”, *Naval War College Review*, Vol. 65, No. 2, 2012, pp. 33–36.

The illustrations used to set the scene in this article primarily refer to issues that occurred over a century ago. In some ways this is entirely fitting, as the primary legal instrument which deals with naval mines, Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines of 18 October 1907⁸ (Hague Convention VIII), also dates from that period. Despite many advances in both weaponry and the law governing armed conflict which have occurred since the early 1900s, there has been no further agreement on any international legal instrument which specifically deals with naval mines.⁹ As Hague Convention VIII, while dated, is the only treaty which specifically deals with the regulation of naval mine warfare in any type of conflict, this article will by necessity consider some of the other international legal instruments which are applicable in different situations in which naval mines might be used. Reference to a number of seminal international law cases which have involved situations where naval mines have been used will also form a key part of the legal analysis that will be undertaken.

Finally, this article has been constructed using a selective approach to each topic which is aimed at ensuring that sufficient information regarding key aspects is addressed, while noting that a greater level of detail on each particular aspect of naval mine warfare can be found elsewhere.¹⁰

Characteristics of naval mines

Before embarking on this legal analysis, it is appropriate to consider what basic and special characteristics make naval mines such a unique weapon in terms of both their design and purpose. From a design perspective, naval mines can be constructed in a surprisingly simple manner. At the most basic level, a contact naval mine may simply consist of amounts of high explosive which detonate upon impact if a vessel touches the mine. At the other end of the spectrum, we find naval mines that are activated by a complex and highly discriminating variety of acoustic, seismic pressure or magnetic signatures.¹¹ In terms of purpose, the primary reason for deploying a naval mine is to sink or damage vessels, with a consequent disruption of sea lanes and shipping that will permit control of the sea, or areas of the sea, as well as

8 Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, 36 Stat. 2332, The Hague, 18 October 1907 (Hague Convention VIII).

9 Sweden sponsored a number of proposals to develop a Protocol to the Conventional Weapons Convention dealing with the topic of naval mines, but in the face of little international support these proposals have not been progressed. See Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995 (San Remo Manual), p. 169; see also Yoram Dinstein and Fania Domb (eds), *The Progression of International Law: Four Decades of the Israel Yearbook on Human Rights*, Brill Nijhoff, Leiden, 2011, p. 375.

10 Recent papers that deal in greater detail with selected aspects of mine warfare, and provide a contemporary analysis of associated legal issues, were published in the Naval Mine Warfare Forum which appeared in *International Law Studies*, Vol. 90, 2014, available at: stockton.usnwc.edu/ils/vol90/iss1/.

11 For a description of mine types, see S. C. Truver, above note 7.

contributing to sea area denial. In fact, naval mines have been described as “amongst the oldest, cheapest and most dangerous anti-access/area denial (A2/AD) threats faced by the United States Navy”.¹² Of particular note is the observation that it is not actually necessary to deploy any mines in order to present a credible threat, as the mere capacity to threaten such deployment will be sufficient to raise a doubt regarding sea safety. Further, it has been observed that mines have been responsible for the vast majority of warship losses or serious damage that has occurred since the end of the Second World War.¹³

Historical context

One of the earliest examples of incendiary or explosive material as a means or method of naval warfare was the use of “Greek Fire” by the Byzantine Greeks in approximately 670 AD.¹⁴ While not directly analogous to the operation of a modern naval mine, the technique employed by the Greeks nevertheless demonstrated that naval warfare could be conducted in a manner that was devastating to opposing naval forces but did not require close-quarter fighting onboard the opponent’s vessel. Although sources provide varying accounts of the usage of mines at sea during the centuries which followed,¹⁵ there is little doubt that the development of weapons which possessed many of the elements at the core of the modern naval mine had occurred by the time the nineteenth century began.¹⁶ Naval mines were used in a number of conflicts during the nineteenth century, including the Crimean War, the American Civil War, the war between Russia and Turkey in 1877–78 and the war between China and France in 1884–85. Further use of naval mines occurred during the Boxer Rebellion in China at the end of the nineteenth century, and naval mines were extensively used during the Russo-Japanese war of 1904–05. In fact, it was the use of naval mines during the Russo-Japanese war which led to the inclusion of mines as a topic requiring

12 Dave Majumdar, “Sea Mines: The Most Lethal Naval Weapon on the Planet”, *The National Interest*, 1 September 2016, available at: nationalinterest.org/blog/the-buzz/sea-mines-the-most-lethal-naval-weapon-the-planet-17559.

13 *Ibid.* See also S. C. Truver, above note 7, p. 32; Andrew S. Erikson, Lyle J. Goldstein and William S. Murray, *Chinese Mine Warfare: A PLA Navy “Assassin’s Mace” Capability*, Naval War College, China Maritime Studies No. 3, 2009, p. 1.

14 For an explanation of “Greek Fire”, see: www.britannica.com/technology/Greek-fire.

15 See, for example, the brief commentary regarding the use and effectiveness of naval mines during the period from 1778 until the 1990s in S. C. Truver, above note 7, pp. 30–32.

16 Some scholars attribute the invention of the modern naval mine to the Chinese during the fourteenth century. See, for example, Joseph Needham, *Science and Civilisation in China*, Vol. 5, Part 7: *Military Technology: The Gunpowder Epic*, Cambridge University Press, Cambridge, 1986, pp. 192–209. For others, the focus is on the use of naval mines by Spain during the Siege of Antwerp during the sixteenth century: see Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War*, 3rd ed., Oxford University Press, Oxford, 2000, p. 104; Howard S. Levie, *Mine Warfare at Sea*, Martinus Nijhoff, Dordrecht, 1992, pp. 9–18.

attention during the Hague Conference of 1907, with the outcome being Hague Convention VIII.¹⁷

As an aside, it was during the American Civil War that a famous incident involving the use of naval mines occurred, when Admiral Farragut gave his oft-quoted (and perhaps misquoted) direction to “damn the torpedoes” when his naval forces were involved in battle at Mobile Bay. In fact, the “torpedoes” to which Farragut referred were an early version of a naval mine.¹⁸ His order followed the sinking of the ironclad *Tecumseh*, which had failed to stay within the red buoys marking the safe passage area which had been carefully surveyed by his staff for a number of weeks prior to Farragut’s ships entering Mobile Bay on 5 August 1864,¹⁹ and directed the commanding officers of the ships in his squadron to ignore the serious threat faced by their ships from mines that had been placed in the water to impede passage.

Subsequently, naval mines have been used in almost every major maritime conflict that has occurred during the twentieth and twenty-first centuries,²⁰ and due to the potency of the threat posed by naval mines, this use has been accompanied by the development of extensive mine counter-measure and clearing techniques which continue into the modern era.²¹

Legal framework

Hague Convention VIII

Hague Convention VIII is a relatively concise document, and it is appropriate to consider the key aspects of this instrument as a preliminary element of the

17 See above note 8. See also Steven Haines, “1907 Hague Convention VIII relative to the Laying of Automatic Submarine Contact Mines”, *International Law Studies*, Vol. 90, 2014, pp. 418–420. For a brief description of the use of naval mines during the Russo-Japanese war, see H. S. Levie, above note 16, pp. 17–18; see also David Letts and Rob McLaughlin, “Law of Naval Warfare”, in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, London, 2016, p. 271.

18 At the time, the weapons that are now known as “mines” were commonly referred to as “torpedoes” – hence the use of the latter term in the quote attributed to Farragut. See Tamara Moser Melia, “Damn the Torpedoes: A Short History of US Naval Mine Countermeasures, 1777–1991”, Contributions to Naval History No. 4, Naval Historical Center, Washington, DC, 1991, pp. 2, available at: edocs.nps.edu/dodpubs/topic/general/DamnTorpedoesWhole.pdf; H. S. Levie, above note 16, p. 16.

19 See T. M. Melia, above note 18, pp. 1–3.

20 Naval mines were used extensively during the First World War, the Second World War, the Korean War, the Vietnam War, the 1980–88 Iran–Iraq War, the 2003 Gulf War and the 2011 Libyan conflict. See Wolff Heintschel von Heinegg, “Methods and Means of Naval Warfare in Non-International Armed Conflicts”, in Kenneth Watkin and Andrew J. Norris (eds), *Non-International Armed Conflict in the Twenty-First Century*, Vol. 88, US Naval War College, International Law Studies, Newport, 2012, pp. 211–212; see also selected examples of mine warfare practices from the First World War and Second World War in Peter Jones, *Australia’s Argonauts*, Echo Books, West Geelong, 2016, pp. 123, 291, 339–340, 368.

21 A recent example of the emphasis placed on the development of modern mine-clearance and warfare capabilities can be seen in the establishment of Australian Mine Warfare Team 16 by the Royal Australian Navy, which is intended to “deliver a sustainable, full-spectrum, deployable mine warfare capability to enable future expeditionary maritime task group operations”. See: news.navy.gov.au/en/Jul2016/Fleet/3079/New-mine-warfare-team-established.htm.

analysis undertaken here. The brevity of Hague Convention VIII is not surprising given that the Hague Conference of 1907 produced thirteen Conventions (and one Declaration), and each Convention dealt with a discrete topic related to warfare that had relevance at the time.²²

One clear piece of evidence regarding the potential effect of naval mines on commercial and naval shipping can be gleaned by considering that during the Hague Conference, the position advocated by certain British commercial interests was for Britain to seek an outright ban on the use of naval mines in any circumstances.²³ This approach was not supported by the Royal Navy, which was the dominant naval force at the time, and the ultimate result was an attempt by Britain at the Conference to obtain tight restrictions on the use of mines at sea.²⁴ There was recognition among other participants at the Conference, who had indicated little (if any) support for the position adopted by British commercial interests, that there should be some legal limits placed on the manner in which mines were used in armed conflict at sea.

Reference to the full title of Hague Convention VIII – Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines – reveals that only one type of mine is actually the subject of the Convention, namely “automatic contact mines”.²⁵ However, it can be argued that the principles regarding the use of mines during armed conflict that are derived from Hague Convention VIII have now become part of the customary law governing the use of all types of these weapons.²⁶

In terms of detail, Hague Convention VIII contains thirteen articles, of which only the first seven can really be considered to be the operative part of the

22 See the Proceedings of the Hague Peace Conferences at: www.loc.gov/rr/frd/Military_Law/pdf/Hague-Peace-Conference_1907-V-1.pdf, especially pp. 272–288 in relation to that part of the Conference which dealt with naval mines.

23 S. Haines, above note 17, p. 420.

24 *Ibid.* See also the San Remo Manual, above note 9, p. 168, where it is contended that at “the time the Convention was drafted, it was deplored that no absolute prohibition could be agreed upon”. See also Y. Dinstein and F. Domb (eds), above note 9, p. 375, where it is noted that “Great Britain had urged outlawing the use of automatic contact mines in open sea areas beyond the belligerents’ territorial waters” as a means of preserving its naval dominance, but this proposal was not supported as “the majority of States represented at The Hague ... [were] ... unwilling to refrain from the use of this most effective means of naval warfare”.

25 The title of Hague Convention VIII is “relative to the Laying of Automatic Submarine Contact Mines”, but the text of the Convention excludes the word “submarine” and refers only to “automatic contact mines”.

26 See, for example, the San Remo Manual, above note 9, p. 169, where it is noted that “practice by belligerents in the first Gulf War showed that the provisions of the Convention have continued validity in modern naval warfare”. The status of Hague Convention VIII as customary international law is left as an open question by A. Roberts and R. Guelff, above note 16, p. 103, who merely observe that “to the extent that any aspect of the Convention may be considered customary international law, such aspect would be applicable to all States and the Convention’s ‘general participation clause’ (Article 7) would cease to be relevant in that regard”. Note also the quotation regarding the Soviet view of Hague Convention VIII in H. Levie, above note 16, p. 175, that “for all its weak points the VIII Hague Convention is regarded as customary international law of the sea”. Haines also considers that “the rules contained in the 1907 Convention are regarded as having attained customary status in relation to automatic contact mines alone”, and he observes that “when combined with other elements of customary law” the result was the production of the rules which are provided in the San Remo Manual: S. Haines, above note 17, p. 443.

Convention.²⁷ Further, it is only Articles 1–5 of Hague Convention VIII that provide the essential elements of the law which now governs the use of naval mines in armed conflict (both international armed conflict (IAC) and non-international armed conflict (NIAC)). These articles, according to the authors of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (San Remo Manual), can be summarized into the following rules:²⁸

- mines can only be used for legitimate military purposes (including sea denial to the enemy);
- belligerents can only lay mines which become neutralized when effective control over the mine is lost;
- free-floating mines are forbidden unless they are directed against a military objective and they become harmless within an hour after control over the mine is lost;
- notification and recording of mine locations must occur, especially so that such locations can be cleared of mines once hostilities end;
- belligerents are not permitted to deploy mines in neutral waters or to use mines in a way that will have the practical effect of preventing passage between neutral waters and international waters.

27 The first seven articles of Hague Convention VIII are:

Article 1. It is forbidden:

1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;

2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;

3. To use torpedoes which do not become harmless when they have missed their mark.

Article 2. It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.

Article 3. When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel.

Article 4. Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral Power must inform ship owners, by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel.

Article 5. At the close of the war, the Contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.

Article 6. The Contracting Powers which do not at present own perfected mines of the pattern contemplated in the present Convention, and which, consequently, could not at present carry out the rules laid down in Articles 1 and 3, undertake to convert the materiel of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements.

Article 7. The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

28 These “rules” are a summary that has been extracted from the commentary relating to mines as a means of warfare which are identified in the San Remo Manual, above note 9, pp. 169–176.

Elaboration of each of these rules as they apply in IAC, NIAC and peacetime, and as they affect the behaviour of neutral States, will be undertaken throughout the remainder of this article.

The ICJ decisions

The use of naval mines has been featured prominently in three key decisions of the International Court of Justice (ICJ): the *Corfu Channel* case,²⁹ the *Nicaragua* case³⁰ and the *Oil Platforms* case.³¹ As there are elements from each of these decisions which can be applied to the legal considerations associated with the use of naval mines in IAC, NIAC and peacetime and by neutral States, these three cases provide a convenient point from which to commence further evaluation.

The *Corfu Channel* case

The circumstances of the *Corfu Channel* case³² arose in the immediate aftermath of the Second World War, and involved the passage undertaken by some British warships in the eastern part of the Mediterranean Sea off the coast of Albania in 1946. Although global conflict had concluded the previous year, tensions still existed in various locations throughout the world as States tried to adjust to what was hoped would be a lasting period of peace. In Albania, as the regime of Enver Hoxha sought to consolidate its power following the conclusion of the Second World War, the country was developing as a socialist State with antipathy towards Western powers. Against this background, some ships of the British Mediterranean Fleet undertook passage through the Corfu Channel in May 1946 and were fired upon by Albanian shore batteries. Great Britain demanded an apology from Albania, but this was refused. Evidence presented to the ICJ showed that in September 1946, Great Britain was considering establishing diplomatic relations with Albania and sought to determine if the Albanian government had “learnt to behave themselves”.³³ In particular, the British government wanted to know if any British ships had passed through the Corfu Channel since the passage of its fleet in May, and advice was provided by the commander-in-chief of the Mediterranean Fleet that no ships had done so but a further squadron of ships would sail through the Corfu Channel in October 1946.³⁴

It was during the October transit that tragedy descended upon the British vessels, with two of them striking mines; nearly fifty sailors lost their lives, and

29 ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949.

30 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986.

31 ICJ, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003.

32 A comprehensive analysis of the current relevance of the *Corfu Channel* case can be found in Sarah Heathcote, Karine Bannelier and Theodore Christakis (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, Routledge, London, 2012.

33 ICJ, *Corfu Channel*, above note 29, p. 28.

34 *Ibid.*

around the same number were injured. The presence of naval mines was not expected by the British, as the Corfu Channel had been swept clear of mines the previous year and was therefore considered “safe” water. In direct response to the British vessels striking mines, a decision was made to implement Operation Retail,³⁵ which involved the clearance of mines from the Corfu Channel by British forces, including in areas that were considered to constitute Albanian territorial waters,³⁶ but without the permission of Albanian authorities. Diplomatic efforts to resolve the ensuing dispute between Britain and Albania, including obtaining the involvement of the United Nations (UN) Security Council, proved to be unsuccessful and the matter was referred to the ICJ by the United Kingdom.³⁷

For present purposes it is not necessary to undertake a full analysis of the case that was brought before the ICJ, but in terms of relevance to issues affecting the use of naval mines, some important principles emerged. First, it is clear from the judgment that a coastal State may deploy mines in its territorial waters in times of peace but in so doing it must not allow an unreported danger to shipping to exist.³⁸ In the *Corfu Channel* case, the ICJ found that the facts presented supported the inescapable conclusion that the presence and location of the mines must have been known by Albanian authorities and accordingly there was a positive obligation placed upon Albania to ensure that notification of the danger to shipping was provided to the international community.³⁹ Second, there is no unilateral right available to a State which would permit its military forces to enter another State’s territorial sea and conduct mine-clearing operations in the absence of coastal State consent.⁴⁰ The rationale which underpins this principle can now be found in Article 2 of the 1982 UN Convention on the Law of the Sea (UNCLOS),⁴¹ which stipulates that a coastal State’s sovereignty extends to the territorial sea – hence any activity in the territorial sea by other States would have to be in conformity with the legal rights over that area of sea which the coastal State possesses. Accordingly, the mine-clearing in the Corfu Channel that was undertaken by British forces as part of Operation Retail was found to have violated Albanian sovereignty and was therefore a breach of international law.⁴² Finally, the third principle which emerged from the case that warrants

35 *Ibid.*, pp. 32–35. Operation Retail was conducted from 12 to 13 November 1946, when twenty-two submarine contact mines were discovered in the Corfu Channel and removed from their moorings by British forces.

36 At the time, there was no codified agreement on the maximum breadth of a State’s territorial waters, but there was wide acceptance of a maximum breadth of 3 nautical miles as a matter of customary international law. Codified agreement regarding the maximum breadth of the territorial sea (12 nautical miles) was finally reached with the entry into force of the United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994) (UNCLOS).

37 ICJ, *Corfu Channel*, above note 29, pp. 5–7.

38 See the discussion by the Court regarding the factual situation that existed in the Corfu Channel during the period May–October 1946: *ibid.*, pp. 19–22.

39 *Ibid.*, pp. 22–23.

40 *Ibid.*, pp. 32–35.

41 UNCLOS, Art. 2.

42 ICJ, *Corfu Channel*, above note 29, p. 35.

consideration in the present context is the positive obligation placed upon a State to ensure that its waters are not used by other States (or organizations – including non-State actors) in a manner that would present a danger to vessels which are legitimately using those waters. In this regard, the argument raised by Albania that it had not laid mines in the Corfu Channel, but that the mines must have been placed there by unknown agents without Albanian knowledge or consent, was rejected by the ICJ as being unsupported by the facts of the case, including the geographical characteristics of the area in which the mines were located.⁴³ The Court considered there was simply no possibility that unknown agents could have deployed mines in the Albanian waters of the Corfu Channel without being observed by the Albanian authorities, who admitted in evidence that they were keeping a very close watch over the Corfu Channel.⁴⁴

The *Nicaragua* case

The use of naval mines in the *Nicaragua* case occurred in the context of a NIAC which was taking place between the government of Nicaragua and groups which sought to displace that government.⁴⁵ Relevantly, the United States provided support in a number of ways to one of these groups, the contras, in their efforts to overthrow the Nicaraguan government. It was the nature of this support, and the issue of whether elements of the support constituted violations of international law, that formed the foundation of the case brought against the United States by Nicaragua.

One element of the support provided to the contras by the United States was the provision of assistance by deploying naval mines in the internal waters and the territorial sea of Nicaragua.⁴⁶ In relation to this issue, the ICJ determined that the United States had breached the following obligations under customary international law: not to use force against another State, not to intervene in the internal affairs of another State, not to violate the sovereignty of another State and not to interrupt peaceful maritime commerce.⁴⁷

In reaching this conclusion, the ICJ considered the factual circumstances that existed in Nicaraguan internal waters and territorial sea during February and March 1984. The Court noted the Nicaraguan claim that twelve vessels struck mines during this period and that “14 people were wounded and two people

43 *Ibid.*, pp. 18–22.

44 *Ibid.*, pp. 21–22.

45 The two main parties involved in the conflict were the Sandinistas, who came to power in Nicaragua at the conclusion of the revolution of 1978–79, and the contras, which is the generic name given to a number of groups which were attempting to overthrow the Nicaraguan government in the early 1980s. The contras received various types of support from the United States.

46 See ICJ, *Nicaragua*, above note 30, paras 75–80, 215, 292.

47 *Ibid.*, para. 292, finding 7. Although not central to the theme of this article, as a consequence of the finding regarding the deployment of naval mines, the ICJ also found the United States to be in breach of its obligations under the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua, 367 UNTS 3, 21 January 1956 (entered into force 24 May 1958).

killed”.⁴⁸ The Court also noted that the exact location and precise type of mine used was information that was not clarified before it.⁴⁹ The Court undertook further analysis of the evidence regarding the laying of mines that was made available to it, and although there is some discrepancy among the information provided to the Court, it was nevertheless able to conclude that

on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.⁵⁰

This finding by the ICJ represents clear authority that the United States had breached its international legal obligations under customary international law by failing to disclose the existence and the location of the mines it had laid in the waters of Nicaragua.⁵¹ Although not representing the unanimous view of the ICJ, the finding also clearly indicates that the Court considered there is an obligation placed upon those who deploy naval mines, even in times of armed conflict, to ensure that those mines do not interfere with the lawful activities of other users of maritime areas. However, the Court expanded on this point by stipulating that “the laying of mines in the waters of another State without any warning or notification is not only an unlawful act but also a breach of the principles of humanitarian law underlying the Hague Convention No. VIII of 1907”.⁵²

In some ways this reasoning by the ICJ represents an expanded interpretation of Hague Convention VIII, as the Court applied “the principles of humanitarian law underlying the specific provisions of the Convention”⁵³ to the factual circumstances that existed in the *Nicaragua* case. In doing so, the Court relied on its earlier finding that Albania’s obligations in the *Corfu Channel* case were based on “certain general and well-recognized principles”, including “elementary considerations of humanity”.⁵⁴

In this regard, it is clear from the ICJ’s consideration of the use of naval mines in the *Nicaragua* case that there are limits applicable to the manner in

48 ICJ, *Nicaragua*, above note 30, para. 76.

49 *Ibid.*

50 *Ibid.*, para. 80.

51 *Ibid.*, para. 292, finding 8.

52 ICJ, *Nicaragua*, Judgment (Merits), Summary, 27 June 1986, p. 166, available at: www.icj-cij.org/docket/files/70/6505.pdf.

53 ICJ, *Nicaragua*, above note 30, para. 215.

54 *Ibid.*; ICJ, *Corfu Channel*, above note 29, p. 22. The Court noted that such “elementary considerations of humanity” are “even more exacting in peace than in war”.

which mines are deployed, and these limits apply regardless of whether the mines are used in peacetime or during armed conflict. Further discussion of this point will occur below in relation to both NIAC and the obligations placed upon neutral States.

The *Oil Platforms* case

The factual circumstances at the time of the incidents which gave rise to the *Oil Platforms* case were complex, as they emanated from a lengthy, and ongoing, IAC between Iran and Iraq.⁵⁵ In short, the case arose following military action that the United States took against certain Iranian oil platforms in October 1987 and April 1988 following attacks against US-owned or US-flagged vessels. At the time there were a large number of naval and merchant vessels from a variety of States operating in the region, with the naval vessels involved in operations aimed at ensuring that oil supplies out of the Gulf could continue to flow safely.

The evidence provided to the ICJ regarding the use of naval mines during the IAC indicated that both Iran and Iraq were involved in extensive mine-laying activities throughout the conflict.⁵⁶ It was also questionable whether adherence to the legal requirements associated with the deployment of naval mines by both Iran and Iraq was in conformity with their respective obligations under customary international law.⁵⁷

In justifying the action that it took in attacking an Iranian oil platform in 1987, the United States referenced a number of attacks against US shipping, including vessels that had been re-flagged to the United States.⁵⁸ The United States also claimed that shots were fired at a US Navy helicopter by Iranian gunboats and from personnel located on the Iranian Reshadat oil platform.⁵⁹ Finally, the United States claimed that it had caught an Iranian vessel (the *Iran Ajr*) in the process of laying mines in international waters; Iran disputed this claim by stating that the vessel was indeed carrying mines, but only for the purpose of transporting them to another location.⁶⁰

The United States justified the attacks that took place against the Salman and Nasr oil platforms on 18 April 1988 on the basis of self-defence following the

55 The IAC between Iran and Iraq lasted from 1980 until 1988 and involved maritime, air and ground forces from both States.

56 ICJ, *Oil Platforms*, above note 31, para. 71.

57 ICJ, *Oil Platforms*, “Separate Opinion of Judge Simma”, *International Law Reports*, Vol. 130, p. 500, para. 43.

58 See ICJ, *Oil Platforms*, above note 31, para. 120, for a comprehensive list of vessels associated with the United States that were attacked in the Gulf between July 1987 and April 1988. The *Bridgeton*, which was re-flagged from Kuwait to the United States, struck a mine near Kuwait on 24 July 1987. See “Bridgeton is Latest of Five Gulf Tankers to Hit a Mine”, *Los Angeles Times*, 25 July 1987, available at: [articles.latimes.com/1987-07-25/news/mn-994_1_gulf-tankers](https://www.latimes.com/1987-07-25/news/mn-994_1_gulf-tankers). The *Texaco Caribbean*, which was operating under a charter to US interests, struck a mine near Fujairah on 10 August 1987: see “Texaco Supertanker Loaded with Iranian Oil Hits Mine: Cargo Leak, None Hurt, Owner Says”, *Los Angeles Times*, 10 August 1987, available at: [articles.latimes.com/1987-08-10/news/mn-230_1_tanker](https://www.latimes.com/1987-08-10/news/mn-230_1_tanker).

59 ICJ, *Oil Platforms*, above note 31, para. 63.

60 *Ibid.*

USS *Samuel B. Roberts* striking a mine four days earlier.⁶¹ After conducting mine-clearing operations, with the assistance of other States, in the immediate vicinity of the position where the USS *Samuel B. Roberts* was struck, a number of mines with Iranian serial numbers were recovered.⁶² The United States contended that these recovered mines and other evidence all pointed to Iranian culpability for the mine that struck the USS *Samuel B. Roberts*; Iran rejected this claim.⁶³ The Court's assessment of the evidence presented to it regarding the laying of mines, and the responsibility for laying the mine that was struck by the USS *Samuel B. Roberts*, was that the evidence was "highly suggestive, but not conclusive".⁶⁴

It is interesting, if not a little puzzling, to note the ICJ's reasoning in relation to the question of whether the incident involving the USS *Samuel B. Roberts* could amount to an armed attack, which in turn would justify the United States taking action against Iran in self-defence. The Court did "not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence'; but in view of all the circumstances"⁶⁵ of the case, the Court was unable to conclude that the United States was justified in using force in self-defence against the two Iranian oil platforms "in response to an 'armed attack' on the United States by Iran".⁶⁶ In reaching this conclusion, the Court was simply unwilling to accept the contention put forward by the United States that the mine which struck the USS *Samuel B. Roberts* had been laid by Iran. The Court observed that both belligerents had engaged in mine-laying operations at the time and therefore the Court could not be certain that Iran was responsible for laying the particular mine that struck the USS *Samuel B. Roberts*.

Naval mines and the spectrum of armed conflict

The following part of the article will use the principles that can be gleaned from the above three cases, and the above analysis of Hague Convention VIII, as the primary basis from which to consider the impact of naval mines on situations that arise in IAC, NIAC and peacetime. The effect on neutral States, where relevant, will also be considered.

Before proceeding further, a preliminary issue that will be briefly considered is the potential consequences that might arise if the deployment of naval mines in certain circumstances can be viewed as a breach of the *jus ad bellum* by constituting a "threat or use of force" contrary to the UN Charter⁶⁷

61 *Ibid.*, para. 67.

62 *Ibid.*, para. 69.

63 *Ibid.*, paras 69–70.

64 *Ibid.*, para. 71.

65 *Ibid.*, para. 72.

66 *Ibid.*

67 Charter of the United Nations, 1 UNTS XVI, 24 October 1945 (UN Charter), Art. 2(4). For additional detail regarding naval mines and the *jus ad bellum*, see David Letts, "Beyond Hague VIII: Other Legal Limits on Naval Mine Warfare", *International Law Studies*, Vol. 90, 2014, pp. 449–451.

and customary international law. It is certainly feasible that a State could offend the requirement to refrain from threatening the “territorial integrity or political independence”⁶⁸ of another State through the laying of naval mines in areas of the sea which directly affect that State.⁶⁹ One threshold issue that would arise in such circumstances is whether the laying of naval mines *per se* would constitute an armed attack and therefore trigger the right to respond to this action using the “inherent right of self-defense”.⁷⁰ Alternatively, the laying of naval mines by a State might be part of a response to a threat or use of force and in that sense constitute part of the action that a State can legitimately take when exercising its right of self-defence.

Of course, any assessment of action taken by States in laying naval mines will depend on the factual circumstances that exist in a given situation, and this brief comment on one element of the *jus ad bellum* does not adequately address the complexity of this topic. Nevertheless, the illustration is provided to demonstrate that the legal characterization of the use of naval mines may vary across the entire spectrum of laws applicable to conflict, including the *jus ad bellum*, and this will obviously impact on the legality of any response taken by a State.

International armed conflict

When considering the use of naval mines in IAC, the situation is reasonably clear in terms of the applicable treaty law, which as noted earlier is limited to Hague Convention VIII – and as a strict matter of law only applies to automatic contact mines. In relation to the question of whether there is agreement regarding the status of the key provisions of Hague Convention VIII being considered as customary international law, there are two related aspects to consider. The first issue is whether the operative articles of Hague Convention VIII that deal with automatic contact mines can be considered part of customary international law, and the second is whether these principles can be extended to cover the use of naval mines generally in IAC – regardless of the type of mine deployed.⁷¹ It is submitted that the key principles regarding the manner in which naval mines may be used in IAC that have been identified above do now constitute customary international law and are therefore binding on States regardless of whether or not the State is party to Hague Convention VIII.⁷² Evidence to support this statement

68 *Ibid.*

69 This issue was one of the complaints raised against the United States in the *Nicaragua* case.

70 UN Charter, above note 67, Art. 51.

71 See commentary in the San Remo Manual, above note 9, p. 169, where it is noted that “the provisions of the Convention have continued validity in modern naval warfare”.

72 For extensive analysis of the customary international law status of Hague Convention VIII, see James J. Busuttill, *Naval Weapons Systems and the Contemporary Law of War*, Oxford University Press, Oxford, 1998, pp. 29–71, especially pp. 78–79.

can be found in the military law manuals of a number of States⁷³ and can also be found in the San Remo Manual.⁷⁴ Further, the three ICJ decisions which have been referred to earlier all acknowledge the customary legal principles that underpin Hague Convention VIII.

It is therefore clear that in IAC the use of naval mines in a manner which offends the operative parts of Hague Convention VIII, referred to above, is prohibited. Accordingly, naval mines, in particular mines that do not become harmless within a short period after control over them is lost, may not be used in circumstances where control over them is lost and they therefore pose an indiscriminate threat to all shipping. This prohibition reflects the requirement for military operations to be conducted only against military objectives. Laying naval mines that are solely targeted at commercial shipping is also not permitted, which reflects the prohibition in Article 2 of Hague Convention VIII, and if a belligerent loses control of its mines, notification of their presence (i.e., as a danger to shipping) should occur. There is also a prohibition placed on laying naval mines in the waters of neutral States,⁷⁵ as to do so would clearly be a breach of the neutral status of the State in question, and a requirement to assist with mine-clearing operations at the conclusion of hostilities.

Before turning to discussion of NIAC, it is useful to provide brief consideration of the ambiguity that accompanies warfare occurring in the “Gray Zone”⁷⁶ and assess what the impact, if any, might be for the use of naval mines. The main characteristics of Gray Zone operations include uncertain legal status of the conflict itself, lack of certainty regarding the status of participants and their objectives, and the predominant use of unconventional means and methods of warfare.⁷⁷ These types of operations may provide particular attraction for the use of naval mines in either offensive or defensive roles, especially if such use could be accomplished in a “set and forget” context. However, in order for such use to be lawful it is considered that certain basic concepts of warfare, especially the principle of distinction, would have to be adhered to. Additionally, the legal status of waters where naval mines are deployed in Gray Zone operations would also have to be considered, as would the applicability of legal sanction, including

73 For example, the recently released US Law of War Manual includes repeated reference to Hague Convention VIII as the authority for many of its contents: US Department of Defense, *Law of War Manual*, 2015 (US Law of War Manual), pp. 909–914. The Manual, which is published online and regularly updated, can be accessed at the US Department of Defense “Publications” web page, available at: www.defense.gov/News/Publications. This practice is also adopted by the UK Ministry of Defence in the *Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004, amended in 2013, paras 13.52–13.64, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf. A convenient source of access to a selection of military law manuals is provided by the US Naval War College’s Stockton e-portal, available at: usnwc.libguides.com/c.php?g=86619&p=557511.

74 See, generally, San Remo Manual, above note 9, pp. 168–176.

75 *Ibid.*, p. 173; see also US Law of War Manual, above note 73, p. 913.

76 For an assessment of the “Gray Zone”, see Hal Brands, “Paradoxes of the Gray Zone”, *Foreign Policy Research Institute E-Notes*, 5 February 2016, available at: www.fpri.org/article/2016/02/paradoxes-grayzone/.

77 See Joseph L. Votel, Charles T. Cleveland, Charles T. Connett and Will Irwin, “Unconventional Warfare in the Gray Zone”, *Joint Force Quarterly*, Vol. 80, No. 1, 2016.

potential criminal prosecution, in the case of the use of mines in circumstances where an IAC did not exist. The issue has considerable complexity, and further contemplation is beyond the scope of this article.

Non-international armed conflict

Consideration of the legal issues relevant to naval warfare in NIAC is reasonably scant. Part of the reason for this situation may be that naval operations do not occur in NIAC with the same frequency with which land operations are undertaken,⁷⁸ and therefore material for analysis and case studies is much less available than is the case with IAC. As an example, writing in 1987, Ronzitti undertook an extensive survey of agreements and documents that are part of the law of naval warfare, but there was little focus on NIAC in this work.⁷⁹ Where there is mention of NIAC in Ronzitti's publication, it is approached from the perspective of belligerency and civil war,⁸⁰ using the lens of Article 1(4) of Additional Protocol I⁸¹ as the mechanism for the analysis undertaken in order to determine whether a given situation constitutes IAC or NIAC, and in particular the potential consequences for those taking part. While this approach has its appeal, there is a certain limitation inherent in this methodology as Article 1(4) applies to IAC and is focused on certain types of conflict, namely those that emanate from fights against "colonial domination and alien occupation and against racist regimes". Therefore Article 1(4) does not cover situations where NIAC is the applicable legal regime and accordingly would not, for example, have applied during the Sri Lanka NIAC that occurred between 1983 and 2009.⁸²

It might be expected that Additional Protocol II (AP II)⁸³ would have some provisions that are directly applicable to naval warfare in NIAC, but perusal of AP II will provide little satisfaction. In relation to the field of application of AP II, Article 1 is clear that a NIAC must occur "in the territory of a High Contracting Party"; this covers naval operations during a NIAC that take place in the internal waters and

78 Natalino Ronzitti, "Naval Warfare", *Max Planck Encyclopedia of Public International Law*, para. 35, available at: opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e342#law-9780199231690-e342-div1-11.

79 Natalino Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff, Dordrecht, 1988.

80 *Ibid.*, pp. 10–13.

81 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I).

82 The Sri Lanka NIAC is unique in the sense that the Liberation Tigers of Tamil Eelam, which was the name of the group involved in the armed conflict against the Sri Lanka government, had a large and capable naval force (the "Sea Tigers") that included a mine-laying capability. N. Manoharan, "Tigers with Fins: Naval Wing of the LTTE", IPCS Article No. 1757, 1 June 2005, available at www.ipcs.org/article_details.php?articleNo=1757&submit=Jump; "Sri Lanka Country Profile: Timeline", *BBC*, 21 September 2016, available at: www.bbc.com/news/world-south-asia-11999611; "Liberation Tigers of Tamil Eelam (LTTE)", *South Asia Terrorism Portal*, available at: www.satp.org/satporgrtp/countries/shrilanka/terroristoutfits/Ltte.htm.

83 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II).

territorial sea of a State, but not those that occur in areas beyond the outer limit of the territorial sea.⁸⁴ Consequently, it is clear that during a NIAC naval mines can be used by the parties to the conflict in both the internal waters of the State and its territorial sea, but the position in relation to other areas of the sea is less certain and the absence of practical examples to draw upon does not assist in clarifying the situation. It has, however, been asserted that if a non-State party to a NIAC attempted to lay mines in the maritime zones of another State, a swift response from that State would inevitably occur.⁸⁵

Other contemporary publications that deal with NIAC are almost completely silent on the topic of naval warfare. For example, the *Manual on the Law of Non-International Armed Conflict* makes only very brief reference to NIAC and naval warfare.⁸⁶ Sivakumaran's comprehensive evaluation of the law of NIAC⁸⁷ only refers to naval warfare in the briefest manner, when he cites the San Remo Manual⁸⁸ as being among those manuals that have contributed to the growth and development of international humanitarian law during the latter part of the twentieth century. Otherwise, the topic of naval warfare is simply not addressed by Sivakumaran in his book. Similarly, in the preface to Dinstein's recent publication dealing with NIACs, he notes their "preponderance and intensity",⁸⁹ yet the ensuing pages are again scant in terms of their discussion of any issues directly arising from naval warfare in NIAC.

Notwithstanding the relative scarcity of published material regarding naval warfare and NIAC,⁹⁰ there are clearly laws which apply to the use of naval mines during NIAC, especially in terms of the manner in which these weapons are deployed. Support for this statement can be obtained from the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case, where it was stated that

customary rules have developed to govern internal strife. These rules ... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.⁹¹

84 See W. H. von Heinegg, above note 20, pp. 217–219.

85 *Ibid.*, p. 219.

86 Michael N. Schmitt, Charles H. B. Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict with Commentary*, International Institute of Humanitarian Law, San Remo, 2006, p. 30, where the authors note the use of a free-floating naval mine as an example of an indiscriminate (and therefore prohibited) weapon in NIAC.

87 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012.

88 *Ibid.*, p. 438.

89 Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, p. xiii.

90 See comments on this topic in Rob McLaughlin, "The Law Applicable to Naval Mine Warfare in a Non-International Armed Conflict", *International Law Studies*, Vol. 90, 2014, pp. 476–479.

91 ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 127.

Applying this logic, it is beyond dispute that mines which are used during a NIAC in an indiscriminate manner, such as free-floating mines in a sea area where there is a large volume of shipping, would offend the fundamental principle of distinction that governs all forms of armed conflict. Lack of publication of the existence of a minefield would also violate what can now be considered to be the basic legal requirements for the use of naval mines during armed conflict, including NIAC.⁹² There are other ways in which mines could be used in NIAC that would be equally problematic. For example, using mines to institute a blockade in circumstances where the sole purpose of the blockade was to starve the civilian population would not be permissible, as starvation is not permitted as a method of warfare in IAC⁹³ or NIAC.⁹⁴

It is clear that not all the rules that apply in IAC will directly apply in NIAC, due at least in part to the fact that there will always be at least one non-State party participating in a NIAC. Another distinction between IAC and NIAC is that the State involved will, assuming that it is successful against its opponent, most likely wish to pursue criminal sanctions against those who have participated in the conflict. Therefore some of the obligations that are placed upon States in IAC will simply not be able to be addressed by at least one of the parties to a NIAC.

A final general observation regarding NIAC is that States may consider that they obtain some advantage from the relative paucity of rules which directly and clearly apply during NIAC. If this line of reasoning is valid, States may take the view that during NIAC there is scope to act in any manner not expressly prohibited by international law (applying the “*Lotus* principle”),⁹⁵ and that there is thus an advantage to be gained by leaving the current incomplete suite of rules applicable in NIAC extant.

Neutral States

The implications for neutral States are equally significant and flow from the requirement, under the law of neutrality, for a neutral State to behave in a manner that reflects its neutrality during any armed conflict. One preliminary remark, which distinguishes situations involving neutral States from peacetime, is that for the law of neutrality to apply there must be an armed conflict under way – that is, there must be a conflict to which a State has by its words or actions clearly established that it is neutral. In such situations, it is well established that

92 W. H. von Heinegg, above note 20, p. 221; this principle also follows the reasoning in the *Nicaragua* case, above note 30, para. 215.

93 AP I, Art. 54(1).

94 AP II, Art. 14; see also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 53, available at: ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule53.

95 Permanent Court of International Justice, *The Case of S. S. Lotus (France v. Turkey)*, Judgment, *PCIJ Series A*, No. 10, 7 September 1927.

the belligerents are not permitted to lay their mines in the internal waters, territorial sea or archipelagic waters of the neutral State.⁹⁶

However, such restrictions do not apply to a neutral State in relation to its own waters. One way in which a neutral State may seek to protect its neutrality is by deploying naval mines in its own internal waters, territorial sea or archipelagic waters as a means of deterring the belligerents from conducting their operations in those areas. Such action would need to be cognizant of passage rights that vessels of other States enjoy in the territorial sea and archipelagic waters, and would therefore necessarily be accompanied by appropriate notification to shipping that there is a naval mine danger in such waters.⁹⁷

In the *Nicaragua* case, the ICJ recognized the right of neutral States to lay mines in their own waters, citing Article 4 of Hague Convention VIII as authority and noting the requirement for advance notification of the presence of mines: “Neutral Powers which lay mines off their own coasts must issue a similar notification, in advance.”⁹⁸

One other matter that will be remarked upon regarding neutral States is the issue of whether they are permitted to conduct mine-clearing activities in sea areas outside their territorial or archipelagic waters. It has been suggested that any such activity “must be approached cautiously and preferably conducted in a multinational context vice unilaterally”,⁹⁹ but the view taken here is that there is no legal requirement for mine-clearing activity by a neutral State to be undertaken as part of a multinational operation. It may indeed be preferable for the sake of appearance, but the neutrality of any State will be a question of fact in the particular circumstances. It is therefore considered that mine-clearance activities in areas outside of a belligerent’s territorial sea or archipelagic waters for the purpose of ensuring safe passage for a neutral State’s vessels (or vessels trading with that neutral State) would not result in an automatic assessment that the actions are inconsistent with neutral status.

Peacetime

It is clear that in times of peace there are general obligations placed upon States to ensure their activities do not unlawfully interfere with the rights and activities of other States,¹⁰⁰ and it is equally clear that these obligations extend to the use of

96 The San Remo Manual, above note 9, notes the prohibition contained in Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 36 Stat. 2415, The Hague, 18 October 1907, Article 2, as well as the general prohibition on the use of force contained in Article 2(4) of the UN Charter; see also ICJ, *Nicaragua*, above note 30, para. 215.

97 See Wolff Heintschel von Heinegg, “Minelaying and the Impediment of Passage Rights”, *International Law Studies*, Vol. 90, 2014, for a detailed analysis of the impact of mine-laying on passage rights, including the impact on neutral States.

98 ICJ, *Nicaragua*, above note 30, para. 215.

99 W. H. von Heinegg, above note 20, p. 567.

100 See, generally, James Crawford, “State Responsibility”, *Max Planck Encyclopedia of Public International Law*, available at: opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093; see also ICJ, *Corfu Channel*, above note 29, p. 22.

naval mines by States in peacetime. Although the 1982 UNCLOS does not deal directly with the issue of naval warfare, it does reflect these general obligations in a number of its articles where the requirement for States to behave in a manner that acknowledges the rights of other States is stipulated. For example, in a State's territorial sea the passage of a foreign vessel will not be considered "innocent" if the vessel engages in activities which are "a threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State",¹⁰¹ and there is also specific reference to "the launching, landing or taking on board of any military device".¹⁰² The combined effect of these two articles is that the deployment of naval mines in a foreign territorial sea during peacetime would not be consistent with the rights available to a State under the UNCLOS.

The situation is different for the coastal State, as it possesses sovereignty over its territorial sea and may therefore, in the present context, place naval mines in its own territorial sea subject to the State complying with its duty not to "hamper" the innocent passage of foreign ships.¹⁰³ The UNCLOS places an additional requirement on the coastal State to "give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea".¹⁰⁴ In effect, any mining in this manner by the coastal State would almost certainly necessitate the use of mines that do not explode in an uncontrolled manner, and therefore automatic contact mines would not be suitable for this purpose but other modern types of mines could be so used.

Further, if the coastal State is laying mines as part of a temporary suspension of passage in its territorial sea, it is required to do so in a way that does not discriminate "in form or in fact among foreign ships" and also ensure that the temporary suspension is "duly published".¹⁰⁵

There are, however, certain situations where the deployment of naval mines in peacetime might appear to be inconsistent with the rights that are provided in the UNCLOS. The two most obvious of these are where it is contemplated that mines would be deployed in straits used for international navigation or in archipelagic sea lanes. In both cases, the passage rights that exist (transit passage¹⁰⁶ and archipelagic sea lanes passage¹⁰⁷ respectively) are non-suspendable and cannot be hampered,¹⁰⁸ so unless the coastal or archipelagic State can deploy its mines in a manner that does not offend this fundamental requirement, the laying of armed mines would not be permitted.¹⁰⁹

101 UNCLOS, Art. 19(2)(a).

102 *Ibid.*, Art. 19(2)(f).

103 *Ibid.*, Art. 24(1). A coastal State also has sovereignty over its internal waters (see UNCLOS, Arts 2, 8), where no passage rights exist for foreign vessels and therefore the notification requirements may not be as relevant; in the case of archipelagic States, sovereignty exists over archipelagic waters (see UNCLOS, Art. 49) and the notification requirements are synonymous with those in the territorial sea.

104 *Ibid.*, Art. 24(2); see also W. H. von Heinegg, above note 20, p. 572–573.

105 UNCLOS, Art. 25(3).

106 *Ibid.*, Art. 38(1).

107 *Ibid.*, Art. 53.

108 *Ibid.*, Arts 44, 54.

109 See W. H. von Heinegg, above note 20, p. 573.

In summary, the use of naval mines by a State in peacetime is not inconsistent with international law. There are legitimate security concerns which can be addressed by the use of mines at sea, but there are also requirements placed on the State that deploys mines to ensure they are deployed in a way that does not unduly interfere with other legitimate users of maritime areas. There is certainly no general “ban” on the use of naval mines in peacetime.

Future outlook and conclusion

One controversial issue that has not been addressed here is whether naval mines may be used to target war-sustaining efforts in IAC or NIAC. If an expansive view is taken, it would be possible to use naval mines in circumstances that are beyond those identified here – for example, the targeting of commercial shipping which is carrying goods that are being traded and the funds obtained are then used to pay for the cost of the conflict. The issue is a contentious one with no clear agreement among States, and reflects a wider argument regarding the differences that exist in defining the width of the legal standard that can be applied to determine the nature and character of military objectives.¹¹⁰ The issue is also especially relevant in an era when the vast majority of armed conflicts are now non-international, and the principle of distinction causes considerable difficulty in its practical application. However, further discussion of this topic will need to wait as it is both outside the scope of this article and also awaiting clearer evidence of State practice in this area.¹¹¹

In terms of the threat posed by naval mines, it is noted that significant naval mining capabilities are held by a relatively small number of States¹¹² and many of these mines are unsophisticated weapons that are unable to discriminate between targets. Naval mines are relatively inexpensive and can be easily deployed from any vessel with minimal training and without the need for special platforms, as was demonstrated during the Iran–Iraq war and the 1990–91 and 2003 Gulf wars. Truver makes the point that “in February 1991, the U.S. Navy lost command of the northern Arabian Gulf to more than 1,300 mines that had been sown by Iraqi forces”,¹¹³ and this observation provides an example of the impact that can occur

110 See the discussion on this topic in William H. Boothby, *The Law of Targeting*, Oxford University Press, Oxford, 2012, p. 106 (including the references in the footnotes).

111 The United States has taken an expansive view by the inclusion of “war-sustaining” capabilities in the definition of military objective: see US Law of War Manual, above note 73, p. 214. A contrary view is expressed in Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2009, pp. 51–55; see also Emily Camins, “The Past as Prologue: The Development of the ‘Direct Participation’ Exception to Civilian Immunity”, *International Review of the Red Cross*, Vol. 90, No. 872, 2008, p. 878.

112 S. C. Truver, above note 7, pp. 53–54, notes that China, Russia and North Korea all have significantly larger naval mine stockpiles than the United States; perhaps even more worrying is the assertion that more than twenty mine-producing States sell these weapons to other States and non-State actors, with obvious maritime security implications.

113 *Ibid.*, p. 30.

from the use of naval mines even in the absence of any significant naval capacity. Clearly, there is an ongoing threat to maritime security from naval mines.

Finally, while the specific legal regime that governs the use of one type of naval mine is dated and limited in its application, the basic legal principles that apply to the use of naval mines in each of the circumstances noted here are well established.¹¹⁴ Of particular note is the observation that these principles reflect the fundamental concept of distinction, which is one of the main principles that underpins the conduct of hostilities in international humanitarian law. In particular, the legal norms associated with the use of naval mines in both IAC and NIAC do not deviate from the requirement that only military objectives may be lawfully targeted and civilians (and civilian objects) should not be the subject of attack.

If these principles are followed, the use of naval mines across the spectrum of conflict can lawfully occur. The overarching concern is, of course, that States and non-State groups will fail to do so, and it is therefore incumbent upon States to take the leading role in ensuring that compliance with the law is practised and observed. One positive step along this path could be to revise Hague Convention VIII so that it has contemporary relevance in the modern age.

114 It has not been possible to address here all the legal considerations that may potentially affect the legality of the use of naval mines as a means of warfare. Detailed examination of other legal instruments that may be applicable was undertaken in D. Letts, above note 67, pp. 446–474.

International law and the military use of unmanned maritime systems

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Abstract

Unmanned maritime systems (UMSs) comprise an important subcategory of unmanned military devices. While much of the normative debate concerning the use of unmanned aerial and land-based devices applies equally to those employed on or under water, UMS present unique challenges in understanding the application of existing law. This article summarizes the technological state of the art before considering, in turn, the legal status of UMSs, particularly under the UN Convention on the Law of the Sea (UNCLOS), and the regulation of their use under the law of naval warfare. It is not yet clear if UMSs enjoy status as ships under UNCLOS; even if they do, it is unlikely that they can be classified as warships. Nevertheless, their lawful use is not necessarily precluded in either peacetime or armed conflict.

* The views expressed are the authors' own and do not necessarily represent those of the US government, the UK government, the UK Ministry of Defence or the US Naval War College.

Keywords: autonomy, unmanned maritime systems, drones, UNCLOS, passage rights, naval warfare, armed conflict.

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Introduction

On 15 December 2016, Chinese forces seized an unmanned underwater vehicle being operated by a US government vessel, USNS *Bowditch*, 50 nautical miles from the Philippine coast in the South China Sea.¹ China did not make clear the legal basis for its actions, although statements attributed to the Chinese government referred to the ambiguity of the law surrounding the use, and seizure, of “drones”, as well as to repeated US “reconnaissance” in waters over which China stakes a claim.² In response, the US government demanded the return of the device, which it said had been “conducting routine operations in accordance with international law”, and which it claimed was a “sovereign immune vessel of the United States”.³ The *Bowditch* incident was ultimately resolved swiftly and peacefully, with the return of the device some five days later.⁴ Yet, underlying it were legal issues such as the navigational rights and obligations of unmanned systems, their status under international law, and whether they benefit from sovereign immunity, as vessels or otherwise.⁵

The use of unmanned systems, together with the possibility that autonomous unmanned systems are likely to come of age soon, has drawn widespread attention in the legal community. Much of this attention has centred on their use in combat. Of note are the vibrant and often emotive debates surrounding the use of air and ground unmanned systems to conduct so-called “targeted killings” and to counter improvised explosive devices in populated areas

1 The incident was widely reported. See, e.g., “U.S. Demands Return of Drone Seized by Chinese Warship”, *New York Times*, 16 December 2016, available at: www.nytimes.com/2016/12/16/us/politics/us-underwater-drone-china.html.

2 Jane Perlez and Matthew Rosenberg, “China Agrees to Return Seized Drone, Ending Standoff, Pentagon Says”, *New York Times*, 17 December 2016, available at: www.nytimes.com/2016/12/17/world/asia/china-us-drone.html.

3 US Department of Defense (DoD), Statement by Pentagon Press Secretary Peter Cook on Incident in South China Sea, 16 December 2016 (*Bowditch* Statement), available at: www.defense.gov/News/News-Releases/News-Release-View/Article/1032611/statement-by-pentagon-press-secretary-peter-cook-on-incident-in-south-china-sea.

4 See, e.g., J. Perlez and M. Rosenberg, above note 2; Chris Buckley, “Chinese Navy Returns Seized Underwater Drone to U.S.”, *New York Times*, 20 December 2016, available at: www.nytimes.com/2016/12/20/world/asia/china-returns-us-drone.html.

5 For attempts at answering some of these questions, see, e.g., James Kraska and Raul “Pete” Pedrozo, “China’s Capture of U.S. Underwater Drone Violates Law of the Sea”, *Lawfare*, 16 December 2016, available at: www.lawfareblog.com/chinas-capture-us-underwater-drone-violates-law-sea; Julian Ku, “The Nonexistent Legal Basis for China’s Seizure of the U.S. Navy’s Drone in the South China Sea”, *Lawfare*, 16 December 2016, available at: www.lawfareblog.com/nonexistent-legal-basis-chinas-seizure-us-navys-drone-south-china-sea.

respectively.⁶ Beyond these debates, the armed forces of many States are increasingly turning to unmanned systems for intelligence, surveillance and reconnaissance (ISR) purposes and for transportation and other aspect of military logistics.

However, there has been little consideration of the legal issues raised by the growing use of unmanned maritime systems (UMSs). This is certain to change, for although the operational use of such systems lags well behind that of their air and ground counterparts, in future maritime security operations and naval warfare their use will loom very large. For instance, UMSs will greatly expand the monitoring capability of law enforcement and naval forces during counter-piracy, counter-drug, counter-weapons of mass destruction proliferation, and refugee operations. During wartime, they are particularly promising with respect to improving transparency of the maritime battlespace, enhancing anti-access/area denial (A2/AD) capabilities, and anti-submarine and anti-mine warfare. And during both peacetime and periods of armed conflict, UMSs are likely to prove themselves invaluable in maintaining the security of the fragile sea lanes of communication upon which global economic prosperity depends.

This article examines the key legal issues surrounding the use of UMSs for military purposes. Although many of the same issues are implicated by civil activities involving UMSs, no effort shall be made to develop them in that context. Moreover, the article is not intended to delve deeply into the contentious issues raised by autonomous, particularly lethal, maritime systems, although when appropriate they shall be highlighted. In that the United States is currently the leader in the development and use of UMSs, the article draws heavily on US doctrine, and reference is often to its systems. Other States are, however, engaged in their own development and fielding programmes, generally along the same lines as those pioneered by the United States. Finally, as to naval warfare, the discussion is limited to the law applicable in international armed conflicts, as it is with respect to such conflicts that the law is most highly developed. That said, many of the legal norms discussed below, especially those regarding the conduct of hostilities, apply *mutatis mutandis* during non-international armed conflicts.

The discussion begins with a broad-stroke explanation of UMSs and their likely missions. The groundwork laid, the legal status of UMSs is examined, alongside the rights and obligations that this status may entail. Attention then turns to an analysis of how the law of naval warfare and the law of neutrality govern UMS activities during international armed conflicts. As will become apparent, several important issues remain unsettled as a matter of international law. Therefore, subsequent State physical or verbal practice will be especially important with respect to clarifying the legal parameters and content of the various legal regimes affecting UMS use for military purposes.

6 For commentary on the debate surrounding unmanned aerial systems, see, e.g., Michael N. Schmitt, "Narrowing the International Law Divide: The Drone Debate Matures", *Yale Journal of International Law Online*, Vol. 39, 2014. On the subject of autonomous weapons more broadly, the strength of feeling on one side of the controversy is demonstrated by the Campaign to Stop Killer Robots; see the "About Us" page on the Campaign's website, available at: www.stopkillerrobots.org/about-us/.

Unmanned maritime systems

Unmanned maritime systems are not an entirely new phenomenon. For instance, they have been used for mine-clearing and battle damage assessment since the Second World War, notably in Vietnam and during Operation Iraqi Freedom in 2003. Interestingly, they were also used to conduct radiation testing following nuclear tests.⁷ However, it is only in the twenty-first century that UMSs became the subject of aggressive technological progress and operational concept development. To illustrate, while the US defence budget for unmanned air systems remained constant between 2011 and 2015, funding allocated to UMSs increased over 300%.⁸ As the inaugural director of the US Navy's unmanned warfare systems has observed, the goal is to fully embed (or "mainstream") unmanned technology in naval operations because unmanned assets will enable naval forces to "understand quicker, act faster, and adapt continuously".⁹

Advancing technologies will certainly expand the resort to UMSs.¹⁰ Indeed, over time, they may fully supplant manned assets in performing certain missions, for they offer a number of advantages over manned systems. Among them are cost; endurance, a key capability in performing tracking missions; persistence in an area, which allows for greater ISR coverage; an ability to operate with great stealth, an important attribute, for example, when resupplying special forces operating covertly ashore; and the freeing up of personnel to perform other essential functions. Of course, like their air and ground counterparts, they offer an alternative to operations that place personnel at risk in hostile environments. Additionally, in that UMSs do not need the infrastructure to support on-board personnel, the transportation capacity of unmanned systems typically exceeds that of similarly sized manned surface vessels or submarines. Perhaps most significantly, the future is certain to witness the collaborative use of UMSs within networks, along the lines of the US Navy's Integrated Undersea Surveillance System, established to monitor large swaths of the oceans and provide early warning and information superiority in the maritime domain.

Yet, UMSs also have disadvantages relative to manned systems. They are more reliant on communications in the sense that loss of a communications link can sometimes disable them entirely, or at least impair their functionality or usefulness. Additionally, UMSs may have design limitations that render them ineffective in certain circumstances to which the crews of manned systems might be better able to react. Manned systems also are generally more adaptive to situations that might not have been considered when developing equivalent UMSs.

7 DoD, *Unmanned Systems Integrated Roadmap FY2011–2036*, 2011, p. 25, available at: www.acq.osd.mil/sts/docs/Unmanned%20Systems%20Integrated%20Roadmap%20FY2011-2036.pdf; US Department of the Navy, *The Navy Unmanned Surface Vehicle (USV) Master Plan*, 2007 (USV Master Plan), p. 1, available at: www.navy.mil/navydata/technology/usvmppr.pdf.

8 DoD, above note 7, p. 16.

9 Megan Eckstein, "Interview: Rear Admiral Robert Girrier on the Future of the Navy's Unmanned Systems", *USNI News*, 12 October 2016, available at: <https://news.usni.org/2016/10/12/22016>.

10 See, e.g., DoD, Defense Science Board, *Task Force Report: The Role of Autonomy in DoD Systems*, 2012, pp. 17–18, available at: www3.nd.edu/~dhoward1/autonomy.pdf.

Unmanned maritime systems comprise unmanned surface vehicles (USVs) and unmanned undersea vehicles (UUVs). The two categories bring different characteristics to bear in maritime operations and are subject to specific limitations. USVs are generally better able to communicate, because communications underwater are highly challenging. Thus, as Rand has noted, “USVs could be highly effective in overcoming challenging A2/AD environments, particularly in C4 ISR, military deception, information operations, electronic warfare, and cyberwarfare missions.”¹¹ Further, because USVs operate from the surface, they are more versatile in the sense of engaging in activities, such as surveillance or reconnaissance, with respect to the water column, surface and superjacent air space. By contrast, the stealth capabilities of UUVs tend to be significantly greater than those of USVs because the very features that limit communications underwater can act to shield UUVs from detection.

Unmanned surface vehicles

As presently envisaged by the US Navy, the primary USV missions, in priority order, are mine countermeasures, anti-submarine warfare, maritime security, surface warfare, special operations forces (SOF) support, electronic warfare, and maritime interdiction operations support.¹² The first, mine countermeasures, is conducted to clear large areas at sea in which to operate safely, maintain transit routes and lanes, and open areas in which operations are about to be conducted, particularly those in shallow waters where manned mine sweepers cannot support littoral operations such as amphibious landing. Various methods can be employed to perform these functions. Sweden and Finland, for instance, use systems that mimic the acoustic and magnetic signature of surface vessels to detonate mines.¹³ Other concepts of operations include a USV that deploys a remotely operated vehicle, which in turn propels itself to a suspected mine, verifies it as such and launches a munition to destroy it. Another involves the deployment into a mined area, by a USV transporter, of a UUV capable of placing charges on mines.¹⁴ The ultimate objective is for USVs to perform all four countermeasure functions – detection, identification, localization and neutralization – in a single sweep.¹⁵

USVs can likewise perform submarine countermeasures. For instance, they can accompany a manned surface group to identify submarines, track them, and, in some cases, attack them (“maritime shield”), thereby minimizing a significant threat to the group, as well as reducing the requirement for manned surface vessels, submarines or aircraft to perform the anti-submarine function. USVs can execute

11 Scott Savitz *et al.*, *U.S. Navy Employment Options for Unmanned Surface Vehicles (USVs)*, 2013, p. 39, available at: www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR384/RAND_RR384.pdf.

12 USV Master Plan, above note 7, p. 11.

13 Antoine Martin, *Unmanned Maritime Systems: Global Review of Technology, Roadmaps, Roles, Challenges & Opportunities, and Predictions*, undated, p. 5, available at: www.uvs-consulting.com/wp-content/uploads/2014/01/AUVSI-Aug-13-UMS-Global-Review-UVSC.pdf.

14 USV Master Plan, above note 7, p. 19.

15 *Ibid.*, p. 18.

the same tasks to clear routes ahead of a surface group's transit ("protected passage"). Although somewhat less suitable for the purpose, they may also carry out "hold at risk" missions, which involve monitoring submarines as they leave port or pass through a chokepoint in order to place and hold them at risk of attack should the need subsequently arise.¹⁶

In their maritime security role, USVs can be launched from a host platform or from ashore to collect information using their onboard sensors. Data is transmitted back to the operating forces either continuously, in real time, or when the system ascertains that certain pre-defined criteria (like the existence of a specified threat) have been met. Such operations may involve directing the USV against a specified vessel or vessels, or putting it on patrol within a demarcated area. USVs may also take a more direct role in maritime security operations. Examples include warning away vessels by means of a loud-hailer, marking them with paint balls or radio tags, and engaging them with onboard guns, missiles or torpedoes.¹⁷ The same capabilities can be employed to execute surface warfare missions.

USV support for special operations can be accomplished, for example, by providing ISR, transporting or infiltrating/exfiltrating SOF forces, maintaining a presence in the vicinity of an SOF operation to provide security, and resupplying forces ashore.¹⁸ Their use for electronic warfare includes providing warnings of ongoing electronic attack, as well as deception and jamming. Examples of the latter include ruses such as the use of a false target generator, spoofing, and local area network jamming.¹⁹ However, because of their typically low profile, USVs lack the "height of eye" to engage in such activities over long distances.²⁰ Finally, USVs may assist in maritime interception operations. Scenarios illustrating this role include: conducting an initial approach of a suspect vessel to determine if it is hostile by, for example, drawing fire; monitoring all sides of a vessel being boarded to provide situational awareness and check that cargo is not being jettisoned or that its crew is not escaping; checking the underside of a vessel with sensors, or possibly a small UUV, to identify trapdoors, moon pools, drop tanks and other features; and using onboard sensors to find and locate hidden cargo, such as groups of trafficked individuals or chemical, biological, nuclear, radiological or explosive material.²¹

An illustration of USV technology is the wave glider, which can be deployed to operate autonomously or semi-autonomously. The device seized by the Chinese in the *Bowditch* incident is an example of this technology, and was described by the US Department of Defense (DoD) as being used to collect "military oceanographic

16 *Ibid.*, pp. 23–24.

17 *Ibid.*, pp. 34.

18 Combined Joint Operations from the Sea Centre of Excellence (CJOS/COE), *Study (2009) for Maritime Unmanned Systems (MUS) in NATO*, 2009, p. 32, available at: www.cjoscoe.org/images/MUS_in_NATO.pdf.

19 USV Master Plan, above note 7, p. 45.

20 Because of the curvature of the Earth's surface, the closer a sensor or transmitter is to the water, the smaller the radius over which it can establish and maintain a line of sight to the target.

21 USV Master Plan, above note 7, p. 48.

data such as salinity, water temperature, and sound speed”.²² Wave gliders use paddles suspended from the hull to benefit from wave energy and employ solar panels to power their instrumentation and communications equipment, as well as multiple sensors. In part because of their energy independence, such devices are suitable for long-range, long-endurance missions that can last a year or more. Further, wave gliders are stealthy because they are acoustically silent and have a low profile relative to the ocean’s surface. These systems are considered especially promising with respect to gathering and transmitting data for ISR and anti-submarine warfare purposes, as well as rapid environmental assessment in littoral warfare and bathymetric surveying.²³

Numerous USVs are in development. Prominent among these is the Sea Hunter ACTUV (anti-submarine warfare continuous trail unmanned vehicle). Costing a relatively inexpensive \$23 million, the Sea Hunter is a 40-metre trimaran that is capable of operation in rough seas, can travel at 31 knots, operates autonomously (with a man on the loop) for three months at a time, and abides by the rules of safe navigation. Capable of patrolling up to 10,000 nautical miles of ocean, it uses its own sensors to locate submarines, such as the very quiet diesel electric variants operated by China and Russia, before following them from as far as two miles away, while providing regular updates on its target’s location and activities.²⁴ Although the Sea Hunter may be armed with torpedoes, as presently conceived a human command is necessary to launch them.²⁵ The same system is also being considered for use in mine countermeasures and other missions.

Unmanned undersea vehicles

A UUV is a “self-propelled submersible whose operation is either fully autonomous (pre-programmed or real-time adaptive mission control) or under minimal supervisory control and is untethered except, possibly, for data links such as a fiber optic cable”.²⁶ As with their surface counterparts, such systems can engage in, or facilitate, a wide array of missions. Of note are ISR, mine countermeasures, anti-submarine warfare, inspection/identification, oceanography, serving as a communication/navigation network node, payload delivery, information operations and time-critical strike.²⁷ For instance, UUVs can be employed to

22 Bowditch Statement, above note 3.

23 Fastwave, *Submission to Defence White Paper 2015: Unmanned Maritime Systems*, 2015, available at: www.defence.gov.au/Whitepaper/docs/256-Fastwave.pdf.

24 Rick Stella, “Ghost Ship: Stepping Aboard the Sea Hunter, the Navy’s Unmanned Drone Ship”, *Digital Trends*, 11 April 2016, available at: www.digitaltrends.com/cool-tech/darpa-officially-christens-the-actuv-in-portland/; Rachel Courtland, “DARPA’s Self-Driving Submarine Hunter Steers Like a Human”, *IEEE Spectrum*, 7 April 2016, available at: <http://spectrum.ieee.org/automaton/robotics/military-robots/darpa-actuv-self-driving-submarine-hunter-steers-like-a-human>.

25 Arthur Villasanta, “DARPA’s Sea Hunter Killer Drone Will Make China’s Submarines More Vulnerable”, *Yibada*, 28 July 2016, available at: <http://en.yibada.com/articles/146010/20160728/darpa-s-sea-hunter-killer-drone-will-make-china-submarines.htm>.

26 US Department of the Navy, *The Navy Unmanned Undersea Vehicle (UUV) Master Plan*, 2004 (UUV Master Plan), p. 4, available at: www.navy.mil/navydata/technology/uuvmp.pdf.

27 DoD, above note 10, pp. 85–86.

gather oceanographic data prior to operations on “winds, bathymetry, water visibility, current waves, bottom geophysical parameters, kelp concentrations, sand bars, etc. to determine minable areas”; to detect (e.g., by using optical and sonar sensors) and neutralize mines; to deploy and retrieve devices, such as sensors, underwater; to transport material needed during SOF operations; and to engage in spoofing (acting as a submarine decoy or creating the impression that multiple submarines are in an area, thereby making it inaccessible to an adversary), jamming and other electronic warfare activities.²⁸ Like USVs, UUVs are capable of supporting maritime shield and protected passage missions, and given their stealth, they are well suited to hold at risk missions, particularly with respect to monitoring submarines.²⁹

UUVs bring several unique features to bear in naval operations. They tend to have a low acoustic and electromagnetic signature, thereby rendering them hard to detect. Even when surfaced to raise a transmission antenna, their low profile makes them difficult to locate by sight or radar. Thus, employing them can contribute to maintaining the element of surprise. UUVs may also be more persistent than surface vessels because they are less susceptible to rough weather and can therefore remain on-station for extended periods despite poor sea conditions. Many UUVs are relatively small, thereby enhancing the ease with which they may be carried and deployed from aircraft, ships and USVs; in some situations, a single platform can deploy multiple UUVs capable of acting in concert. Relatedly, their size makes them easily recoverable and reusable. When UUVs fail, they simply settle to the bottom, where they can be recovered so long as the water is not too deep. Small size and difficulty of detection also make UUVs ideal for operating in shallow waters. Finally, they are, except for nuclear submarines, the only undersea systems capable of operating beneath the polar ice cap.³⁰

In addition to their use in detecting and neutralizing mines, UUVs are particularly attractive for their capacity to engage in mining themselves. For instance, the US Defense Science Board has highlighted their utility in “cascaded operations”.³¹ Today’s offensive sea mining capabilities are limited, but UUVs could provide a means to significantly extend capabilities by increasing the influence range via mobility. Extra-large UUVs could be deployed from one or more shore sites or surface ships, and autonomously travel to an area of operations. Once the UUVs arrive, they could deploy smaller UUVs or variants of modular torpedoes that have both automated target recognition capabilities and enough explosive material to disrupt or disable (or possibly even destroy) surface vessels. The UUV modular torpedoes would essentially serve as intelligent mines that can manoeuvre in an area and disrupt or disable adversary ships upon target verification. This would enable friendly forces to restrict the adversary’s

28 UUV Master Plan, above note 26, p. 11; CJOS/COE, above note 18, p. 24.

29 UUV Master Plan, above note 26, p. 12.

30 CJOS/COE, above note 18, pp. 24–25.

31 DoD, Defense Science Board, *Summer Study on Autonomy*, 2016, pp. 61–62, available at: www.acq.osd.mil/dsb/reports/DSBSS15.pdf.

freedom of movement and control access to key maritime areas, such as chokepoints and harbours. UUVs could also be used to stop enemy ships from returning to port, thus precluding replenishment.

Another possible application for UUVs is in tapping, or disrupting, communications cables running along the ocean floor. Such cables carry all manner of signals and data, both military and civilian, traversing vast distances at often great depths. They are a lucrative target for States wishing to acquire intelligence about their rivals or enemies, or, in times of tension, to hamper or prevent the flow of information.³²

Numerous UUV variants are under development. Illustrative is the Haiyan, a Chinese vehicle that can operate at depths of up to 1,000 meters, travel at 4 knots, and sustain operations for a month. It carries multiple sensors that enable it to perform missions such as surveillance of submarines, undersea patrols, mine-sweeping and, in certain configurations, anti-surface warfare.³³ Russian UUV development apparently includes a “nuclear delivery drone” capable of transporting a nuclear payload up to 6,200 nautical miles, deep underwater, at speeds of up to 56 knots.³⁴ Its assumed purpose would be to attack coastal targets. In the United States, Boeing has developed the Echo Voyager, a 51-foot autonomous UUV that can operate for months at a time. The system, which is undergoing sea trials, uses a hybrid rechargeable power system, has a modular bay that allows it to employ differing payloads, and surfaces to transmit information back to friendly forces, thereby obviating the need for physical tethers to maintain communications links. The system is expected to perform undersea surveillance and mine detection, as well as other missions.³⁵

Legal status of unmanned maritime systems

The issue of the legal status of unmanned maritime systems is divisible into two sub-issues: status as a ship (or vessel) and status as a warship. Both are complex and somewhat unsettled.

There is no accepted definition of a “ship” or “vessel” in the law of the sea. Indeed, both terms appear in this body of law, apparently without distinction, and sometimes in the same treaty, as is the case with the UN Convention on the Law of the Sea (UNCLOS).³⁶ For the purposes of this article, the term “ship” will be used. Qualification as a ship is particularly important, as ships enjoy certain navigational

32 See, e.g., Bruce Dorminey, “How Bad Would It Be if the Russians Started Cutting Undersea Cables? Try Trillions in Damage”, *Forbes*, 2 November 2015, available at: www.forbes.com/sites/brucedorminey/2015/11/02/russian-navy-probing-u-s-undersea-communications-cables-in-new-global-threat/#6b625ac766b1.

33 DoD, above note 31, p. 43.

34 Kyle Mizokami, “Pentagon Confirms Russia Has a Submarine Nuke Delivery Drone”, *Popular Mechanics*, 8 December 2016, available at: www.popularmechanics.com/military/weapons/a24216/pentagon-confirm-russia-submarine-nuke/.

35 Kevin McCaney, “Boeing’s New Autonomous UUV Can Run for Months at a Time”, *Defense Systems*, 14 March 2016, available at: <https://defensesystems.com/articles/2016/03/14/boeing-echo-voyager-uuv.aspx>.

36 United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 397, 10 December 1982.

rights, and shoulder various obligations, that are not enjoyed by other entities which operate on, in or above the water, such as aircraft.

Although UNCLOS does not define the term “ships”, when reading the instrument in the context of its own text, as is appropriate pursuant to Article 31 of the Vienna Convention on the Law of Treaties,³⁷ it appears to consider that ships are manned. For instance, pursuant to Article 94 of UNCLOS, a flag State must ensure that each ship flying its flag

is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship [and] that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.³⁸

Some treaties do define ships, albeit in ways that complicate matters. For instance, the 1954 Convention for the Prevention of Pollution of the Sea by Oil (as amended) defines a ship as “any sea-going vessel of any type whatsoever, including floating craft, whether self-propelled or towed by another vessel, making a sea voyage”³⁹; the 1973 Convention for the Prevention of Pollution from Ships (as amended) provides that a ship is “a vessel of any type whatsoever operating in the marine environment ... includ[ing] hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms”⁴⁰; and the 1996 Protocol to the London Dumping Convention (as amended) states that “[v]essels and aircraft’ means waterborne or airborne craft of any type whatsoever”.⁴¹ Taking a different approach are the Convention on International Regulations for Preventing Collision at Sea (COLREGS), which applies to “every description of water craft, including non-displacement craft and seaplanes used or capable of being used as a means of transportation on water”,⁴² and the Convention on Conditions for Registration of Ships (not yet in force), which extends to “any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both”.⁴³

37 Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331, 23 May 1969, Art. 31(1)–(2).

38 UNCLOS, Art. 92(4)(b)–(c).

39 1962 Amendments to the 1954 International Convention for Prevention of Pollution of the Sea by Oil, 600 UNTS 332, 11 April 1962, Art. 1(1).

40 International Convention for Prevention of Pollution from Ships of 1973, as amended by the 1978 Protocol, 1340 UNTS 61, 184, 17 February 1978, Art. 2(4).

41 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes or Other Matter, 36 ILM 1, 7 November 1996, Art. 1(6). See also Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1046 UNTS 138, 29 December 1972, Art. III(2).

42 Convention on the International Regulations for Preventing Collisions at Sea, 28 UST 3459, TIAS No. 8587, 1050 UNTS 16, 20 October 1972, Rule 3(a).

43 United Nations Convention on Conditions for Registration of Ships, UN Doc. TD/RS/CONF/19/Add.I, 7 February 1984 (not yet in force), Art. 2.

As is apparent, it is not possible to unequivocally characterize UMSs as ships, at least with respect to the application of maritime treaties. As they are unmanned, it is arguable that UNCLOS is inapplicable to them. By contrast, the 1954 Pollution Convention takes a highly inclusive approach by imposing no such requirement and encompassing even floating seagoing craft that are unpropelled. The 1973 Pollution Convention and the 1996 Protocol to the London Dumping Convention are likewise inclusive. All three would extend to many UMSs. Some UMSs will be capable of transporting goods and persons on the sea and therefore would be subject to the COLREGS, whereas those not engaged in that activity and UUVs would not be reached by the instrument. And the Registration Convention would apply to UMSs used for transportation, but would not appear to pertain to other UMSs, even if they have that capability.

The differing approaches are understandable because the definitions are crafted for the purposes of the individual instruments. Thus, for instance, the pollution conventions adopt a broad definitional approach since their object and purpose is to limit pollution at sea to the extent feasible, whereas the COLREGS are intended to regulate navigation on the surface of the water and therefore do not reach submerged submarines or UUVs. Accordingly, when determining the applicability of a treaty to UMSs, fidelity must be paid to the instrument's scope and definitional provisions.

UNCLOS presents a special case in that it lays out the crucial, and foundational, maritime navigational regime, but contains no definitional provision and is therefore subject to interpretive dissonance. As noted, it would appear the instrument is meant only to apply to manned seaborne craft. This interpretation may be challenged, however, because given the size and capabilities of some prospective UMSs, interpreting the instrument teleologically as applicable to them based on the Convention's object and purpose of establishing a comprehensive legal regime at sea makes some sense. Such an assertion invites the counter-argument that States Parties may wish to limit certain rights which would attach to UMSs if they qualify as ships, such as the rights of innocent, transit and archipelagic passage, by taking a narrower approach. Therefore, it will be particularly important to monitor State practice regarding the characterization of UMSs because "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is relevant as to the Convention's proper interpretation.⁴⁴ Such practice may be both physical, as in the case of UMSs exercising the passage rights of ships, or verbal, for instance through government statements that purport to interpret the Convention. At present, any definitive conclusion as to the instrument's applicability to UMSs would be premature.⁴⁵

Further complicating matters is the fact that it is widely accepted by States that many provisions of UNCLOS are reflective of customary international law. The content and interpretation of customary law shifts and develops over time through State practice and *opinio juris*. Therefore, a colourable argument may be fashioned

44 VCLT, Art. 31(3)(b).

45 For a contrary view, see, e.g., J. Kraska and R. Pedrozo, above note 5.

that, irrespective of the correct interpretation of UNCLOS, UMSs are ships pursuant to customary international law and they may accordingly enjoy, and are subject to, the navigation and other rights and obligations of customary law, which in great part are reflected in the Convention. To illustrate, an argument could be made that even if a State Party's UMS has no right of innocent passage through the territorial sea pursuant to UNCLOS, it nevertheless enjoys such a right pursuant to customary international law. The absence of State practice and *opinio juris* on the matter makes such an argument tenuous, but it must be remembered that customary international law develops by States asserting rights and obligations that did not previously exist.

The US position is interesting in this regard, for although it is a non-party to UNCLOS, the United States is of the view that many of the instrument's provisions, including those governing navigation, reflect customary international law.⁴⁶ The 2007 US Navy/Marine Corps/Coast Guard's *Commander's Handbook on the Law of Naval Operations* labels UMSs as "other naval craft", but it is anticipated that the 2017 update to this document will also refer to them as "vessels", consistent with the language used by the DoD in stating its position following the *Bowditch* incident.⁴⁷ Doing so will render the *Handbook* internally consistent in the sense that the new version is also expected to confirm that UUVs and USVs enjoy the navigational rights of ships, such as innocent and transit passage. By the same logic, they would have the other key navigational rights and obligations, such as freedom of the high seas, enjoyed by ships. The position taken by the United States is likely to encourage other States to follow suit.

If UMSs do enjoy navigational rights, they will be bound by the conditions associated with those rights. For example, during innocent, transit and archipelagic sea lanes passage, a UMS would be required to proceed continuously and expeditiously,⁴⁸ and to refrain from any activities other than those incident to its passage, especially the threat or use of force against the coastal State.⁴⁹ Innocent passage carries further restrictions – those of most relevance to UMSs include prohibitions on exercises or practice with weapons; the collection of information to the prejudice of the coastal State; acts of propaganda; the launching, landing or taking on board of any military device; research and survey activities; and interference with communications systems, a category that would include underwater communications cables.⁵⁰ Furthermore, while UMSs entitled to exercise transit or archipelagic passage would be allowed to do so in their normal mode,⁵¹ which may be submerged for a UUV, during innocent passage all underwater vehicles must be on the surface.⁵²

46 DoD, Office of the General Counsel, *Law of War Manual*, June 2015, updated December 2016 (DoD Manual), § 13.1.2.

47 *Bowditch* Statement, above note 3.

48 UNCLOS, Arts 18(2), 38(2), 53(3).

49 *Ibid.*, Arts 19(2), 39(1), 54.

50 *Ibid.*, Art. 19(2).

51 *Ibid.*, Arts 39(1)(c), 54.

52 *Ibid.*, Art. 20.

As well as the question of qualification as a ship and entitlement to navigational rights, it is necessary to ascertain whether UMSs can have the status of warships. The requirements for such status were first set forth in the 1907 Hague Convention VII,⁵³ and are today replicated in Article 29 of UNCLOS:

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

The conditions are universally recognized and there is little question that they have acquired customary international law status.⁵⁴

It would be difficult to interpret the definition to include a UMS. Assuming *arguendo* that it qualifies as a ship, a UMS could easily be part of the inventory of the armed forces and appropriately marked, but it would be necessary to stretch the notion of command by a commissioned officer to include remote control of its activities. Moreover, as UMSs are unmanned (or at best, manned remotely), on a plain text reading of the requirement to be manned by a crew subject to military discipline, they do not qualify as warships. In time these criteria may shift or soften, but as things presently stand, even if UMSs qualify as ships, they cannot be warships.

Notwithstanding these difficulties, warship status is less important during peacetime than it might at first appear. It is true that under UNCLOS, warship status affords certain rights. For instance, warships may seize a pirate ship;⁵⁵ visit a ship on the high seas suspected of engaging in piracy, the slave trade, unauthorized broadcasting, being without nationality, or flying a foreign flag (or showing no flag) when it is actually of the nationality of the ship conducting the visit;⁵⁶ conduct hot pursuit;⁵⁷ and engage in enforcement measures designed to safeguard the marine environment.⁵⁸ However, each of these rights is granted equally to other ships that are “clearly marked and identifiable as being on government service and authorized to that effect”.⁵⁹ UNCLOS imposes no further criteria, meaning that there is no inherent reason why a UMS could not be duly authorized by a government to exercise each of the peacetime rights enjoyed by warships, so long as it is marked accordingly and, crucially, qualifies as a ship.

Similarly, while UNCLOS recognizes the sovereign immunity of warships, essentially the same privileges are afforded to other vessels on government non-

53 Convention No. VII relating to the Conversion of Merchant Ships into War-Ships, 18 October 1907, 205 Consol. TS 319, Arts 2–6.

54 See, e.g., Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995 (San Remo Manual), para. 13(g).

55 UNCLOS, Art. 107.

56 *Ibid.*, Art. 110.

57 *Ibid.*, Art. 111(5).

58 *Ibid.*, Art. 224.

59 *Ibid.*, Arts 107, 111(5), 224. Similarly, Article 110(5) provides for the right of visit to be exercised by “other duly authorized ships or aircraft clearly marked and identifiable as being on government service”.

commercial service. Both categories are protected from the enforcement jurisdiction of other States and are inviolable in the sense that they may not be boarded, seized or otherwise interfered with. Only one UNCLOS provision on immunity is written as applying to warships alone: under Article 30, if a warship fails to comply with the laws and regulations of a coastal State in whose territorial sea it is operating, the coastal State may require it to leave. However, considering the broad immunity already enjoyed by government vessels on non-commercial service, it is hard to imagine what additional enforcement action could be taken against them. Therefore, so long as a UMS qualifies as a ship and is operated by a government for exclusively non-commercial purposes, it will enjoy effectively the same sovereign immunity under UNCLOS as a warship.

The issue of sovereign immunity becomes more difficult to resolve if UMSs do not qualify as ships in the first place. The German Commander's Handbook takes the position that UMSs enjoy sovereign immune status to the extent that they are controlled from a ship which itself enjoys such status.⁶⁰ This much seems clear. However, the United States goes further by asserting that "USVs and UUVs engaged exclusively in government, noncommercial service are sovereign immune craft. USV/UUV status is not dependent on the status of its launch platform."⁶¹ While, as discussed above, the United States appears to be moving towards a clear assertion of the status of UMSs as ships, the reference here to the immunity of "craft" suggests a reliance on the immunity enjoyed by State property in general. This is a well-established, if poorly understood, principle⁶² that must be respected in the law of the sea as an example of "other rules of international law", to which key provisions of the UNCLOS regime are subject.⁶³ In any case, so long as UMSs belong to the State and are solely engaged in non-commercial purposes, the US position would appear to be sound.

Moving from the peacetime context, sovereign immunity of UMSs is less relevant during international armed conflict. The principles of immunity set out above do not apply between opposing belligerents because UMSs may qualify as military objectives irrespective of whether they enjoy sovereign immunity, and may therefore be attacked or seized as booty of war.⁶⁴ Nevertheless, status as a warship is

60 German Navy, *Commander's Handbook: Legal Bases for the Operations of Naval Forces*, SM 3, 2002, p. 45.

61 US Navy, US Marine Corps and US Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-12/COMDTPUB P5800.7A, 2007 (US Commander's Handbook), para. 2.3.6.

62 The principle is reflected in the United Nations Convention on Jurisdictional Immunities of States and Their Property, UNGA Res. 59/38, 2 December 2004 (not yet in force). The Convention is based on draft articles adopted, with commentaries, by the International Law Commission (ILC). ILC, Report on the Work of Its Forty-Third Session, UN Doc. A/46/10, 1991, p. 13. As the ILC notes, "[l]egal theories abound as to the exact nature and basis of immunity. . . . Beyond or around the hard core of immunity, there appears to be a grey area in which opinions and existing case law and, indeed, legislation still vary." *Ibid.*, p. 23.

63 UNCLOS, Arts 2(3), 19(1), 21(1), 31, 34(2), 58(3), 87(1), 138, 293(1), 297(1)(b).

64 As an object, a UMS may generally be attacked so long as it meets the definition of a military objective: see San Remo Manual, above note 54, paras 40–41. To the extent that an enemy unmanned maritime system might be considered a vessel, even if it does not qualify as a warship, it is subject to capture and prize adjudication when outside neutral waters: *ibid.*, paras 135–138. On booty of war, see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 49. See also DoD

relevant for other purposes under the law of naval warfare. In periods of international armed conflict, warships are the only vessels entitled to exercise belligerent rights, the most significant being the use of force against the enemy. Other rights include control of neutral vessels in the immediate vicinity of naval operations,⁶⁵ visit and search of merchant ships outside neutral waters when the warship reasonably suspects they are subject to capture,⁶⁶ and enforcement of blockades.⁶⁷

Notwithstanding the issues surrounding their legal status, UMSs are envisioned as engaging in, or facilitating, many of the activities that depend on qualification as a ship or warship. The lack of status as such does not necessarily mean that UMSs may not engage in them. This is so in two regards.

First, UMSs may be launched from a ship to facilitate the functions that it is entitled to perform. An example is the use of a USV to inspect the hull of a ship subject to the right of visit. Such usage is legally no different than the launch of rigid inflatable boats to transfer a boarding team to the intercepted vessel. It is the ship which is exercising the right, not the UMS. Along the same lines, warships may transit an international strait and archipelagic sea lanes in “normal mode”.⁶⁸ While vessels in transit passage must “refrain from any threat or use of force against” the coastal State,⁶⁹ it is well accepted that they may use on-board helicopters to ensure the security of the ship during passage, since doing so is their “normal mode” of operation. Unmanned maritime vessels could be deployed to perform an analogous function. Again, as a matter of law, it is the ship that is transiting in normal mode, not any UMSs involved.

A similar approach can be applied during an armed conflict. For example, a warship maintaining a line of blockade may use UMSs to perform surveillance functions in order to alert the ship to attempts by neutral vessels to breach the blockade. Again, it is the ship that is exercising the belligerent right to maintain a blockade during an armed conflict. More to the point, UMSs are both military equipment and “means of warfare”. Thus, they may be employed in any circumstance in which it would be lawful to use other weapon systems, such as torpedoes, missiles or mines, especially during naval engagements on the high sea or operations in an adversary’s territorial waters.

There are, however, limits to such an approach. Fundamentally, the control over the UMS must be such that, as a matter of fact, it is still the entitled ship that is

Manual, above note 46, § 5.17.3; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, para. 11.88.

65 San Remo Manual, above note 54, para. 108.

66 *Ibid.*, para. 118. The term “merchant ship” (or vessel) is broadly interpreted. For instance, it is defined by the United Kingdom as “a vessel that is not a warship, an auxiliary vessel, or other state vessel (such as a customs or police vessel) and that is engaged in commercial or private service”. UK Ministry of Defence, above note 64, para. 13.5(k). See also San Remo Manual, above note 54, para. 13(i).

67 As set out in the San Remo Manual, “[a] blockade may be enforced and maintained by a combination of methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document”. *Ibid.*, para. 97. While this paragraph acknowledges the potential use of e.g. mines, the effective enforcement of a blockade generally requires, in practice, the exercise of the right of capture, which is reserved to warships. *Ibid.*, paras 98, 118, 146(f).

68 UNCLOS, Arts 39(1)(c), 53(3).

69 *Ibid.*, Arts 39(1)(b), 54.

exercising the right in question. Moreover, the use of the system has to be consistent with any restrictions on the right in question. Of particular relevance are those relating to innocent passage, during which “the launching, landing or taking on board of any military device” is prohibited,⁷⁰ as is “any other activity not having a direct bearing on passage”.⁷¹ Given these explicit prohibitions, the deployment of UMSs that do not themselves enjoy the right of innocent passage would appear to be proscribed under that regime.

The law of naval warfare

It is unquestionable that UMS operations are governed by the law of naval warfare during an international armed conflict, as are operations involving any other means of warfare. Indeed, the use of a UMS, including one that operates with a high degree of autonomy, to engage in hostilities against another State would initiate such an armed conflict. As noted in the International Committee of the Red Cross (ICRC) Commentary to the 1949 Geneva Conventions:

Any difference arising between two States and leading to the intervention of armed forces is an [international] armed conflict ... even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.⁷²

Thus, even if a UMS conducted hostile operations only against another such system, the laws governing international armed conflict would apply.

Legal review of unmanned maritime systems

As noted, although it is difficult to characterize UMSs as warships, a UMS is undoubtedly a “means of warfare” (weapons and weapons systems) to the extent that it is capable of engaging in an activity which qualifies as an “attack”, such as anti-surface, anti-submarine or mine-laying operations.⁷³ The manner in which UMSs are, or are intended to be, employed are “methods of warfare” (tactics).

70 *Ibid.*, Art. 19(2)(f).

71 *Ibid.*, Art. 19(2)(l).

72 Jean Pictet (ed.), *Commentary to the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field*, ICRC, Geneva, 1960 (ICRC Commentary on GC I), p. 32. See also Jean Pictet (ed.), *Commentary to the Geneva Conventions of 12 August 1949*, Vol. 2: *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960 (ICRC Commentary on GC II), p. 28; Jean Pictet (ed.), *Commentary to the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 23; Jean Pictet (ed.), *Commentary to the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 20. This point was reiterated in both of the ICRC’s updated commentaries published to date: ICRC Commentary on GC I, 2nd ed., 2016, § 236; ICRC Commentary on GC II, 2nd ed., 2017, § 258.

73 In international humanitarian law, an attack is defined as an “[act] of violence against the adversary, whether in offence or in defence”. Protocol Additional (I) to the Geneva Conventions of 12 August

Article 36 of Additional Protocol I to the Geneva Conventions (AP I) provides that:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Although the requirement to review new means of warfare is customary in nature, controversy exists over whether the requirement to review new “methods of warfare” has achieved customary status. US policy, for instance, only requires a review of weapons and weapons systems prior to acquisition.⁷⁴

Weapon reviews are conducted based on the intended use of the weapon or weapon system in question, in the setting and situations in which it is expected to be employed.⁷⁵ A central issue is the weapon’s ability to engage in discriminate warfare, and in this regard, the ban on “a method or means of combat which cannot be directed at a specific military objective ... and consequently, [is] of a nature to strike military objectives and civilians or civilian objects without distinction”, looms large in a weapon review.⁷⁶

In the UMS context, the sensors that identify a target are therefore likely to be the focus of the greatest attention, especially with respect to how they are affected by depth, temperature, visibility, salinity and other features of the maritime environment. Most current UMSs, and systems nearing development, use sensors and weapons similar (or identical) to those already employed in naval operations, such as torpedoes, mines and guns. However, the fact that a UMS may do so does not alone suffice to meet the weapon review requirement, since the obligation is to assess the “system” rather than its individual components. A proper weapon review will evaluate the performance of sensors and weapons as they operate in conjunction with each other, as well as the linkages to any decision-making functions of the UMS and/or to a human exercising remote control.

This assessment will include whether the “unmanned” feature of the UMS in some way affects its ability to distinguish between lawful military objectives and

1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (AP I), Art. 49(1). While the treaty definition applies only to attacks from the sea that are directed at the land or may affect civilians on land, it is widely accepted as applying to naval warfare, generally, as custom. San Remo Manual, above note 54, para. 13(b).

74 DoD Manual, above note 46, § 6.2. See also Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 2010, Rule 9, para. 2; Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, 2013, Rule 48, para. 2.

75 ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, November 2006, § 1.2.

76 AP I, Art. 51(4)(b)–(c). On the customary law prohibition, see ICRC Customary Law Study, above note 64, Rule 71.

unlawful targets, as is required by the principle of distinction.⁷⁷ Being unmanned does not necessarily preclude or impede a system's ability to distinguish. In some cases, it might, as when the system's sensors are relatively rudimentary or are limited by external factors, such as rough seas or poor weather. In others, the absence of a human on board may have no bearing on whether the UMS's sensors can adequately distinguish. Of course, whether a system's engagement process involves a human "in the loop" (remotely controlling the engagement), "on the loop" (monitoring the engagement with the ability to terminate it when necessary) or "out of the loop" (the system performs autonomously) will have implications when gauging the ability of the UMS to comply with the principle.

It is also necessary to consider whether the intended use of a candidate UMS violates any specific weapons prohibitions. While UMSs, as a category, are not specifically regulated in international humanitarian law, they may share certain characteristics with weapons such as torpedoes or mines that are the subject of regulation. To the extent that this is so, they must comply with the relevant law. For instance, torpedoes that miss their target must be rendered harmless once they have completed their attack run.⁷⁸ Mines, similarly, must become harmless within an hour of control being lost over them.⁷⁹ These requirements, intended to prohibit the use of "dumb" weapons that would pose a hazard to shipping after their use, are unlikely to present a significant hurdle to the development and employment of UMSs. However, account must be taken of them during the review process.

It is important to understand that a weapon or weapon system will pass legal review so long as it can meet the required standards in the environment(s) into which it is intended to be introduced. This means that the characteristics of that environment can be taken into consideration. Thus, for example, if civilians and civilian ships (and submarines) are usually absent from areas where a UMS is likely to be used, as they are in much of the sea, then that is a relevant factor in assessing the risk of striking military objectives and civilians or civilian objects without distinction. It must be cautioned, however, that the actual proximity of civilians and civilian ships has to be taken into consideration when employing these systems, for instance in a busy sea lane or international strait. In other words, it is necessary to distinguish the *per se* lawfulness of a UMS on the basis that there are circumstances in which it is capable of distinction, from its lawfulness, or lack thereof, in a specific engagement.

77 The principle of distinction requires that parties to a conflict "shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly ... direct their operations only against military objectives": AP I, Art. 48. On the customary law status of the principle, see ICRC Customary Law Study, above note 64, Rule 1. As to the maritime context, see San Remo Manual, above note 54, para. 39.

78 Convention No. VIII relative to the Laying of Automatic Submarine Contact Mines, 36 Stat. 2332, TS No. 541, The Hague, 18 October 1907 (Hague Convention VIII), Art. 1(3). See also San Remo Manual, above note 54, para. 79.

79 Hague Convention VIII, Art. 1(1). See also San Remo Manual, above note 54, para. 82(b).

Conduct of hostilities

It is the subsequent use of a UMS which has passed legal review that is most likely to run afoul of the law. Of central importance in this respect are the prohibition against attacks on persons or objects not constituting lawful military objectives (a category, as set out below, that has unique characteristics under the law of naval warfare), the prohibition against conducting an attack indiscriminately, the rule of proportionality, and the requirement to take precautions in attack. In treaty law, these rules are found in AP I. However, the section of the Protocol in which they appear is only applicable to attacks conducted from the sea when they are directed against objectives on land or where civilians on land may be affected.⁸⁰ Most attacks likely to be conducted by a UMS, at least in the present state of the technology, will be against other maritime systems, for instance by mining or direct attack, and will accordingly not be governed directly by AP I conduct of hostilities rules. Despite this fact, it is widely accepted that customary law counterparts of the rules do apply at sea.⁸¹

As with any other naval engagement, a party to the conflict employing a UMS to conduct an attack must assess whether that attack is directed at a lawful target.⁸² A special regime for “military objectives” exists at sea. Certain ships are immune from direct attack, protected from indiscriminate attack, included in proportionality calculations, and considered vis-à-vis the requirement to take precautions in attack. These include enemy:

- (a) hospital ships;
- (b) small craft used for coastal rescue operations and other medical transports;
- (c) vessels granted safe conduct by agreement between the belligerent parties including:
 - (i) cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war;
 - (ii) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
- (d) vessels engaged in transporting cultural property under special protection;
- (e) passenger vessels when engaged only in carrying civilian passengers;
- (f) vessels charged with religious, non-military scientific or philanthropic missions, vessels collecting scientific data of likely military applications are not protected;

80 AP I, Art. 49(3).

81 San Remo Manual, above note 54, paras 40, 42(b)(i), 46.

82 *Ibid.*, para. 42(b)(i). See also ICRC Customary Law Study, above note 64, Rules 11–12; AP I, Art. 51(4). Protected ships may sometimes lose their protection if they fail to meet the associated requirements. San Remo Manual, above note 54, paras 48–49; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 6 UST 3217, 75 UNTS 85 (GC II), Art. 34 (providing specifically for the loss of protection by hospital ships).

- (g) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection;
- (h) vessels designated or adapted exclusively for responding to pollution incidents in the marine environment;
- (i) vessels which have surrendered; [and]
- (j) life rafts and life boats.⁸³

Unlike civilian objects in land warfare, however, a number of civilian ships may be attacked. Enemy merchant vessels become military objectives if they are involved in belligerent activities on behalf of the enemy, such as cutting undersea cables; perform the duties of an auxiliary to enemy forces, as with transporting troops; gather intelligence for the enemy, perform an early warning function or contribute to enemy command and control; sail in a convoy escorted by enemy warships or aircraft; are armed at a level that poses a risk to warships; or make an effective contribution to the enemy's military operations in some other way.⁸⁴ Enemy merchant vessels may also be attacked if they refuse an order to stop, or actively resist visit, search or capture.⁸⁵

In all these cases, UMSs could be used to conduct the attack, so long as other legal requirements were met. As an example, if a convoy of enemy warships and enemy merchant vessels is detected far out to sea, an armed UMS would be an ideal means with which to conduct the attack, since the risk to the attacker's own forces would be minimized and there would be no requirement to distinguish between the various vessels in the convoy as they would all be subject to attack. For the near term, the likelier use of UMSs is for identifying and/or tracking targets for attack by other means. Such operations raise no unique legal issues – on the contrary, as explained below, the use of a UMS may be required as a feasible precaution in attack by way of verifying the nature of the potential target.

Pursuant to the law of naval warfare, enemy merchant vessels, with some exceptions,⁸⁶ may be captured beyond neutral waters for adjudication in a prize proceeding.⁸⁷ If there is any doubt as to their status, they may be visited and searched, so long as there are reasonable grounds for suspecting that they are subject to capture.⁸⁸ The right of visit and search, as well as capture, also applies

83 San Remo Manual, above note 54, paras 47. See also GC II, Arts 21, 22, 27, 38 (providing for protection of hospital ships and medical transports); Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, 14 May 1954, Art. 12(3) (providing for the protection of vessels carrying certain cultural property); Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, 36 Stat. 2396, TS No. 544, 18 Oct 1907, Arts 3, 4 (providing for the protection of small coastal fishing vessels and small boats engaged in local coastal trade, and of vessels charged with religious, scientific or philanthropic missions).

84 San Remo Manual, above note 54, para. 60.

85 *Ibid.*, para. 60(e).

86 *Ibid.*, para. 136; GC II, Arts 21, 22, 27, 38 (providing for protection of hospital ships and medical transports); AP I, Art. 70 (providing for the protection of relief consignments).

87 San Remo Manual, above note 54, para. 135; US Commander's Handbook, above note 61, para. 8.6.2.1. See also James Kraska, "Prize Law", in *Max Plank Encyclopaedia of International Law*, December 2009.

88 San Remo Manual, above note 54, para. 118.

to ships that are flying a neutral flag when the commander of a warship suspects the vessel in question of having enemy character; are transporting contraband; are acting as a transport for enemy forces; are operating under some form of enemy control; have failed to present proper and authentic documents; are violating regulations set forth by the belligerent within the immediate area of naval operations; or are attempting to breach a blockade.⁸⁹

UMSs could conduct or facilitate these operations in various circumstances. Recall, for instance, that UMSs may be employed during a boarding operation to monitor all aspects of the ship being boarded, thereby enhancing the security and situational awareness of the boarding team. Furthermore, sensors on the UMS might be able to examine the ship's internal contents to identify and locate contraband. Of course, unmanned systems would be extremely useful as a force multiplier in monitoring blockades or compliance with regulations issued by military commanders in the immediate zone of operations.

The question of whether a UMS is *per se* capable of being directed against a military objective – that is, whether it can be used discriminately – should have been addressed during the weapon review process. However, even if the system is capable of being used discriminately, the operator is prohibited from employing it without directing it against a lawful target.⁹⁰ An example of such indiscriminate use would be sending a USV incapable of distinguishing a warship from a civilian vessel into a dual-use port. In that the USV will attack any vessels it locates there, and because the port is being used by both military and civilian ships, the attack would be indiscriminate.

Similarly, it would be unlawful to use a UMS to monitor shipping lanes used by both civilian and military ships and attack any ship passing through them. This is so even though warships may be in the lanes at times, and sinking one would amount to a significant military advantage. It is the fact that the system is not distinguishing between ships which are and are not subject to attack that renders the use of the UMS unlawful. It must be cautioned, however, that it is not a violation of the law of armed conflict to use a UMS that cannot distinguish lawful from unlawful targets, without more; rather, it is the use of such a system in circumstances in which it is likely to encounter and attack both that is unlawful.

An issue related to the obligation to distinguish arises from the fact that enemy vessels which have surrendered are exempt from attack.⁹¹ Recognizing surrender would be an especially significant challenge for autonomous systems, requiring as it does the interpretation of complex behaviour.⁹² While the text of Article 41(2)(b) of AP I provides for the protection of those who “clearly [express] an intention to surrender”, it is well accepted that the surrender must be evident to the opposing side, and this is also true in the maritime context.⁹³

89 *Ibid.*, paras 114, 146.

90 *Ibid.*, para. 41.

91 AP I, Art. 41(2)(b); San Remo Manual, above note 54, para. 47(i).

92 See, e.g., Robert Sparrow, “Twenty Seconds to Comply: Autonomous Weapon Systems and the Recognition of Surrender”, *International Law Studies*, Vol. 91, 2015, pp. 703–712.

93 San Remo Manual, above note 54, para. 47.56–47.57.

The United States goes further, taking the position that a surrender need only be accepted when it is feasible for the opposing side to do so.⁹⁴ As a result, it is unlikely to be an issue if UMSs are unable to recognize surrender, although a UMS must be redirected or recalled, if to do so is feasible, so as not to attack a formerly lawful target that has offered its surrender.

The rule of proportionality likewise applies in naval warfare.⁹⁵ It prohibits an attack in which the expected incidental injury to civilians and collateral damage to civilian objects is excessive relative to the anticipated military advantage of the attack. The fact that a UMS is conducting an engagement presents no unique legal obstacles so long as the decision on proportionality is made by a man in, or on, the loop. In such circumstances, the UMS is merely a weapon system like any other, in which assessments of proportionality are made by a human considering all relevant circumstances.

Compliance with the rule of proportionality may be problematic when an autonomous UMS is unable to assess the expected collateral damage or anticipated military advantage likely to result in the attendant circumstances.⁹⁶ However, this would not necessarily render an engagement unlawful because the UMS could be programmed to only attack under certain conditions. For instance, USVs might be programmed to engage only those submarines that have the distinct signature, acoustic or otherwise, of a class, or hull, from the enemy's fleet. So long as their weapons were expected to affect only underwater objects, then, depending on where and for how long the USVs performed this function, their usage would be unlikely to raise proportionality questions. Or consider UMSs that are able to identify enemy surface warships with a high degree of reliability, but which are programmed not to attack if another ship not meeting the target criteria is within the destructive radius of the weapon(s) to be used. As a rule, the vast areas involved and the quality of sensor technologies are such that it is in naval warfare that unmanned systems will present the fewest proportionality challenges.

It is in relation to the requirement to take precautions in attack that UMSs may make their greatest contribution to advancing the protective effects of international humanitarian law. AP I includes a specific provision on such precautions during maritime operations. According to Article 57(4):

In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.⁹⁷

This is a curious provision as it appears in a section that, as noted, is applicable in the maritime context only to sea-to-land attacks. The ICRC Commentary to the article

94 DoD Manual, above note 46, § 5.10.3.3. See also ICRC Customary Law Study, above note 64, pp. 168–169.

95 San Remo Manual, above note 54, para. 46(d).

96 See discussion of this issue in Michael N. Schmitt and Jeffrey C. Thurnher, “‘Out of the Loop’: Autonomous Weapon Systems and the Law of Armed Conflict”, *Harvard National Security Journal*, Vol. 4, 2013, pp. 253–257.

97 AP I, Art. 57(4).

speculates that paragraph 4 is meant to address situations in which the attack is not against land-based targets, but some effect of the attack manifests there.⁹⁸ Article 57 (4) also uses the term “reasonable” rather than the word used in the other aspects of the article, “feasible”, thereby begging the question of whether there is a difference.

These issues need not detain the discussion. Whatever the intent behind the paragraph and word choice, it is widely accepted today that Article 57 fairly replicates the customary law precautions requirements that generally apply to naval warfare.⁹⁹ These are that the attacker must do everything feasible to verify that the target is a lawful one; choose means and methods of warfare, as well as targets, that will result in the least harm to civilians and civilian objects without sacrificing military advantage; cancel or suspend an attack if it becomes apparent that the rule of proportionality will be violated or other violations of the law of armed conflict will result; and provide an effective warning of an attack that may affect the civilian population when circumstances so permit.

The precautions in attack requirements have several implications in the UMS context. Of central importance is the verification obligation. Given that UMSs are unmanned, the systems may be deployed to the proximity of potential targets to verify their status and actions, as well as to assess any potential for collateral damage, without endangering one’s own personnel or other critical assets. To the extent that such systems are available to a naval commander, and their use is operationally feasible in the circumstances, they must be employed if doing so would contribute meaningfully to verification of a target. Likewise, they may be used to monitor an engagement in order to ensure continuing adherence to the law of armed conflict.

The precautions in attack obligation to select means of warfare is also relevant. There may be situations where unmanned systems can achieve the same objective as an attack conducted directly by a warship or other manned system, but at lower risk to civilians. Consider an enemy merchant vessel with civilians aboard that is attempting to evade lawful capture or a neutral ship that is in the process of breaching a blockade. A UUV might be able to disable the ships by, for example, damaging or disabling their propellers. If this is so, the UUV would have to be used, if feasible in the circumstances, in lieu of a warship armed with weapon systems likely to cause greater collateral damage or incidental injury. Additionally, the requirement to select the means of warfare least likely to cause civilians and civilian objects harm may determine the type of weapon deployed from a UMS. In the example above, it could drive selection of a weapon likely to disable, rather than sink, the ships.

USVs are likely to offer an effective means of warning ships. Recall that an attempt must be made to capture certain ships before they are attacked and that warships have an obligation to conduct a visit and search in various situations

98 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, paras 2230–2233.

99 San Remo Manual, above note 54, para. 46; DoD Manual, above note 46, §§ 5.11, 13.3 (“In general, the rules for conducting attacks, such as bombardments, by naval forces are the same as those for land or air forces.”); German Navy, above note 60, pp. 165–166.

where the status of a ship is uncertain. USVs could be employed to warn the ships concerned that if they resist capture or fail to cooperate in the visit (and, possibly, search), they open themselves to attack. Such warnings are important in that merchant ships may carry civilians. Moreover, warning is imperative in the case of a ship with uncertain status because the very fact that status is uncertain evidences doubt, and doubt imposes a presumption of civilian status.¹⁰⁰ It is only when the ship resists visit and search that the doubt is rebutted as a matter of law. Additionally, naval forces have a right to control the immediate area of operations,¹⁰¹ and USVs would be helpful in warning away vessels that might be placed at risk by their presence therein.

The law of neutrality¹⁰²

Consideration of neutrality issues with respect to UMSs centres on two issues: navigational prerogatives and belligerent operations in neutral territory, including the territorial sea. With respect to the former, neutral waters include internal waters, the territorial sea, and archipelagic waters.¹⁰³ During an international armed conflict, UMSs may be used by belligerent ships, when doing so is part of their normal mode of operation, while in either transit passage through an international strait or archipelagic sea lane passage. Similarly, neutral ships may use UMSs as they transit belligerent international straits and archipelagic waters.¹⁰⁴ If they are considered ships, or otherwise granted navigational rights, they would be entitled to conduct transit passage and archipelagic sea lane passage in their own right. Despite the existence of an armed conflict, neutral States are precluded from suspending or impeding the rights of transit and archipelagic sea lanes passage.¹⁰⁵

The treatment of territorial waters in the law of neutrality differs from that set forth in the law of the sea. During an armed conflict, neutral coastal States may, but are not required to, allow “mere passage” through their territorial sea by belligerent warships.¹⁰⁶ Should mere passage be allowed, the neutral State is entitled to impose conditions and restrictions thereon. Any such conditions and restrictions must be applied equally to the warships of all parties to the conflict.¹⁰⁷

100 For instance, see San Remo Manual, above note 54, para. 58. See also ICRC Customary Law Study, above note 64, pp. 35–36; but see DoD Manual, above note 46, § 5.4.3.2.

101 San Remo Manual, above note 54, para. 108.

102 Although its application in some circumstances has undoubtedly been modified by the Charter of the United Nations, the law of neutrality remains valid and relevant today. See, e.g., Michael Bothe, “The Law of Neutrality”, in *The Handbook of International Humanitarian Law*, 3rd ed., 2013, pp. 552–554.

103 San Remo Manual, above note 54, para. 14.

104 *Ibid.*, paras 23–30.

105 *Ibid.*, para. 29.

106 Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, 36 Stat. 2415, TS No. 545, The Hague, 18 October 1907 (Hague Convention XIII), Arts 9–10.

107 Hague Convention XIII, Art. 9.

As discussed above, unmanned systems associated with a warship are bound by the same rules as the warship. While those operating independently do not currently qualify as warships, they would, were they to be considered as having navigational rights, benefit from the mere passage regime. That said, the neutral coastal State would be within its rights to bar such passage, either for UMSs in general, or for particular types, such as those carrying weapons, so long as it does not discriminate between belligerents.

On whatever basis UMSs may be present in neutral waters, the law of neutrality places strict limitations on their activities, especially engaging in “hostile actions”. These include, but are not limited to:

- (a) attack on or capture of persons or objects located in, on or over neutral waters or territory;
- (b) use as a base of operations, including attack on or capture of persons or objects located outside neutral waters, if the attack or seizure is conducted by belligerent forces located in, on or over neutral waters;
- (c) laying of mines; or
- (d) visit, search, diversion or capture.¹⁰⁸

It is important to emphasize that the limitations apply with respect to taking actions against an adversary’s ships that are also engaged in mere passage. Of course, UMSs could, as discussed, conduct or facilitate the forbidden activities, as in the case of laying mines or participating in the visit and search of a merchant ship. Should they do so, the party to the conflict to whom they belong will be in breach of the coastal State’s neutrality. The prohibitions also extend to hostile activities while in transit through or under a neutral international strait or neutral archipelagic sea lane.¹⁰⁹

Despite the restrictions, warships may take defensive measures for their own security while passing through these waters. It is well settled that doing so includes the launching of aircraft and engaging in acoustic and electronic surveillance. This being so, there is no basis for denying such ships the right to use unmanned systems to ensure security, for instance, by monitoring the activities of enemy ships in the area.¹¹⁰ On the contrary, UMSs would be invaluable in ensuring the security of warships in the permitted forms of passage.

Neutral States also bear obligations under the law of neutrality. Of primary importance is the duty to prevent or halt belligerent activities that violate their neutrality, such as the conduct of hostilities.¹¹¹ Accordingly, should a UMS engage in the hostile actions set forth above, or any other activity qualifying as the exercise of a belligerent right, the neutral State would be obliged to put an end to the conduct. Indeed, the neutral State could resort to force if necessary to

108 San Remo Manual, above note 54, para. 16. See also Hague Convention XIII, Art. 2.

109 San Remo Manual, above note 54, para. 15.

110 *Ibid.*, para. 30.

111 *Ibid.*, paras 15, 22. These obligations are drawn, in part, from Hague Convention XIII, Art. 25. See also DoD Manual, above note 46, § 15.3.2.

meet this obligation. If it fails to halt the exercise of belligerent rights in its waters by a UMS, the opposing party to the conflict would be entitled to do so itself, including the use of force where strictly necessary.¹¹²

Unmanned maritime systems may be used by belligerents in the exclusive economic zone and the high seas for any otherwise lawful purpose related to the armed conflict. When engaging in such activities, “due regard” must be paid to the rights of neutral shipping and other neutral interests in those areas. For instance, belligerents must pay due regard to the rights of the coastal State to explore and exploit natural resources within its exclusive economic zone and continental shelf, and to act in a manner consistent with the preservation of the maritime environment.¹¹³ Similarly, on the high seas, the use of UMSs must respect neutral States’ rights to explore and exploit the natural resources of the seabed, ocean floor and subsoil, and must avoid causing any damage to cables and pipelines on the seabed, except for those exclusively serving an enemy State.¹¹⁴ The reference to avoiding damage to cables is particularly pertinent to UMSs, which might plausibly be used to damage, or otherwise interfere with, submarine communication cables.

Conclusions

Recent events in the South China Sea highlight the importance of understanding how international law affects unmanned maritime systems. The category comprising UMSs is broad and growing in its scope. It includes devices that operate both on and under the sea, and which may be used for a diverse range of tasks, from oceanographic survey to the conduct of hostilities. The status of these systems is an important question, for it entails important rights and obligations both in peacetime and during armed conflict. The matter of status, however, remains unresolved. While there is a plausible argument for affording UMSs navigational rights, either as ships or as a special case, it is too early to reach a definitive conclusion. Furthermore, while the conditions for warship status currently appear unattainable for UMSs, it is conceivable that the law on point will evolve through practice and expressions of *opinio juris*.

Irrespective of the unsettled issues surrounding status, there is no question that UMSs may be lawfully – and usefully – employed both in peacetime and during armed conflict. Even without rights of their own, they may be deployed by ships and warships to perform numerous and diverse functions. In particular, as a means of warfare, they may be used during armed conflict like any other weapon. Equally, however, they are subject to the same duties and obligations that attach to the ships from which they are deployed, as well as those rules bearing on weapon systems and their use. The fundamental point is that, despite the novelty of UMSs, States must apply the existing law to them in good faith.

112 San Remo Manual, above note 54, para. 22; DoD Manual, above note 46, § 15.4.2.

113 San Remo Manual, above note 54, para. 34.

114 *Ibid.*, paras 36–37.

Africa and international humanitarian law: The more things change, the more they stay the same

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Abstract

Africa, both on the inter-State level and the academic level, maintains a very low profile in the global debate on international humanitarian law (IHL). IHL issues do not feature prominently in the armed conflict debate within Africa, and African States and people do not significantly participate in the global IHL debate. This contribution is aimed at both identifying the reasons for this lack of regional engagement with IHL and identifying entry points for such engagement. It also ambitiously calls for ongoing and engaged focus on IHL in Africa, and to this end, a number of issues for future consideration can be extrapolated from the issues discussed.

Keywords: law of armed conflict in Africa, historical development of the law of armed conflict in Africa, colonialism and the law of armed conflict, African perspective on the law of armed conflict.



Introduction

The human cost of armed conflict on the African continent has been devastating. While what follows is not an exhaustive list, during the past two decades alone there has been armed conflict in Angola, Burundi, Cameroon, the Central African Republic, Chad, Côte d'Ivoire, Djibouti, the Democratic Republic of the Congo (DRC), Egypt, Eritrea, Ethiopia, Liberia, Libya, Mali, Niger, Nigeria, Sierra Leone, Somalia, South Sudan, Sudan and Uganda. Some of these States, notably the DRC and Somalia, continue to suffer from armed conflict and have done so for multiple decades. The death toll of the Second Congo War alone has been estimated, at the most liberal end of the spectrum, at 5.4 million people, and at the most conservative end of the spectrum at 860,000 people.¹ Hawkins has concluded on the basis of calculating the land area of continents or regions in proportion to conflict that between 1990 and 2007, 88% of conflict deaths internationally were in Africa, 8% in Asia, 2% in Europe, and 1% each in the Americas and the Middle East.² The statistics post-2007 will in all likelihood show a variance with the escalation of fatalities in the Middle East.

Notwithstanding the prevalence of armed conflict continentally, and the massive violations that have been documented during African armed conflicts in recent history – which include the Rwandan Genocide and systematic campaigns of targeting civilians by a range of non-State armed actors in different countries, such as the Revolutionary United Front in Sierra Leone and the Lord's Resistance Army in the north-eastern DRC – we find that today, Africa, both on the inter-State level and the academic level, maintains a very low profile in the global debate on international humanitarian law (IHL) or the law of armed conflict (LOAC).³ This raises the question of whether the most acute contemporary challenges to IHL in Africa are elevated to the global debate. The challenges surrounding the Boko Haram insurgency serve well as an example in this regard. This lack of engagement with IHL is very likely symptomatic of the exclusion, due to colonialism, of African States in the formative years of modern conventional IHL. As such, this contribution is moulded around two related questions: why is the IHL debate marginalized within Africa? And are IHL issues

- 1 The International Rescue Committee (IRC) has estimated that 5.4 million excess deaths occurred between August 1998 and April 2007. Benjamin Coghlan, Pascal Ngoy, Flavien Mulumba, *et al.*, *Mortality in the Democratic Republic of the Congo: An Ongoing Crisis*, IRC, 1 May 2017, p. ii. On the other hand, the Human Security Report Project of Simon Fraser University disputes these findings, finding instead that the armed conflict-related fatalities for this period are closer to 860,000. Human Security Report Project, *Human Security Report 2009/2010: The Causes of Peace and the Shrinking Costs of War*, 2 December 2010, Part II, p. 131. For an academic discussion of methodology, see Michael Spagat, Andrew Mack, Tara Cooper *et al.*, "Estimating War Deaths: An Arena of Contestation", *Journal of Conflict Resolution*, Vol. 53, No. 6, 2009.
- 2 Virgil Hawkins, *Stealth Conflicts: How the World's Worst Violence is Ignored*, Ashgate, Aldershot, 2008, p. 25.
- 3 While some authors draw a distinction between IHL and the LOAC that corresponds largely with the distinction between the protection of victims of armed conflict on the one hand and the regulation of the conduct of hostilities on the other, this author uses these terms as synonyms.

of African concern excluded from the global IHL debate? This article endeavours not only to address the “why” in these questions, but also to propose solutions.

The first part of this contribution, “Africa and the Development of the Law of Armed Conflict: From the 1864 Geneva Convention to the 1977 Protocols”, consists of a discussion of the status of African States during the colonial period and, as such, their exclusion, for the most part, from international negotiations regarding IHL. One response to this part of the piece may well be that the issue is simple: African States could not participate because they were not independent. Such an approach undermines the African experience of the consequences of colonialism, which to many Africans remains a contemporary issue and not a historic one, and in so doing dismisses much of what lies at the heart of anti-Eurocentrism within Africa. The colonial experience hugely contributes to such anti-Eurocentrism in contemporary Africa. As such, this first part of the contribution serves to provide context to the second part, “Africa in the Global IHL Debate, and the IHL Debate in Africa”. It is in this part that the questions underlying this article are interrogated. In particular, the actors that determine the agenda of the global debate are identified, and the extreme focus on pan-Africanism in regional integration within Africa and increasing anti-Eurocentrism is discussed as a stumbling block to the mainstreaming of more global regimes of law such as IHL. Finally, the last part of the contribution touches on “The Future of IHL in Africa”. In this part, the role of the International Committee of the Red Cross (ICRC) is highlighted in the mainstreaming process of IHL within Africa.

The works of Diallo,⁴ Bello,⁵ Wodie⁶ and Mubiala⁷ are significant in locating IHL in the African context, but unfortunately have not resulted in a more sustained focus. The present contribution identifies a range of entry points and approaches to the enhancement of IHL in Africa. However, considering the depth and breadth of the problem that is armed conflict in Africa, and the lack of Africa-specific IHL scholarship, one has to be realistic about the range of issues that can be addressed in a single contribution. That said, ambitious as it may be, this contribution is aimed at framing the debate and fostering an engaged and ongoing scholarly discourse on IHL with a specific African regional focus. In an attempt to do so, this author identifies a number of issues and entry points for future research and discussion. Key examples include the contribution of African civil society, militaries from African countries, and sub-regional actors.

4 Yollande Diallo, “Humanitarian Law and Traditional African Law”, *International Review of the Red Cross*, Vol. 16, No. 179, 1976.

5 Emmanuel G. Bello, *African Customary Humanitarian Law*, Oyez Publishing, London, 1980; Emmanuel G. Bello, “A Proposal for the Dissemination of International Humanitarian Law in Africa Pursuant to the 1977 Protocols Additional to the Geneva Conventions of 1949”, *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Vol. 23, Nos 1–4, 1984.

6 Vangah Francis Wodie, “Africa and Humanitarian Law”, *International Review of the Red Cross*, Vol. 26, No. 254, 1986.

7 Mutoy Mubiala, “International Humanitarian Law in the African Context”, in Monica Kathina Juma and Astri Suhrke (eds), *Eroding Local Capacity: International Humanitarian Action in Africa*, Nordiska Afrikainstitutet, Uppsala, 2002.

In speaking of “African” approaches, perspectives or challenges, one must guard against the pitfalls of generalization. It is not feasible to engage with such approaches, perspectives or challenges in respect of each of the fifty-four States that make up the African continent. As such, due consideration must be given by the reader to the fact that the regional approach espoused for in this contribution is informed by the interests and experiences of individual States. That is to say that the experiences of individual States were drawn upon in instances where they are particularly relevant to the point at hand. Similarly, speaking of a global IHL debate is in many respects not satisfactory, as there are many ongoing debates on IHL issues at any given time, some global and some more local. These debates are dynamic and take on new dimensions as they progress. Nevertheless, it is useful to be able to refer to those issues that feature prominently and consistently in the contemporary IHL discourse collectively. For present purposes, the term “the global debate” will be used.

Many of the arguments put forward in this contribution also hold true for other parts of the developing world, notably South America and much of Asia. This is due to a range of factors, including the fact that many States within South America and Asia share comparable colonial histories to States in Africa, and that the socio-economic status of individuals within parts of these regions is somewhat comparable to that prevailing in much of Africa. While the examples and experiences I draw on in developing my various arguments bring forward an African perspective, I do anticipate that many of these points can find relevance to other parts of the world.

Africa and the development of the law of armed conflict: From the 1864 Geneva Convention to the 1977 Protocols

Today much attention is placed on the rapid expansion and diversification of international law, which has led to different subsets of international law competing for dominance with one another. International lawyers generally have a grasp of the historical development of modern international law during the era of empire – which was characterized by Western hegemony, exclusionism and exceptionalism. In contrast to this narrative of the development of general international law, the parallel development of the law of armed conflict, as a sub-regime of international law, is generally portrayed as an all-inclusive, universal regime of law. For instance, in the introductory chapter of *The Handbook of International Humanitarian Law*, Greenwood paints a picture of such an all-inclusive regime that reflects practices from across the globe, and concludes that “the theory that humanitarian law is essentially ‘Eurocentric’ is in reality more a criticism of most literature on the subject than a reflection of historical fact”.⁸ The situation is much more nuanced than this approach suggests.

8 Christopher J. Greenwood, “Historical Development and Legal Basis”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed., Oxford University Press, Oxford, 2008, p. 16.

There is much merit in humanitarian actors relying on local custom and traditional institutions in their efforts to enhance compliance with IHL. Diallo acknowledges that “the misunderstanding or lack of knowledge of the African traditional background, by making it necessary to resort to entirely foreign ideas, will then make it more difficult to obtain African acceptance of certain principles”.⁹ The ICRC’s *Spared from the Spear* study serves as an excellent example of this approach.¹⁰ One of the stated objectives of this study was to “demonstrate to all those interested that the long-standing Somali conventions of warfare, whose provisions are generally consistent with those of the Geneva Conventions, existed long before the latter were formulated and adopted”.¹¹ Nevertheless, we know through the *travaux préparatoires* of the Geneva Conventions that such Somali conventions of warfare played no role in formulating the norms of the Geneva Conventions. The same is true of the Peul customs that underlie Diallo’s study. As is the case with traditional Somali conventions of warfare and Peul customs as illustrated by Diallo, the traditional practices of various tribes across Africa, and outside of Africa, share features with the principles contained in the Geneva Conventions.¹² However, there is no direct causal relationship between the Geneva Conventions and these various traditional customs, beyond the fact that, like IHL norms, such traditions are generally steeped in humanity and pragmatism.¹³ Wodie acknowledges as much in stating that, notwithstanding the fact that various African customs reflect sentiment similar to modern rules of IHL, “traditional Africa was not aware of humanitarian law”.¹⁴ Moreover, over-reliance on this approach will prove problematic when confronted with a culture where such traditional practices do not support the prevailing foundational conceptions of IHL. There thus seems to be a disconnect between “our” understanding of the antecedent state of international law during the nineteenth and early twentieth centuries, and “our” understanding of the development of modern conventional IHL, which occurred during the same period.

Modern conventional IHL largely found its genesis in the first Geneva Convention of 1864 and the Hague Regulations of 1899 and 1907. In their elaboration, prevailing considerations that moulded general international law at the time surely also influenced them – that is to say that the era of empire impacted upon the development of IHL, as it did in every other area of

Upon taking over authorship of this chapter for the third edition of the publication, O’Connell retained this sentence: see Mary Ellen O’Connell, “Historical Development and Legal Basis”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 16.

9 Y. Diallo, above note 4, p. 63.

10 Musa Yusuf Hussein, Mohammed Abdilaahi Riraash and Ibrahim Jaji M. Wa’ais (eds), *Spared from the Spear: Traditional Somali Behaviour in Warfare*, Somali Delegation of the International Committee of the Red Cross and Somali Red Crescent Society, February 1998.

11 *Ibid.*, p. 5.

12 See, generally, Y. Diallo, above note 4; E. G. Bello, *African Customary Humanitarian Law*, above note 5.

13 *Ibid.*

14 V. F. Wodie, above note 6, p. 249.

international law.¹⁵ In order to appreciate the context of the development of IHL in Africa, it is imperative to address the status of African States within the international legal order during the period contemporary with key developments of conventional IHL.

The background of the development of IHL in Africa

The status of African States in the international legal order: The impact of colonization

During the nineteenth and early twentieth centuries, European empires managed to absorb into their domain of power virtually the entire territory of Africa. The only States on the continent that arguably escaped Western colonialism are Ethiopia and Liberia, and they are tenuous examples at best.¹⁶ While significant administrative colonial rule was never established in Liberia and Ethiopia, these States certainly did not escape the wrath of colonialism or alien domination altogether. The practice of claiming territory in Africa predated the development of specific legal doctrine to justify such claims to territory.¹⁷ Most of the early modern informal colonial claims in Africa were based on colonial treaties.¹⁸ These treaties were essentially written documents signed and entered into by illiterate (in the Western sense) village chiefs, in a language they did not understand, transferring all people within their village and their ancestor's claims to the territory and its resources to the colonizing entity. It was on this basis that King Leopold II of Belgium infamously claimed the territory of the modern-day DRC as his own.¹⁹

15 Simma has warned that the effects of such expansion and diversification should not be overstated, and notes that different sub-regimes of international law, which would include modern IHL, developed and continue to exist very much within the structural confines of international law more generally. Bruno Simma, "Fragmentation in a Positive Light", *Michigan Journal of International Law*, Vol. 25, No. 4, 2004, pp. 846–847.

16 Between 1821 and 1947, the American Colonization Society formed a settlement of freed American slaves of African descent in Liberia (although in reality more of the settlers' roots could be traced to Central America than to Africa). This settlement was conceived within the rhetoric of colonialism. In 1947, Liberia declared independence as Africa's first republic. However, for the period 1947–80, the so-called Americo-Liberians, who represented a significant minority in Liberia, absolutely dominated political power in that country. Robin Dunn-Marcos, Konia T. Kolllehon, Bernard Ngovo and Emily Russ, "Liberians: An Introduction to their History and Culture", Culture Profile No. 19, Center for Applied Linguistics, Washington, DC, April 2005, pp. 3–16. For its part, Ethiopia lost the Second Italo-Ethiopian War, culminating in Italy's military occupation of Ethiopia under the flag of Italian East Africa. Italian East Africa was short-lived, as in 1940 Italy aligned itself with the Axis powers and by the end of 1941 the Allied powers had liberated Ethiopia during the East Africa Campaign. While Ethiopia remained an independent State throughout this period, Italy's occupation of Ethiopia was an attempt at claiming a colonial territory. See, generally, Eric Rosenthal, *The Fall of Italian East Africa*, Hutchinson & Co., London, 1941.

17 The Berlin Conference (1884–85) regulated European colonization and trade in Africa, and introduced the principle of "effective occupation". See, generally, Stig Förster, Wolfgang Justin Mommsen and Ronald Edward Robinson, *Bismarck, Europe and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition*, Oxford University Press, Oxford, 1988.

18 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2001, pp. 136–137.

19 *Ibid.*, pp. 155–166.

The legendary explorer Stanley was the primary agent through which Leopold secured these treaties in the context of the Congo Free State. Sir Richard Francis Burton's claim that "Stanley shoots negroes as if they were monkeys" goes some way in indicating that Belgian forces in the DRC considered themselves to be operating in a legal and moral vacuum.²⁰

The concept of empire as it manifested in Africa was much more nuanced than the term "colonialism" suggests. Koskenniemi argues that there were various methods and mechanisms through which Western powers could extend their exclusive influence in African States, which did not amount to formal administration and thus the establishment of a colony.²¹ Lord Lindley provides the example of British Bechuanaland:

an interesting example of a protectorate in which the internal as well as the external sovereignty has passed to the protecting Power, but the territory has not been formally annexed, so that, in the eyes of British law, it is not British territory.²²

One effect hereof was that British law did not apply within the relevant territory. As a result, Britain was able to maintain a *de facto* colony without being hampered by British law, which for example outlawed slavery.

Over time, doctrine developed to justify legally the colonization of non-Western peoples. Essentially, the justification for establishing colonial administrations and acquiring territory through the means of occupation was founded on the notion that the relevant territory was *terra nullius* – that is to say, the territory was occupied by "savages" who were not politically organized.²³ The inherent hegemony of this construct is well illustrated by Lord Lindley's writings on "backward territory" in international law of 1926, wherein he stated that "territory which is *territorium nullius* may pass under the dominion of a Sovereign" by occupation and accretion. He went on to state that on the other hand, "transference of territory under a Sovereign to the *territorium nullius* may take place" by abandonment, forfeiture and destruction.²⁴ It is interesting to note that the transacting parties are the sovereign and the *territorium nullius* – no mention is made of the people indigenous to the *territorium nullius*.

In Africa the impact of colonialism is still felt today, and in the context of IHL Mubiala has noted that "the specific problems of the acceptance of

20 See, generally, Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, Pan Books, London, 2006. See also, generally, John Bierman, *Dark Safari: The Life Behind the Legend of Henry Morton Stanley*, Hodder and Stoughton, London, 1991.

21 M. Koskenniemi, above note 18, pp. 124–125.

22 Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice relating to Colonial Expansion*, Longmans, Green & Co., London, 1926, p. 187.

23 During the nineteenth and early twentieth centuries, there was a nuanced debate regarding the regulation by international law of European engagement with the non-European world. The particularities of this debate go above and beyond the scope of this contribution. For more on this debate, see M. Koskenniemi, above note 18, pp. 98–178.

24 M. F. Lindley, above note 22, p. 187.

contemporary IHL ... [are] largely due to its European origins. Africans strongly distrust any European-inspired legal system, let alone a humanitarian law that proved ineffective during the colonial wars.”²⁵

Africa and the “logic of exclusion-inclusion” in the development and application of international law

Koskenniemi speaks of “the myth of civilization: a logic of exclusion-inclusion” when addressing the development of international law in the period contemporary with the first Geneva Convention of 1864 and the Hague Regulations.²⁶ He argues that European States were struggling to “minimize their colonial liabilities” while maximizing their influence. In a similar fashion, European States were the driving force behind the development of IHL conventions to protect their interests in spaces where such protections would be useful, such as inter-State armed conflicts within Europe, but exclude the constraints inherent in these conventions in spaces where they would restrict the relevant State’s activities, such as colonial wars. The concepts of statehood and sovereignty, and the concomitant international legal personality that attaches to States proper, were to undergo a dramatic metamorphosis leading up to and following the Geneva Convention of 1864. However, this metamorphosis was gradual. It was only in 1856, with the adoption of the Peace Treaty of Paris, that a non-Christian State, the Ottoman Empire (Turkey), was regarded as a member of the international community of civilized States.²⁷ This accounts for the fact that only twelve Western European States negotiated the Geneva Convention of 1864. Only three African States subsequently ratified this Convention.²⁸

25 M. Mubiala, above note 7, p. 47.

26 M. Koskenniemi, above note 18, p. 127.

27 The notion of civilized peoples and States in international law thinking came to the fore during the later parts of the nineteenth century. “For purposes of the application of European international law, Lorimer, in 1883–1884, divided the human race into three categories: ‘civilized’, ‘barbarian’ and ‘savage’; Von Liszt, in 1898, classified it, in his turn, as ‘civilized’, ‘semi-civilized’ and ‘uncivilized.’” Mohammed Bedjaoui, “General Introduction”, in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects*, Martinus Nijhoff, Dordrecht, 1991, p. 8. The full extent of international law was to apply only among civilized States, meaning Christian States, whereas semi-civilized States, such as Siam and China, had a limited international law status, allowing them to be party to treaties, for example. Uncivilized States existed outside of the confines of international law. *Ibid.*

The remnants of this approach remain visible today in some of the most important international law instruments – for example, Article 38(1) of the Statute of the International Court of Justice (ICJ), which provides the traditional expression of the sources of international law, defines the general principles of international law as “the general principles of law recognized by civilized nations”. Statute of the International Court of Justice, Annex, Charter of the United Nations, 26 June 1945 (entered into force 24 October 1945). Similarly, Common Article 3 of the Geneva Conventions prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

28 These were the Congo (27 December 1888), the Orange Free State (28 September 1897) and the South African Republic (30 September 1896). For a list of States Parties, see ICRC Database on Treaties, States Parties and Commentaries, available at: <https://ihl-databases.icrc.org/ihl/INTRO/120?OpenDocument> (all internet references were accessed in January 2017).

As convener of the first Hague Conference in 1899, Russia invited twenty-six States to participate. In addition to the European States, Persia, China, Japan, Siam, the Ottoman Empire and the United States were invited. By 1907, when the United States took the initiative to organize the second Hague Conference, forty-seven States were invited, of which only Abyssinia (Ethiopia), Costa Rica and Honduras did not attend. On this occasion, those invited included nineteen Latin American States;²⁹ Asia was represented by China, Japan, Persia, and Siam, while Abyssinia was the only African invitee. These events were significant, but at the time, they were still met with considerable scepticism. For his part, Westlake concluded that even though China, Siam and Persia participated in the Hague Conferences, their admission into the “system” nevertheless fell short of “recognizing the voices as of equal importance with those of the European and American Powers”.³⁰ To date, from the African continent, only Ethiopia (during 1935), Liberia (during 1914) and South Africa (during 1978) have ratified any of the Hague Conventions/Declarations emanating from the Hague Conferences of 1899 and 1907.

By the time the Geneva Conventions of 1949 were negotiated, fifty-nine States participated. Thus, during the period between the recognition of the Ottoman Empire as a sovereign State during 1856 and the negotiation of the 1949 Geneva Conventions, membership of the international community of “civilized States” expanded significantly. As a corollary, so too did the number of States which actively engaged in the development of conventional IHL. Nevertheless, from an African perspective not much had changed. Only Egypt and Ethiopia represented the African continent at the negotiations of the 1949 Geneva Conventions.³¹ This was largely due to the fact that most African States remained subject to colonial control. However, States such as Liberia and South Africa were free to participate, but did not do so.

A wave of decolonization followed the adoption of the Geneva Conventions of 1949, and by the time the conference was convened to elaborate the 1977 Additional Protocols, 135 States were participating, with thirty-nine States representing the African continent.³² Moreover, of the twelve national liberation movements from eight countries who attended as delegates, eight groups from six countries were African.³³

This was a watershed moment for African involvement in the development of IHL. Much of the agenda during the negotiations of the Additional Protocols was determined precisely by the increase in non-international armed conflicts (NIACs)

29 These States were the Argentine Republic, Bolivia, the United States of Brazil, Chile, Colombia, Costa Rica (invited but did not attend), Cuba, the Dominican Republic, Ecuador, Guatemala, Haiti, Honduras (invited but did not attend), Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay and the United States of Venezuela.

30 John Westlake, “The Native State of India”, 1910, in L. Oppenheim (ed.), *The Collected Papers of John Westlake on Public International Law*, Cambridge University Press, Cambridge, 2014, p. 623.

31 Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 1, 1949, pp. 158–170.

32 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva, Vol. 2 (1974–1977), 1977, pp. 25–408.

33 *Ibid.*

in the developing world, particularly Africa. However, for African States, independence, and the concomitant equal sovereignty that came with it, had been a hard-fought ideal for decades. Many of these States viewed the regulation of NIAC as the internationalization of domestic affairs.³⁴ This sentiment was well expressed by the representative of Zaire in relation to Additional Protocol II (AP II) relevant to NIAC:

Several provisions of this Protocol encroach upon the internal laws of states and thus dangerously compromise the sovereignty and territorial authority of these states on matters which ... are within their domestic jurisdiction. The mistake was to place on an equal footing a sovereign state and a group of its insurgent nationals, a legal government and a group of outlaws, a subject of international law and a subject of domestic law.³⁵

This line of argumentation is consistent with the views expressed by Western States in the early development of conventional IHL. The *travaux préparatoires* indicate that African States “gave priority to humanitarian issues affecting Africa as a result of external factors”.³⁶ These States placed much emphasis on the internationalization of wars of national liberation, and the issue of mercenaries, while largely neglecting AP II. Moreover, in many newly independent African States the withdrawal of the colonial administration had left a massive power vacuum, which came to be occupied by often fragile governments. This led to civil wars by various factions vying for power, frontier disputes and secessionist movements. Key examples in this regard include the Congo Crisis (1960–65),³⁷ the Biafran War (1967–70),³⁸ and the situation regarding Morocco and Western Sahara which continues to this day.³⁹ The experience for many African actors was that these newly independent African States fought for independence without the benefit of IHL, yet as soon as they gained independence, AP II was negotiated and all of a sudden they had to afford to insurgents the legal recognition that they themselves had never benefited from. Indeed, as suggested above, the *travaux préparatoires* do not support the dominant narrative that the development of the law of NIAC was responsive to the needs of Africa – certainly not from the perspective of African States generally. The notion of NIAC was not new; Western empires had engaged consistently in NIACs during the preceding century. Instead, following the end of empires, Western States thought they were unlikely to be affected by NIACs, and as such, the regulation of NIAC was deemed by many to be an issue of developing States with weak governance.

34 V. F. Wodie, above note 6, p. 251.

35 Michael Bothe, “Conflits armés internes et droit international humanitaire”, *Revue Générale de Droit International Public*, No. 1, 1978, pp. 82.

36 M. Mubiala, above note 7, p. 39.

37 David N. Gibbs, *The Political Economy of Third World Intervention: Mines, Money and U.S. Policy in the Congo Crisis*, University of Chicago Press, Chicago and London, 1991, pp. 77–164.

38 See, generally, Suzanne Cronjé, *The World and Nigeria: The Diplomatic History of the Biafran War, 1967–1970*, Sidgwick and Jackson, London, 1972.

39 Stephen Zunes and Jacob Mundy, *Western Sahara: War, Nationalism, and Conflict Irresolution*, 3rd ed., Syracuse University Press, Syracuse, NY, 2010, pp. 3–90.

While a great majority of African States are party to AP II today, their resistance to stringent regulation of NIAC during the negotiating conference should not be underestimated, and is well evidenced by the *travaux préparatoires*.

The arbitrary nature of colonial borders in Africa was a key contributor to the emergence of frontier disputes. International law dealt with this issue through a norm known as *uti possidetis*. According to Ratner, “stated simply, *uti possidetis* provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence”.⁴⁰ While, as the International Court of Justice has pointed out, the *uti possidetis* norm is necessitated by pragmatic considerations,⁴¹ from an African perspective this norm may serve to further entrench scepticism of international law as being Eurocentric.

The application of IHL in colonial wars

The important point to understand from the above, for the purposes of this contribution, is the implication that African States played no meaningful role in the negotiation and development of early IHL instruments. Even more importantly, neither did they benefit from the application of such instruments during the colonial era. We thus find that foundational notions of IHL, such as equality of belligerents, were forged along the lines of who “civilized” States deemed to be their equals. The colonial conflicts predated the 1949 Geneva Conventions, and as such Common Article 3 was not relevant, and because colonial wars were fought against non-State entities, conventional IHL did not apply. The point of departure of the Western powers in the colonial wars was generally that the communities indigenous to the territory in question never had any form of sovereignty to begin with. Sovereignty, as it were, was a concept reserved exclusively for European powers. Westlake argued:

International law has to treat natives as uncivilized. It regulates, for the mutual benefit of the civilized states, the claims which they make to sovereignty over the region and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded.⁴²

Anghie has commented:

The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these peoples, presenting them as suitable objects for conquest, and legitimizing the

40 Steven R. Ratner, “Drawing a Better Line: *Uti Possidetis* and the Borders of New States”, *American Journal of International Law*, Vol. 90, No. 4, 1996.

41 ICJ, *The Case Concerning the Frontier Dispute (Burkina Faso v. The Republic of Mali)*, Judgment, 22 December 1986, *ICJ Reports 1986*, paras 20–32.

42 John Westlake, *Chapters on the Principles of International Law*, as quoted in M. Koskenniemi, above note 18, p. 127.

most extreme violence against them, all in the furtherance of the civilizing mission – the discharge of the white man’s burden.⁴³

This point of departure was challenged for the first time during the Second Boer War, as the Boers too were of European decent.⁴⁴ Yet, there was a voice that maintained the general premise regarding colonial territories and their peoples in the context of the Second Boer War. Field Marshal Lord Wolseley, commander-in-chief of the British War Office, expressed the following view:

I know the Boers of all classes to be most untruthful in all their dealings with us and even amongst themselves. They are very cunning, a characteristic common to all untruthful races ... To attempt to tie our hands in any way, no matter how small, by the “Laws and Customs of War” proposed for *civilized* nations at the peace Conference, would be in my opinion suicidal, for the Boers would not be bound by any such amenities.⁴⁵

The only IHL convention to which all forces involved in the Boer War were party was the 1864 Geneva Convention. Major-General Sir John Ardagh, director of British military intelligence, was of the view that the substantive content of the Hague Conventions embodied the Laws and Customs of War, and as such found general application.⁴⁶ Ardagh further commented:

The peculiar conditions of the war in South Africa may justify a departure in certain instances from the Laws and Customs of War on the ground of military necessity, but as reciprocity is the foundation of the observance of international rules, it should be most carefully weighed how such departures would affect us if their exercise was appealed to as precedent created by ourselves when we found ourselves engaged in other wars.⁴⁷

The question arises as to why this same reasoning, being the basis on which the Laws and Customs of War were applicable to relevant military engagement, was not employed in other wars between colonizing powers and local populations. Many factors certainly impacted on this, the most important of which seems to be that what lay at the heart of the distinction was conceptions of being civilized and

43 Anthony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law”, *Harvard International Law Journal*, Vol. 40, No. 1, 1999, p. 7.

44 The Boer Wars were two separate armed conflicts. The First Boer War was fought between the United Kingdom and the South African Republic from 20 December 1880 to 23 March 1881. The Second Boer War, which was a much more significant armed conflict, both in intensity and duration, was fought between the British Empire on one side and the Zuid-Afrikaansche Republiek (Transvaal, known as the South African Republic) and Oranje-Vrijstaat (Orange Free State) on the other, and lasted from 11 October 1899 to 31 May 1902. See Herold E. Raugh, *The Victorians at War, 1815–1914: An Encyclopedia of British Military History*, ABC-CLIO, Santa Barbara, CA, 2004, pp. 49–54.

45 Lord Wolseley to Parliamentary Under-Secretary, War Office 32/850, 14 February 1900, as quoted in Andries W. G. Raath and Hennie A. Strydom, “The Hague Conventions and the Anglo-Boer War”, *South African Yearbook of International Law*, Vol. 24, 1999, p. 156.

46 John Charles Ardagh, “Ardagh Papers”, Microfilm A422, Transvaal Archives, Pretoria.

47 John Charles Ardagh, “Major-General Sir John Ardagh: Papers”, National Archives of the United Kingdom, PRO 30/40/17.

being “barbarian”.⁴⁸ The forces of both the Zuid-Afrikaansche Republiek (Transvaal) and the Oranje-Vrijstaat (Free State), the two Boer Republics who fought the Second Boer War, were of Western European descent; they spoke a European language (Dutch); they dressed like Europeans; they were Christian; and they organized themselves politically in a European manner. It was thus more difficult to employ the rhetoric of civilized versus savage in interactions with the Boer forces. No legal criteria were ever developed to determine which peoples were savages and which were civilized – these determinations were based on social constructs and perceptions.⁴⁹

Even more recently, the peoples indigenous to colonial territories were, for the most part, excluded from the benefits of IHL. This point is illustrated by the reservation made to the Geneva Conventions by Portugal on 14 March 1961:

As there is no actual definition of what is meant by a conflict not of an international character ... Portugal reserves the right not to apply the provisions of Article 3, in so far as they may be contrary to the provisions of Portuguese law, in all territories subject to her sovereignty in any part of the world.⁵⁰

At the time of this reservation, Portugal maintained the following colonies in Africa: Angola, Cabinda, Cape Verde, Portuguese Guinea and Mozambique, all of which gained independence only between 1973 and 1975. Indeed, the Portuguese Colonial War in Angola commenced five weeks before this reservation was made, and lasted until 1974. This reservation served to exclude the application of Common Article 3 to conflicts fought by Portugal within its colonies.

African troops in World War I: The genesis of the applicability of IHL in Africa

World War I (WWI) was particularly significant in the context of IHL in Africa. It marked the first occasion on which African States, most of which were at the time subject to colonial domination, engaged in armed conflict legally bound by conventional IHL.⁵¹ The African theatres of WWI were much larger territorially than the African theatres of World War II (WWII). Africans participated in WWI in three contexts: (1) colonial wars fought between local tribes and colonialist forces, such as the Zaian War in Morocco;⁵² (2) wars between

48 M. Koskeniemi, above note 18, pp. 76–88.

49 See above note 26 for more detail.

50 Reservation to the Geneva Conventions (1949) by Portugal, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=663716D11E477ECFC125640203F977C>.

51 The application of IHL during the Second Boer War arguably provides a limited exception to the general statement that conventional IHL first found application to African armed forces during WWI.

52 See Robin Leonard Bidwell, *Morocco under Colonial Rule: French Administration of Tribal Areas 1912–1956*, Frank Cass, Abingdon, 1973, pp. 48–62. This armed conflict was fought from 1914 to 1921 between France and the French Protectorate of Morocco on one side, and the Zaian Confederation (together with various Berber tribes) on the other. During WWI, the Zaian Confederation received support from the Central Powers.

opposing colonial powers within Africa, such as the East Africa Campaign in WWI, fought primarily between the British and German Empires in East Africa, both of which utilized African forces extensively;⁵³ and (3) African soldiers deployed in the European theatres of WWI subject to the command and control of officers from their colonial masters.⁵⁴ It is impossible to know exactly how many Africans fought in the European theatres of WWI. It has been estimated that the Allies mobilized 650,000 colonial troops in Europe, but this figure includes not only Africans.⁵⁵ Britain did not mobilize any African troops in European theatres of war, but did do so in the Middle East. Yet according to Koller, “unlike Britain, the French deployed large numbers of African troops in Europe, including 172,800 soldiers from Algeria, 134,300 from West Africa, 60,000 from Tunisia, 37,300 from Morocco, 34,400 from Madagascar and 2,100 from the Somali Coast”.⁵⁶ The East Africa Campaign serves well to illustrate the level of African involvement and African suffering during WWI. As Paice has stated:

The death toll among the 126,972 British troops who served in the East Africa campaign was officially recorded as 11,189 – a mortality rate of nine per cent – and total casualties, including the wounded and missing, were a little over 22,000. The loss of life among armed combatants was, however, only the tip of the iceberg. ... By the end of the war more than one million [African] carriers had been recruited by the British in their colonies and in German East Africa, of whom no fewer than 95,000 had died.⁵⁷

The African armed forces that fought under colonial masters were bound to conventional IHL not by virtue of the status of the “States” to which they belonged being fully sovereign, as indeed most of them were not. Instead, they were bound by virtue of the fact that they acted as functionaries of their “colonial masters” – most of which were parties to antecedent IHL conventions. More than a century has now passed since the beginning of WWI. While there is increased formal recognition for the contribution made by African troops to the war, unfortunately a lack of public awareness remains. For instance, on 5 November 2013, French president François Hollande commemorated the 430,000 African soldiers from French colonies who fought for France in WWI, and acknowledged that they “took part in a war that was not necessarily theirs”.⁵⁸ President

53 See A. Adu Boahen, *General History of Africa*, Vol. 7: *Africa under Colonial Domination 1880–1935*, UNESCO, 1990, pp. 132–142; Hew Strachan, *The First World War in Africa*, Oxford University Press, Oxford, 2004, pp. 93–184. The East Africa Campaign lasted from August 1914 to November 1918. African forces from across the British Empire were mobilized; German forces also relied heavily on local conscripts.

54 Christian Koller, “The Recruitment of Colonial Troops in Africa and Asia and their Deployment in Europe during the First World War”, *Immigrants & Minorities*, Vol. 26, Nos 1–2, 2008.

55 *Ibid.*, p. 113.

56 *Ibid.*, p. 114.

57 Edward Paice, *Tip and Run: The Untold Tragedy of the Great War in Africa*, Weidenfeld & Nicolson, London, 2007, pp. 392–393.

58 Guillaume Gueguen, “Hollande Honours Africa Role in France’s WWI Fight”, *France 24*, 8 November 2013, available at: www.france24.com/en/20131108-african-troops-soldiers-world-war-french-hollande-senegal-algeria-tunisia.

Hollande said that no soldier who fought for France and shed blood in battle should be forgotten, and emphasized that “the ultimate recognition is awareness” – he thus acknowledged a lack of public awareness and, by extension, public recognition.

Africa in the global IHL debate, and the IHL debate in Africa

In as far as the elaboration of treaty norms is concerned, IHL is a rather stagnant branch of international law. As such, even though African States now form a part of the international community of sovereign equal States, the era of the development of foundational, conventional IHL has largely passed. It should hardly be surprising that there is an apathy among many quarters within Africa of legal concepts, intended to be of a universal nature, the development of which occurred without any significant African participation.⁵⁹ This apathy is given theoretical expression by the Third World Approaches to International Law (TWAAIL) movement. Mutua identifies the first objective of TWAAIL as understanding, deconstructing and unpacking “the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans”.⁶⁰ This anti-Western attitude is also very prevalent in the political space.⁶¹ The degree of such apathy differs in different States and contexts, as noted elsewhere, and the individual contexts of States is an area where these issues should be further researched. This historical context is indispensable in understanding the current status of IHL in the African context.

Whether it be technological innovation that creates new means of armed conflict, or whether it be challenges to fundamental notions of the law of armed conflict, the global discourse on the law of armed conflict is strongly influenced by the “cutting edge” as determined by the needs of a select few Western States. Along these contours, we see massive bodies of work developing on topics such as cyber-warfare and terrorism. Indeed, the technology that drives new means of armed conflict is so dynamic that, in a consumerist style, the debate keeps shifting from one technology to the next. This is not to say that the global debate does not engage with more traditional or foundational issues within the IHL discourse, as indeed it does. However, these issues are often only elevated to the global debate once they become relevant to Western States. For example, the dynamics of the “war on terror” elevated questions surrounding the locality and geographic scope of hostilities in transnational NIACs for the purposes of

59 M. Mubiala, above note 7, p. 47.

60 Makau Mutua, “What is TWAAIL?”, *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 5–8 April 2000, p. 31.

61 Abdulai argues that “African leaders also tend to resent the paternalistic attitude of Western Countries toward them. This warped idea in the West that it is their responsibility to ‘change’ a ‘backward Africa’ to be like them is much resented in modern-day Africa.” David N. Abdulai, *Chinese Investment in Africa: How African Countries can Position Themselves to Benefit from China’s foray into Africa*, Routledge, Abingdon, 2017, section 9.4.

determining the applicability of IHL to the global debate.⁶² However, the tactics of the Lord's Resistance Army had posed these same questions since 1986.

As was alluded to in the introduction to this article, IHL maintains a very low profile on the African continent. There are two sides to this coin – on the one side, IHL issues do not feature prominently in the armed conflict debate within Africa (certainly not when compared to the developed/Western world). On the other, African States and African people do not participate, in a significant manner, in the global debate. These two facets of the problem cannot be divorced from one another. The only way in which African States and actors can influence the agenda of the global debate is by including IHL issues in the armed conflict debate within Africa, and so progressively infiltrating the global debate.

While IHL as a regime of law is marginalized in the formal African armed conflict debate, it is very encouraging that the humanitarian objectives of IHL echo with people across Africa. The ICRC's *People on War Report* was a study published during 1999 which included twelve countries globally, with Nigeria, Somalia and South Africa representing the African continent.⁶³ The methodology of the study included in-depth, face-to-face interviews, group discussions and national public opinion surveys. An additional group of five States was studied by way of a questionnaire only.⁶⁴ A range of questions that focused on IHL issues were put to participants, and the study includes the statistical data on responses. In general terms, the African States sampled did not show a marked departure from the general trends identified in the study. Having said that, there are clear examples where particular States depart from the general trend. For example, in respect of the question "Are there any laws that say you can't attack the enemy in populated villages or towns knowing many civilians/women and children will be killed, even if it would help weaken the enemy?", the average response across all States was 36% "yes". Some 50% of Somali respondents said yes, while the figure was 30% for South African respondents and only 21% for Nigerian respondents.⁶⁵ In some instances, the results are rather perplexing. Considering the response received from Nigerian participants in regard to a basic application of the principle of distinction, it is surprising that in response to the question "Do you think the existence of the Geneva Conventions prevent[s] wars from getting worse or does it make no real difference?", 71% of Nigerian respondents felt that the Geneva Conventions prevent wars from getting worse.⁶⁶ For this question the

62 For instance, the International Law Association's (ILA) study group on "The Conduct of Hostilities under International Humanitarian Law: Challenges of 21st Century Warfare" specifically included the issue of the geographic scope of the battlefield in its study. See ILA Study Group, "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare", Interim Report, 2014.

63 ICRC, *The People on War Report: ICRC Worldwide Consultation on the Rules of War*, 1999, available at: www.icrc.org/eng/assets/files/other/icrc_002_0758.pdf. The States where in-depth, face-to-face interviews were carried out were Afghanistan, Bosnia-Herzegovina, Cambodia, Colombia, El Salvador, Georgia/Abkhazia, Israel, the occupied territories and the autonomous territories, Lebanon, Nigeria, the Philippines, Somalia and South Africa.

64 The States that were surveyed on a questionnaire-only basis were France, the Russian Federation, Switzerland, the United Kingdom and the United States. See "About the People on War Project", in *ibid.*

65 ICRC, above note 63, p. 19.

66 *Ibid.*, p. 20.

average response across all States was 56% in favour of this opinion; for Somalia is was 51% and for South Africa 40%. Nevertheless, the overall conclusion that there is not a large variance between Africa and other regions more holistically is very important.

Determining the agenda of the contemporary global IHL debate

Before determining which issues feature in the global IHL debate – and equally importantly, which issues do not feature – it is relevant to consider who the parties are who set the agenda for this debate. There are essentially five groups of actors who have the potential, in any given case, to influence the agenda of the global debate (this is not to imply the making of international law, but instead the proactive and deliberate influencing of the debate): academics, governments, armed forces, civil society, and international organizations (including regional organizations). The media, non-State armed groups and jurisprudential developments may also influence the debate. However, while the media certainly play a significant role in creating awareness of issues, they do not directly contribute to the IHL dimensions of the debate.⁶⁷ While the relevance of non-State actors within the IHL discourse has become increasingly prominent, such groups do not yet play a proactive role in engaging in the normative IHL debate. Lastly, formal jurisprudence certainly does contribute significantly to this debate, though tribunals hear matters brought before them and do not proactively engage with a specific issue. There is no readily available scholarship on the question of who influences and determines the global debate on IHL. A study into this question could be very useful for the better understanding of IHL and associated issues. However, this is a complex question, one which will likely involve a research design incorporating both qualitative and quantitative components, and is certainly beyond the scope of the present contribution. The framework put forward here is very basic and serves only to provide a systematic approach to dealing with the core question of the current contribution, which is the enhancement of IHL in the African context.

States remain the primary agents through which international law, including IHL, is developed. Among the five groups listed above, States are represented both by governments and by armed forces. This is so because in the context of IHL, armed forces often play a very central role in determining a State's policy. Each of the five groups pursues unique goals and agendas. While in a strong democracy there should be significant synergy between the goals and agendas of a government and those of its armed forces, not all States are strong democracies, and in many States there is a noticeable gap between the government's goals and agendas and those of the armed forces. Moreover, even

67 The media do not influence the agenda of the global debate directly. They may take up a relevant issue, such as unmanned aerial vehicles (UAVs) or child soldiering, but they typically do not couch the issue as an IHL issue as opposed to an IHRL issue. Having said that, the media play a massive role in drawing attention to IHL issues such as UAVs and child soldiering.

in stronger democracies, the civilian legal corps of a department of foreign affairs will likely approach an issue differently than a military lawyer. However, the goals and agendas of governments, armed forces and international organizations (as State-based organizations) will often be loosely aligned. Engagement with specific IHL issues by these actors is determined by what is relevant to them and their agendas at any given point in time. They all engage with one another, and they also engage with their networks beyond their States. The agendas of many of these actors take on an added layer of political complexity in the context of peace support and multinational operations. Of these groups of actors, it is only academics who have the freedom to pursue research agendas that are not related to current events or developments. However, academically there is generally less value in pursuing a research agenda divorced from the pertinent legal questions of the time. This author is not suggesting that actors belonging to each of these five categories absolutely have to engage with an issue for that issue to make it onto the agenda – indeed, this is usually not the case. Often, military and government lawyers will be very tight-lipped about specific IHL issues. For instance, when it became public knowledge that the United States is using unmanned aerial vehicles (UAVs) in the context of its targeted killing programmes, the issue of the use of weaponized UAVs skyrocketed to the top of the agenda of the global IHL debate. Those responsible for this were for the most part academics, civil society and functionaries within international organizations. Nevertheless, it is supremely important to note that while the US government and US armed forces, for obvious reasons, often avoid pertinent issues, when they do engage with matters such as UAVs, they do so within the language and structural parameters of IHL (which is not to say that their positions are necessarily in conformity with IHL).⁶⁸

The number of armed conflicts that are taking place at any given time will probably surprise most people. The DRC, for example, has seen the parallel existence of multiple ongoing armed conflicts, of an international and non-international character, at the same time. It is, however, not surprising that from among this vast array of armed conflicts internationally, it is only a handful that set the trends as far as the global debate on IHL is concerned. This is not due to any specific agenda of exclusion, or to exceptionalism. Instead, when countries within which IHL is prioritized (that is to say, where there is a critical mass of IHL expertise and focus from among a combination of actors belonging to the five categories mentioned above) engage in armed conflict, debate on issues that affect the specific armed conflict intensifies dramatically. Many of the issues that have become relevant in the context of Western military engagement in Iraq and Afghanistan, such as detention during NIACs,⁶⁹ have long existed in the context of many armed conflicts in States across Africa. However, because of a lack of engagement with IHL within these States, these issues were not elevated in any

68 See, for example, Harold H. Koh, “The Obama Administration and International Law”, Annual Meeting of the American Society of International Law, 25 March 2010.

69 See for example, *Hassan v. United Kingdom*, [2014] ECHR 29750/09, 2014, p. 31.

significant way, to the global level of discourse and debate. There are a range of factors that contribute to this lack of engagement within Africa. There is undoubtedly a lack of IHL capacity across all five actor groups identified above, and particularly in academia. However, this lack of capacity may well be symptomatic of a broader scepticism toward IHL within Africa, which I argue is indeed the case.

“African solutions for African problems” and the marginalization of IHL in Africa⁷⁰

“African solutions for African problems” makes for an appealing sentiment – one of self-reliance, responsibility and autonomy – and is thus often invoked by African leaders. However, this sentiment can also serve to exclude global solutions to African problems – such as IHL. To borrow from Koskeniemi again, there is frequently “a logic of exclusion-inclusion” in the operationalization of “African solutions for African problems”. It is a convenient way to exclude external scrutiny. A key example in this regard is the position taken by many African States on the occasion of an extraordinary session of the Assembly of Heads of State and Government of the African Union (AU) during October 2013 which was set up specifically to discuss the International Criminal Court’s (ICC) prosecution of President Uhuru Kenyatta and Deputy President William Samoei Ruto, both of Kenya. In this regard, Dersso has commented:

Sadly, the heads of state and government who attended the summit defended their position to insulate themselves from ICC prosecution based on the political ideal of “African solutions to African problems”. Hiding behind this to serve their self-interest is both a misuse and a perversion of the ideal. Such instrumentalisation of this ideal erodes its moral force as well as its political and institutional significance for enabling the continent to take the lead in dealing with the challenges it faces.⁷¹

A common refrain from those within Africa who oppose the ICC is that it is a Western, Eurocentric institution that exerts its power only over Africans, and is thus a continuation of Western domination. Jean Ping, former president of the AU, has said that “the ICC seems to exist solely for judging Africans”.⁷² While the ICC has a close relationship with IHL, the rejection of legal norms and institutions which are deemed “Western” or “Eurocentric” by African States is not isolated to this institution.

70 The phrase “African solutions for African problems” was coined by the economist George Ayittey in 1993. See George Ayittey, “An African Solution for Somalia”, *Wall Street Journal*, 7 October 1993, p. A12.

71 Solomon A. Dersso, “The AU’s ICC Summit: A Case of Elite Solidarity for Self Preservation?”, *Institute for Security Studies*, 15 October 2013, available at: www.issafrica.org/iss-today/the-aus-icc-summit-a-case-of-elite-solidarity-for-self-preservation.

72 Rowland J. V. Cole, “Africa’s Relationship with the International Criminal Court: More Political than Legal”, *Melbourne Journal of International Law*, Vol. 14, No. 2, 2014, p. 679.

There is certainly a large measure of truth to the critique that much of the international architecture is dominated by Western thought. The solution, however, lies not in withdrawing into the regional shell under the banner of “African solutions for African problems”. A further implication of this is that African States are not bringing to the table African solutions to global problems. As Sen has opined:

I have also argued against considering the question of impartiality in the fragmented terms that apply only within nation states – never stepping beyond the borders. This is important not only for being as inclusive in our thinking about justice in the world as possible, but also to avoid the dangers of local parochialism against which Adam Smith warned nearly two and a half centuries ago. Indeed, the contemporary world offers much greater opportunity of learning from each other, and it seems a pity to try to confine the theorization of justice to the artificially imposed limits of nation states. This is not only because [quoting Martin Luther King] “injustice anywhere is a threat to justice everywhere” (though that is hugely important as well). But in addition we have to be aware how our interest in other people across the world has been growing, along with our growing contacts and increasing communication.⁷³

Much attention has been placed of late on creating buy-in among armed non-State actors into IHL principles, with the underlying idea being that voluntary compliance will be enhanced should there be such buy-in by the armed actor in question.⁷⁴ This approach has been operationalized specifically in Africa and other parts of the developing world.⁷⁵ At the same time, it is overlooked that in the African context, there is often little buy-in into IHL even from State actors.⁷⁶ The historical discussion with which this article commenced serves to contextualize the present-day lack of engagement with IHL in Africa.

As armed conflict issues are not discussed within the parameters of IHL in Africa, the question arises: in which areas other than IHL are these issues absorbed? The rhetoric within Africa is largely one of pan-Africanism and regional integration. The preamble to the Constitutive Act of the AU commences with these words: “Inspired by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the

73 Amartya Sen, “Global Justice”, in James J. Heckman, Robert L. Nelson and Lee Cabatingan (eds), *Global Perspectives on the Rule of Law*, Routledge, Oxon, 2010, pp. 69–70.

74 See, for example, Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010.

75 The organization Geneva Call is a leader in the field in such direct engagement with armed non-State actors. This organization has been active in twenty-seven States, including eight African States (Burundi, the DRC, Mali, Niger, Senegal, Somalia, Sudan and Western Sahara). See the organization’s website, available at: <http://genevacall.org/>.

76 The TWAIL movement engages with these issues; see, generally, M. Mutua, above note 60, pp. 31–40.

peoples of Africa and African States”. Additionally, the stated goals of the African Union, as provided for in the Constitutive Act, include:

- (a) achieve greater unity and solidarity between the African countries and the peoples of Africa; ...
- (c) accelerate the political and socio-economic integration of the continent;
- (d) promote and defend African common positions on issues of interest to the continent and its peoples; ...
- (j) promote sustainable development at the economic, social and cultural levels as well as the integration of African economies; ...
- (l) coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.⁷⁷

There is little doubt that this embrace of pan-Africanism and regional integration in Africa is a response to historical Western domination and subjugation.⁷⁸ As a result, collectively, African States have selectively embraced regimes of law that fit into the goals of pan-Africanism and regional integration. International human rights law (IHRL), for example, is very well suited to these goals. Through the application of developed IHRL concepts, such as the principle of subsidiarity, the operationalization of legal norms can occur mostly in a more local space – the African continent. Despite being the least developed of the three regional human rights systems, the African system has received a great deal of attention. Africa has produced leading human rights law scholars whose voices are heard, and taken seriously, on the international stage.⁷⁹ Many African universities play host to academic centres and research focus groups on IHRL.⁸⁰ Across Africa there are innumerable African grass-roots human rights NGOs that act as a check on State power.⁸¹ For the most part, debate regarding IHL issues is either absorbed or

77 Constitutive Act of the African Union, 2158 UNTS 3, 1 July 2000 (entered into force 26 May 2001), Art. 3.

78 Indeed, the Organization of African Unity (OAU), the predecessor to the AU, was set up with the express purpose of promoting “the unity and solidarity of the African States” and “eradicate[ing] all forms of colonialism from Africa”. As provided for in Charter of the Organization of African Unity, 479 UNTS 39, 25 May 1963 (entered into force 13 September 1963), Art. 2.

79 The nationality of holders of United Nations (UN) human rights special procedures mandates is indicative in this regard. All six working groups include a member from Africa (however, this is a formal requirement); of the six independent experts, one is from Africa; and six of the thirty Special Rapporteurs are from Africa. The fact that the UN aspires to geographic representation may account for this to some extent, but it is worth noting that a strong African voice has emerged during the past decades in the human rights discourse. The work of Mahmood Mamdani, Makau wa Mutua, Christof Heyns and Frans Viljoen, among many others, serves well as an example in this regard.

80 A key example in this regard is the Centre for Human Rights at the University of Pretoria, which won the 2006 UNESCO Prize for Human Rights Education as well as the 2012 African Union Human Rights Prize.

81 There are literally thousands of such NGOs – the following list serves merely for illustrative purposes: Zimbabwe Lawyers for Human Rights (Zimbabwe); Uganda Conflict Action Network (Uganda); Mubende Human Rights (Uganda); Sudan Organisation Against Torture (the Sudan); Youths for

muffled by the vibrant IHRL debate, and within the architecture of human rights law, on the continent. There thus seems to be an attempt to fit a square peg in a round hole.

Viljoen has argued that Africa has indeed played a major role in developing IHL.⁸² The title of one of Viljoen's essays is "Africa's Contribution to the Development of International Human Rights and Humanitarian Law" – he thus addresses both IHRL and IHL together. The examples Viljoen cites of Africa's contribution to the development of human rights are plentiful, and include: unique facets of the African Charter on Human and Peoples' Rights;⁸³ developments regarding children's rights initiated by the African Charter on the Rights and Welfare of the Child;⁸⁴ developments regarding refugee protection initiated by the Organization of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa;⁸⁵ and environmental protection with specific reference to developments brought on by the African Convention on the Conservation of Nature and Natural Resources and the Bamako Convention.⁸⁶ In addition to these developments, which emanated from within Africa, Viljoen also indicates that African States played a meaningful role in the development of the United Nations (UN) human rights architecture.⁸⁷ The argument that Africa engages actively with the development of human rights, both regionally and internationally, is very compelling. In contrast hereto, the examples drawn upon to indicate Africa's contribution to IHL are limited to the establishment of the International Criminal Tribunal for Rwanda (ICTR) and its jurisprudence; the adoption of the Rome Statute and the establishment of the ICC,⁸⁸ and the regulation of mercenaries.⁸⁹ These examples are not nearly as

Human Rights Protection and Transparency Initiative (Nigeria); Association Malienne des Droits de l'Homme (Mali); Association Mauritanienne des Droits de l'Homme (Mauritania); Association Marocaine des Droits Humaine (Morocco); Centre for Human Rights and Rehabilitation (Malawi); Centre for Minority Rights Development (Kenya); Chadian Association for the Promotion and Defense of Human Rights; and the Legal Resources Centre (South Africa).

82 Frans Viljoen, "Africa's Contribution to the Development of International Human Rights and Humanitarian Law", *African Human Rights Law Journal*, Vol. 1, No. 1, 2001.

83 *Ibid.*, pp. 19–22. Group or peoples' rights serve as a very good example.

84 *Ibid.*, pp. 22–23. Viljoen illustrates that in many respects the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 11 July 1990 (entered into force 29 November 1999), provides better protection than the UN Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990).

85 F. Viljoen, above note 82, pp. 23–28. The expansion of the concept of "persecution" for purposes of refugee status determination by the OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, 10 September 1969 (entered into force 20 June 1974), is emphasized.

86 F. Viljoen, above note 82, pp. 23–28. African Convention on the Conservation of Nature and Natural Resources, 1001 UNTS 3, 15 September 1968 (entered into force 16 June 1969); Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 2101 UNTS 177, 30 January 1991 (entered into force 22 April 1998).

87 F. Viljoen, above note 82, p. 31.

88 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002).

89 The first ever convention regulating mercenary activities was elaborated in Africa: OAU Convention for the Elimination of Mercenarism in Africa, OAU Doc. CM/433/Rev. L. Annex 1, 3 July 1977 (entered into force 22 April 1985).

compelling as those cited in respect of human rights.⁹⁰ Firstly, the ICTR was created through a UN Security Council resolution,⁹¹ and only three African States voted on the resolution, one of which cast the only vote against; and secondly, both the ICTR and ICC belong more properly to international criminal law and not to IHL.⁹² The regulation of mercenaries is indeed an area of IHL in which Africa played a leading role; however, citing Taulbee,⁹³ Viljoen acknowledges:

The African response can be explained primarily with reference to the fact that the mercenary has become “the symbol of racism and neo-colonialism within the Afro-Asian bloc”, because the recurring scenario was one of “white soldiers of fortune fighting black natives”.⁹⁴

Thus it seems that African States’ motivation for engaging with this issue is directly linked to their lack of motivation for engaging with IHL more generally, which is due to their colonial history. There is a much greater sense of ownership of IHRL within Africa, and IHRL gives considerable deference to regional development and action when compared to IHL. Viljoen’s contribution further serves as a good example of the point made above, that in the African context the IHL debate is, for the most part, absorbed into IHRL. This is not a criticism of Viljoen, who specifically acknowledges that “international humanitarian law is distinct from international human rights law”.⁹⁵ Indeed there are many virtues in the co-application of IHRL and IHL, and in multi-, inter- and transdisciplinary scholarship more generally. However, in an environment where IHL issues are dealt with mostly by human rights lawyers, often these issues are subjugated to human rights thinking and ideals, which are not always consistent with the logic of IHL, and there is the further implication that these issues are not dealt with by subject-matter experts.

The African Union and IHL

Considering the general pleas for “African solutions to African problems”, and increasing anti-Eurocentrism, within Africa, which are often perceived to exist

90 It should be acknowledged that in period since Viljoen’s article (above note 82), a number of instruments have been adopted in Africa that contribute to IHL in respect of specific issues. These include the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention, 2009), and on the sub-regional level, the ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials (2006).

91 UNSC Res. 955, 8 November 1994.

92 IHL certainly plays a very meaningful role in the development of international criminal law (ICL), and vice versa. Klabbers has noted that it is useful and justifiable to treat IHL and ICL separately, as IHL covers more than war crimes, crimes against humanity, genocide and aggression, and similarly, ICL covers more than IHL. Moreover, ICL “assigns responsibility to individuals, and thereby breaks through the classic structure of international law”. See Jan Klabbers, *International Law*, Cambridge University Press, Cambridge, 2013, p. 219.

93 James L. Taulbee, “Myths, Mercenaries and Contemporary International Law”, *California Western International Law Journal*, Vol. 15, 1985, p. 342.

94 F. Viljoen, above note 82, p. 37.

95 *Ibid.*, pp. 31–32.

within those areas of international law with universalist aspirations, it makes sense to look towards the AU as the central actor in enhancing IHL on all levels within African States. During 2013, the AU launched its Agenda 2063, which, as the name suggests, is a fifty-year plan aimed at a “shared strategic framework for inclusive growth and sustainable Development & a global strategy to optimize the use of Africa’s Resources for the benefit of all Africans” [*sic*].⁹⁶ The Agenda consists of twelve “flagship programmes”, including “Silencing the Guns by 2020”, which is framed in the following terms:

Silencing the Guns by 2020: aims to fulfil the pledge of the AU Heads of State and Government meeting on the occasion of the Golden Jubilee Anniversary of the founding of the OAU, “not to bequeath the burden of conflicts to the next generation of Africans, “to end all wars in Africa by 2020” and “make peace a reality for all African people and rid the continent free of wars, end inter- and intra-community conflicts, violations of human rights, humanitarian disasters and violent conflicts, and prevent genocide [*sic*]”.⁹⁷

Agenda 2063 is generally characterized by such an overly ambitious approach. The philosophy suggests that if mankind ends all wars, we need not be too concerned with ensuring the proper conduct of hostilities and protection of victims of war. The idea that all wars in Africa can be ended in a mere seven years is altogether unrealistic. Moreover, this rhetoric can be destructive to those who engage in it, as it poses the question: if it can be done in seven years, why are we only doing it now?

While “Silencing the Guns by 2020” occupies a considerable portion of Agenda 2063, IHL is noticeably absent. During 2015, the AU launched the “First Ten-Year Implementation Plan 2014–2023”, in order to give concrete guidance for the progressive implementation of Agenda 2063.⁹⁸ The issue of armed conflict on the African continent again features strongly. The plan for the first ten years is characterized by seven aspirations, which are underpinned by twenty goals. The third aspiration is “[a]n Africa of good governance, democracy, respect for human rights, justice and the rule of law”.⁹⁹ Although this aspiration is directly linked to IHL, IHL features only indirectly in Goal 11, which falls under this aspiration and provides for “[d]emocratic values [and] practices, [and] universal principles of human rights, justice and the rule of law”, and specifically includes, as a continental goal for 2023, “[African Governance Architecture] Clusters on Democracy; Governance; Human Rights; Constitutionalism and Rule of Law and Humanitarian Assistance”.¹⁰⁰ The fourth aspiration calls for “a peaceful and secure Africa”,¹⁰¹ and includes Goals 13 to 15, which are: “Goal 13: Peace,

96 AU, *Agenda 2063: The Africa We Want*, Framework Document, September 2015.

97 *Ibid.*, p. 108.

98 AU, *Agenda 2063: The Africa We Want – First Ten-Year Implementation Plan 2014–2023*, September 2015.

99 *Ibid.*, p. 73.

100 *Ibid.*, p. 74.

101 *Ibid.*, p. 78.

Security and Stability are Preserved”;¹⁰² “Goal 14: A Stable and Peaceful Africa”;¹⁰³ and “Goal 15: A Fully Functional and Operational African Peace and Security Architecture”.¹⁰⁴ The manner in which these goals are fleshed out challenges the coherency of Agenda 2063 as it relates to armed conflict. For instance, Goal 13 includes as a national-level target for 2023: “Level of conflict emanating from ethnicity, all forms of exclusion, religious and political differences is at most 50% of 2013 levels.”¹⁰⁵ Juxtaposed against this is the target for 2023 under Goal 14, “A Stable and Peaceful Africa” at both the national and continental levels – not to mention one of the flagship projects of the Agenda as a whole, that being to “Silence the Guns by 2020”.¹⁰⁶

As national level-targets for 2023, Goal 14 includes “[s]ufficiently capable security services by 2020” and “[r]espect for rules of engagement and human rights in conflict situations [being] entrenched in the security forces”.¹⁰⁷ Certainly, these goals are linked directly to the professionalism of African armed forces, and IHL training and compliance forms a key component of such professionalism. Nevertheless, Agenda 2063 is preoccupied with ending all wars, and the relevance of IHL training, dissemination and compliance is never directly addressed.

Interestingly, Agenda 2063 is largely silent on assigning responsibility for targets to functionaries within the organization. The AU functionaries who deal with IHL issues most actively on a day-to-day basis are: (1) the Department of Political Affairs, (2) the Office of the Legal Counsel, (3) the AU Commission on International Law (AUCIL), and (4) the Peace and Security Department, which includes the Peace Support Operations Division, the Defense and Security Division, and the Conflict Prevention and Early Warning Division. However, the so-called African Peace and Security Architecture (APSA) is also very relevant to the broader discussion of IHL in Africa.¹⁰⁸ The APSA falls under the authority of the AU Peace and Security Council (PSC), and its ideals are informed most concretely by the Protocol relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol),¹⁰⁹ and the Common African Defence and Security Policy (CADSP).¹¹⁰ Additionally, the AUCIL, the Panel of the Wise, the Continental Early Warning System, the African Standby Force and the Peace Fund all form part of the APSA.

102 *Ibid.*

103 *Ibid.*, p. 79.

104 *Ibid.*, p. 81.

105 *Ibid.*, p. 78.

106 *Ibid.*, p. 79.

107 *Ibid.*, p. 80.

108 For additional information on the APSA, see Kwesi Aning and Samuel Atuobi, “Responsibility to Protect in Africa: An Analysis of the African Union’s Peace and Security Architecture”, *Global Responsibility to Protect*, Vol. 1, No. 1, 2009; Ademola Jegede, “The African Union Peace and Security Architecture: Can the Panel of the Wise Make a Difference?”, *African Human Rights Law Journal*, Vol. 9, No. 2, 2009.

109 Protocol relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002 (entered into force on 26 December 2003) (PSC Protocol).

110 Solemn Declaration on a Common African Defence and Security Policy, 28 February 2004.

IHL features strongly in the working documents of these various entities. The PSC Protocol serves well as an example, where “respect for the sanctity of human life and international humanitarian law” is expressly included as both an objective and a guiding principle of the PSC.¹¹¹ Furthermore, the powers of the PSC extend to following up “within the framework of its conflict prevention responsibilities ... respect for the sanctity of human life and international humanitarian law by Member States”.¹¹² Finally, the African Standby Force is established in terms of Article 13 of the Protocol, which specifically provides:

The [AUCIL] shall provide guidelines for the training of the civilian and military personnel of national standby contingents at both operational and tactical levels. Training on International Humanitarian Law and International Human Rights Law, with particular emphasis on the rights of women and children, shall be an integral part of the training of such personnel.¹¹³

There is an apparent conflation of IHL ideals with the PSC’s broader objectives of conflict prevention and cessation. This can be seen in the PSC’s express objective to “promote and encourage ... respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts”.¹¹⁴ Respect for IHL cannot realistically be seen as an element of efforts to prevent conflicts. However, more problematic is the lack of IHL awareness and implementation on the operational level during armed conflicts in Africa. While the data are sporadic, and in some cases anecdotal, there is almost universal agreement that IHL implementation and compliance in African armed conflicts is very low.¹¹⁵ While IHL is relatively well mainstreamed in the workings of the AU at the policy level, the question remains as to how to ensure that the objectives, mandates, guiding principles and general policies of the AU feature on the operational level. While armed conflict is prevalent in a significant number of AU member States, organizationally, the AU is responsible for three active peace support operations, with a total of more than 42,000 deployed uniformed personnel.¹¹⁶

The preceding discussion serves largely as an indictment of African actors for failing to come to the IHL table and make their voices heard. This is, however, not the entire picture. Firstly, as the initial part of this contribution suggests, Africa’s colonial history has impacted heavily by creating a climate of scepticism among African States towards international, largely Western concepts such as IHL – much of the TWAIL movement in international law is premised on this

111 PSC Protocol, above note 109, Arts 3(f), 4(c).

112 *Ibid.*, Art. 7(1)(m).

113 *Ibid.*, Art. 13(13).

114 *Ibid.*, Art. 3(f).

115 See, for example, Office of the UN High Commissioner for Human Rights (OHCHR), *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010. Additionally, trial records and judgments of the ICTR, the Special Court for Sierra Leone and the ICC provide compelling evidence of broad non-compliance with IHL.

116 AU, *African Union Handbook*, 2016, pp. 60–63.

scepticism.¹¹⁷ There are various additional factors that contribute to such scepticism today – the rejection of the ICC as non-African, with an agenda of prosecuting Africans, serves well as a contemporary example in this regard. Incidentally, the AU has been used as a vehicle to advance anti-ICC rhetoric within Africa, and the most concrete expression of this rhetoric is the Malabo Protocol of the AU, which seeks to create an African regional criminal chamber parallel to the ICC.¹¹⁸ Contextually, the establishment of this chamber appears to be motivated by an effort to exclude ICC jurisdiction on the basis of complementarity. However, while less visible, the lack of development of expertise and the lack of engagement with IHL issues from within Africa are even more to the point.

Secondly, a seat is generally not reserved for African actors at the IHL table on the international level. For example, it was reported by participants that only two experts from sub-Saharan Africa participated in the process that led to the adoption of the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Interpretive Guidance).¹¹⁹ It is worth mentioning here that with the prevalence of NIACs within Africa, the notion of direct participation in hostilities is of incredible significance to the African continent. Another example is the *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Tallinn Manual).¹²⁰ The Tallinn Manual process was an expert-driven process initiated by the NATO Cooperative Cyber Defence Centre of Excellence, an accredited NATO Centre of Excellence.¹²¹ This may suggest that the process included only participants from NATO member States, but this is not the case; for instance, an Australian Defence Force officer participated as an expert. None of the experts, peer reviewers or editors involved in this process were African – and while it is true that at present cyber-warfare is not a threat in Africa compared to other parts of the world, it certainly is one of the major global future threats in which all States internationally have an interest. What is also interesting is the extent to which the experts involved in the ICRC Interpretive Guidance and the Tallinn Process overlap.¹²² This may well entrench a sentiment that exists in some quarters: that a small clique of Western experts dominates these processes.

From the preceding discussion there seems to be a disconnect between the attitude from within Africa regarding engagement with IHL – that is to say, a

117 M. Mutua, above note 60.

118 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human rights (Malabo Protocol), 24 June 2014 (not in force).

119 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009. This process was conducted under Chatham House rules, and a list of expert participants was never released. Thus, this information cannot be confirmed.

120 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013.

121 *Ibid.*, p. 16.

122 Unlike the Tallinn Manual, the ICRC Interpretive Guidance does not list the names of the experts that were involved in the process. Nevertheless, the *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, was dedicated to a forum in which the Interpretive Guidance was debated. Kenneth Watkin, Michael N. Schmitt, Bill Boothby, W. Hays Parks and Nils Melzer all contributed to this special edition, and they were all part of the expert group. Of these individuals, only W. Hays Parks was not included in the expert group for the Tallinn Manual process.

conscious lack of engagement with the global debate – and the attitude of those international actors who are well established within the IHL debate regarding bringing Africa to the table. On the one hand, it appears that the colonial experience of Western domination and subjugation has entrenched a sentiment within African States of distrust towards more international and perhaps Western concepts such as IHL. At the same time, international actors certainly do not exclude African participants intentionally. Rather, their experience is such that there is no will from within African States to participate in these processes and to develop the subject-matter expertise necessary to engage with the IHL debate on the global level. Clearly, the solution to this problem requires active engagement from both sides of this divide.

The future of IHL in Africa

The means and methods of armed conflict in Africa have in no way remained stagnant during the century since the beginning of WWI, but developments in the African context are much less technologically driven. Some of the issues of specific concern in contemporary armed conflict in Africa include: the perpetuation of armed conflict for purposes of natural resource exploitation; the effects of porous borders and mobile non-State armed actors; issues regarding the application *rationi loci* of IHL; the escalation and de-escalation of violence in the context of small-scale NIACs and the application and cessation of application of IHL; child soldiering; and linking violence to less organized armed groups. Some of these issues have featured in the global debate, while others have not. The criminalized character of contemporary armed conflicts in Africa and the associated exploitation of natural resources, as well as child recruitment, are issues that have received very broad attention. One key example in this regard is the Kimberley Process Certification Scheme;¹²³ another good example is the issue of sexual violence during armed conflict, particularly in the DRC.¹²⁴ At the same time, other issues, such as the escalation and de-escalation of violence in the context of small-scale NIACs and the application and cessation of application of IHL, do not feature in any significant manner in the global debate. Yet still other issues, such as non-State armed actors, that have long existed in the African context do feature in the global debate, but this is largely due to these problems having occurred in much more recent history in the context of armed conflicts to which developed States are party. This raises the question of why some of these issues feature in the global debate, and others not.

There are many factors that influence whether an issue becomes part of the global debate, including the visibility of the issues (e.g., child soldiering), whether the

123 The Kimberley Process Certification Scheme is a process created by UNGA Res. 55/56, 29 January 2001, in order to “give urgent and careful consideration to devising effective and pragmatic measures to address the problem of conflict diamonds”. The Kimberley Process has also received the support of the Security Council: UNSC Res. 1459, 28 January 2003.

124 See, for example, OHCHR, above note 115.

issues are of concern beyond the IHL debate (e.g., natural resource exploitation), and whether the issues have impact beyond Africa (e.g., the market for conflict diamonds and columbite-tantalite is largely Western). However, even those issues of particular African concern which are discussed within the global debate do not always feature much in the debate within Africa. Child recruitment, for example, is not exclusively an African problem, but it certainly has been a greater problem within Africa than elsewhere for many years. Yet the civil society organizations, governments and academics that engage with this issue most vigorously are generally not African. It thus appears that a lack of consistent engagement from within Africa contributes to the patchwork manner in which IHL issues of African concern reach or do not reach the global debate.

It is not possible to devise a concrete, predetermined action plan for the mainstreaming of IHL within Africa, and of Africa within the global IHL debate. Achieving this goal will require a flexible and comprehensive approach. As mentioned before, the focus should be on enhancing the IHL debate within Africa. Should this be achieved, the inclusion of African issues within the global debate will occur as a matter of course, as will the better development of expertise within Africa. As a start, it is most important to identify entry points around which momentum can be built. Much of the preceding discussion has focused on Africa as a regional entity, but this regional entity is made up of States, and States act in their own interest before acting in the regional interest. As I cautioned in the introduction, it was not feasible for me to focus this contribution on individual State considerations, as this would have involved separate discussion of each of the fifty-four States that make up the African continent. However, it would be unrealistic not to recognize the fact that the IHL debate within each State is unique. Of the five actor groups identified above (academics, governments, armed forces, civil society and international organizations), it is unlikely that the initiative will come from the governments or armed forces of any specific States. What is needed is an entity that has the potential to engage with each State in Africa, and specifically with those States affected by armed conflict. Two such entities exist: the ICRC and the AU. Ewumbue-Monono and von Flüe identified the transition from the OAU to the AU as a watershed moment for ICRC engagement in promoting IHL within Africa.¹²⁵ In reflecting on ICRC engagement with the OAU, these authors recognized that:

Although on balance OAU-ICRC cooperation in promoting humanitarian law has had some positive effects, these could be increased in cooperation with the African Union, which has wider objectives and has created new opportunities for promoting and implementing international humanitarian law in Africa.¹²⁶

125 Churchill Ewumbue-Monono and Carlo von Flüe, "Promotion of International Humanitarian Law through Cooperation between the ICRC and the African Union", *International Review of the Red Cross*, Vol. 85, No. 852, December 2003, p. 764.

126 *Ibid.*, p. 760.

Unfortunately, after thirteen years, it appears that notwithstanding the formal inclusion of IHL in the working documents of the AU and specifically the APSA, the level of IHL capacity-building within the AU has not progressed much. It is thus unlikely that the AU would, of its own accord, intensify its engagement with IHL. As such, it still falls to the ICRC to not only engage with States individually, but also to work with the AU in placing IHL firmly on the agenda of the armed conflict debate within Africa.

The ICRC has a well-staffed delegation accredited to the AU, and has twenty-nine delegations across Africa in total.¹²⁷ Moreover, the ICRC delegation to the AU has had “observer status”, first at the OAU and then at the AU, since 1992. The ICRC delegations in Africa are very active in IHL training and dissemination. This engagement occurs across the spectrum, and includes formal programmes of engagement with the armed forces, governments (including parliamentarians) and academia.¹²⁸ Indeed, when compared to other regions of the world the ICRC has invested disproportionate resources in such efforts in Africa, yet Africa remains underrepresented in the global IHL debate. The training in which the ICRC engages in Africa is generally aimed at a relatively low knowledge level, and does not build much on knowledge to the point of creating real subject-matter expertise. Unfortunately, this is a necessary consequence of the lack of existing expertise within Africa. Perhaps a valid course of action will be to develop a training programme that focuses more on depth of knowledge – this will, however, require significant additional resources. The reasons for this are surely manifold, but include the fact that there is no vibrant IHL community or discourse on the African continent, and as such, there is a lack of a knowledge base. Such training and dissemination is nevertheless of incredible importance, as we know that the benefits of IHL are unlocked not through enforcement, but through compliance. For compliance to occur within armed forces, two essential ingredients are required: proper training and discipline. What more could then be done?

While the ICRC is very involved in Africa, the organization does not involve Africa significantly in its affairs at headquarters level. This is well evidenced by the lack of involvement of African experts in substantive ICRC studies. This is certainly an area in which the ICRC can improve in respect of engagement with Africa. This shortcoming is surely also symptomatic of a general lack of high-level expertise on IHL in Africa. However, while there is no vibrant IHL community, there are a number of experts from Africa who have the knowledge, skills, experience and stature to contribute to such ICRC processes.

A further issue is that, as a Swiss organization, the ICRC also fits into the mould of “Eurocentrism” of which many African entities are particularly critical and sceptical. This problem can be mitigated in a number of ways. The ICRC can

127 ICRC, *Annual Report 2015*, Vol. 1, 2015, p. 104, available at: <https://app.icrc.org/files/2015-annual-report/>.

128 Mutsa Mangezi and Sarah Swart, “Back to Basics: Enhancing African Adherence to the Rules of War”, *Humanitarian Law & Policy*, 4 October 2016, available at: <http://blogs.icrc.org/law-and-policy/2016/10/04/africa-ihl-ratification-compliance/>.

decentralize its engagement strategy with the AU by engaging more extensively with African civil society – that is to say, not the global NGOs with a footprint in Africa, but instead the African-initiated NGOs. These civil society organizations may in turn engage with the AU and member States. Again, it would be unrealistic not to acknowledge the challenges that face this solution – corruption may well hamper greater reliance on local actors. The ICRC can also make much greater use of local expertise in training and other areas of engagement, letting Africans be the mouthpiece to advocate IHL ideals to Africans wherever feasible. These suggestions may appear to serve to manipulate States and actors in Africa, by “disguising” the work of the ICRC. However, this is not the case. Instead, the ICRC’s understanding and manner of work will also develop through closer collaboration with African actors. It should be mentioned that responsibility for the mainstreaming of IHL in Africa cannot rest on the shoulders of the ICRC alone. ICRC initiatives in Africa make a disproportionately large contribution as it is.

The International Institute of Humanitarian Law (IIHL) in San Remo also contributes significantly to engagement with African armed forces. The IIHL draws on African experts as lecturers and facilitators, provides training to a significant number of African participants, and includes topics of African concern in its programme of work – a key example in this regard is the Africa Accountability Colloquium.¹²⁹

A recurring theme when engaging with IHL in Africa is a lack of expertise. This creates a vicious cycle, as expertise is needed to create further expertise. The reasons for this lack of expertise are manifold, but include the fact that the IHL is marginalized in the armed conflict debate in Africa. The educational opportunities in Africa are limited when compared to other regions of the world, yet Africa produces leading scholars in separate but related fields, such as IHRL. Universities, civil society, individual States and armed forces, national IHL committees and National Red Cross and Red Crescent Societies in Africa must intensify their efforts. These entry points, specifically at the individual State level, form an intrinsic part of the future IHL debate in Africa, and should be the subject of further analysis.

Conclusion

The need for greater African involvement in the IHL debate was recognized by Bello when he proposed the establishment of an African Institute of International Humanitarian Law in 1984.¹³⁰ There are people in Africa within the five sectors that determine the global IHL debate who work tirelessly at elevating IHL within Africa, and Africa in the global IHL debate. It is unfortunately a rather lonely endeavour. African States and actors have participated very strongly in the

¹²⁹ See: www.ihl.org/africa-accountability-colloquium/.

¹³⁰ Emmanuel G. Bello, “A Proposal for the Dissemination of International Humanitarian Law in Africa”, above note 5, p. 311. Bello’s call was echoed in M. Mubiala, above note 7, p. 47.

development of other areas of international law, with international criminal law being a key example due to its proximate existence with IHL. Unlike IHL, African States played a central role in developing international criminal law, not only in the context of treaty negotiations, but also jurisprudential development specifically in the context of the ICTR and the Special Court for Sierra Leone. The deterioration of the relationship between the ICC and African States is a very sad and unfortunate state of affairs. Nevertheless, African involvement in, and certainly initial buy-in into, the international criminal law project can serve as a beacon of hope, and perhaps a blueprint for the mainstreaming of IHL within Africa, and Africa within the global IHL debate.

There is a need for the development of academic expertise within Africa on IHL. African scholars can play a very meaningful role in bringing issues of African concern to the attention of international audiences through conference presentations and both scholarly and popular publications. Unfortunately, yet predictably, in “our” desire to be at the forefront of our field, African scholars tend to engage more with those issues that are on the global agenda than with the issues of African concern that are not on this agenda. As an anecdotal example, I can draw on my own experience as a South African academic: I know many more postgraduate students from the African continent pursuing research in IHL on issues such as UAVs and cyber-warfare than I know students who are engaging with issues of particular concern within Africa.

This article has emphasized the role of the ICRC in facilitating the mainstreaming of IHL in Africa, but there are other entry points too. Each of the five actor groups identified as being responsible for determining the agenda of the global debate (academics, governments, armed forces, civil society and international organizations) provides for multiple entry points in furthering the goal of mainstreaming IHL in Africa, and Africa in the global debate. The value of this article lies much more in identifying the problem and the complexities that caused the problem, and by so doing framing the debate, than in providing the solution. This is because only once there is awareness of the problem can those individuals and entities who are in a position to be part of the solution direct their actions to mainstreaming IHL in Africa.

DEBATE

Inclusive gender: Why tackling gender hierarchies cannot be at the expense of human rights and the humanitarian imperative

Chris Dolan*

Chris Dolan has worked extensively as an academic, practitioner and activist with refugees, internally displaced persons (IDPs) and ex-combatants in conflict and post-conflict settings in sub-Saharan Africa. As Director of the Refugee Law Project, a university outreach project in Uganda working with refugees and IDPs from across the Great Lakes region, he has established new programming for male survivors of conflict-related sexual violence alongside existing work with women survivors. This programming also draws attention to the specific needs of lesbian, gay, bisexual, transgender and intersex refugees. He provides training and has consulted widely with the United Nations and non-governmental organizations on the same.

The “Debate” section of the Review aims to contribute to the reflection on current ethical, legal or operational controversies around humanitarian issues. In its issue on “Sexual Violence in Armed Conflict” (Vol. 96, No. 894, 2014), the Review published an Opinion Note by Chris Dolan entitled “Letting Go of the Gender

* This article was written with generous research support from the Swedish Foundation for Humanities and Social Sciences and the Swedish Research Council, and is an output of the author’s work on forms, logics and contexts of sexual violence in conflict, a project with Professors Maria Stern and Maria Eriksson-Baaz.

Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence, arguing for a shift in the conceptualization of gender-based violence (GBV) in humanitarian settings from an emphasis on gender equality to an ethos of gender inclusivity. Jeanne Ward’s reply, “It’s Not About the Gender Binary, It’s About the Gender Hierarchy”, was published in a later issue of the Review (Vol. 98, No. 901, 2016). Ward suggested retaining a focus on women and girls in GBV work, while moving forward in partnership with those who wish to accelerate programming directed towards men and lesbian, gay, bisexual, transgender and intersex (LGBTI) communities broadly. In this issue, Dolan responds to Ward’s position, pointing to empirical and practical developments that have advanced the understanding of how to effectively respond to GBV, including GBV perpetrated against men, boys and members of the LGBTI community. Dolan calls for the IASC Guidelines to be revised in 2020 to be the guiding text on preventing and responding to GBV in humanitarian settings, and explores what it means to do inclusive gender while also tackling hierarchies.

Keywords: sexual violence, gender equality, gender inclusivity, inclusive gender, humanitarian response, human rights, GBV, LGBTI, humanitarian imperative, Inter-Agency Standing Committee, male survivors, women and girls.

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Introduction

In 2014, the Refugee Law Project, a community outreach project of Uganda’s main university whose vision is “[that] all people in Uganda enjoy their human rights, irrespective of their legal status”,¹ was suspended by the government of Uganda for allegedly “promoting homosexuality”. The suspension, caused in part by the organization’s support to largely cisgender and heterosexual male refugee survivors of conflict-related sexual violence whom the government misconstrued to be homosexuals, highlighted governmental blindness to even the most basic realities of sexual gender-based violence in conflict settings, among them being that it affects all genders. It also highlighted the corresponding need for documents such as the 2005 Inter-Agency Standing Committee (IASC) *Guidelines for Gender-Based Violence Interventions in Humanitarian Settings* (GBV Guidelines)² to provide a reference point for humanitarians working on these issues in politically complex contexts. The coincidence of the attack on the organization’s work and the existence of a global revision process to the GBV Guidelines raised questions for this author about whether or not the second edition of the Guidelines would offer a clear pathway to those tasked with operationalizing their commitments to human rights for all and to the

1 See: www.refugeelawproject.org/who-we-are/our-profile.

2 IASC, *Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies*, September 2005, available at: https://interagencystandingcommittee.org/system/files/legacy_files/tfgender_GBVGuidelines2005.pdf.

humanitarian imperative of impartial assistance to human beings in need. Would this extensive revision process bring on board recent feminist thinking about and scrutiny of gender-based violence (GBV)? Would it, importantly, recognize that sexual violence against cisgender men and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons is also based on interconnected understandings and norms of gender and sexuality?

The author's hopes that the revised guidelines would see a "Letting Go of the Gender Binary" that had shaped the first edition were largely dashed by the publication of the second. Unlike the first edition, which was up front about being specifically focused on women and girl victims of GBV,³ the second edition makes rhetorical gestures towards inclusion of non-females, but largely fails to follow through on the programming implications of this. Jeanne Ward's argument that "It's Not About the Gender Binary, It's About the Gender Hierarchy" lays bare the rationale and decision-making that underpin this outcome, an outcome that threatens to short-change non-female victims of GBV for the next decade to come. Ward and those who share her position appear to fear that talking about an inclusive approach to gender programming will cause the collapse of twenty years of gender mainstreaming as we know it.⁴ Ward's twenty-two-page article amounts to a manifesto for an *exclusive approach to gender programming*, in contrast to what "Letting Go of the Gender Binary" is all about, namely, a call for inclusive approaches to gender theory and gender programming – in short, what can be described as "inclusive gender".

Inclusive gender

At the heart of an inclusive approach to gender theory and programming lies a profound concern with artificially *constructed* polarizations and the manner in which these can be – and are – utilized to "divide and rule" constituencies whose underlying shared interests are masked in the process.⁵ Inclusive understanding of gender reflects feminist understandings of intersectionality as they apply to human beings; rather than privileging bodily sex as a constant in oppression, it opens up the complexity of diverse combinations of bodily sex (whether female, male or other), race, ethnicity, class, ability and, I would suggest for the context of humanitarian operations, refugee experiences, in the construction of an

3 "The Guidelines provide practical advice on how to ensure that humanitarian protection and assistance programmes for displaced populations are safe and do not directly or indirectly increase women's and girls' risk to sexual violence": *ibid.*, p iii.

4 See Jeanne Ward, "It's Not About the Gender Binary, It's About the Gender Hierarchy: A Reply to 'Letting Go of the Gender Binary'", *International Review of the Red Cross*, Vol. 98, No. 901, 2016, p. 290, in which Ward describes "concerns that such definitional compromises could be exploited in order to draw attention away from the problem of violence against women and girls in GBV theory and practice".

5 For one of the most insightful expositions of the constructed nature of gender identity, see Judith Butler, *Gender Trouble: Feminism and Subversion of Identity*, Routledge, New York, 1990.

individual's gender identity at any given point in time.⁶ These can create not only multiple mutually reinforcing oppressions, but also shifting vulnerabilities and a corresponding need to question assumed patterns.⁷ With regard to sexual violence specifically, as Patricia Hill Collins observes, “[s]olutions to violence against women remain unlikely if violence against women is imagined through mono-categorical lenses such as gender lenses of male perpetrators and female victims”.⁸

Inclusive gender sees hegemonic masculinity and the work it does in the oppression of non-hegemonic men as a core expression of patriarchy.⁹ It also draws on a growing body of empirical and theoretical academic and policy work (much of it by feminist scholars) which indicates that the vast majority of gender-based violence against men, including sexual violence, whether at the time it occurs or in its lengthy (sometimes never-ending) aftermath, is intricately interconnected with sexual and other forms of gender-based violence against women, girls and boys.¹⁰ Inclusive approaches to gender programming thus do not just pay homage to the space created by decades of feminist activism, they are themselves a critical dimension, extrapolation and articulation of that theorizing and activism. These approaches call for the nuancing of assertions of a global and unchangeable state of gender hierarchy, in the belief that such assertions

6 For an extensive discussion of intersectionality as a knowledge project, as an analytical strategy and as a critical praxis the definition and boundaries of which are necessarily emergent, see Patricia Hill Collins, “Intersectionality’s Definitional Dilemmas”, *Annual Review of Sociology*, Vol. 41, 2015.

7 Elaborated by Kimberlé Crenshaw even before the 1993 United Nations (UN) Declaration on the Elimination of Violence against Women (DEVAW) around which Ward’s piece hinges. Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color”, *Stanford Law Review*, Vol. 43, No. 6, 1991, p. 1296.

8 P. H. Collins, above note 6, p. 12.

9 For Ward, by contrast, it is not. See J. Ward, above note 4, p. 291.

10 See, for example, R. Charli Carpenter, “Recognizing Gender-Based Violence against Civilian Men and Boys in Conflict Situations”, *Security Dialogue*, Vol. 37, No. 1, 2006; Claire Cohen, *Male Rape Is a Feminist Issue: Feminism, Governmentality and Male Rape*, Palgrave Macmillan, London, 2014; R. W. Connell, *Masculinities*, Polity Press, London, 1995; Adam Jones, “Gendercide and Genocide”, *Journal of Genocide Research*, Vol. 2, No. 2, 2000; Noreen Abdullah-Khan, *Male Rape: The Emergence of a Social and Legal Issue*, Palgrave Macmillan, London 2008; Marnia Lazreg, *Torture and the Twilight of Empire: From Algiers to Baghdad*, Princeton University Press, Princeton, NJ, 2008; Judy El-Bushra and Judith Gardner, “The Impact of War on Somali Men: Feminist Analysis of Masculinities and Gender Relations in a Fragile Context”, *Gender & Development*, Vol. 24, No. 3, 2016; Miranda Alison, “Wartime Sexual Violence: Women’s Human Rights and Questions of Masculinity”, *Review of International Studies*, Vol. 33, No. 1, 2007; Chloé Lewis, “Systemic Silencing: Addressing Sexual Violence against Men and Boys in Armed Conflict and Its Aftermath”, in Gina Heathcote and Dianne Otto, *Rethinking Peacekeeping, Gender Equality and Collective Security*, Palgrave Macmillan, London, 2014; Margarethe Silberschmidt, “Disempowerment of Men in Rural and Urban East Africa: Implications for Male Identity and Sexual Behavior”, *World Development*, Vol. 29, No. 4, 2001; Hannah Wright, *Masculinities, Conflict and Peacebuilding: Perspectives on Men through a Gender Lens*, Saferworld, 2014; Laura Sjoberg, *Women as Wartime Rapists: Beyond Sensation and Stereotyping*, New York University Press, New York, 2016; Chiseche Mibenge, “Investigating Outcomes of a Limited Gender Analysis of Enslavement in Post-Conflict Justice Processes”, *Journal of Peacebuilding and Development*, Vol. 5, No. 3, 2010; Amalendu Misra, *The Landscape of Silence: Sexual Violence against Men in War*, Hurst & Co., London, 2015; Sarah E. Davies and Jacqui True, “Reframing Conflict-Related Sexual and Gender-Based Violence: Bringing Gender Analysis Back In”, *Security Dialogue*, Vol. 46, No. 6, 2015.

necessarily reify (and thereby reinforce) a damaging patriarchal model of gender hierarchy underpinned by acute heteronormativity.¹¹ They also call for new alliances and coalitions between affected groups.¹² The need for interest groups,¹³ particularly where these are structured around vulnerabilities whose disclosure demands extremely careful management, to at times establish and occupy autonomous spaces is not in question. However, the potential usefulness of alliances between various interest groups that share common concerns (not least – for the purposes of this debate about GBV – the concerns that both women and men have in relationship to their experiences of conflict-related sexual violence) is clear. For example, in the Refugee Law Project’s experience working with women and men in heterosexual relationships in which both partners are survivors of sexual violence (by no means an infrequent occurrence), recovery of either partner is difficult if each remains unaware of the other’s situation. Autonomy and alliances are thus not necessarily incompatible; indeed, a judicious balancing of the two may be the only way out of what can otherwise become intellectual, experiential and political cul-de-sacs and ghettos of our own making.

Extensive practical experience working directly with refugee women, men and LGBTI survivors of sexual violence suggests that accessing appropriate support services which work for all survivors regardless of gender is a struggle that is particularly acute for the latter categories. While the 1993 United Nations (UN) Declaration on the Elimination of Violence Against Women (DEVAW) undoubtedly remains a seminal document, the humanitarian community now needs to take into account the multiple theoretical, experiential and policy developments of the subsequent twenty-two years if it is to overcome this otherwise intractable lack of access by these under-served multitudes of victims. The fact that women and girls *are* widely subjected to GBV should not be used, whether explicitly or implicitly, to render *invisible* the related realities of widespread sexual violence against men, boys and others. Whether from a normative or utilitarian perspective, the pursuit of one rights agenda should not be allowed to obscure the rights of others.

The Office of the UN High Commissioner for Refugees’ (UNHCR) definition of GBV provides a useful way forward in this debate. UNHCR argues that GBV is

any act that is perpetrated against a person’s will and is based on gender norms and unequal power relationships. It encompasses threats of violence and coercion. It can be physical, emotional, psychological, or sexual in nature,

11 See, for example, Nicola Pratt, “Reconceptualizing Gender, Reinscribing Racial–Sexual Boundaries in International Security: The Case of UN Security Council Resolution 1325 on ‘Women, Peace and Security’”, *International Studies Quarterly*, Vol. 57, No. 4, 2013, p. 57; Chris Dolan, “Has Patriarchy been Stealing the Feminists’ Clothes? Conflict-Related Sexual Violence and Security Council Resolutions”, *IDS Bulletin*, Vol. 45, No. 1, 2016.

12 Patricia Hill Collins describes such alliances as “coalitional politics”. P. H. Collins, above note 6, p. 8.

13 J. Ward, above note 4, pp. 282, 283.

and can take the form of a denial of resources or access to services. It inflicts harm on women, girls, men and boys.¹⁴

Such approaches not only enrich our understanding of GBV against women and girls, but also allow new groups (men, boys, non-binary and gender fluid persons) to come into view based on intersecting yet fluid forms of vulnerability and harm. Further critical developments that should inform this debate include the progressive position of the 2002 Rome Statute on crimes of sexual violence,¹⁵ the Obama administration's position both on LGBTI rights and on the need to include humanitarian programming for male survivors of sexual violence, and the acknowledgement of men and boys in UN Security Council Resolution (UNSC Res.) 2106¹⁶ and in the UK government's Prevention of Sexual Violence Initiative from 2012 to date. These advances now need to be incorporated substantively – rather than merely rhetorically – into what should be one of *the* guiding texts on preventing and responding to GBV in humanitarian settings.¹⁷

Where the 2015 GBV Guidelines fall short

Ward's articulation of the underpinnings of the 2015 GBV Guidelines is striking in several regards. Firstly, the description of the "strenuous" consultations undertaken¹⁸ barely disguises the methodological and political problems of the process adopted. At the time of the revisions, the GBV Area of Responsibility (AOR) was comprised of representatives of only North-based institutions. How many of the fifteen representatives were women – and how many were from the global North?¹⁹ Except for the first launch of the guidelines in South Africa (not the epicentre of current humanitarian crises), all three launches were in the global North: Geneva, Washington, DC, and Canada. There is no mention of dialogue

14 UNHCR, "Sexual and Gender Based Violence", available at: www.unhcr.org/sexual-and-gender-based-violence.html.

15 The Rome Statute definition of rape, for example, is gender-neutral both in terms of victims and perpetrators. It recognizes that rape can be done with objects, not just the penis. With the exception of forced pregnancy, the other forms of sexual violence identified (sexual slavery, enforced prostitution, forced sterilization and "any other form of sexual violence of comparable gravity") can all be experienced by persons of any gender. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Arts 7(1)(g)(i), 8(2)(b)(xxi); International Criminal Court, *Elements of Crimes*, reproduced from *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002*, pp. 8–10, 28–30, available at: www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.

16 UNSC Res. 2106, UN Doc. S/RES/2106, 2013, available at: [http://undocs.org/en/S/RES/2106\(2013\)](http://undocs.org/en/S/RES/2106(2013)).

17 For a recent critique of the revised GBV Guidelines, see Heleen Touquet and Ellen Gorris, "Out of the Shadows: The Inclusion of Men and Boys in Conceptualisations of Wartime Sexual Violence", *Reproductive Health Matters*, Vol. 24, No. 47, 2016.

18 J. Ward, above note 4, p. 276.

19 On 18 November 2014, this author conducted a Skype call with six members of the GBV AOR, all of whom were women.

with survivors themselves, only a hundred “GBV experts”.²⁰ While the numbers are impressive and the process certainly took its time, it appears driven by and directed to an audience very far removed from its supposed beneficiaries, the actual and potential victims of GBV writ large – including male survivors. Could any serious individual spend even one day with a group of LGBTI or male survivors and remain satisfied that the GBV Guidelines offer adequate guidance for those aiming to prevent and respond comprehensively to GBV on the basis of human need? Far from being an example of victim/survivor-centred “excellent engagement”,²¹ the revision process is reminiscent of what Pratt, in discussing UNSC Res. 1325 through a postcolonial feminist lens, describes as “a reinscription of racial–sexual boundaries, evocative of the political economy of imperialism”.²²

Secondly, the degree to which the 2015 GBV Guidelines reflect a consensus – let alone a comprehensive or representative reflection of the needs of supposed beneficiaries – is questionable. Ward herself recognizes that her approach is not universal and that there was “tension among some Task Team members” at certain points.²³ As a lead author, she also admits to including mentions of “men and boys” in the Guidelines to secure support and gain attention from humanitarian actors and donors who might not be receptive to her views.²⁴ Some of these minor concessions, despite their dubious intentions, are not insignificant. For example, at a practical level, the 2015 GBV Guidelines state:

Female and male survivors may require exceptional access to WASH facilities as a result of urethral, genital and/or rectal traumas that render basic washing and hygiene activities difficult and time-consuming. They may also require additional non-food items ..., such as incontinence pads, which should be dispensed in a confidential and non-stigmatizing fashion.²⁵

At a more conceptual level, the Guidelines recognize that “[i]n some settings, some groups of males may not be protected from sexual violence because they are assumed to not be at risk by virtue of the privileges they enjoyed during peacetime”.²⁶ Notwithstanding these advances, the GBV Guidelines remain

20 Examples of attempts to carry out extensive “beneficiary-based consultation” do exist and could have been drawn upon. See, for example, Kirsti Lattu, *To Complain or not to Complain: Still the Question*, Humanitarian Accountability Partnership International, Geneva, 2008.

21 Chris Dolan and Thea Shahrokh, with Jerker Edström, Darius King Kabafunzaki, Dieudonné Maganya, Aimé Moninga and David Onen Ongwech, “Engaged Excellence or Excellent Engagement? Collaborating Critically to Amplify the Voices of Male Survivors of Conflict-Related Sexual Violence”, *IDS Bulletin*, Vol. 47, No. 6, 2016.

22 N. Pratt, above note 11.

23 J. Ward, above note 4, p. 290.

24 *Ibid.*

25 IASC, *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action*, 2015, p. 283, available at: www.gbvguidelines.org. Unfortunately, recommendations that the nutrition sector also alert humanitarian actors to the specific nutritional needs of those suffering rectal damage were not included.

26 *Ibid.*, p. 11.

characterized by oft-repeated statements reifying women and girls as victims and men as actual or potential perpetrators, for reasons that Ward's article now makes clear.²⁷

Thirdly, much though Annex 5 of the GBV Guidelines does provide some important statistics on sexual violence against men (though none about sexual violence against LGBTI persons), there is still a lack of acknowledgement of the fact that far more extensive documentation of the experiences of women, girls, men and boys will be required if we are to have evidence-based programming in the field of sexual and other forms of gender-based violence. This is despite a growing body of work which ably demonstrates that simple coding decisions – let alone more complex attitudinal challenges – can completely change the overall picture of scale, distribution and even perpetrators of sexual violence.²⁸ The position that “[d]ata affirm what we already know: that women and girls suffer sexual violence at higher rates than men and boys”²⁹ is sociologically naive at best, and politically opportunistic at worst.³⁰ It does not address the question that is often posed by humanitarian practitioners, namely: “We understand that it (sexual violence against men as well as LGBTI persons) exists, but how do we find these survivors?”³¹ Answering that question requires us to identify and address the methodological, social and legal challenges that result in highly gendered patterns of disclosure by victims and reporting by researchers and institutions.³² The resultant partial datasets make it impossible to see not only the interconnections between the experiences of women and girls and those of men and boys, but also the fact that such experiences lie on a continuum of gender-based violence. Data that are fundamentally incomplete provide a correspondingly shaky foundation for humanitarian programming. The failure to

27 For example, this author urged that wherever the text asks “Are males, particularly leaders in the community, engaged in these community mobilization activities as agents of change?”, it should be altered to “Are males, **including** leaders in the community, engaged in these community mobilization activities, both as agents of change **and as potential victims?**”.

28 See, for example, Lara Stemple and Ilan H. Meyer, “The Sexual Victimization of Men in America: New Data Challenge Old Assumptions”, *American Journal of Public Health*, Vol. 104, No. 6, 2014. See also Lara Stemple, Andrew Flores and Ilan H. Meyer, “Sexual Victimization Perpetrated by Women: Federal Data Reveal Surprising Prevalence”, *Aggression and Violent Behavior*, Vol. 34, 2016, available at: <http://dx.doi.org/10.1016/j.avb.2016.09.007>. For discussion of what re-coding of testimonies can do for understanding of patterns of conflict-related violence, see Michele Leiby, “Digging in the Archives: The Promise and Perils of Primary Documents”, *Politics & Society*, Vol. 37, No. 1, 2009.

29 J. Ward, above note 4, p. 295.

30 For a critical examination of the evidence base and what it tells us about the gender-based nature of sexual violence against men and boys, see S. E. Davies and J. True, above note 10.

31 This question has been put to the author in a number of workshops, including the UNHCR workshop on “Working with Male SGBV Survivors”, Amman, Jordan, 15–17 September 2015; the “Working with Male SGBV Survivors in Refugee Settlements” training for Danish Refugee Council staff, Adjumani District, 18–19 November 2016; and “Surfacing Sexual Violence” in the CERAH training on Sexual Violence in Conflict Settings and Emergencies, Geneva, 21 March 2017.

32 As Davies and True have already done, we should “question all the studies to date in which it has been claimed that SGBV did ‘not’ occur ... because we have little understanding of the socially and culturally specific barriers to reporting for men and women, girls and boys”. S. E. Davies and J. True, above note 10, p. 8.

address these challenges is also an obstacle to the parallel and broader work of tackling stigma and unpicking legal frameworks that serve to silence victims.

Discussion and conclusion

The world has changed considerably since the passing of UNSC Res. 1325 in 2000, let alone the DEVAW in 1993.³³ The Women, Peace and Security agenda is not unproblematic, whether conceptually or politically,³⁴ and its implementation faces many problems in practice.³⁵ By contrast – and contrary to the assertion that the interrogation of an exclusive model of gender programming is happening only in “a few humanitarian corners”³⁶ – the move towards an inclusive approach is well under way in many somewhat significant spaces. Whether in the field of international criminal law,³⁷ the UN Security Council, the British House of Lords’ Committee on Ending Sexual Violence in Conflict, UNHCR’s revised definition of GBV and the development of its first ever workshop on working with men and boy survivors (held in Jordan in September 2015), UNHCR’s ongoing study of sexual violence against men in the Middle East and North Africa region, CERAH’s comprehensive training on sexual violence in conflict for humanitarian workers (developed in partnership with the International Committee of the Red Cross), Médecins Sans Frontières and the Danish Refugee Council’s growing interest in training on the topic, the European Union’s recent decisions to support the creation of “a culture of care for male victims of sexual violence” in Bulgaria, Austria, Germany, Spain and Italy,³⁸ or calls for reviews of domestic legislation that disadvantages male and LGBTI victims, the momentum is increasing.

The revision process for the GBV Guidelines was a missed opportunity for the largely US-based GBV AOR to step out of a twenty-year individual and institutional comfort zone and take responsibility for its work on “gender”.³⁹ The

33 As noted in the global study on the implementation of UNSC Res. 1325, “[t]he nature of conflict in certain regions is qualitatively different, the content of what we mean by ‘peace’ and ‘security’ is evolving, and the understanding of what we mean by ‘justice’ has also transformed. This ever-changing and ever evolving reality poses major dilemmas for the four pillars of Security Council resolution 1325 and its subsequent resolutions: these pillars of prevention, protection, participation, and peacebuilding and recovery.” UN Women, *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council Resolution 1325*, 2015, p. 13.

34 See N. Pratt, above note 11. See also Jamie J. Hagen, “Queering Women, Peace and Security”, *International Affairs*, Vol. 92, No. 2, 2016.

35 See UN Women, above note 33.

36 J. Ward, above note 4, p. 278.

37 In striking contrast to the IASC process discussed here, the second edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, dated March 2017, dedicates a whole chapter to the specifics of working with male survivors.

38 See European Commission, “Award Decision: Transnational Projects to Support Victims of Violence”, 2016, Annex 1, available at: http://ec.europa.eu/justice/grants1/files/2015_action_grants/2015_spob_ag_vict/award_decision.pdf?utm_content=buffer1b175&utm_

39 “Without this wider acceptance of responsibility that relates not only to violence but also to the concept of gender itself, the success of violence prevention programs (from the grassroots to the international) is likely to be compromised.” Rosemary Grey and Laura J. Shepherd. “‘Stop Rape Now?’ Masculinity, Responsibility, and Conflict-Related Sexual Violence”, *Men and Masculinities*, Vol. 16, No. 1, 2013, p. 118.

point of view reflected in Ward’s article, and its concern with splitting hairs between “binary” and “hierarchy”, “patriarchy” and “hegemonic masculinity”, resulted in the revision process being co-opted to fight a rearguard action to hold onto a specific position long overtaken by theoretical, empirical and practical developments. The resultant 2015 GBV Guidelines enable the continued denial of resources and access to services for male and LGBTI survivors of sexual violence – a denial which is itself a form of GBV and an additional harm.⁴⁰ Academics, activists and victim/survivor-centred practitioners who are exploring what it means to do inclusive gender in the context of ever-escalating humanitarian crises, while also tackling hierarchies, may rightly conclude that, rather than waiting another ten years until 2025, the next revision to the IASC’s GBV Guidelines should be brought forward to allow publication of the third edition in 2020.

40 See UN Women, above note 33.

REPORTS AND DOCUMENTS

Protection considerations in the law of naval warfare: The Second Geneva Convention and the role of the ICRC

Speech given by ICRC President Peter Maurer on the occasion of the launch of the Updated Commentary on the Second Geneva Convention on 4 May 2017

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From early history, people have used the sea, lakes and rivers for trade and commerce, for adventure and discovery. Despite these close ties, our survival on water depends on man-made objects such as ships, navigation systems and oxygen tanks. If we get injured or sick on water, or if our ships sink, we are vulnerable and our lives are in immediate danger.

Nothing demonstrates this more clearly and more tragically in recent times than the large numbers of migrants and refugees who died while trying to cross the Mediterranean Sea. Many of these men, women and children successfully escaped a deadly conflict on land, only to perish at sea.

Many States have a military presence at sea in times of peace, sometimes far away from their coastline. Existing and emerging powers are investing heavily in their navies, deploying warships, including submarines.

Often this is to pursue objectives other than fighting a war. Navy ships are deployed to protect lines of communication essential to trade and economic prosperity; to act as a deterrence; to conduct surveillance and interdiction; and to project the State's power overseas.

The sea is of vital economic importance, and shipping and fishing are multi-billion-dollar industries. The discovery of offshore resources such as fossil energy and seabed mining has further enhanced the economic potential of the oceans. As with anything of economic value, there is a risk of competing

territorial claims over the right to these resources, which might even escalate into armed conflict.

The ICRC has also relied on boats to carry out its humanitarian activities. In the last decade alone, the ICRC has chartered vessels to evacuate wounded and sick in Sri Lanka [2009], to facilitate the return home of detainees in Libya [2011], and to bring in relief supplies to areas inaccessible by land in Somalia [2006], Lebanon [2006], South Sudan [2014] and Yemen [2015].

To adapt to the complex reality of modern-day warfare and the growing challenges of assisting victims of armed conflicts, the ICRC is currently exploring how feasible it would be to have an ICRC hospital ship. Such vessels would significantly increase the ICRC's emergency response capacity to complex emergencies and allow us to innovate and adapt to a rapidly changing world.

The term “maritime security” has become a buzzword in recent years. Its meaning is broad, covering operations against piracy, “terrorist” threats to shipping, trafficking of narcotics, the illicit movement of people and goods, arms proliferation, and illegal fishing. With the increased attention on maritime security operations, terrorism threats and migration, it is important to recall that humanitarian law is specifically and exclusively designed to operate in the context of an armed conflict.

Maritime security operations take many forms, some of which might involve the use of force at sea. Militaries, and their naval forces, are a major actor in these operations. While these activities generally remain below the threshold of armed conflict and therefore outside the scope of international humanitarian law [IHL], they raise questions relating to the lawfulness of using force at sea.

These operations increase the potential for incidents that could trigger an armed conflict at sea. If this happens, the rules protecting the victims of the conflict must be known and their contemporary meaning understood by all parties to the conflict. And this leads me to why we are here today.

In March last year, the ICRC reached a major milestone in launching the updated Commentary on the First Geneva Convention of 1949, dealing with the protection of wounded and sick members of the armed forces on land. This was the first update of Pictet's Commentary, published in 1952.

Today, we reach a second milestone, and I am very proud to present to you today the updated Commentary on the Second Geneva Convention.

Applying the same methodology used for the update of the Commentary on the First Convention, the ICRC again opened up the drafting process to external contributors who, together with our staff lawyers, researched and drafted the texts of the Commentary.

Drafts were peer-reviewed by forty senior scholars and practitioners from around the world, many of whom serve in, or used to serve in, their country's naval forces. We also benefited from input from international organizations with relevant subject-matter expertise. The Commentary is therefore the result of a thorough and collaborative process.

This updated Commentary aims to reflect current practices of the world we live in today, and provide up-to-date legal interpretations. Both the factual and legal

landscapes have changed since the publication of the initial Commentary in 1960, with potential implications for the interpretation of the Convention.

For one, international law regulating activities at sea has developed significantly since 1949, in particular the UN Convention on the Law of the Sea and several conventions under the auspice of the International Maritime Organization.

Naval warfare capabilities have also developed, to the point of allowing parties to strike targets far away. Many States nowadays possess submarines in their naval arsenals.

Advances in technology have also influenced how States carry out their obligations under the Second Convention. For example, new technologies such as satellites and unmanned aerial platforms can be used to assess the number and location of wounded, sick and shipwrecked at sea. Technology enabling underwater searches to retrieve the dead has also advanced considerably in recent years.

The updated Commentary takes into account these legal and factual developments to the extent that they affect the interpretation of the Second Convention.

The Second Geneva Convention, just like the First Convention, recognizes that even when the IHL rules regulating the conduct of hostilities are properly applied, armed conflict results in death and destruction.

At its core, the Second Convention requires that members of the armed forces who are wounded, sick or shipwrecked must be respected and protected. This Convention regulates in great detail the types of vessels that may be used to rescue and to provide medical and other care, including military hospital ships and coastal rescue craft. I trust that the panel of experts we have convened today will provide detailed insights on these subjects.¹

Critically, the Convention requires the parties to the conflict, after each engagement, to take all “possible measures” to search for, collect and provide care to the victims of an engagement at sea. The Second Convention also deals with the protection of deceased persons, and regulates the delicate subject of burial at sea. These obligations are important to ensure respect for the dignity of the deceased person.

Although contained in two separate Conventions, the First and Second Geneva Conventions embody the same logic and humanitarian principles: members of the armed forces who suffer during armed conflict must be aided, protected and cared for, regardless of whether their suffering takes place on land or at sea.

Just as the First Geneva Convention is as relevant today as it was in 1949 for any armed conflict that takes place on land, so the Second Convention is relevant for any armed conflict that takes place wholly or partly at sea or other waters.

There have been a number of armed conflicts with hostilities at sea since 1949. In these conflicts, the Second Geneva Convention was crucial for ensuring

1 Video of the panel of experts at the launch of the Updated Commentary on the Second Geneva Convention is available at: www.icrc.org/en/event/launch-updated-commentary-second-geneva-convention.

the care and protection of the wounded, sick, shipwrecked and dead members of the armed forces.

The reach of the Second Convention is greater than one might initially think. For one, oceans constitute 71% of the Earth's surface. The use of submarines and unmanned naval systems further increases the physical space in which an armed conflict could occur at sea. In addition, the Second Convention applies not only to the seas but also to other bodies of water such as internal waters and lakes.

It is also important to note that, while the history of naval warfare mostly deals with armed conflicts waged by States against States, non-international armed conflicts can also have a naval component. In such event, common Article 3 applies.

This provision sets a minimum yardstick protecting persons not, or no longer, participating in any armed conflict, whether on land or on water. Critically, under common Article 3, civilians are among those protected.

At the launch of the updated commentary on the First Geneva Convention, I spoke about the increased complexity of today's armed conflicts – more actors, more weapons, more refined strategies and more networks. These complexities are not unique to warfare on land. Warfare is changing and new weapons are being developed, including warfare capabilities at sea.

I also referred to the challenge of ensuring respect for IHL. Since recent conflicts have mainly impacted people and objects on land, it is on land that respect for IHL has been most rigorously tested. But the effect of warfare can often also be felt at sea, including on shipping. The challenge of ensuring respect for IHL is not specific to the first Geneva Convention.

The rules contained in the Second Convention can only be effective if they are respected and properly implemented by the belligerents. As with warfare on land, the key to increasing protection is respect for and better implementation of the existing rules.

Here, the ICRC has an important role to fulfil as guardian and promoter of humanitarian rules and as an impartial, neutral and independent organization whose exclusive humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence. It follows from the ICRC's mission and mandate that it does not take a position on the underlying reasons for armed conflict, including any territorial claims States may have at sea.

The ICRC has a long history in the interpretation of IHL rules applicable to warfare at sea. During the drafting of the 1864 Geneva Convention, the ICRC proposed a similar convention for maritime warfare. This is an area of IHL that is underrepresented in scholarly circles, and where we remind everyone of the protection considerations to comply with during an armed conflict at sea.

The updated Commentary of the Second Geneva Convention forms a natural part of the ICRC's broader and historical engagement in the protection of victims of armed conflict at sea. I am convinced this Commentary will facilitate common understanding of the meaning and critical importance of the provisions of the Second Convention, which in turn will contribute to the protection of those who suffer during armed conflict at sea.

REPORTS AND DOCUMENTS

War in cities: What is at stake?

Speech given by ICRC President Peter Maurer, as part of the ICRC's Research and Debate Cycle on War in Cities, at the Graduate Institute, Geneva, on 4 April 2017

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We know that many of the world's conflict-affected cities – from Aleppo to Donetsk, from Gaza to Mogadishu, from Aden to Tripoli – are struggling to survive.

For centuries, wars were predominantly fought across vast battlefields, pitting thousands of men, large army corps and heavy weaponry against each other in open fields. Cities could be besieged or sacked, but fighting rarely took place on the streets. Today's armed conflicts look quite different: city centres and residential areas have become the battlefields of our time. Wars have moved into the lives, cities and homes of ordinary people in a more vicious way than ever before.

The more we can do to understand urbanization and its challenges and complexities, the better we can adjust our humanitarian response.

Two thirds of the global population is predicted to be living in cities by 2030, and urban centres are under pressure as they struggle to absorb this rapid increase. At the same time, armed conflicts are increasingly fought in urban environments, with some 50 million people bearing the brunt of the consequences.

A staggering 96% of urban growth is expected to take place in developing countries in cities that already face fragility. Out of the 65 million people who are forcibly displaced, 75% live in urban areas.

When wars are fought in cities, the vital infrastructure that makes communities function is damaged or destroyed. There is often no safe water to drink, electricity to power homes and businesses, or health services to vaccinate or cure disease. Health and humanitarian workers are deliberately attacked, and people are forced to leave looking for safety.

The ICRC recently completed a report, drawing on thirty years of evidence, to analyze the humanitarian response in urban areas and the progressive deterioration of essential services during protracted armed conflicts.¹

The report showed, to a considerable extent, that the problems stem from the complexity of urban systems and their dependence on large-scale, interconnected infrastructures which rely on the availability of qualified staff to ensure service delivery.

When a city is under fire, educational and employment opportunities are lost. As a result, large numbers of people are internally displaced or seek refuge in neighbouring countries, overburdening the capacities of the host city's infrastructure. It also leads to a "brain drain" effect as specialist skills of engineers, urban planners and medical staff are lost.

The impact after decades of fighting

When wars drag on for many years, they become a major source of human suffering and a cause of displacement, migration and development reversals. The impact is severe on the people, infrastructure and economies of cities.

Humanitarian assistance was once thought of as a short-term relief effort but is increasingly a longer-term necessity in protracted armed conflicts. The ICRC works simultaneously to address immediate needs as well as the future health, water, livelihood and protection systems that ensure people's survival and dignity.

We fix and set up water supply infrastructure destroyed by war, we support health facilities like hospitals and orthopaedic centres or bring in mobile health clinics, we train locals to develop skills and not rely on foreign experts, and we help people start sustainable small businesses through cash grants. For example, in Syria alone, the ICRC is maintaining essential water, waste management and energy infrastructure for 18.5 million people.

But the ICRC does not stop at mitigating the impact of violence on urban populations; equally, we focus on how wars in cities are conducted and the limits that must be placed on armed actors and their conduct in order to shrink the needs of people exposed to urban warfare.

Most people killed in urban conflict are civilians

Logic follows that where there are more people and more weapons, there are more victims. An overwhelming percentage of people killed or injured by explosive weapons in populated areas are civilians. Civilians, not military targets. These are people who are not taking part in the conflict. They are mothers and fathers and

1 ICRC, *Urban Services during Protracted Armed Conflict: A Call for a Better Approach to Assisting Affected People*, Geneva, 2015, available at: www.icrc.org/sites/default/files/topic/file_plus_list/4249_urban_services_during_protracted_armed_conflict.pdf.

children who are not part of the fight and simply wish to lead their lives without the constant threat of bombs or gunfire.

The Geneva Conventions and international humanitarian law [IHL] speak very clearly to the obligation during armed conflicts to protect the civilian population and civilian objects. The specific challenges posed by urban warfare should be taken into account: armed forces need to be prepared to address such challenges considering the overarching objective of the laws of war, which is to protect civilians.

Explosive weapons that have a wide impact area have a significant likelihood of indiscriminate effects when used in densely populated areas. These include large bombs, imprecise artillery, multi-barrel rocket launchers and certain types of improvised explosive devices.

In their urban operations, armed forces have to take into account the vulnerability of large numbers of people due to their dependence on urban services and the intricacy and interconnectedness of these essential services. They must avoid or minimize harm to civilians, including in their choice of means and methods of attack.

In addition to the high risk of incidental civilian death, injury and disability, heavy explosive weapons tend to cause extensive damage to critical civilian infrastructure, triggering debilitating “domino effects” on interconnected essential services such as health care, water and electricity supply systems.

Current and recent armed conflicts – such as those in Syria, Ukraine, Afghanistan, Yemen, Iraq and Gaza – have exposed the particularly devastating effects on civilians of the use of heavy explosive weapons in populated areas. This impact in turn provokes further civilian death and displacement, and these effects are exacerbated when wars are long and drawn out.

The ICRC is not blind to the difficulties of the battlefield. Notably, too often, an enemy will hide and fight in populated areas and endanger the civilian population, a practice which is prohibited under IHL. The anonymity of big urban areas supports the unfortunate strategy of human shields, which is often at the origin of a vicious cycle of behaviour leading to disrespect of the law.

The multiplicity of roles individuals can take – from daylight civilian to night-time fighter and back – adds to the complexity of a battlefield in which civilian and military areas are increasingly intertwined.

Our call for limits to the fighting

The ICRC works to remind all parties to take precautions – in peacetime and in conflict – to protect their people, and avoid situating military objects within or near densely populated areas; not to use the civilian population to shield military activities; and not to behave in a way which exposes civilians to risks.

Military commanders have to face these challenges and have the responsibility to minimize the incidental effects on civilians of an attack. And in view of the devastating humanitarian consequences observed by the ICRC in such situations, serious questions are raised on how armed forces are interpreting and

concretely implementing in their military processes the relevant obligations of international humanitarian law.

The onus is on them to explain their choices, notably their choice of weapons, when they conduct hostilities in populated areas. While in the military there is often a lack of specific guidance on the choice of weapons in urban operations, some good practices exist and need to be shared and discussed. Unsurprisingly, with more detailed rules for military commanders, the ICRC engages in discussion with senior commanders, who can feel unduly hampered by the multiplicity of restricting rules in achieving their military objectives when fighting an adversary that often does not respect those rules.

The intricacies of asymmetric warfare are particularly difficult to manage in such environments; the balance between military necessity and protection of civilians is particularly complicated to find in situations of imbalance.

We see this debate as one of the entry points through which the non-reciprocal character of the rules of IHL is challenged by the asymmetry of many conflicts and by demands to consider reciprocity of behaviour when making judgements under IHL. The debate on the use of force in fighting terrorism (or the “war on terror”, as some call it) is rooted in such complexities of urban battlefields.

There is another aspect to consider in this debate: with the massive impact of warfare in urban areas widely communicated due to social media and the prevalence of smartphones, there is at least in one part of global public opinion a tendency to consider any civilian victim of armed conflict as a result of violations of IHL. In other parts of the public, populist demands for more intensified warfare and no restraining rules in fighting terrorism [are invoked to condone] torture, indiscriminate bombings and targeted killings.

This polarization of public opinion around IHL has been recognized by the most recent study on people in war.² While many support IHL and its protective role, a notable group of people in Europe and the US support the departure from a more considered interpretation of IHL.

The underlying principle in all of this discussion can never be forgotten: foremost, it is civilians who must be protected, and all should err on the side of their protection. It is on this premise that the ICRC is calling on all parties to armed conflicts to avoid the use of explosive weapons that have a wide impact area in densely populated areas. But I would add that it is first and foremost the dimension of suffering of civilians in complex, interconnected urban areas that eventually has to lead States and other armed actors to rethink military strategy in densely populated areas.

Some of the most extreme suffering in armed conflicts in today’s towns and cities is experienced by people living under siege. The price of civilian victims is simply too high in the dynamics we are witnessing today.

2 ICRC, *People on War: Perspectives from 16 Countries*, Geneva, 2016, available at: www.icrc.org/en/document/people-on-war.

When neighbourhoods are under siege

IHL sets out clear rules about humanitarian conduct that are relevant to sieges. These rules must be respected, further elaborated and refined to avoid starvation and the collapse of health and water services generating severe humanitarian consequences for besieged populations. Humanitarian workers need better access to repair damaged infrastructure, days of tranquillity are needed to be able to substitute the lack of services, safety zones around hospitals need to bring minimal stability to the most vulnerable. Negotiations must allow for the disentanglement of civilians and fighters.

The utmost care is needed during evacuations of people from cities under siege. In urban environments there can be a multiplicity of groups controlling different territories, and the front lines change and multiply; all of this increases difficulty of contact, security guarantees and access.

Last December, the ICRC in its role as a neutral intermediary, working with the Syrian Arab Red Crescent [SARC], evacuated 35,000 people from devastated eastern Aleppo to rural neighbourhoods. The streets of Aleppo have been devastated by violence, with families struggling for months to find safety, food, medical care or shelter. With temperatures below freezing, people were burning whatever they could find, including blankets and clothes, to keep themselves and their children warm. More than 100 SARC volunteers and ICRC staff remained by their side day and night over the week to ensure their safety and try to provide some guidance and reassurance.

In particular, this huge operation required careful negotiations with the different parties on the ground. Negotiations were held over a week and stalled several times until solid guarantees were given to ensure civilians would be protected and provided safe passage.

The impact of protracted fighting on people's lives

So you can see the complexity of today's conflicts. People who survive urban warfare have no choice but to adapt to extraordinary circumstances, whether they stay in their home cities or decide to flee. But they urgently need better protection and support. The mental, emotional and physical impact of urban warfare on people requires greater attention to work out how best to alleviate and prevent this suffering.

The invisible scars that people are left with cannot be underestimated. Wars affect people in very deep and profound ways. While it is difficult to predict the long-term impact of those who live in war zones, for example the children of Mosul, it is likely to have severe effects which we should not overlook.

Just a month ago I was in Eastern Ukraine, the second time I have visited since fighting broke out almost three years ago.

The armed conflict in the Donbass is taking place in highly populated areas. The vital infrastructure which hundreds of thousands of people depend on for their survival is on the front line of the fighting. Donetsk, once an industrial hub and one of the largest cities in Ukraine, has seen heavy shelling, civilian fatalities and homes destroyed.

What I saw there was a weariness of the people who have lived now for so long in fear, without reliable basic services. In almost every interaction I have had, what was apparent was intense frustration and despair that people feel, of being faced with an increasingly long conflict and no clear way out.

In all my discussions with politicians, senior officials and our staff in Ukraine, it became clear just how deep a division the conflict has driven through society. No one is left untouched. One of the saddest places I visited was a kindergarten, which was right on the front line at the beginning of the conflict. The kindergarten, once a place of learning and the high spirits of children, today sits abandoned. I saw children's books scattered and dirtied on the floor, right where they fell when the shells hit. At one time, the basement of the kindergarten was used as a bomb shelter, with over sixty people hiding in the darkness from the terror outside.

It was a stark reminder of how everyday life is torn apart during conflict. People must pass through checkpoints, sometimes queuing for hours or even days. Children stop attending schools. Medicines are hard to find and electricity and food supplies are unreliable. Life is so hard, so tenuous for so many.

We at the ICRC are listening to people like those in the Donbass, and we are doing our best to change our humanitarian responses to meet their needs. For example, after the Donetsk Filtration Station was damaged in the fighting, the ICRC worked to address that critical need. With 40,000 people lacking clean drinking water, the situation is now critical. At the beginning of March, the ICRC, as a neutral intermediary, asked for a reinforced ceasefire in order to allow for the area to be de-mined and for the filtration plant employees to repair the damage. In the meantime, ICRC teams have started delivering drinking water to residents.

Fragile cities on the brink of conflict

There is a second and related trend occurring in cities that we must pay close attention to as we adjust our response. The rapid urbanization we are seeing is creating fragile cities – places like Bamako and Caracas – where violence is accelerating, fuelled by the drug trade, mass unemployment and civil unrest.

It is not outright war but plain violence that kills in those cities, which enter the vicious circle of fragility, violence and, possibly, conflict. In some of the most violent cities in Latin America, as many people die by firearm violence as in Syria – a country at war.

Many large cities of South Asia, Africa and Latin America are already suffering the consequences of rapid and unregulated expansion – most visibly in neglected and violence-affected slums and shanty towns.

The correlation between urbanization and violence is unquestionably a complex one, with many factors at play, such as social inequality, unequal distribution of resources, lack of investment, low levels of education and high unemployment. This is particularly troublesome as we know that an increasing percentage of global wealth comes from economic growth in urban areas. Urban violence therefore not only endangers people's lives but also potentially affects the global economy.

More than 1.5 billion people, including 350 million of the world's extreme poor, live in an environment of continuous fragility, violence and conflict. That is a huge number of people at risk – it is reported that ten times more people living in such circumstances die outside of conflict than in times of conflict. And the lines between violence and armed conflict are increasingly blurred – the ICRC works to reduce this fluidity through legal guidance, but what we know is that violence contributes to fragility, and that fragility can quickly lead to conflict.

As this is an area of keen interest for me, I will share one story of how the ICRC is working to reduce armed violence with those who live in the favelas in Rio de Janeiro.

I am told about a mother of four living in a violent slum whose husband suddenly disappeared without trace. She had been struggling to provide for herself and her children and worries constantly about their safety. The constant stress makes the woman ill, yet she is unable to get the psychological support or care she needs. The violence has caused the nearby health clinic to close and made health-care workers afraid to enter the neighbourhood.

For five years now, the ICRC has been partnering with Brazilian government agencies, neighbourhood associations and the Brazilian Red Cross. The Rio Project is having good success helping people, like this mother, who live with the psychological scars of violence to access better health-care and mental health services.

Solutions in cities need everyone

As with the Rio Project, partnerships are key to the ICRC's approach, whatever the situation. At all times the ICRC adopts a neutral, independent and impartial stance. We aim to be pragmatic and innovative, tailored to the specific needs of the affected communities and the particular dynamics of each context.

Primarily we must fully involve the people and communities affected by violence to really understand their needs, to co-design and implement an effective response that helps bolster their resilience, and ultimately to help ensure the sustainability of programmes.

The ICRC also works closely with local service providers, connecting them with vulnerable people and communities to facilitate safer access to basic services. We work with the true front-line responders in urban violence settings – National Red Cross and Red Crescent Societies, civil society organizations and local authorities – to design an appropriate integrated response. We also work

with mayors, urban planners and police and the private sector. All groups that are responsible for the positive functioning of urban life need to be involved.

At a global level we are adapting to the long-term humanitarian needs that protracted conflicts create. But this means that international donors must adapt too: additional, multi-year funding for the long-term work of the few humanitarian actors present in war zones is crucial to ensuring the basic minimum needed for the survival of people.

Bringing humanitarians together with stakeholders from the private sector allows us to harness the power and resources of the private sector to support and advance humanitarian work. More ambitious social and economic agendas can only evolve if built on the foundations of stable partnerships with economic operators. This is one of the reasons why the ICRC is working with the World Economic Forum's Global Agenda Council on Fragility, Violence and Conflict to find solutions to increase resilience in urban conflict zones.

The ICRC has also been working through global mechanisms like the New Urban Agenda and Habitat III, to provide clear policy guidance on urban humanitarian action for national governments and city authorities in the next twenty years. This guidance will be important in situations where municipal authorities need to partner with the ICRC and other humanitarian organizations to protect and assist their city's population and build essential urban services that are resilient in bad times as well as good times.

There is probably no other context through which warfare and violence in urban areas are so clearly visible as in some of the cities in Yemen. While war and violations of IHL have taken their toll, at the same time violence and conflict have slowly killed economic activities, which are so essential to the survival of populations. With both trends combined, we end up with what we have: massive disruption of the economic, political and societal fabric, and the virtual impossibility of humanitarian actors functioning as a substitute for non-existent economic activities and social services for a whole population.

The mark of a resilient city should be its commitment to human dignity – for all who reside there. While these are challenging times, we can never abandon those who live with conflict on their doorstep. We can never stop striving to find solutions for those kindergarten students in Eastern Ukraine, for the families struggling to feed their children in Gaza or Mosul, or those in Aleppo making the impossible decision to stay or go.

All parts of communities need to do better to protect people. Armed forces and military groups need to exercise the utmost precaution in their attacks, city authorities must look to build cities that will withstand disaster, and private sector investment needs to similarly adapt. The complexity of the issue is so great that it requires a response, a new methodology, from the international community that perhaps we have never seen before.

My call is for us to work together to reduce violence and help cities and communities better cope with fragility. We can mitigate the effects of wars on people; this, ultimately, is our mission.

REPORTS AND DOCUMENTS

Revised practical guidance for first responders managing the dead after disasters

Dr Sarah Ellingham, Dr Stephen Cordner and Dr Morris Tidball-Binz

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Abstract

The proper and dignified management of the dead is one of the three pillars of the humanitarian response to disasters, along with the rescue and care of survivors and the provision of essential services. First launched in 2006, the widely used publication Management of Dead Bodies after Disasters: A Field Manual for First Responders offers practical and easy-to-follow guidelines. It has become the go-to guide not only for non-experts confronted with dead bodies in the aftermath of a catastrophe, but also for those responsible for disaster planning and preparedness in countries with well-developed forensic services. Ten years after the publication of the 2006 Manual, a revised edition has been released. The inclusion of a decade of experience in its field implementation, as well as the incorporation of recent scientific developments in mass fatality management, makes the revised Manual an invaluable resource for first responders confronted with the realities of dead body management following a disaster.

Keywords: humanitarian forensic action, management of the dead, disaster victim identification, first responders, disasters.

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In May 2005, the Pan American Health Organization (PAHO), the World Health Organization (WHO) and the International Committee of the Red Cross (ICRC) organized an expert meeting on lessons learned from the management of the dead¹ in the aftermath of the 2004 Indian Ocean tsunami. Held in Lima, Peru, the meeting identified the need for practical, easy-to-follow guidelines on the management of the dead for non-expert first responders, who are almost always at the forefront of disaster response in large emergencies. The result was the first edition of *Management of Dead Bodies after Disasters: A Field Manual for First Responders*² (2006 Manual), developed in close collaboration with the ICRC's Forensic Advisory Board, which is comprised of internationally leading experts in the in the field of forensic science. This document offered practical guidelines for non-specialists on how to handle human remains in the aftermath of mass fatalities. It was translated into multiple languages and has since become the most consulted and downloaded document on the PAHO website.

The humanitarian community recognizes the proper and dignified management of the dead as one of the three pillars of disaster response, along with the recovery and care of survivors and the supply of basic services. Neglect of this core principle has the potential to cause trauma and emotional suffering to bereaved families, long outliving the physical effects of the disaster in question.³ Unfortunately, in mass disasters, it is not unusual for only a few of the deceased to be identified.

The first response, often carried out by members of the affected communities in the initial hours and days, lays the crucial foundation for the dignified handling of those who have died. This early response will condition the later identification of the dead, and as such, should be properly handled. In simple steps, the Manual sets out the elements of this proper procedure for non-experts acting as first responders. By filling this gap in the emergency response, the Manual complements other guidance aimed at forensic specialists, such as the Interpol disaster victim identification (DVI) guide.⁴ The DVI guide, launched in 1984 and updated several times since, is aimed at a different audience: police and forensic specialists. It has systematized the technical aspects of human identification, making an important contribution to the response to small and medium-sized disasters. However, in large disasters where the authorities simply cannot respond, or when experts are not available at the scene, guidance for those providing the first response is needed. It is this gap that the Manual was designed to fill.

1 In this article, as in the Manual, the terms “the dead”, “dead body/bodies”, “the deceased”, “deceased persons” and “human remains” are all synonymous and are used interchangeably.

2 Olivier Morgan, Morris Tidball-Binz and Dana van Alphen, *Management of Dead Bodies after Disasters: A Field Manual for First Responders*, 1st ed., PAHO, Washington, DC, 2006. For more on the 2006 Manual, see Morris Tidball-Binz, “Managing the Dead in Catastrophes: Guiding Principles and Practical Recommendations for First Eesponders”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007.

3 WHO, *Disaster Risk Management for Health: Mass Fatalities/Dead Bodies*, 2011. See also Pål Kristensen, Lars Weisæth and Trond Heir, “Bereavement and Mental Health after Sudden and Violent Losses: A Review”, *Psychiatry*, Vol. 75, No. 1, 2012.

4 Interpol, *Disaster Victim Identification Guide*, 2nd ed., 2013.

In the ten years since the 2006 Manual was released, its usefulness and importance have become apparent. It has found frequent application in disaster response planning and preparedness, including in countries with highly developed forensic services and disaster response agencies. Over the past decade, there have been important scientific and technical developments in mass fatality management. In addition, lessons have been learned in the aftermath of the 2013 Typhoon Haiyan⁵ in the Philippines, during the 2014/15 Ebola epidemic in West Africa⁶ and following the 2015 earthquake in Nepal.⁷ Together, these have generated improvements to the recommendations that underpin the Manual's continued usefulness and led to its revision.

The 2016 revised Manual⁸ (2016 Manual or, hereafter, the Manual) is divided into twelve short chapters covering the essential aspects of managing the dead following a mass fatality. In the immediate aftermath of a disaster, these chapters can be photocopied and distributed to first responders tasked with various responsibilities. The Manual furthermore contains eleven annexes which include data collection forms, checklists, practical recommendations, useful additional information and links for anyone involved with the management of the dead in emergency responses.

The Manual continues to serve its original purpose: providing guidance on the appropriate and dignified management of the dead, and on carrying out the early, crucial steps which will assist the later identification of the deceased, as well as promoting respect for the bereaved. The 2016 Manual is not a comprehensive framework for forensic investigations, nor does it replace the need for later specialist forensic identification of victims. Implementation of the Manual's recommendations is required to enable later effective investigations by specialist forensic teams using the Interpol DVI guidelines,⁹ if and when such teams arrive in the field.

To make the information more easily accessible, the aims of each chapter are listed at its beginning, and the material is summarized in a "Do's and Don'ts" section concluding each chapter.

The following sections will outline the content of the 2016 Manual, highlighting its updates and additions.

5 Chris McCall, "Scars of Typhoon Haiyan Still Run Deep 1 Year On", *The Lancet*, Vol. 384, No. 9955, 2014.

6 WHO, *Nepal Earthquake 2015 – Grade 3 Emergency*, 2016, available at: www.who.int/emergencies/nepal/en/ (all internet references were accessed in January 2017).

7 WHO, *Field Situation: How to Conduct Safe and Dignified Burial of a Patient Who Has Died from Suspected or Confirmed Ebola Virus Disease*, Geneva, October 2014, available at: www.who.int/csr/resources/publications/ebola/safe-burial-protocol/en/.

8 Stephen Corder, Rudi Coninx, Hyo-Jeong Kim, Dana van Alphen and Morris Tidball-Binz (eds), *Management of Dead Bodies after Disasters: A Field Manual for First Responders*, 2nd ed., PAHO, Washington, DC, 2016 (2016 Manual), available at: <https://shop.icrc.org/gestion-des-depouilles-mortelles-lors-de-catastrophes-manuel-pratique-a-l-usage-des-premiers-intervenants-595.html>.

9 Interpol, *Disaster Victim Identification Guide*, 2009, available at: www.interpol.int/INTERPOL-expertise/Forensics/DVI-Pages/DVI-guide.

Planning and coordination

In the event of a disaster, time is of the essence. Planning and effective coordination are the backbone to any successful disaster response operation. Command structures, logistics and the necessary resources to successfully implement a plan of action for the management of the dead need to be developed in advance. At the local, regional and national levels, it is paramount to quickly appoint the agencies and individuals in charge of overseeing operations, as well as coordination groups. Responsibilities must also be allocated promptly. At a local level, this includes:

- health and safety;
- search and recovery;
- allocating unique codes to the bodies;
- taking photographs and recording data;
- the temporary storage of bodies;
- the traceable long-term storage of bodies;
- providing support to the bereaved;
- the collection and management of information on the missing;
- communications with next of kin and the media;
- logistics; and
- liaison with operational partners and authorities.

On a regional and national level, coordination groups to advise on liaison with local agencies, logistical support of police or military, technical support for data collection, information management, and legal issues related to identification need to be established. Liaison with the public and the media, as well as with diplomatic missions and external organizations, should also be addressed.

The Manual includes a helpful and comprehensive checklist of items needed for the recovery of the dead, including personal protective equipment (PPE), recovery, transportation and storage equipment, and recording equipment.¹⁰

Health and safety, including infectious disease risk of dead bodies

In all disaster response scenarios, the health and safety of the first responder are of the utmost importance. Contrary to circulating misconceptions, human remains do not generally pose a risk of causing epidemics. However, as with the deceased in any circumstances, there is always a chance that an individual who died in a mass fatality was already infected with a blood-borne disease such as hepatitis or HIV.¹¹ In such

¹⁰ 2016 Manual, above note 8, pp. 3–6.

¹¹ See, e.g., H. Douceron, L. Deforges, R. Gherardi, A. Sobel and P. Chariot, “Long-lasting Postmortem Viability of Human Immunodeficiency Virus: A Potential Risk in Forensic Medicine Practice”, *Forensic Science International*, Vol. 60, No. 1–2, 1993.

cases, the risk of transmission to body handlers can be kept in check by ordinary precautions such as adequate PPE (gloves, boots and apron), while the risk to the public not in direct contact with such remains is negligible.¹² The exceptions to usual disasters are situations where the deaths occurred as a result of a highly infectious disease (i.e., an epidemic) or the disaster occurred in an area where such disease is endemic. For example, in the Ebola crisis, handling the dead was one of the main modes of transmission of the disease. In such circumstances special precautions are required, and these are explained in the Manual.¹³ Importantly, the Manual stresses that untrained first responders are not to be involved in responses to chemical, biological (epidemic) or radiation disasters.

Other hazards are much more common, and it is these issues that the Manual focuses on: the risk of injury from collapsing buildings and falling debris, heatstroke, hypothermia, tetanus from simple cuts, and the psychosocial effects of dead body management. Psychological support, including debriefing and the option of counselling for body handlers, is an important component of risk management.¹⁴

Allocating a unique code to dead bodies

Allocating a unique code to each recovered body or body part at the earliest possible time is crucial. Although the need for this procedure was included in the 2006 Manual, the concept is so important that it has been clarified and given a separate chapter of its own in the revised edition.¹⁵ It ensures that the body or the body part can be traced and that related information can be associated with it. This helps to prevent bodies from getting “lost”, remaining unidentified or being misidentified. The code, which is a sequential number, is unique and must be included in all photographs and records related to the remains, in addition to the place where the body was found and the name of the person or team that dealt with the body. The unique code should be allocated, the body labeled and photographs taken as soon as possible, preferably all at the time when the body is first located.

Taking photographs and recording data from dead bodies

The 2016 Manual has also dedicated a separate chapter to the taking of photographs and recording of data from human remains.¹⁶ Good photographic documentation of the remains, taken as early as possible, together with the recording of any associated details and artefacts, is indispensable. Decomposition begins and progresses rapidly, particularly in warmer climates, rendering visual recognition

12 Claude de Ville de Goyet, “Epidemics Caused by Dead Bodies: A Disaster Myth that Does Not Want to Die”, *Pan American Journal of Public Health*, Vol. 15, No. 5, 2004, available at: http://publications.paho.org/english/editorial_dead_bodies.pdf.

13 2016 Manual, above note 8, pp. 7–9.

14 *Ibid.*, p. 8.

15 *Ibid.*, pp. 11–12.

16 *Ibid.*, pp. 13–17.

impossible after a few days or sometimes even hours. As it may take days for forensic specialists to be dispatched and arrive at the scene, prompt photographic documentation by first responders is invaluable.

Prior to photographing, bodies should be cleaned as much as possible to show facial features, and the unique body code must be included in each picture. If possible, a standard photographic scale or an object of known size – a dollar bill, for example – should appear in the picture. At a minimum, the following photographs should be taken: a full-length front-view picture of the body, a front view of the entire face, any obvious distinguishing features (such as tattoos or jewellery) and all clothing.

At the time of taking photos, information about the remains should be recorded in the Dead Body Information Form (Annex 1 of the Manual) as soon as possible. The form has room for basic information on physical appearance and the recovery location. Mandatory data include the person's sex (if recognizable), the approximate age range, personal effects, obvious identifying features, height, colour and length of hair, and visible dental features. Any personal effects need to stay with the body, in order to facilitate their return to the families or next of kin.

Each separate body part should be managed like a whole body would, as it may not belong to the nearest incomplete body. This means allocating and labelling it with a unique code, taking photographs and filling out the Dead Body Information Form. Following the above procedure will help to ensure that all human remains, associated items and information remain traceable throughout the process, and will provide strong support to later attempts at identification.

Recovery of dead bodies

Throughout the recovery operations, the health and safety of recovery personnel are crucial. In terms of management of the dead, body recovery is the first step and needs to take place as early as possible.¹⁷ Recovery goes hand in hand with the allocation of a unique code, labelling and documentation. Ideally the body should be placed into a body bag at the location of recovery. The Manual includes a series of photographs illustrating how to respectfully and efficiently roll a body into a body bag.¹⁸ After the recovery, human remains need to be kept in a cool place, secure from scavengers, public viewing and direct sunlight.

Temporary storage of dead bodies

There are two separate chapters dedicated, respectively, to the temporary storage of dead bodies (Chapter 7)¹⁹ and the traceable long-term storage and disposal of dead

¹⁷ *Ibid.*, pp. 19–22.

¹⁸ *Ibid.*, p. 21.

¹⁹ *Ibid.*, pp. 23–25.

bodies (Chapter 8).²⁰ In mass fatality events that overextend local capacities, the authorities might not be able to quickly process remains in terms of data collection. In these cases, organized and respectful short-term storage to protect the remains as efficiently as possible needs to be established. For this, a centralized collection centre where all data recording can take place needs to be determined.

Each dead body (or individual body part) needs to be bagged separately and have its own unique code on waterproof labels attached to the body (or body part) as well as attached to the bag. Ideally the remains should be kept refrigerated between 2 °C and 4 °C. When this is not possible, storage should be in a protected, cool location. Alternatively, temporary burials can be considered. In such cases, if there are small numbers of bodies, they should be placed in individual graves. Larger numbers can be placed in trench graves, side by side, with at least 0.4 metres between bodies. Each body, and each bag, needs to be individually labeled. The location of the body, with its unique code, must be recorded at the surface of the grave site, and on a plan of the whole burial site.

Traceable long-term storage and disposal of dead bodies

The identification of the dead is the responsibility of the authorities. However, once identified, the remains need to be released to the next of kin as soon as possible. Unidentified remains and unclaimed bodies need to be placed in properly documented long-term storage. In these situations, the preferred option is burial, as it is dignified and preserves the body for potential future identification and return to the family. Each body should be traceable after storage and burial to enable easy future location and recovery when necessary.

Selection of the burial site needs to be carefully considered, taking into account local customs, proximity to the local community, soil conditions and distance from drinking water sources. All human remains should be buried in clearly marked individual graves, which need to be carefully documented and mapped to ensure continuity and traceability. Unidentified bodies should not be cremated.

Support for families and relatives

Proper consideration of the next of kin is of the utmost importance. For this, a family liaison focal point – in the case of a large mass fatality, a Family Assistance Centre – should be established wherever possible. All next of kin need to be given realistic expectations of the recovery and identification process and should be informed about the findings prior to the media or anyone else. Children should not be expected to aid in the visual identification of remains. However, if the family wish to view the body as part of their grieving process, this should be

²⁰ *Ibid.*, pp. 27–28.

respected and facilitated. Psychological support to families should be provided, taking into account the families' needs, cultures and context. In some instances, material support to help with funerary rites may need to be provided, and special legal provisions put in place to expedite the issuing of death certificates and other urgent documents.

Collection and management of information on the missing, including those presumed dead

It is vital that information on missing persons is effectively collected, recorded and made accessible in a manner allowing for the recovered human remains to be identified. By definition, human identification is the attribution of the correct name to human remains. Only the bodies of those known to be missing (i.e., whose names have been collected onto a list) will have the possibility of being identified. Personnel in charge of data management need to be appointed. The recording of as much information as possible about the missing, as well as its consolidation and centralization, ideally in an electronic database, is particularly important. It is not uncommon for individuals to be reported missing multiple times to different agencies and by different individuals, and to be listed under different names and aliases. There is a potential for duplication and confusion if the data are not managed appropriately.

The process of obtaining *ante mortem* information of missing persons from relatives requires trained personnel who will treat next of kin with sensitivity, sympathy and respect. Annex 2 of the Manual provides a convenient template for this.

Communications with families and the media

Good communication is a key factor in effective disaster management, because it helps maintain the victim's dignity, minimizes additional grief to the next of kin and also contributes to successful victim recovery and identification.

A Family Assistance Centre should be established as soon as possible so that the next of kin can be briefed regularly, swiftly and collectively. The briefings should include information about the recovery and identification process, the storage and disposal of remains, and anything else of relevance. The families of identified individuals should be briefed privately before information is released to the media. The privacy of victims and families is a high priority. In large-scale disasters, the Internet, noticeboards or other media outlets such as newspapers, TV and radio will need to be used to communicate with the next of kin. Having a media liaison officer to regularly hold briefings with the press minimizes the risk of inaccurate or premature reporting. Close working relationships with operating relief agencies are crucial, as these agencies frequently work in close direct contact with the affected communities and are a valuable conduit for

information. Good communications with external agencies are also important, as these agencies are not always well informed and may provide mistaken information to the community and the media – as is often the case, for example, with regard to the infectious disease risk of dead bodies.

Frequently asked questions

The “Frequently Asked Questions” section of the Manual addresses the myths of health risks to the public from the dead, the recovery and disposal of human remains, and existing opportunities for assisting in the response efforts. Because of the experience with the Ebola epidemic, the 2016 edition emphasizes that in such circumstances (and epidemics of, for example, Lassa fever or cholera), untrained first responders should not be involved in handling the dead. An additional question has been included: what are the minimum steps needed to identify as many bodies as possible? Sometimes, even the authorities do not know the answer to this question. In order to reach an identification, information gathered about a missing person is compared and matched to information collected from the recovered body. In relation to the former, a list of the missing, as well as specific information about each missing person, is required. This is then compared with information about the dead bodies: for example, photographs preferably taken prior to the onset of decomposition, identifying features, clothing and personal effects. When a comparison is positive, or further examination of the body is required, the body can be tracked and retrieved because its location is recorded and the body itself is labeled with the same unique code that is on the information recorded.²¹

Conclusion

The dignified management of the dead after a mass fatality, including their identification, is a fundamental component of disaster response. When the local emergency response capacity collapses as a result of a disaster, the management of the dead frequently falls to first responders from the affected community until the arrival of outside agencies, including forensic services. The popularity of the 2006 Manual demonstrates the demand for practical and easy-to-follow guidelines, a gap which the Manual filled. The revised 2016 Manual takes into consideration experiences and lessons learned from ten years of application in the field, namely from the management of the 2014 Ebola epidemic, as well as technical and scientific developments of the past decade. With increasing globalization, the majority of mass fatalities nowadays incorporate an international dimension, making a standardized approach in the crucial first

21 See below for a discussion of the implications of reliance upon DNA to assist with identification.

hours and days after the event indispensable. For the success of subsequent identification efforts, the revised Manual is a timely and important resource.

Annex 1: Dead Body Information Form

Annex 1, previously called the “Dead Bodies Identification Form”, is now called the “Dead Body Information Form”. It can be printed online or photocopied from the Manual and handed out to first responders to help them in the crucial task of recording information about human remains as accurately and as early as possible in the response phase, which might aid in future identifications. The form includes the unique body code and prompts the recording of data under sections titled “Physical Description” and “Associated Evidence”.

DEAD BODY INFORMATION FORM

Unique code: (Use this same code on associated files, photographs or stored objects.)	
Possible identity of body (Explain reasons for attributing a possible identity):	
Person completing this form Name:	Official status:
Place & date:	Signature:
Recovery details (Include place, date, time, by whom found, and circumstances of finding. Give GPS coordinates if available. Indicate if other bodies were recovered in the same area, including name and possible relationship, if identified)	

A. PHYSICAL DESCRIPTION

A.1	General condition (mark one):	a)	Complete body	Incomplete body (describe):		Body part (describe):	
		b)	Well preserved	Decomposed	Partially skeletonized	Fully skeletonized	Burnt
A.2	Apparent sex (mark one and describe evidence):	Male		Female		Undetermined	
		Describe evidence (genitals, beard, etc):					
A.3	Age group (mark one):	Infant	Child	Adolescent	Adult	Elderly	
A.4	Physical description (measure or mark one):	Height (crown to heel with units):		Short	Average	Tall	
		Weight (specify units):		Slim	Average	Fat	
A.5	a) Head hair:	Colour:	Length:	Shape:	Baldness:	Other:	
	b) Facial hair:	None	Moustache	Beard	Colour:	Length:	
	c) Body hair	Describe:					

A.6	Distinguishing features:	Use additional sheets if needed. If possible, include a sketch of the main findings. Note if photographs taken (include unique code in all photographs)
	Physical (e.g. old amputations – limbs, fingers)	
	Surgical prosthesis (e.g. artificial limb)	
	Skin marks – (scars, tattoos, piercings, birthmarks, moles, etc.), specify location	
	Apparent injuries: include location, side	
	Dental condition: (crowns, gold teeth, adornments, false teeth). Describe any obvious features	

B. ASSOCIATED EVIDENCE

B.1	Clothing:	Type of clothes, colours, fabrics, brand names, repairs. Describe in as much detail as possible
B.2	Footwear:	Type (boot, shoes, sandals), colour, brand, size. Describe in as much detail as possible
B.3	Eyewear:	Glasses (colour, shape), contact lenses. Describe in as much detail as possible
B.4	Personal items:	Watch, jewellery, wallet, keys, photographs, mobile phone (include number), medication, cigarettes, etc. Describe in as much detail as possible
B.5	Identity Documents	Identity card, passport, driving licence, credit card, etc. Take photograph if possible (including the unique code in the photograph). Describe the information contained in them

C. RECORDED INFORMATION

C.1	Fingerprints:	Yes	No	Taken by whom? Stored where?
C.2	Photographs of body:	Yes	No	Taken by whom? Stored where?

D. STATUS OF BODY

Stored:	(mortuary, refrigerated container, temporary burial), Describe location
	Under whose responsibility:
Released:	To whom and date:
	Authorized by:
	Final destination:

Annex 2: Missing Persons Information Form

Annex 2, the Missing Persons Information Form, is to be filled out by those with requisite training in interviewing the next of kin of missing individuals. It includes the categories “Physical Description” and “Personal Effects”.

MISSING PERSONS INFORMATION FORM

Missing person’s name and unique number for this file: (If name, give family name first followed by comma then other names) (Use unique number on associated files, photographs or stored objects.)
Interviewer name:
Interviewer contact details:
Interviewee(s) name(s):
Relationship(s) to missing person:
Contact details of interviewee:
Address.....
Telephone..... Email.....
Other contact person for missing person, if different from above: (who to contact in case of news). Give name and contact details

A. PERSONAL INFORMATION

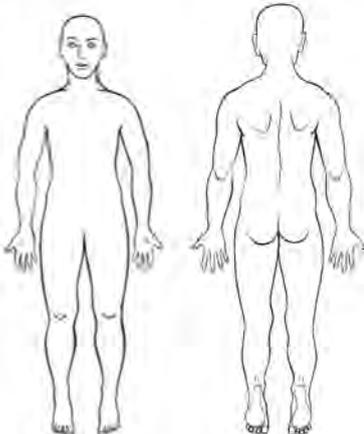
A.1	Missing person’s name:	Include surname, father’s and/or mother’s name, nicknames, aliases				
A.2	Address/place of residence:	Last address, plus usual address if different from the former				
A.3	Marital status:	Single	Married	Divorced	Widowed	Partnership
A.4	Sex:	Male	Female	Other		
A.5	If female:	Unmarried name:				
		Pregnant	Children	How many?		
A.6	Age of missing person:	Date of birth:			Age:	
A.7	Place of birth, nationality, principal language					

A.8	Identity document: Main details (number, etc.)	If available, enclose photocopy or photograph of ID		
A.9	Fingerprints available?	Yes	No	Where:
A.10	Occupation:			
A.11	Religion:			

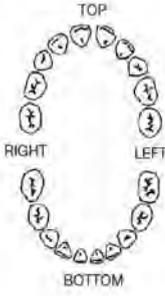
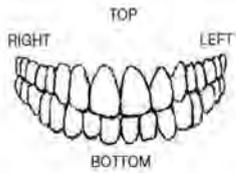
B. EVENT

B.1	Circumstances leading to disappearance: (use additional sheet if necessary)	Place, date, time, events leading to disappearance, other victims and witnesses who last saw missing person alive (include name and address)		
	Has this case been registered elsewhere?	Yes	No	With whom/where:
B.2	Are other family members missing; if so, have they been registered/identified?	List name, relationship, status:		

C. PHYSICAL DESCRIPTION

C.1	General description (indicate exact measure, or approximate AND circle the corresponding group):	Height (exact/estimated?):	Short	Average	Tall	
		Weight:	Slim	Average	Obese	
C.2	Ethnic group/skin colour:					
C.3	Eye colour:					
C.4	a) Head hair:	Colour:	Length:	Shape:	Baldness:	Other:
	b) Facial hair:	None	Moustache	Beard	Colour:	Length:
	c) Body hair	Describe				
C.5	Distinguishing features: Physical – e.g. shape of ears, eyebrows, nose, chin, hands, feet, nails, deformities Skin marks – Scars, tattoos, piercings, birthmarks, moles, circumcision, etc. Past injuries/amputations – include location, side, fractured bone, joint (e.g. knee), and if person limped Other major medical conditions – operations, diseases, etc. Implants – pacemaker, artificial hip, IUD, metal plates or screws from operation, prosthesis, etc.	Continue on additional sheets if needed. Use drawings and/or mark the main findings on the body chart.				
						

	<p>Types of medications – (used at time of disappearance)</p>	
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<p>C.6</p>	<p>Dental condition: Please describe general characteristic, especially taking into account the following:</p> <ul style="list-style-type: none"> ▪ Missing teeth ▪ Broken teeth ▪ Decayed teeth ▪ Discolorations, such as stains from disease, smoking or other ▪ Gaps between teeth ▪ Crowded or crooked (overlapping) teeth ▪ Jaw inflammation (abscess) ▪ adornments (inlays, filed teeth etc) ▪ any other special feature <p>Dental Treatment: Has the Missing Person received any dental treatment such as</p> <ul style="list-style-type: none"> ▪ Crowns, such as gold-capped teeth ▪ Color: gold, silver, white ▪ Fillings (incl. color if known) ▪ False teeth (dentures): upper, lower ▪ Bridge or other special dental treatment ▪ Extractions 	<p>If possible, use a drawing, and/or indicate the described features in the chart below.</p> <p>If the missing person is a child, please indicate which baby teeth have erupted, which have fallen out and which permanent teeth have erupted and use the chart below.</p> <div style="display: flex; justify-content: space-around; align-items: flex-start;"> <div style="text-align: center;"> <p>BABY/PRIMARY TEETH</p>  </div> <div style="text-align: center;"> <p>ADULT/PERMANENT TEETH</p>  </div> </div>
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D. PERSONAL EFFECTS

<p>D.1</p>	<p>Clothing: (worn when last seen/at time of disaster)</p>	<p>Type of clothes, colours, fabrics, brand names, repairs. Describe in as much detail as possible</p>
<p>D.2</p>	<p>Footwear: (worn when last seen/at time of disaster)</p>	<p>Type (boot, shoes, sandals), colour, brand, size. Describe in as much detail as possible</p>
<p>D.3</p>	<p>Eyewear:</p>	<p>Glasses (colour, shape), contact lenses. Describe in as much detail as possible</p>

D.4	Personal items:	Watch, jewellery, wallet, keys, photographs, mobile phone (include number), medication, cigarettes, etc. Describe in as much detail as possible
D.5	Identity documents: (which the person was/might have been carrying when last seen/at time of disaster)	Identity card, passport driving licence, credit card, etc. Take photocopy if possible. Describe the information contained in them
D.6	Habits:	Smoker (cigarettes, cigars, pipes), chewing tobacco, betel nut, alcohol, etc. Please describe, including quantity
D.7	Doctors, medical records, X-rays:	Give details of doctor, dentist, optometrist, or other
D.8	Photographs of missing person:	If available, enclose photographs or copies of photographs: as recent and as clear as possible, ideally smiling (with teeth visible), and also photographs of clothing worn when disappeared

Note: By signing this form, the interviewee understands that the information collected in this form will be used only for the search and identification of the missing person. Its content is confidential and any use other than for the search and identification of the missing person requires the explicit consent of the interviewee.

Place and date of interview:

Interviewer signature:

Interviewee signature:

If requested, a copy of this form with contact details of the interviewer should be made available to the interviewee.

Annex 3: Label for the dead body with unique body code and chain of custody record

Annex 3 comprises a photocopiable template for the dead body label, which is to be filled out by the first responders. It has room for the unique body code as previously described. In addition, the label allows for the chain of custody of the body to be recorded. This label should be either waterproof or paper sealed in plastic, and duplicated. One copy should be securely attached to the body or a body part inside the body bag, while the other should be attached to the outside of the bag, allowing for the chain of custody form to be easily accessed so it can be updated at each handover of the body.

●

UNIQUE BODY CODE

PLACE OF RECOVERY
PERSON/TEAM
NUMBER

Date	Time
------	------

CHAIN OF CUSTODY

<u>Received from</u>	<u>To</u>
Date	Time
<u>Received from</u>	<u>To</u>
Date	Time
<u>Received from</u>	<u>To</u>
Date	Time

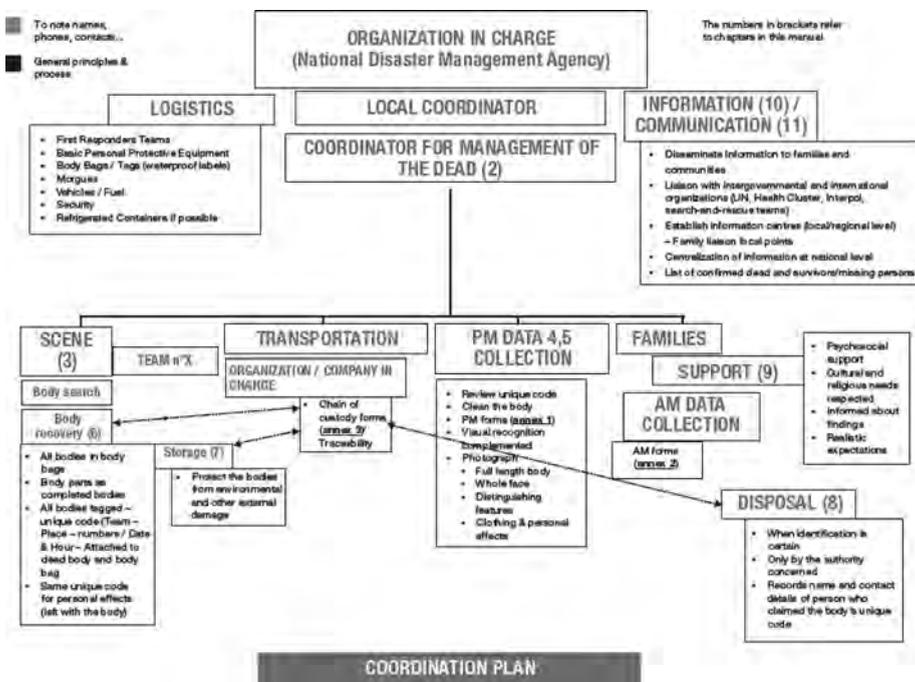
Annex 4: Mass Fatality Plan Checklist

The Mass Fatality Plan Checklist in Annex 4 outlines the key elements of an effective mass fatality plan. The Checklist is split into categories: Purpose; Activation; Command and Control; Logistics; Welfare; Identification and Notification;

International Dimensions; Site Clearance and Recovery of Deceased; Mortuary; Disposal: Final Arrangement; Chemical Biological, Radiological, Nuclear (CBRN) Disasters; Public Information and Media Policy; Health and Safety; and Disaster Mortuary Plan.

Annex 5: Coordination plan flowchart for management of the dead: An example

Annex 5 is an adaptable example of a coordination plan flowchart, which lists the most fundamental aspects to be considered in a mass fatality response, and which can be adapted to individual scenarios and contexts.



Annex 6: Dealing with the bodies of persons who died from an epidemic of infectious disease

Another new feature of the Manual is Annex 6, which is dedicated to the management of the dead from an epidemic of infectious disease. As previously stated, it is important to stress that untrained first responders should not handle the dead in these circumstances. When infected with Ebola virus disease (EVD),

the bodies remain very infectious for some time after death. If first responders and non-experts are to be trained to handle human remains in these circumstances, this training should be provided by individuals who are experienced in handling the disease. Those providing training should also understand the mode of transmission, be experienced in handling the bodies and know the correct and crucial procedures for donning and doffing PPE. The annex includes a summary of the WHO guidelines on safe handling and burial of deceased victims of EVD, while emphasizing that this is not a replacement for proper training.

The following is an excerpt from Annex 6.

<p>1. Prior to departure:</p> <ul style="list-style-type: none"> • Team composition and • preparation of disinfectants 	<p>Each team:</p> <ul style="list-style-type: none"> • 4 carriers, each to wear full PPE • one sprayer in full PPE • one technical supervisor – no PPE • one community facilitator/communicator – no PPE
<p>2. Gathering of all necessary equipment before going to the house of the deceased</p>	<ul style="list-style-type: none"> • Body bags • Hand hygiene • PPE • Waste management
<p>3. Arrival: Prepare for burial with the family at the house of the deceased; evaluate risks</p>	<ul style="list-style-type: none"> • Greet family without PPE • Offer condolences; seek family representative; discuss organization of the burial • Explain safety procedures • If family has a coffin, identify family members who will carry it • Verify that a grave has been dug; if not, organize digging
<p>4. Donning of the PPE</p>	<ul style="list-style-type: none"> • Put on all PPE in presence of the family
<p>5. Placement of the body in the body bag</p>	<ul style="list-style-type: none"> • At least two members of team enter the house • Place body bag alongside the body and open it • Take the body by the arms and legs and place body in body bag • Close the bag • Disinfect outside of body bag
<p>6. Placement of the body in a coffin where culturally appropriate; if not available, transport body to the crematorium</p>	<ul style="list-style-type: none"> • Take body bag and place it in the coffin • Place clothes and other items, as wished by family, in coffin • Allow family member, wearing gloves, to close coffin • Disinfect coffin • Respect grieving time requested by family
<p>7. Collection of soiled objects, disinfection if needed, or burning and cleaning and disinfection of the environment (rooms, house) wearing PPE</p>	<ul style="list-style-type: none"> • Clean with detergent then disinfect all rooms and annexes of the house possibly infected by deceased patient; especially areas soiled by body fluids (e.g. blood, nasal secretions, sputum, urine, faeces and vomit) • Collect and dispose of any sharps possibly used on the patient in a leakproof and puncture-resistant container • With family agreement, any objects, clothes or bed linen soiled with the deceased patient's body fluids should be burnt at some distance from the house. Replace sheets, mattresses, straw mats and the like with new items • Disinfect other objects possibly infected by deceased patient <p>At the end of this step, all belongings of the deceased patient are either burnt, in the coffin, or in a disinfected bag; and all potentially contaminated places in the home are disinfected.</p>
<p>8. PPE removal by burial management team</p>	<ul style="list-style-type: none"> • Guide disinfection of any family members wearing PPE • Disinfect reusable PPE (e.g. rubber boots) of the team • Remove single use PPE into appropriate waste bag following the recommended steps • Perform hand hygiene • Recover reusable disinfected equipment in a waste bag <p>At the end of this step, the team members have removed their PPE and performed hand hygiene</p>
<p>9. Transportation of the coffin or the body bag from the house to the cemetery</p>	<ul style="list-style-type: none"> • If coffin is not soiled, transport using household gloves is sufficient • Rear of a suitable car can serve as a hearse • Respect and grieving time required • Some family members can sit with the coffin, but not in the cab which is required for the burial team • Conventional expressions of grief – shouting/crying/songs – should be respected <p>At the end of this step, the coffin is on its way to the cemetery</p>

<p>10. Burial at the cemetery and engaging of community for prayers as this dissipates tensions and provides a peaceful atmosphere</p>	<ul style="list-style-type: none"> • Carriers wearing household gloves take coffin to, and lower it into, the grave • Place bags with clothes and objects in the grave • Respect cultural customs (e.g. opening a node of the coffin to allow the spirit to escape; allow time for prayers and speeches; family members to close the grave) • Place permanent identification marker on the grave • Recover and place household gloves in infectious waste bag for disinfection • After removal of gloves, perform hand hygiene
<p>11. Return to the hospital</p>	<ul style="list-style-type: none"> • Incinerate the single-use equipment • Reusable equipment is again disinfected and dried • The hearse is cleaned and disinfected, especially the part which carried the coffin (or body bag)

Annex 7: Cemeteries

Annex 7 addresses concerns and considerations for choosing a burial ground for temporary or long-term storage of bodies in the aftermath of disasters. Points covered include the potential for the contamination of drinking water from decaying human remains, preventing predator access and topographical considerations, as well as cultural, religious and legal aspects of burial.

Criteria / risks to be taken into account	Measures
<p>Contamination of drinking water from decaying human remains</p>	<ol style="list-style-type: none"> 1. Contamination of the water may occur from buried human remains through microorganisms washing out into drinking water in high concentrations. The microorganisms are those that were present in the bodies at death. However, no epidemics or widespread disease outbreaks which were unequivocally the result of seepage from cemeteries are documented in the literature. 2. Keep a safe distance between the burial site and drinking wells, boreholes and wells (250m*). 3. Keep a safe distance between the burial site and any other spring or watercourse (30m*) and from field drains (10m*). 4. Human remains should be buried above the groundwater table. 5. A buffer zone with deep-rooting vegetation around the burial ground helps to eliminate microorganisms and decay products. 6. Coffins should be made from materials that decompose rapidly and do not release persistent chemical by-products into the environment. <p>*Distances may vary according to the local geological and hydrological properties of the soil</p>
<p>Scavengers</p>	<ul style="list-style-type: none"> • The body should be covered with a thick layer of soil (90cm–1.2m) to prevent scavenger access. • Enclosure of the site may prevent access by big scavengers.
<p>Topography</p>	<p>Cemeteries are usually located on elevated ground, above the surrounding area, in order to protect the groundwater.</p> <ul style="list-style-type: none"> • If the chosen site is flat, the risk of flooding should be excluded. Slopes and hills can be subjected to landslides and may be more difficult to develop. • A geological and hydrological opinion should be sought in any case prior to the opening of a new cemetery.
<p>Cultural and religious aspects</p>	<ul style="list-style-type: none"> • Funeral rites differ widely within and between communities. The burial site should allow the bereaved to honour their dead according to their wishes. • The final burial site of each body must be indicated above ground. • For unidentifiable body parts (e.g. from highly fragmented bodies), a memorial garden/monument may be installed as agreed with the bereaved families.
<p>Legal aspects</p>	<ul style="list-style-type: none"> • Many countries have a legal framework around the installation of cemeteries (public health law, environmental laws, laws around the management and protection of the water, construction laws, cemetery laws, privacy laws).

Annex 8: Processes enabling the use of forensic DNA analysis in a large mass fatality disaster

It is a mistake to think that the use of DNA simplifies the management of the dead in a mass disaster. When the correct procedures are being adhered to, DNA analysis is an extremely powerful tool which helps increase the number of victims identified following a mass fatality disaster. DNA sampling takes place subsequent to the assigning of a unique body code and the examination of the remains according to the procedures outlined in the Manual. The extracted samples (which could be muscle, bone or perhaps fingernails or toenails – this needs to be agreed in advance with the laboratories involved) need to be secured, labelled and properly stored to decelerate DNA degradation. A comprehensive list of missing individuals and their *ante mortem* information are still required, as well as biological reference samples from surviving family members, for identifications based on DNA profiling to be successful. Other considerations include the identification of laboratories for the analyses; samples taken from human remains and biological reference samples should normally be processed in separate laboratories, each with the capacity and technical standards to deal with the large number of samples and to analyze and interpret the results, including the statistics required for ascertaining the identity of human remains. Financing for these analyses needs to be sourced.

PROCESS	REASONS WHY THE PROCESS IS NEEDED
The bodies are each given a unique body code, have been examined in accordance with this manual, the findings recorded, and the bodies stored in such a way that they can be tracked and accessed.	This process allows specific bodies with distinctive, potentially identifiable characteristics or findings, or whose DNA profile is later matched with the biological relative(s) of a missing person, to be retrieved for
	<ul style="list-style-type: none"> • further examination; or • return of the body to relatives for burial; or • enables placement of a memorial marker with the correct name if the body is already buried and will not be moved.
A sample from the body is obtained from which DNA can be extracted (e.g. muscle, bone, toenail).	DNA profiling of the deceased is enabled.
The sample is secured, labeled (including with the unique body code) and stored so that its further deterioration is arrested, its continuity is ensured and it is available for profiling.	This optimizes the chance that DNA profiling of the sample from the dead body will be possible by minimizing sample deterioration. When profiling is successful and leads to a match, it enables the profile to be reliably traced back to a particular body.
There is a list of names of the missing together with antemortem information about those people in accordance with this manual.	Without a list of the missing, it is not possible to make a significant number of identifications on any basis (even with full DVI examinations), including with DNA profiling of the dead bodies. Without a list it will be harder to obtain reference DNA samples from family members. Without antemortem information about the missing person, it will not be possible to corroborate any DNA matches with other information.
There is a system designed to enable relatives of those missing and believed to be dead to provide a reference biological sample.	Without appropriate reference samples (which will vary according to circumstances and profiling systems) significant numbers of DNA-led identifications will not be made because there will be insufficient statistical power in the matches.

Identify and communicate with laboratories which are capable of dealing with large numbers of degraded samples (from the dead bodies), and large numbers of biological samples from relatives. Samples from victims and from families should be processed in physically separate locations if one laboratory is to be used for all samples.	Laboratories may not be available in-country. Sending samples overseas may invoke additional psychosocial, political and logistical considerations for next of kin and the authorities.
Establish a framework for evaluating DNA data that considers the number of individuals missing and adopts statistical thresholds for DNA-based matches. Ensure that suitable software, along with robust protocols, is available for the comparison of the two groups of samples (victims and relatives).	A failure here will result in false identifications (possibly multiple), thereby undermining the whole identification process.
The finances required to fund the above need to be understood, and a source found.	For large-scale disasters, the finances will probably be beyond the capacity of many governments.

Annex 9: The management of dead foreign nationals following a large mass fatality disaster

As mass fatality events frequently include individuals of foreign nationality, arrangements applying to overseas nationals following their identification need to be made. These procedures should be established in advance and may need to include Interpol and foreign embassies. It is crucial that a systematic approach to management of all the dead and their identification is taken, and that this process is not distorted by pressure to prioritize the identification of foreign nationals.

Annex 10: Supporting publications

Annex 10 is a list of supporting publications which the reader of the Manual may wish to consult to gain more in-depth knowledge on the individual topics discussed. The list includes the following references:²²

Claude de Ville de Goyet, “Epidemics Caused by Dead Bodies: A Disaster Myth that Does Not Want to Die”, *Pan American Journal of Public Health*, Vol. 15, No. 5, 2004, pp. 297–299, available at: http://publications.paho.org/english/editorial_dead_bodies.pdf.

H. Douceron, L. Deforges, R. Gherardi, A. Sobel and P. Chariot, “Long-lasting Postmortem Viability of Human Immunodeficiency Virus: A Potential Risk in Forensic Medicine Practice”, *Forensic Science International*, Vol. 60, No. 1–2, 1993, pp. 61–66.

William D. Haglund, Melissa Connor and Douglas D. Scott, “The Archaeology of Contemporary Mass Graves”, *Historical Archaeology*, Vol. 35, No. 1, 2001, pp. 57–69.

²² References have been edited here to match the format of the *Review*.

ICRC, *Forensic Human Identification*, Geneva, 2013, available at: www.icrc.org/en/publication/4154-forensic-identification-human-remains.

ICRC, *Missing People, DNA Analysis and Identification of Human Remains: A Guide to Best Practice in Armed Conflicts and Other Situations of Armed Violence*, 2nd ed., Geneva, 2009, available at: www.icrc.org/en/publication/4010-missing-people-dna-analysis-and-identification-humanremains-guide-best-practice.

Interpol, “Disaster Victim Identification”, Interpol Resolution No. AGN/65/RES/13 of the 65th Interpol General Assembly, Antalya, 23–29 October 1996, available at: www.interpol.int/content/download/22405/210383/version/4/file/65-RES-13-Ang.pdf.

Interpol, *Principles of Good DVI Governance*, Lyon, available at: www.interpol.int/INTERPOL-expertise/Forensics/DVI.

PAHO/WHO, Resolution on the International Transportation of Human Remains, 1966, available at: http://iris.paho.org/xmlui/bitstream/handle/12345_6789/2177/CD16.R36en.pdf?sequence=1.

United Nations Office for the Coordination of Humanitarian Affairs, “The Cluster Approach”, *Humanitarian Response*, available at: www.humanitarianresponse.info/en/coordination/clusters.

WHO, “Ebola Virus Disease”, Fact Sheet No. 103, Geneva, August 2015, available at: www.who.int/mediacentre/factsheets/fs103/en/.

WHO, *Field Situation: How to Conduct Safe and Dignified Burial of a Patient Who Has Died from Suspected or Confirmed Ebola Virus Disease*, Geneva, October 2014, available at: <http://who.int/csr/resources/publications/ebola/safe-burial-protocol/en/>.

WHO, *Laboratory Biosafety Manual*, 3rd ed., Geneva, 2004, available at: www.who.int/csr/resources/publications/biosafety/Biosafety7.pdf?ua=1.

WHO, *Personal Protective Equipment in the Context of Filovirus Disease Outbreak Response: Rapid Advice Guideline*, Geneva, October 2014, available at: <http://who.int/csr/resources/publications/ebola/ppe-guideline/en/>.

C. P. Young, K. M. Blackmore, A. Leavens and P. J. Reynolds, *Pollution Potential of Cemeteries*, Environment Agency, Bristol, 2002.

Annex 11: International organizations

Annex 11 is a list of international organizations, namely WHO, the PAHO, the ICRC, the International Federation of the Red Cross and Red Crescent Societies, and Interpol, all of which may be involved with the response to a mass fatality incident and could be consulted for support and research.

REPORTS AND DOCUMENTS

Generating respect for the law: An appraisal

13–14 October 2016, ICRC,
University of Tasmania Faculty
of Law and Institute for the
Study of Social Change

IHL symposium report*

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Executive summary

The symposium on “Generating Respect for the Law: An Appraisal” brought together experts from various disciplines, including law, political science, government, philosophy, history, humanitarian action, the military and academia, from across Australia. Over the course of two days, these experts considered several questions: How have perceptions of international humanitarian law (IHL) evolved over time, and where do we now stand? What are the challenges raised by transnational asymmetric armed conflict? How should armed groups who do not accept the constraints of IHL be approached? What roles should States, academics and civil society play in generating respect for the law? And lastly, how does new technology change the face of contemporary warfare?

Several conclusions can be drawn from the resulting discussion. Most importantly, the law alone is not enough to change behaviour on the battlefield.

* This report is a summary of an IHL symposium and does not necessarily represent the views of the ICRC or the University of Tasmania.

The challenge of improving respect for IHL is not new, but it has been made sharper by the barbarity we witness in contemporary conflicts. For those who voice strong support for IHL, the task is not to strengthen their own observance of IHL norms, but to find means to nurture respect in more restrictive environments. The drivers are both moral and legal, stemming from States' obligations to respect and ensure respect for IHL. The International Committee of the Red Cross itself has acknowledged that it must do more to engender respect for the law.

It may be useful to take a step back and determine what we mean when we use the word "respect". Is refraining from behaviours that violate the law sufficient? Is it important that refraining from such behaviours be based on an understanding that they are incompatible with morality or ethics? Does the motivation for refraining from these behaviours matter? Relatedly, does a blind reliance on the letter of the law lead to a sort of "moral de-skilling" that may ultimately undermine respect for the principle of humanity underlying IHL norms?

Determining the type of respect we are seeking to engender will allow the international community to seek out ways of influencing the behaviour of States and non-State armed groups. The most challenging of these to engage will be those that are not interested in applying IHL at all. Here we should note that given the apparent lack of appetite for the development of new norms, the future of IHL may lie in soft law.

The international community can look to the past for insights into how to approach new technologies on the battlefield. Each generation has struggled with new developments, and parallels can be drawn between how technology was dealt with when first encountered in the past, and how we are dealing with it today.

It is also vital that we highlight successes in the law as well as violations. IHL violations are ever-present in the international media, but respect is rarely reported, as good news is no news. This may lead to the perception that the law does not work. As such perceptions undermine the law's influence, it is important to show that IHL does have an impact.

Lastly, acknowledging that the mere existence of the law alone is not sufficient to generate respect for the law, future initiatives aimed at generating greater respect for IHL norms will need to include an open dialogue that is not limited to military lawyers, but reaches across disciplines.

The event also raised a number of interesting questions, which can inspire further discussion on these topics.

* * *

Introduction

The IHL symposium on "Generating Respect for the Law: An Appraisal", co-organized by the International Committee of the Red Cross (ICRC), the University of Tasmania's Faculty of Law and the Institute for the Study of Social Change, was held in Hobart on 13 and 14 October 2016. The symposium, which

took place in the context of the ICRC's 2016 cycle of conferences on "Generating Respect for the Law", gathered experts from disciplinary backgrounds including law, political science, government, philosophy, history, humanitarian action, the military and academia to discuss how to create an environment conducive to respect for international law, particularly international humanitarian law (IHL), from a multidisciplinary perspective. Participants included: Vincent Bernard, ICRC; Leonard Blazeby, ICRC; Dr Gavin Daly, University of Tasmania; Fabio Forgione, Médecins Sans Frontières; Dr Jai Gaillot, University of New South Wales; Dr Rosemary Grey, Melbourne Law School; Fred Grimm, ICRC; Dr Matt Killingsworth, University of Tasmania; Dr Rain Liivoja, Melbourne Law School; Marnie Lloyd, University of Melbourne; Professor Tim McCormack, University of Tasmania Faculty of Law; Dr Rebecca Shaw, University of Queensland; Professor Dale Stephens, Adelaide Law School; Dr Phoebe Wynn-Pope, Australian Red Cross; and Australian government representatives.¹

There were a few underlying assumptions to the discussions that took place over the course of the two-day symposium. Firstly, in seeking to generate increased respect for IHL, the problem was not seen to be in the rules themselves – existing IHL norms are sufficient to govern armed conflict. Secondly, the problem is not ignorance of the rules; violations are caused by other factors, mainly a lack of political will to adhere to international norms. Lastly, the international community needs a multidisciplinary approach to address the lack of respect for IHL. The main objective of the discussion was to explore new ways to address violations of IHL and human rights and to get new perspectives from diverse disciplinary backgrounds on renewing the ICRC's approach.

How perceptions of IHL have evolved over time

Currently, there is a general feeling of pessimism in discussing respect for IHL. In an increasingly connected yet divided world, there are many challenges that must be addressed in order to ensure greater respect for IHL, including the lack of trust in international mechanisms, new technologies, the tendency of States to distance themselves from the battlefield, and the converse practice among non-State armed groups (NSAGs) to continue to resort to suicide bombings and other low-tech, up-close means of violence. Importantly, the main hurdle to be overcome is the striking lack of political will among States to ensure greater compliance with IHL or to negotiate new international norms. In light of all this, it is clear that there is a continued need to generate respect for IHL and other norms of restraint that can influence behaviour in armed conflict.

In starting this discussion, one important factor that should be determined is what we mean when we talk about respect for the law. Often we are talking about behavioural respect: refraining from behaviours that are in violation of the law,

1 Special thanks to Hannah Salisbury, for her note-taking, and to Netta Goussac and Ellen Policinski for their work in preparing this report.

regardless of the motives for doing so. There is also, at the other end of the spectrum, the philosopher's respect: refraining from such behaviours on the basis of realizing that they are incompatible with morality or ethics. In between these two is respect tied to an "honour culture" that is predicated on a contrast between civilization and barbarism, between "gentlemen" and "others". When talking about respect for IHL, where should the desired behaviour come from?

Due to the nature of IHL, it is difficult to identify instances of its respect. In contrast, violations are widely reported, which has led to the perception that the law is violated now more than ever, but in fact this is not necessarily the case. Paradoxically, while there is a perception that IHL is no longer respected, there is more of it than ever before in the form of a range of new treaties that have been ratified by States, the jurisprudence of international courts and tribunals, and the integration of IHL into States' domestic legal orders to an unprecedented extent.

One way to examine the evolution in perceptions of IHL is by looking at the specific example of the sacking of captured cities across the ages as a way of tracking continuity and compliance with international norms from the time of the Conference of Westphalia. Sacking cities fell out of fashion in the Napoleonic period, but there was a pre-existing custom of sacking cities during war. Therefore, despite the shift in what was considered acceptable, cities continued to be sacked and bombarded during the Napoleonic era, and a dichotomy arose between the ethical discourse of officers and the lack of restraint by common soldiers causing civilian suffering during sieges. At that time, respect for norms in armed conflict could be tied to the chivalric tradition, and thus there was an appeal to military honour and military shame. However, the sense among officers was that the sacking of cities by common soldiers was both unavoidable and at the same time unacceptable.

Sexual violence in armed conflict is another type of IHL violation that reveals much about perceptions of the law. Sexual violence is undoubtedly a violation of IHL, a war crime, and can also be an element in both the crime of genocide and in crimes against humanity, but it is still endemic in armed conflict. This is a stark reminder that the law alone is not enough to change behaviour. Sexual violence is linked to norms that are even older than IHL, such as ideas about men's entitlement to women's bodies and men's ideas of asserting dominance over others sexually, and these inform behaviour. IHL is an aspirational standard in this aspect, not a predictor of how people behave on the ground. There has been a rapid advancement on the topic of sexual violence in armed conflict, from the common acceptance of rape as part of the spoils of war to the recent *Bemba* case before the International Criminal Court (ICC),² but this may have led to perverse incentives for groups who commit sexual violence with the specific intention of gaining notoriety.

Domestic law may play an underappreciated role in influencing behaviour. International criminal law can also serve as a deterrent, but the likelihood of criminal prosecution at the international level is too low to generate the desired

2 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, 21 March 2016.

respect for IHL. There is therefore a perception that IHL norms are more effective when translated into domestic law, perhaps also due to States' desire to exercise primacy of their national judicial systems, which is demonstrated where ICC Statute crimes are incorporated into domestic criminal legislation. In the military, the risk that troops will commit offences recognized in domestic criminal law can serve as a deterrent to commanders.

That said, it is possible to overstate how effective the law in and of itself can be at preventing behaviour. For example, targeting decisions do not necessarily turn solely on the legality of the attack, but also on policy considerations, which can sometimes be more protective than what is strictly required by the law. However, the discussion leading up to such decisions is about the law and in particular the principles of distinction, proportionality and precautions, so IHL is still an important part of the process even if it is not ultimately the determining factor.

In the present day, it can be argued that law has so saturated military thinking that it has had an anesthetizing effect on ideas of military honour or the "warrior's code", which formerly supplied norms of restraint. An over-reliance on the law risks giving rise to a mentality where legal compliance is the answer, and ethical or moral compliance are not relevant to the decisions being made. By virtue of IHL taking the reins in military decision-making, there is a danger of the "moral de-skilling" of military personnel. This could be seen as the success of IHL marginalizing other political and ethical commitments. However, military decisions do not necessarily turn on what lawyers say can be done; rather, they are based on a whole range of factors including law, expenditure of resources, whether a given operation is considered worth putting troops at risk, and so on. One theory is that it is actually the professionalism of an armed force that determines restraint, rather than the norms that it ascribes to.

Contemporary challenges raised by asymmetric, non-international armed conflict

Many of today's armed conflicts involve both States and NSAGs. Some NSAGs claim they must resort to measures that violate IHL due to the military superiority of the States they fight against. At the same time, asymmetric conflicts can create perverse incentives for States to violate their own IHL obligations when faced with a real or perceived existential threat. Under such circumstances, it becomes easier for NSAGs to violate IHL in turn, leading to a type of "erosion of humanity".

Neither States nor NSAGs are a monolithic group when it comes to respect for IHL. There is a spectrum of IHL compliance on which militaries and societies fall. Broadly speaking, States can be divided into three general categories vis-à-vis IHL: those that endeavour to respect IHL, those that are interested in IHL but with patchy application, and those that are not interested in applying IHL at all. The goal is to encourage those with patchy compliance towards greater compliance while at the same time moving recalcitrant societies towards more respect and ensuring that generally compliant parties do not lose their commitment to IHL.

Similarly, NSAGs should not all be painted with the same brush on their ability or their desire to comply with IHL. Some have proposed a sliding scale of obligation depending on the level of organization of the group in question, but this is not welcomed by all. Those suggesting this notion have in mind the fact that if the law is not realistic, it may be disregarded. The goal is not to lower the standard but to ensure that the law is realistic so that NSAGs are more inclined to respect it. The counter-argument is that IHL already includes an element of feasibility, for example the requirement to take “feasible precautions”.³

Private military and security companies (PMSCs), another type of non-State actor, are a contemporary manifestation of the mercenary industry that has evolved over centuries. While there are arguments which suggest that PMSCs fit into the existing legal framework, there have simultaneously been efforts to clarify the position of PMSCs and to regulate their behaviour, which may be instructive in how to affect behaviour in armed conflicts more broadly. Such efforts include a UN treaty proposal, the Montreux Document and the International Code of Conduct (ICoC) and its Association (ICoCA). The UN’s Draft Convention on Private Military and Security Companies⁴ opened the discourse on how to best regulate PMSCs, though without substantial progress. The non-binding Montreux Document,⁵ likewise, has not resulted in demonstrable changes in behaviour, though it has been effective in engaging State involvement. Lastly, the ICoC was well received by the PMSC industry, unsurprisingly as parts of the industry itself were involved in drafting the code of conduct. Adherence to the ICoC enhances the perceived reliability of member firms and therefore their ability to secure contracts. This makes adherence to accepted norms in the best interests of the PMSC. The lesson that can be taken away from this example is that financial interest, and a sense of ownership by the affected audience, is a way to ensure compliance. Self-interest and “soft law” mechanisms could potentially serve as a model for future development of norms should the current hostility to new treaties persist.

The Australian Defence Force (ADF) can be examined as an example of a State armed force that cares about respecting IHL in asymmetric armed conflict, knowing first-hand the challenges of transnational, asymmetric armed conflict. The ADF takes its IHL obligations very seriously and has designed and implemented processes that facilitate IHL compliance, even where it might be inconvenient to do so, irrespective of expectations of reciprocity or lack thereof.

3 See Marco Sassòli, “Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality between Armed Groups and States?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011. Compare with Yuval Shany, “A Rebuttal to Marco Sassòli”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011. See also Rene Provost, “The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassòli and Yuval Shany”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011.

4 Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Self-Determination, UN Doc. A/HRC/15/25, 2 July 2010, Annex.

5 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Montreux, 17 September 2008.

Reflecting on why Australia's experience differs from that of some other States, a number of factors come to light. The ADF is not involved in any existential armed conflicts or even any armed conflicts where the price of military failure would directly affect the State; it has not moved to "casual disregard" of the civilian population and, on the contrary, its mission is often to protect civilians; Australian society expects its military to comply with IHL; and lastly, the ADF has taken a number of essential measures when fighting in asymmetric conflict, including requiring investigation of all civilian casualty incidents, and there is a strong governance framework for detention and systemic integration of IHL into the targeting process.

Drivers of behaviour in armed conflict

There is a wealth of ongoing research into what drives the behaviour of NSAGs, the most notable being the ICRC's own study of restraints on behaviour in war, an update to its 2004 study.⁶ The goal of both this research and the present discussion is to identify means of affecting behaviour, including that of certain NSAGs who reject IHL on its face, which could provide guidance for those seeking to ensure respect for the law. We can look to what affects the behaviour of State armed forces for inspiration on what might affect the behaviour of NSAGs. Where NSAGs control populations or territory they may have similar incentives to States to comply with IHL, as predictability and respect for the rule of law contribute to stability and prosperity. Where NSAGs seek legitimacy, there is an obvious incentive to comply with IHL. For other NSAGs, this may be more difficult.

Compliance theory can provide useful insights into why States do or do not respect the law. By analogy, compliance theory might also be applied to NSAGs with a clear hierarchical structure. According to one view, it is the internalization of norms into domestic legal systems and the development of habitual compliance through repeated behaviour that leads to respect for international law.⁷ Debate on how a norm should be interpreted can encourage the legal, political and social internalization of that norm. The discussion about compliance is an opportunity for such a transnational legal discourse on IHL to take place.

Self-interest may also lead parties to armed conflict to respect IHL, with political scientists having postulated for many years that governments act out of self-interest. For most of the twentieth century, the understanding was that military self-interest was a main driver for governments. Since World War II this has expanded to include economic self-interest. Beyond this, however, States are also motivated by non-material self-interest, such as their reputation or identity.

For an example of the self-interest of armed forces leading to policies that reduce civilian casualties, one can look to the counter-insurgency doctrine

6 See "The Roots of Behavior in War Revisited", video, available at: www.icrc.org/en/event/roots-behaviour-war-revisited (accessed in January 2017).

7 See Harold Koh, "Why Do Nations Obey International Law?", *Yale Law Journal*, Vol. 106, No. 1, 1996.

developed by coalition forces in Iraq. According to the this doctrine, members of the military assumed additional risk in order to avoid civilian casualties, as such casualties were believed to undermine the coalition forces' mission by alienating the local population that they, as well as the insurgents, were trying to win over. Killing civilians was therefore no longer seen as mere "collateral damage", but as tangibly undermining long-term counterterrorism goals. This framed avoidance of civilian casualties in terms of the coalition forces' self-interest, rather than in legal terms.

State armed forces have integrated the Geneva Conventions into their rules of engagement and often feel that the Conventions are part of the "warriors' code" by which they live. NSAGs do not participate in the drafting of international treaties, and may therefore feel less ownership of the Geneva Conventions and the norms they contain. Humanitarian actors often engage with NSAGs in order to get them to formally adopt the norms of IHL so that they feel ownership over them. The international community, including both States and humanitarian organizations, should consider where to involve NSAGs in drafting or developing international law (or whether or not to involve them at all). This is most clear when referring to the obligations contained in the Geneva Conventions, which even encourage the conclusion of special agreements by armed groups. Customary international law, on the other hand, is still determined by the practices of States, rather than armed groups. Providing an opportunity for NSAGs to participate in the development of the law in this way may increase their feeling of ownership of the law and their incentives to comply with it. Since not all NSAGs have equal capacity or resources to meet IHL standards, determining what practice contributes to a customary law norm may be a difficult task.

How much can be done to promote compliance with IHL depends on analysis of the organized armed group, level of contact and possible dialogue. Dialogue with armed groups is important as it has a noted link with their compliance with IHL – and despite the general assumption that dialogue with NSAGs is difficult, they are incredibly diverse in terms of structure, motivation, etc., and much work is being undertaken with armed groups that are more open to leverage.

Roles of States, academics and civil society in generating respect for the law

Generating respect for the law requires continuous interaction between governmental, military, academic and civil society actors.

In Australia, formal respect for the law is systematized: military lawyers work with government legal advisers to provide advice to decision-makers (the executive branch) who are ultimately accountable to Parliament, which has oversight of the ADF. Other actors – including the ICRC, Australian Red Cross and a broad range of civil society actors – can influence government processes.

Formally, however, the State remains at the centre of humanitarian law-making. Whether in response to a perceived "withdrawal" by States from the

development of IHL, or as a result of slow treaty-making or a desire by States to maintain “plausible deniability”, informal law-making (such as the development of manuals and guidances by academics, experts and the ICRC⁸) has emerged as a useful mechanism for advancing awareness of and respect for IHL. This is not necessarily an indication of “abdication” by States; rather, it may be an example of “forum shopping”, whereby States choose a forum of IHL development where they will achieve results. Informal law-making offers opportunities for clarification and development of the law, but also brings challenges, such as the absence of binding regulation.

When it comes to the clarification and understanding of IHL, the Australian military has followed others (such as the United States) by forming strategic ties with academia in order to enrich IHL training and debate. Academic military law centres can perform a vital role in generating respect for IHL by providing a platform for military lawyers to discuss their views on IHL issues and facilitating meaningful debate on IHL issues in view of the public. While engagement by government and military lawyers in academic debate is possible, the need to respect confidentiality and professional responsibility can sometimes limit the level of engagement (such limitations should not arbitrarily inhibit transparency). Academia can also play a role in educating humanitarian professionals about IHL.

While the academy can bring IHL “into the open”, building community knowledge and engagement can be very difficult, with some countries achieving more success than others. In this respect, a broad range of actors – from humanitarian actors to military industrial actors to the media – all have a role to play in “owning” IHL compliance.

The law must be accessible to those actors who wish to champion its respect. NGOs in particular must overcome resource barriers and equip themselves with IHL knowledge in order to understand their own rights and obligations and effectively influence governments.⁹ In this respect, widespread dissemination of IHL is key. National Red Cross and Red Crescent Societies are central to dissemination efforts, acting in their role as auxiliaries to governments in the humanitarian field. Demonstrating a desire to translate knowledge into action, Australian Red Cross disseminates IHL among the key IHL actors in Australia and seeks to influence not just individuals but systems and rules as well. These endeavours, however, must remain distinct from government-led efforts, for example in areas such as the countering and prevention of violent extremism.

Examples of good practice on respect for IHL belie a pervasive gap between academia and public policy. Parliamentarians neither invite nor trust “outside” advice, academics remain wary of being “politicized”, and few NGOs have

8 See, for example, the San Remo Manual, Harvard Manual, Tallinn Manual, Manual on International Law Applicable to Military Uses of Outer Space, and Copenhagen Principles, as well as the ICRC’s *Interpretive Guidance on Direct Participation in Hostilities* and the Commentary to the Geneva Conventions.

9 See, for example, the Humanitarian Leadership Programme offered by Deakin University, Australia.

specialist knowledge of IHL. Contemporary examples from Australia – such as policies on indigenous people and migration – illustrate the importance of breaking down barriers between elected representatives, civil society and those with knowledge of the subject matter.

Technology and the changing face of warfare

The modern face of warfare prompts us to distinguish between rules that are “technology-neutral” (rules that are capable of being applied to new technologies) and rules that are “technology-specific” (rules that are developed for a particular type of technology). Technology-specific rules – such as those that can be found in the field of arms control – should nonetheless be informed by legal, humanitarian, strategic and technological considerations. Today, discussions of technology-specific rules often focus on four key fields: lethal autonomous weapon systems, human enhancement of military personnel, military uses of nano-technology, and cyber-warfare. Discussion has naturally focused on specific technical questions, such as whether there can be meaningful consent by military personnel for pharmaceutical enhancements.

However, the impact of technology on humanitarian law and military ethics goes beyond the technical. New technologies can challenge the underlying assumptions of IHL. For example, the ability to remotely conduct cyber-operations challenges the notion of “effective control” and thereby the rules for determining whether territory is occupied. New technologies can also give rise to complex ethical challenges and cause us to consider the moral antecedents of IHL itself, such as the sanctity of life and notions of mercy, empathy, pity and honour. Pharmaceutical enhancements or nano-technology in the body could reduce a soldier’s sense of personal vulnerability and give rise to asymmetry between individual combatants. This raises a number of questions. Does a reduced sense of personal vulnerability mean that soldiers will be less likely to show mercy to their enemy? If so, are we compelled to protect ideas such as mercy against the influence of new technology? Conversely, does autonomous warfare reduce the influence of hatred, fear and vengeance? Should we embrace or be concerned by the prospect of a “clinical” application of IHL?

Like the introduction of a new species of animal into an ecosystem, new technologies can alter the delicate balance that influences decisions to use lethal force. The lower cost and greater geographic range of new technologies also means that prospective parties to conflict need no longer be able to control large swathes of territory with firepower or human force, nor must they achieve broad democratic support. Small groups of trained professionals may be able to achieve comparable outcomes to large armies. Advances in technology may lead to “cleaner” wars, where fighting parties conduct hostilities at a distance and “smart” weapons minimize incidental damage or loss of life. Technology is already facilitating humanitarian interventions and revolutionizing how we communicate about war.

What will be the long-term impact of this change to the military ecosystem? Some argue that reducing the financial and political barriers to war may ultimately lead to greater suffering and loss of life in conflict. The growing asymmetry between fighting parties may also lead less-resourced parties to rely on more brutal methods. Yet reduction of human suffering is the aim of IHL. Laying bare the realities of war through communications technologies can support accountability measures. Should we embrace all opportunities to limit the suffering caused by war, including new war-fighting technologies? Or should the unknowable impacts of new technologies prompt us to refocus efforts on, for example, conflict prevention?

The use of technology as a force multiplier can result in an increased focus on the individual combatant in modern conflict. Under this individualized approach – whereby a specific individual can be the target of a military operation which, in turn, was authorized by a single decision-maker – warfare seems more like policing. The societal implications of these consequences of new technologies go beyond IHL. How does the individualizing of conflict impact on the relationship between the individual and society as a whole?

New technologies can also offer opportunities for the development and strengthening of IHL. For example, the use of remotely controlled weapon systems can be seen as an opportunity to ensure greater compliance with IHL. This potential has been borne out by European jurisprudence on the right of members of armed forces to be properly trained and equipped.¹⁰ As the technology of war becomes accessible to a wider group of people, so too grows the number of people who must be made aware of humanitarian law. Weapon system developers may become a new audience for IHL dissemination.

The confusion and discomfort that often pervades the discussion of “technological warfare” illustrates that the law is saturated with morality (even legal positivists may come to the conclusion that the law must be broken because “it is the right thing to do”). But it is not clear whether human-designed technologies will perpetuate the same moral strictures that influence human behaviour in war. In this respect, the debate surrounding new technologies is a prism through which we can (re-)examine old assumptions about IHL.

Conclusions

It would be wrong to assume that all people, or all nations, consider international law (including IHL) to be relevant and important. Contrary to the perception that international law is only useful for small or middle powers, international law remains crucial to the most important decisions made by all States, including the decision to go to war and the conduct of hostilities.

The challenge of improving respect for IHL is not new, but it has been made sharper by the barbarity we witness on the battlefield. For those who voice strong support for IHL, the task is not to strengthen their own observance, but to find

10 UK Supreme Court, *Smith et al. (No. 2) v. Ministry of Defence*, UKSC 41, 19 June 2013.

means to nurture respect in more restrictive environments. There are both moral and legal elements, stemming from States' obligations to respect and ensure respect for IHL. The ICRC itself has acknowledged that it must do more to engender respect for the law.

Fulfilment of this goal requires honest self-reflection in order to understand the problem and implement workable solutions. We must recognize that IHL is not a panacea, and that we cannot continue to depend on traditional normative frameworks – new tools are required to create the humanitarian outcomes we desire. We must find new ways to speak to each other about IHL – a common language that acknowledges ideas from diverse fields such as science, history, ethics, military strategy and humanitarian action. And we must bring these conversations into the open, so that respect for IHL is integrated into the relationship between the public and the State.

What next?

It may be useful to take a step back and determine what we mean when we use the word “respect”. Is refraining from behaviours that violate the law sufficient? Is it important that refraining from such behaviours be based on an understanding that they are incompatible with morality or ethics? Does the motivation for refraining from these behaviours matter? Relatedly, does a blind reliance on the letter of the law lead to a sort of “moral de-skilling” that may ultimately undermine respect for the principle of humanity underlying IHL norms?

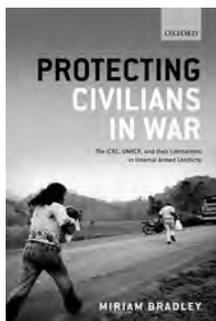
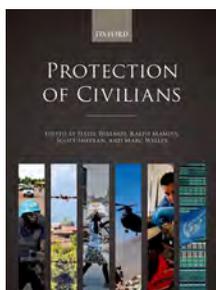
Determining the type of respect we are seeking to engender will allow the international community to seek out ways of influencing the behaviour of States and NSAGs. The most challenging of these will be those who are not interested in applying IHL at all. Here we should note that if the appetite for the development of new norms is low, the future of IHL may lie in soft law.

The international community should look to the past for insights into how to approach new technologies on the battlefield. Each generation has struggled with new developments, and parallels can be drawn between how new technologies were dealt with when they emerged in the past and how we deal with them today.

It is also vital that we highlight successes in the law as well as violations. IHL violations are ever-present in the international media, but respect is rarely reported, as good news is no news. This may lead to the perception that the law does not work; such perceptions undermine the law's influence, so is important to show that IHL does have an impact.

Lastly, acknowledging that the law alone is not sufficient to generate respect for the law, future initiatives aimed at generating greater respect for IHL norms will need to include an open dialogue that is not limited to military lawyers, but reaches across disciplines.

COMPARATIVE BOOK REVIEW



Protection of Civilians

Haidi Willmot, Ralph Mayima, Scott Sheeran and Marc Weller (eds)

Protecting Civilians in War: The ICRC, UNHCR, and Their Limitations in Internal Armed Conflicts

Miriam Bradley

Book reviews by Marten Zwanenburg, Legal Counsel at the Ministry of Foreign Affairs of the Netherlands.*

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Protection of civilians (PoC) is a theme that is high on the policy agenda of the international community. This is well illustrated by the activity of the United Nations (UN) Security Council in 2016. The Security Council held an open debate on this topic in January, was briefed on attacks on medical facilities and personnel in armed conflict as part of its PoC agenda in May, held a ministerial-level open debate on PoC in peace operations in June, and in September was briefed on measures to prevent attacks on health care in armed conflict as a follow-up from the resolution adopted after its May meeting. However, PoC is a priority issue not only for the Security Council, but also for States, international organizations, non-governmental organizations and civil society.

* Both books published by Oxford University Press, Oxford, 2016. These book reviews were written in a personal capacity. They do not necessarily reflect the views of the Ministry of Foreign Affairs or of any other part of the government of the Netherlands.

The expression “protection of civilians” may appear simple and easy to understand, but in fact its meaning can differ depending on who the interlocutor is. As the editors of *Protection of Civilians* write in their introduction, the concept remains unclear and confusion persists regarding the legal framework that applies to it. This edited volume is an attempt to develop a holistic and coherent understanding of PoC.

The topic is examined from a number of different perspectives. Divided into three thematically defined parts, the book consists of nineteen chapters. In the first part, a number of authors address the conceptual and historical foundations of PoC. The second part provides an analysis of the underpinning legal framework, while the third examines civilian protection practice across a number of fields. Finally, in the conclusion the editors attempt to draw these various parts together and offer a holistic vision of PoC by reconciling definitions, identifying a cohesive legal framework and finding complementarities in protection activities.

The list of authors that contributed to the volume is multidisciplinary and impressive. It includes practitioners with extensive practical experience in dealing with PoC in conflict areas, such as Patrick Cammaert, Richard Bennett and Lise Grande; contributors with a background in policy or experience in advising States or international organizations on issues relating to the topic, notably Ralph Mayima, who leads the Protection of Civilians Team in the UN Department for Peacekeeping Operations’ Department of Field Support; and respected academic experts in a particular field of expertise relevant to PoC, such as Siobhan Wills and Cedric de Coning.

This broad range of contributors and perspectives suggests that the targeted audience is also diverse. The book will be of interest not only to academics from different fields, but also to interested practitioners including diplomats, peacekeepers, human rights workers and humanitarian professionals.

The scope of this review does not allow for a discussion of each chapter, but the editors have provided a useful brief synopsis of the chapters in the introduction to the volume. This review will therefore look at the three different parts of the book and attempt to draw out some common themes that present themselves therein.

The first part, which relates to the conceptual and historical foundations of PoC, comprises five chapters. By discussing the development of PoC and its relationship with other concepts such as the Responsibility to Protect, these chapters provide a framework for better understanding the subject matter. An important point made by several authors is that the history of PoC is tied to the development of international humanitarian law (IHL) and the latter’s concern for protecting civilians from the consequences of armed conflict. Another important point is that the concept is used in different fields of activity. Sheeran and Kent explain that PoC plays an important role in UN peacekeeping. They state that “the genesis of PoC lies in the well-documented failures of UN Peacekeeping in the 1990s and, most notably, concerning the atrocities within so-called ‘safe havens’ in the former Yugoslavia and the genocide in Rwanda”.¹ Mayima

1 Scott Sheeran and Catherine Kent, “Protection of Civilians, Responsibility to Protect, and Humanitarian Intervention: Conceptual and Normative Interactions”, in *Protection of Civilians*, p. 43.

explains that there is also a close connection between humanitarian assistance and PoC. In his view, the growth of humanitarian action in the 1990s had an important impact on concepts and practices of civilian protection. However, the main problem is the lack of precision in defining the concept of PoC. The fact that it has many fathers is a contributing factor. As Mayima writes, distinct fields of practice among humanitarians and peacekeepers led to different principles, precepts and definitions being developed. Dissatisfaction with current definitions remains, and the language of protection continues to register confusion among field practitioners. There is no single authoritative source for understanding the concept of PoC. Even within a particular field of activity there are different perspectives. As Sheeran and Kent explain (within the context of UN peacekeeping), some argue that PoC entails protection from physical harm, while others employ a rights-based approach and expand the concept to incorporate the protection and promotion of human rights, humanitarian relief and development activity. In their chapter, Kjeksrud *et al.* examine the organizational approaches to PoC of the UN, the North Atlantic Treaty Organization, the African Union and the European Union. They demonstrate how these international organizations approach PoC differently, largely as a result of their distinct institutional frameworks.

The second part of the book attempts to draw together a cohesive international legal framework by exploring the treatment of civilian protection within the *jus ad bellum*, the *jus in bello*, international human rights law (IHRL) and international refugee law (IRL). These chapters demonstrate that there are obligations in a number of different branches of international law that are directly relevant to PoC. A particularly relevant branch is IHRL, discussed in the chapter written by Clapham. Although the chapter is somewhat less clearly structured than others, it usefully points out that IHRL goes beyond commitment to physical protection and offers a reminder for governments, armed groups and individuals of existing accountability for their actions before a court of law. The latter point is arguably less true with respect to IHL, at least as far as States and non-State armed groups are concerned (in contrast to individual criminal responsibility). As Williamson explains, the lack of effective enforcement mechanisms is a weakness of that body of law. Unlike many human rights conventions, there is no provision for the creation of a strong monitoring body or complaints procedures. On the other hand, he does conclude that IHL provides a robust, wide-ranging and detailed legal framework to facilitate the protection of civilians in armed conflicts. This conclusion is based on a discussion of IHL treaties and customary international law. Interestingly, Williamson does not make reference to common Article 1 of the Geneva Conventions. It has been argued recently that this provision entails far-reaching obligations for States to ensure that other parties to an armed conflict respect their IHL obligations.² Though this concept is not

2 See, in particular, the updated Commentary on Article 1 of the first Geneva Convention. ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 2016, available at: ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD (all internet references were accessed in February 2017).

accepted by a number of States, it may become an important element in the legal underpinning of the PoC concept.

The nature of the obligation under common Article 1 is discussed in the chapter contributed by Wills, which focuses largely on the question of whether, under international law, the UN or its member States taking part in UN missions have a legal obligation to protect civilians. She concludes that such obligations can be derived from IHRL, IHL and the law of international responsibility. These obligations are relatively weak because they depend on a narrow intersection of developing (or debatable) law, practice and circumstance, but have important operational implications for UN missions.³ One very interesting question discussed here is whether the mandate creates obligations for a UN mission. In other words, if the mission fails to carry out its PoC task, can it be held responsible for failure to carry out the mandate? Wills states that the majority view is that mandates provide an authorization to act but do not, in themselves, create any legal obligation to do so. However, she adds, some provisions in peacekeeping mandates do imply that at least those particular paragraphs are intended to be obligatory, such as an obligation to report gross violations of human rights “immediately”.⁴ However, the correctness of this conclusion seems doubtful.⁵ Even if it is not, it is clear that there are other sources of law that impose an obligation to protect civilians. This is a point of vital importance, because it means that PoC goes beyond an authority to act. Wills also briefly discusses the question of accountability for a breach of international obligations, which is a very important issue. Similar to other chapters in this part, Mooney’s chapter on displacement and PoC under IRL underlines the fact that the lack of protection experienced by many today is not the result of a lack of norms. Rather, it is the result of a lack of implementation of those norms.

It would have been useful if the part on the legal framework contained a chapter discussing the relationship between different branches of international law, in particular IHRL and IHL. These fields are now largely discussed in isolation, which suggests that their application is the same in all situations. However, depending on the situation, norms of either one or the other may be more relevant. In particular, in a situation of armed conflict, norms of IHL as *lex specialis* may displace human rights norms.⁶

The third and final part of the book examines politics and practice with regards to civilian protection across a number of different fields, including diplomacy, the military and humanitarian fields, human rights, development, and

3 Siobhan Wills, “International Responsibility for Ensuring the Protection of Civilians”, in *Protection of Civilians*, p. 225.

4 *Ibid.*, p. 232. Wills refers in particular to UN Security Council Resolution 1996, which included a requirement for the United Nations Mission in the Republic of South Sudan of “immediately reporting gross violations of human rights to the UN Security Council”. UNSC Res. 1996, 8 July 2011, para. 3(b)(iii).

5 For more detail, see the reviewer’s contribution to a symposium on the blog *Opinio Juris* in which the chapter by Wills is discussed, available at: opiniojuris.org/2016/09/07/protection-of-civilians-symposium-some-thoughts-on-legal-obligations-for-un-peacekeeping-operations-to-protect-civilians/.

6 For a discussion of this issue, see *inter alia* Marten Zwanenburg, “The Interplay of International Humanitarian Law and International Human Rights Law in Peace Operations”, in Erika de Wet and Jann Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations*, Pretoria University Law Press, Pretoria, 2014, p. 53.

community self-protection. As such, it presents less of a cohesive picture than the other two parts, though this is not to say that it is less important. One contribution that may be of particular interest to readers is the one by Guéhenno, who between 2000 and 2008 was undersecretary-general for peacekeeping operations of the UN. Unsurprisingly, he largely focuses on PoC by UN peacekeeping operations. He argues that in order to have credibility, a peacekeeping operation must have the trust of the local population. This in turn depends on the operation's ability to protect that population, which has led to the inclusion of the task of PoC in UN peacekeeping operations mandates. However, a weakness of these operations is that they often do not have the requisite capabilities to carry out that task. Additionally, another weakness is that troop-contributing States are reluctant to use force pre-emptively. Guéhenno considers that the use of force is only one element of protection, and that ultimately, outsiders to the conflict cannot protect civilians in a lasting way. If PoC is to be more than a temporary response to an emergency, it needs to address the foundations of what constitutes a protective environment – that is, the consolidation of the State.

Guéhenno's call for a broad conception of PoC that focuses on the political settlement of conflicts can be compared with the perspective put forward in the contribution by Grande, currently the deputy special representative of the UN secretary-general for Iraq. Her perspective is focused primarily on the physical protection of civilians. She argues strongly for a "security-first" approach. This implies that priority is given to building the capacity of a State to ensure the safety of its population and communities, instead of all-encompassing reforms of the State. According to Grande, the focus should be on "building the capacity and capability of selective security forces to physically protect and ensure the safety of civilians".⁷ As the chapters by Grande and Guéhenno demonstrate, there are many different, often diverging views on what PoC is and how it can be achieved.

Finally, this divergence in views is recognized in the conclusion of the book, which deplores the lack of clarity of the concept because it undermines political consensus at the strategic level and cooperation and implementation of practical activities in the field. The conclusion attempts to bring together different strands of the volume and, on this basis, to offer a holistic vision of PoC. Although the editors are to be commended for this attempt, success is ultimately only partly achieved. The definition of PoC offered by the editors does not necessarily clarify matters very much.⁸ It is long and unwieldy, and it does not succeed in clarifying

7 Lise Grande, "The Problems and Dilemmas of Helping to Build Protection Capacities", in *Protection of Civilians*, p. 405.

8 The proposed definition reads: "'Protection of civilians' is the act of protecting from violence and minimizing harm toward those not directly participating in hostilities, in conflict situations. Such acts are undertaken pursuant to the rights and responsibilities of national authorities, belligerents, and the international community, and are governed by a legal framework of positive and negative obligations based on the UN Charter, IHL, IHRL, and refugee law. In this context, the state of being protected manifests primarily as a fulfilment of the rights to life and physical integrity, whether citizen or alien. Direct protection activities are those that have a proximate casual [*sic*] connection resulting in the immediate and direct physical protection of civilians. Indirect protection activities are those that have a less proximate casual [*sic*] connection vicariously resulting in the protection of civilians."

the interrelationship of different elements. Much more useful is the list of general principles that should guide protection practice set out by the editors. This list draws on the analysis in many of the chapters of the volume. Although not everyone will agree with all these principles, they provide a useful overview of considerations that should at least be taken into account when undertaking protection activities. Perhaps the most important conclusion drawn concerns the importance of political will for protection to be successful. As the editors state, what is required above all is real political commitment underwritten by a willingness to act. With this in mind, the volume is an important contribution to the literature on PoC as it brings together many different elements of the topic, and it represents a small but vital step toward a more coherent understanding of PoC.

In her book *Protecting Civilians in War: The ICRC, UNHCHR, and their Limitations in Internal Armed Conflicts*, Miriam Bradley also focuses on PoC in armed conflict. However, her approach is very different to the one taken in *Protection of Civilians*. Bradley focuses exclusively on the humanitarian activities for PoC. More specifically, she analyzes how the International Committee of the Red Cross (ICRC) and the Office of the United Nations High Commissioner for Refugees (UNHCR) understand protection, and how they put that understanding into practice in Colombia, the Democratic Republic of the Congo (DRC) and Myanmar. This specific topic does not appear to have been addressed in the literature so far; as such, Bradley's book is a useful contribution, and the narrow focus allows her to delve deeper into the subject. The ICRC and UNHCR were chosen because they were considered the most significant humanitarian agencies in terms of scale of operations, as well as wider influence on protection actors. The three countries were selected for a number of different reasons, including the fact that the ICRC and UNHCR have sizeable operations there, that they are also of significant international policy importance, and that they conform to trends in contemporary conflicts.

Bradley recognizes that protection is a contested concept which can be interpreted narrowly or broadly. She chooses to conceptualize protection narrowly, with a focus on the physical safety and security of civilians.

The book is divided into six chapters, with an introduction and a conclusion. In the first chapter, the author examines the institutional history, structure and culture of the ICRC and UNHCR. She finds that UNHCR is more bound to States, as well as financially and politically more dependent on them than the ICRC. However, she notes that the ICRC needs to take State preferences into account when making institutional policy choices. Additionally, decision-making in the ICRC is more bottom-up, while in UNHCR it is more top-down. The author goes on to describe the ICRC as an organization that does a better job of sharing information internally, with personnel that are characterized as much more confident and more consistent in their approach than those of UNHCR. In both organizations, a combination of moral and institutional imperatives has driven mandate expansion. While the public justification for this

expansion tends to rest on the moral case for incorporating the new issue area, a more market-based logic can often also be identified.

The second chapter discusses how the humanitarian principles of humanity, impartiality, neutrality and independence are interpreted by the two organizations. It finds that interpretations vary between the two. These differences are closely linked to the institutional characteristics of each organization, manifesting themselves *inter alia* in their interpretation of neutrality. Since UNHCR sees its role primarily as supporting the State, it mainly works with States, whereas the ICRC also works with non-State armed groups. Another interesting example is with regards to the organizations' independence; as UNHCR is part of the UN system, there are more constraints on its independence. The ICRC is not a member of any organization that can formally influence it, though this does not mean that there are no pressures on it. Notably, both the ICRC and UNHCR rely heavily on voluntary contributions from a small number of governments, which as a result have certain leverage over them. Bradley also notes that the ICRC has not always acted independently of influence from Switzerland. The overarching conclusion of this chapter is that the institutional culture of an organization mediates its role in balancing principles with pragmatism.

The legal frameworks for protection are the subject of the third chapter. It finds that IHL is the principal relevant legal framework for the ICRC, while the law relating to refugees and internally displaced persons (IDPs) is central to the work of UNCHR. This legal framework is important as it determines on which issues and in which manner the organizations work, although both occasionally do work outside their legal mandate. The author concludes that both organizations have a preference for legalistic approaches to protection. The ICRC's approach is underpinned by the assumption that an approved legal framework will make protection wider-reaching and more systematic. This may be supplemented or substituted on a case-by-case basis with non-legal argumentation if that is expected to generate better results. Guiding principles and domestic legal instruments of the State in which it operates are the favoured protection tools of UNHCR.

The fourth chapter focuses on objectives and strategies of protection. It analyzes what the ICRC and UNHCR have set out to achieve in their protection work and how they aim to achieve it. Four types of objectives have been identified: reducing the overall level of violence, reducing the threat such violence poses to civilians, reducing the vulnerability of civilians, and reducing or mitigating the consequences of violence. Bradley finds that the ICRC emphasizes threat reduction through strategies that are mainly actor-centred and direct, while UNHCR is much more focused on structural change in the form of developing public policy with the aim of reducing vulnerability. The author is very critical of UNHCR, stating that the organization has come to see legal protection and public policy changes as ends in and of themselves, rather than as means to ensure the physical safety and security of civilians.

The fifth chapter discusses the protection roles and responsibilities of other actors. These other actors include the States in which the organizations do their

work, non-State armed parties to conflict, international peace operations and affected communities. The chapter finds that whereas the ICRC emphasizes the role of armed parties, UNHCR focuses on that of the State. This difference in emphasis, the chapter argues, can largely be explained by institutional factors such as the fact that the UNHCR terms of engagement in a country are set by the government and the fact that the mandate of the ICRC leads it to engage with all parties to armed conflicts. However, from the case studies it also becomes clear that the local situation plays an important role. The ICRC worked more closely with government forces than with armed groups in Colombia and the DRC, but not in Myanmar; this was due, at least in part, to the fact that the organization was relatively new there.

The sixth chapter looks at protection activities by the ICRC and UNHCR. It distinguishes a wide range of different activities undertaken by the two organizations in the context of their protection mandate and discusses the organizations' approach to them. It concludes that in many ways the activities emphasized by the ICRC and UNHCR in their efforts to protect IDPs and other civilians replicate the activities that each organization undertakes to address prior issue areas within its mandate. The ICRC generally has a much more clearly conceptualized rationale linking its activities to particular protection objectives than UNHCR does.

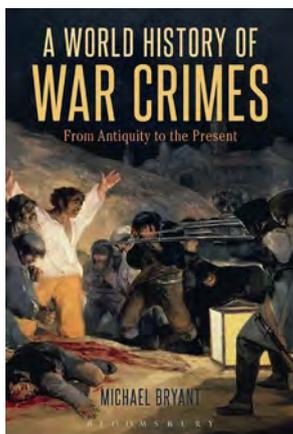
The conclusion of the book starts from the fact that the two organizations have expanded the issues they deal with: the ICRC's mandate has come to include non-international armed conflicts in addition to international ones, while UNHCR is now concerned with IDPs in addition to refugees. The approach adopted to the pre-existing issue areas, together with the logic used to justify their expansion, has shaped the approaches towards new issue areas. This can be seen in the legal framework employed, the objectives pursued and the actors engaged with by the two organizations. The author refers to this as "old approaches for new problems", a description which makes clear that she is quite critical of this approach. She considers that old solutions are likely to be of limited effectiveness in addressing new problems for several reasons. First, the lack of a clear mandate for new activities leads to the two organizations being less confident when dealing with them and to old issues being prioritized. Second, both organizations operate in a legalistic way and take a State-centric approach. Such an approach is not necessarily the most effective one when dealing with in-country protection of IDPs, for example, which requires greater attention to non-State actors. Third, UNHCR often works at least one step away from conflict and violence, and does not always seem to analyze how its activities might indirectly impact the levels of violence and threats.

Bradley's book will be of particular interest to those developing protection policies for humanitarian organizations, either at headquarters or in countries where those organizations are active. It is difficult to assess whether her conclusions are validated by the practice of humanitarian organizations more broadly. They are, however, clearly argued and supported by the facts taken from the work of the ICRC and UNHCR in Colombia, the DRC and Myanmar, as discussed in the

book. Minor notes of criticism concern the book's readability and its reference to theoretical frameworks. The style in which it is written does not make it an easy read; the writing is dense and not always easy to follow. This may be a result of the fact that the book is based on doctoral research. The same can be said for the sections in which the author refers to theoretical models, for example where she refers to the work of Michael Barnett and Martha Finnemore. These references to theoretical work give the impression of being somewhat extraneous to the substantive analysis, rather than being an integral part of it. This does not detract from the fact that the book achieves its aim – that is, to explain how the ICRC and UNHCR understand protection and how they put that understanding into practice in a number of selected States.

Overall, these two books paint a mixed picture of the state of the “protection of civilians project”. There is increasing political attention towards PoC, and as the editors of *Protection of Civilians* write, a growing acceptance that the international community has an interest in, and responsibility for, the safety of civilians in conflict situations. There has been significant progress in implementation of PoC, but at the same time the action often falls well short of the rhetoric. The PoC doctrine is applied selectively, and the political will to implement it is often lacking. At a more fundamental level, there is much confusion concerning what PoC means, making it clear that further reflection is needed. These books, particularly *Protection of Civilians*, provide an important input for that reflection.

BOOK REVIEW



A World History of War Crimes: From Antiquity to the Present

Michael Bryant*

Book review by Dr. Kailash Jeenger, Assistant Professor in the Faculty of Law, University of Rajasthan, Jaipur, India.

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To comprehend, understand and appreciate the present legal system adequately, it is necessary to acquire a background knowledge of the course of its growth and development. ... If we were to confine our attention exclusively to the law as it is, our understanding of it is bound to be deficient as it is not possible to appreciate its present ordering without some familiarity with its past.¹

In line with the above quotation, Michael Bryant,² professor of history and legal studies at Bryant University, presents yet another historical account in his book *A World History of War Crimes: From Antiquity to the Present*. The work is a succinct yet comprehensive blend of the history not only of war crimes but also of the development of the laws of war, from prehistoric times to the present era. Such a combination of history and law is a rarity, and hence the book has a twofold advantage and is indeed welcome. War crimes³, in simple terms, amount to serious violations of the laws and customs of war, and thus their history is bound to run parallel with that of the laws of war. This is why the title of each chapter makes reference to the laws of war applicable in a certain period of history. For instance, the titles of the first three chapters are “The Roots of the Law of War in World History”, “The Law of War in Rome, the Islamic World,

* Published by Bloomsbury, London, 2015.

and the European Middle Ages”, and “Making Law in the Slaughterhouse of the World: Early Modernity and the Law of War”. The subtitle of the book – “From Antiquity to the Present” – indicates in limited words the wide amplitude of Bryant’s research. The book thus seeks to contribute to the emerging scholarship of history and international law, as it is an original work enriched by reliable sources.

The introduction of the book begins with a sentence telling the bitter truth of human stupidity: “At a no longer verifiable point in distant time, the human mind discovered that the crude weapons it had fashioned to hunt and fell animals could be turned against human beings with the same deadly effect.”⁴ Subsequently, Bryant attempts to establish that the notions of crime and its derivative war crime are much later inventions. For this purpose, he briefly discusses the evolution of the idea of criminal acts in pre-modern societies, after which he informs the reader that the term “war crime” was coined in 1906 by Oppenheim in his treatise *International Law*. He adopts Jasper’s concept of the Axial Age as a methodology to identify the crucial emergence of the vision of goodness and justice in world history that is relevant to the conduct of war even today.⁵

Stone Age warfare is the author’s starting point for his historical account of war crimes, which further covers the ancient laws of war in China, India, Israel, Greece, Rome and the Islamic world, discussing every important political upheaval. It is no easy task to gather those necessary early facts in respect of war crimes from the sparsely available sources on the ancient history of war and the customs of warfare. To support his discussion on Stone Age massacres, he cites excavation sites at Djebel Sahaba in Sudan and at Talheim in Germany.⁶ The history of conflict subsequent to the Stone Age is discussed with the help of the prevailing practices and early classical and religious literature of Europe and Asia, such as the Book of Deuteronomy, the Quran, the Mahabharata, the Arthashastra, the works of Cicero and Sun Tzu’s *The Art of War*.⁷

Efforts to trace the restraints on war in archaic and classical Greece are even more difficult because it has been observed that generally only barbarism committed by the Greeks on the battlefield is found in books.⁸ However, Bryant does describe some of the religious and ritualistic limitations on war prevalent in Greece. While

- 1 M. P. Jain, *Outlines of Indian Legal and Constitutional History*, 7th ed., LexisNexis, New Delhi, 2014, p. 2.
- 2 Bryant’s previous works include *Confronting the “Good Death”: Nazi Euthanasia on Trial, 1945–53*, University Press of Colorado, Boulder, CO, 2005; *Eyewitness to Genocide: The Operation Reinhardt Death Camp Trials, 1955–1966*, University of Tennessee Press, Knoxville, TN, 2014.
- 3 For a statutory definition, see Rome Statute of the International Criminal Court, 2187 UNTS 90/37 ILM 1002 (1998)/[2002] ATS 15, 17 July 1998 (entered into force 1 July 2002), Art. 8.
- 4 *A World History of War Crimes*, p. 1.
- 5 *Ibid.*, p. 5.
- 6 For comprehensive data on this connection, the scientific and anthropologic study done by Hobhouse could also be used as it exhibits a data analysis of men slain, women and children enslaved, human sacrifice and cannibalism during primitive feuds. It would, however, be a secondary source. See Leonard Trelawney Hobhouse, Gerald Clair Wheeler and Morris Ginsberg, *The Material Culture and Social Institutions of the Simpler Peoples*, Chapman & Hall, London, 1915, pp. 228–243.
- 7 *A World History of War Crimes*, pp. 18–38.
- 8 See, for example, Charles G. Fenwick, *International Law*, Indian reprint, Vakils, Feffer and Simons, Bombay, 1971; Charles Seignobos, *History of Ancient Civilisation*, trans. Arthur Herbert Wilde, Charles Scribner, New York, 1906, pp. 158–159.

discussing the Roman laws of war, he traces their origin in natural law and *jus gentium*, which are explained in detail. The section on medieval Europe and the laws of war is equally remarkable as it tells the reader about just war doctrine, canon law, declarations of the Lateran Councils, trials, courts of chivalry and, most importantly, the gap between theory and practice and the tendency to disregard the law when fighting outsiders. Thus, the reader finds a unique blend of the history of war crimes and the development of the laws of war.

The title of third chapter, “Making Law in the Slaughterhouse of the World: Early Modernity and the Law of War”, is ferocious enough to indicate the quantum and magnitude of savagery committed in Europe during that period. The slaying of soldiers in Cirencester’s conquest and the slaughter of thousands in Magdeburg are cases in point. The author brings out the truth beautifully: “Neither the Roman *jus gentium* nor the medieval code of chivalry softened the brutality of warfare, particularly when the cause was consecrated as ‘just’ and the enemy was a true outsider.”⁹ The author cites siege warfare, rebellion and religious conflict as the prime causes of indiscriminate violence in early modernity. Indeed, civilization was not a guarantee of humane treatment. One criticism that can be made of the book here is that it appears to have been centred largely on Europe – recording the wholesale butchery and destruction of cultural property committed by Mongol, Turkish and Arabian invaders in India and other regions of Asia during the medieval era would have rendered the historical account more comprehensive.

Bryant gives due acknowledgment of the contribution of early modernity theorists in the third chapter. He not only cites their relevant texts, but also links them with the political events occurring at the time. Moreover, he also examines the relevance of the writings today. He includes in this section writings by Vitoria, Ayala, Suarez, Gentili and Grotius, and devotes his most poetic and superlative prose to those who broke from the traditional approaches of amoral expediency and just war doctrine and instead presented before mankind a humane approach which led to universally acceptable norms that would continue to be relevant in the future. He equates Gentili with a skilled mariner wintering in safe and familiar harbours, who suddenly hoists sail and scuds into the vast watery unknown.¹⁰ He calls Grotius an idealist and a world-class jurist.

In the fourth chapter, Bryant’s account of eighteenth- and nineteenth-century law clearly highlights two different turning points: first, the sentiment of nationalism unleashed more barbarism in war than the attachment to dynasty, and second, the Industrial Revolution and the invention of more destructive weapons brutalized the havoc of war and brought wholesale butchery. The author thus asserts that advancement in technology made mankind pitiless, inhumane, insensitive and more barbaric, as was evident from the French Revolution, Peninsular War, Crimean War and Franco-Prussian War. Indeed, as weapons were less destructive until the eighteenth century, civilians were not easy targets and consequently restraints on war were soft – but when advanced weapons were

9 A *World History of War Crimes*, p. 68.

10 *Ibid.*, p. 94.

discovered and used in war, violence increased, especially against civilians, and war therefore had to be limited by law. This leads the author to present the nineteenth century as the dawn of stricter restraints on war, which started off with provisions in municipal laws and ultimately led to States signing multilateral treaties.

Among the events that occurred in the First World War, the fifth chapter highlights the two most relevant ones: war crimes committed by Germany and the half-hearted attempts to punish the German perpetrators, which are presented as lessons to be learnt if the world community wants to punish war criminals:

The conventional view of efforts after the First World War to prosecute violations of the Law of War tends to be negative. The failure of justice enacted on so many levels has bolstered the argument that the postwar settlement, as seen from the vantage point of the Law of War, was a disaster. Yet the bitter experience of the war crimes debacle would leave an enduring mark on the minds of the planners who devised the trials of Nazi and Japanese war criminals twenty-five years later. They would learn from the Allies' mistakes after the Great War, and in the process forge a new paradigm of war crimes prosecution that would revolutionise international law.¹¹

In the sixth chapter, the author presents a well-researched and detailed account of German and Japanese violations during the Second World War.¹² The chapter begins by focusing on the events prior to the beginning of the Second World War, with the German conquest of Austria and the Sudetenland in 1938, and extends to the indiscriminate, brutal misdeeds committed in the name of the Final Solution, Germanization, general pacification, the German war of extermination, and the gas chambers. Nazis made the utmost abuse of chemicals, gases and technology in accomplishing these shocking crimes against mankind. Besides this, the chapter features war crimes committed by the Japanese army, including the Rape of Nanking, the Bataan Death March, the use of bacteriological weapons, and medical crimes. The price paid by the victims of the above inhumane treatment laid the foundation for the prosecution of war criminals and the unanimous resolution to humanize the laws of war.

The author goes on to tell the reader how the international community did not repeat the mistakes committed in attempting to punish the war criminals of the First World War. A concerted plan was devised in the form of the International Military Tribunal Charter to show the whole world that the heinous war crimes, crimes against peace and crimes against humanity weighed more than the selfish defences of superior command, *ex post facto* laws and victor's justice. The author concludes with these words:

Finally, both the crimes committed during the war and their judgment afterward fostered a moral revulsion against extreme forms of state

¹¹ *Ibid.*, pp. 155–156.

¹² This chapter demonstrates the impact of Bryant's earlier works, which concentrated on the Second World War. See, for example, the topics covered in his previous works, above note 2.

criminality in the postwar era, leading by the 1990s to the creation of *ad hoc* tribunals and, in an effort to establish a fair, permanent, and independent judicial body, an international criminal court.¹³

In the seventh chapter, the author steps into the period of the making of the four 1949 Geneva Conventions, a path-breaking attempt in the history of the laws of war to comprehensively restrain war and fix accountability. While critically outlining the features of the Geneva Conventions, a few loopholes are highlighted in the discussion, such as the fact that the Conventions did not use the term “war crimes” for violations of the laws of war; that there was no provision as to international trials of war criminals; and also that the United States and France opposed the application of Common Article 3 to their operations in Vietnam and Algeria. Additionally, the chapter presents a history and overview of the adoption of Additional Protocols I and II to the Geneva Conventions, and the Chemical Weapons Convention.

The chapter extends to cover breaches of international humanitarian law (IHL) and other conventions committed at the end of the twentieth and beginning of the twenty-first century, namely mass killings, systematic rape and forced displacement in Bosnia in 1994, genocide and other violations of IHL in Rwanda in 1994, the terrorist attacks of 11 September 2001 in the United States and the subsequent US interrogation programme in the name of the “war on terror”. In connection to this, the author unhesitatingly remarks that the United States is equally guilty of committing war crimes in its use of inhumane interrogation techniques. He states: “Not without irony, history has revealed that the immoderate responses of democratic societies to terrorist attacks in the name of an overriding military necessity pose a graver danger to the Law of War than terrorism itself.”¹⁴

In the final chapter, “The Future of the Law of War”, Bryant visualizes in light of the present international state of affairs the effect of the laws of war in times to come. He emphasizes that the relevance of international legal restraints on war should not be judged by deviations from those restraints, because occurrences of crimes in civil society do not render domestic criminal law any less useful.¹⁵ In his opinion, our best hope of curbing humankind’s peculiar talent for superfluous violence and extravagant self-destruction lies in the ideal of humanitarianism as reflected in the Geneva and Hague Conventions.¹⁶

Summing up, it can be said that the limited number of pages in Bryant’s book does not render it any less useful, to researchers and jurists as well as students. The book will be a great help to all those engaged in the study of IHL, peace and conflict and history because it is not confined to the history of war crimes but encompasses the history of war and the accompanying development of the laws of war.

13 *A World History of War Crimes*, p. 196.

14 *Ibid.*, p. 224.

15 *Ibid.*, p. 227.

16 *Ibid.*

BOOKS AND ARTICLES

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This selection is based on the new acquisitions of the ICRC Library

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ADDENDUM

Interview with Eyal Weizman – ADDENDUM

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In the above published interview, the photo credit for the image of Eyal Weizman was erroneously omitted. This photograph was taken by Ekaterina Izmetieva.

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