

2009

Self-Defense, The Law of Armed Conflict and Port Security

George K. Walker

Follow this and additional works at: <https://scholarcommons.sc.edu/scjilb>



Part of the [International Law Commons](#)

Recommended Citation

Walker, George K. (2009) "Self-Defense, The Law of Armed Conflict and Port Security," *South Carolina Journal of International Law and Business*: Vol. 5 : Iss. 2 , Article 7.

Available at: <https://scholarcommons.sc.edu/scjilb/vol5/iss2/7>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Journal of International Law and Business by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

SELF-DEFENSE, THE LAW OF ARMED CONFLICT AND PORT SECURITY

George K. Walker*

Symposium colleagues have analyzed the law of the sea (LOS) and U.S. law as they relate to ports security.¹ This article surveys other situations, *i.e.*, the intersection of port security issues with law of self-defense and actions under the U.N. Charter, and the law of armed conflict (LOAC) as it affects the oceans, historically styled the law of naval warfare and neutrality. *Jus cogens* principles, *i.e.*, fundamental norms transcending the usual sources of international law, may apply in these situations. Sometimes the results are the same as those under the law of the sea or U.S. law; in others they are, or can be, radically different.

Part I analyzes the law of self-defense and U.N. Charter law that may affect ports and ports security. Part II briefly discusses *jus cogens*, a relatively new concept of superior norms trumping traditional sources of international law. Part III surveys armed conflict situations that may affect port security issues and the conduct of military operations. Part IV discusses the legitimacy under international law of certain state actions relating to ports.

* Professor of law, Wake Forest University School of Law. B.A., University of Alabama, 1959; LL.B., Vanderbilt University, 1966; A.M., Duke University, 1968; LL.M., University of Virginia, 1972. Member, Virginia and North Carolina bars. Charles H. Stockton Professor of International Law, 1992-93, Naval War College. I presented an earlier version of this article during a panel discussion in Symposium, *The Ins and Outs of the Modern Port: Where Do We Go from Here?*, at the University of South Carolina School of Law, on February 27, 2009. I am grateful for comments and suggestions that my co-panelists, Jennifer L. North and John T. Oliver, gave, and for the Journal staff's comments and assistance in preparing this for publication. A Wake Forest University School of Law grant supported research. Errors are my responsibility. Copyright (c) George K. Walker.

¹ Jennifer L. North, *The Ins and Outs of Modern Ports: Rethinking Container Security*, 5 S.C. J. INT'L L. & BUS. 193 (2009); John T. Oliver, *Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction Over Foreign-Flagged Vessels in U.S. Ports*, 5 *id.* 213 (2009). See also William D. Baumgartner & John T. Oliver, *Conditions on Entry of Foreign-Flag Vessels into US Ports to Promote Maritime Security*, INTERNATIONAL LAW AND MILITARY OPERATIONS, 84 INT'L L. STUD. SER. 33 (Michael L. Karsten ed., 2008).

I. SELF-DEFENSE AND U.N. CHARTER LAW

Besides principles emanating from the law of self-defense, today intertwined with law under the U.N. Charter, there are special situations involving self-defense in the territorial sea, internal waters and ports of States.² Part I.A analyzes self-defense and Charter law; Part I.B discusses circumstances where self-defense may be involved with territorial sea, internal waters or port security situations.

A. THE LAW OF SELF-DEFENSE; U.N. CHARTER LAW

Like the U.S. Constitution's Supremacy Clause,³ the Charter also has a "trumping" provision, Article 103, declaring that the Charter is supreme over all treaties.⁴ There are several issues with respect to it. Does Article 103 also override other primary sources of international

² A State's territorial sea, although subject to innocent passage rules, *see infra* notes 73, 75, 88, 136-38 and accompanying text, is part of the coastal State's sovereign territory. Internal waters lie to the landward side of baselines defining the territorial sea and are also part of the coastal State's sovereign territory. Airspace above the territorial sea and internal waters is also subject to coastal State sovereignty. U.N. Convention on the Law of the Sea, Dec. 10, 1982, arts. 2, 4, 5, 1833 U.N.T.S. 3 (hereinafter UNCLOS); Convention on the Territorial Sea & Contiguous Zone, arts. 1-2, 5(1), 6, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 (hereinafter Territorial Sea Convention); Convention on International Civil Aviation, arts. 1, 2, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295. Most ports lie in internal waters and are therefore subject to that coastal State's sovereign control. A.R. Thomas & James C. Duncan, eds., *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 73 INT'L L. STUD. SER. 1, 115 at ¶ 2.3.1 (1999).

³ U.S. Const. art. VI.

⁴ U.N. Charter art. 103; *see also* International Law Commission, Draft Articles on State Responsibility, (hereinafter ILC Draft Articles on State Responsibility), art. 59 & cmt., in Report on the Work of Its Fifty-Third Session (23 April - 1 June and 2 July - 10 August 2001), U.N. GAOR, 55th Sess., Supp. No. 10, U.N. Doc. A/56/10, at 365 (hereinafter 2001 ILC Rep.), *reprinted in* JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* 314 (2002); LELAND F. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS* 614-17 (3d & rev. ed. 1969); ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* § 592 (9TH ED. 1996); 2 BRUNO B. SIMMA, ED., *THE CHARTER OF THE UNITED NATIONS* 1292-1302 (2D ED. 2002); Robin R. Churchill, *Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea*, in *INTERNATIONAL LAW AND MILITARY OPERATIONS*, *supra* note 1, at 143, 148.

law,⁵ e.g. Articles 2(4) and 51, and not custom and general principles of law? If all of the Charter recites fundamental norms or *jus cogens*, as some Soviet authors claimed,⁶ Article 103 would supersede customary or general principles rules. A more modest claim would be that only selected Charter provisions, e.g., and not Article 103, have *jus cogens* status.

Even if Article 103 does not represent *jus cogens* (and this is my view), what is its status if coupled with action pursuant to other Charter provisions? The first is the “inherent right of individual and collective self-defense,” which States may invoke until the U.N. Security Council acts on a particular situation pursuant to Charter Article 51.⁷ When

⁵ I.C.J. Statute arts. 38(1) and 59 recite the traditional primary sources of international law, treaties, custom, and general principles, and two subordinate sources, scholars’ research and judicial decisions and that there is no concept of common-law precedent in international law. See also RESTATEMENT (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102-03 (1987) (hereinafter RESTATEMENT); see also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1, cmt. c (1965); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW CH. 1 (7TH ED. 2008); R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 5-13 (3d ed. 1999) (LOS source analysis); Jennings & Watts, *supra* note 4, §§ 8-17.

⁶ GRIGORII I. TUNKIN, THEORY OF INTERNATIONAL LAW 98 (William E. Butler trans. 1974); see *infra* Part II for *jus cogens* analysis.

⁷ U.N. Charter art. 51; see also Goodrich et al., *supra* note 4, at 342-53; 1 SIMMA, *supra* note 4, at 778-806. U.N. Charter art. 2(1) recognizes the principle of state sovereignty, traditionally interpreted to mean that in the absence of governing law, States may act in their interest. U.N. Charter art. 2(1). National sovereignty, sometimes diminished or eroded, has been a fundamental principle since the Peace of Westphalia, Treaty of Peace of Munster, Fr.-Holy Rom. Empire, Oct. 14/24, 1648, art. 64, 1 Consol. T.S. 198, 319; Treaty of Peace of Osnabruck, Swed.-Holy Rom. Empire, Oct. 14/24, 1648, art. 9 *id.* 119, 198; see also Christian L. Wiktor, Multilateral Treaty Calendar 1648-1995, at 3 (1998). The Peace of Westphalia began the modern State system. Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT’L L. 20 (1948). Treaties and decisions invoking the sovereignty principle include UNCLOS, *supra* note 2, art. 157(3); Vienna Convention on the Law of Treaties, May 23, 1969, pmbl., 1155 *id.* 331 (hereinafter Vienna Convention); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A), No. 10, at 4, 18; S.S. Wimbledon (U.K. v. Ger.), 1923 *id.*, No. 1, at 15, 25; see also Declaration on Principles of International Law Concerning Friendly Relations & Co-Operation Among States in Accordance with the Charter of the United Nations, Principle 6, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970) (hereinafter Friendly Relations Declaration), reprinted in 9 I.L.M. 1292; Declaration on Inadmissibility of Intervention in Domestic Affairs of States & Protection of Their Independence & Sovereignty, G.A. Res. 2131, U.N. GAOR,

Article 51 is coupled with Article 103, as a matter of the law of treaties, does this mean that an Article 51-supported right of self-defense supersedes treaties like the LOS conventions?⁸ It would seem so. The

20th Sess., U.N. Doc. A/RES/2131 (1965), *reprinted in* Dietrich Rauschnig et al., *Key Resolutions of the United Nations General Assembly 1946-1996*, at 26, 28 (1997); United Nations, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* ¶ 29 (2004) (states accepting U.N. Charter benefit of "privileges of sovereignty . . . [must] also accept its responsibilities") (hereinafter High-Level Panel); U.N. Secretary-General, *An Agenda for Peace: Report of the Secretary-General on the Work of the Organization*, U.N. Doc. A/49/277, S/24111 (1992), *reprinted in* 31 I.L.M. 956, 959; MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 21-23 (Brian Chapman ed., 3d ed. 1977); J.B. BRIERLY, *THE LAW OF NATIONS* 45-49 (Humphrey Waldock ed., 6th ed. 1963); Brownlie, *supra* note 5, at 289-91; Goodrich et al., *supra* at 36-40; Jennings & Watts, *supra* note 4, §§ 37, 107; LORD MCNAIR, *THE LAW OF TREATIES* 754-66 (1961); RESTATEMENT, *supra* note 5, Part I, ch. 1, *Introductory Note*, 16 & 17; 1 SIMMA, *supra* note 4, at 70-91; R.P. Anand, *Sovereign Equality of States in International Law*, 197 R.C.A.D.I. 9, 22-51 (1986); Boutros Boutros-Ghali, *Empowering the United Nations*, FOREIGN AFF. 89, 98-99 (Winter 1992); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 539 (1993); Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 R.C.A.D.I. 1, 49-50 (1957); Louis Henkin, *International Law: Politics, Values and Functions*, 216 *id.* 9, 46, 130 (1989); Oscar Schachter, *International Law in Theory and Practice*, 178 *id.* 9, 32 (1982); C.H.M. Waldock, *General Course on Public International Law*, 106 *id.* 1, 156-72 (1962). Sovereignty is a debatable issue today. Henry Kissinger, *Does America Need a Foreign Policy?* 21-22, 235-37 (2001) declared that the concept of sovereignty was in trouble; Henkin, *International*, *supra* had recognized the force of sovereignty, but LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 8-10 (1995) denounced the concept.

⁸ Today the United States and a dwindling number of States are party to four treaties that are a primary source, other than custom, for LOS situations: Territorial Sea Convention, *supra* note 2; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 478, 499 U.N.T.S. 311 (hereinafter Continental Shelf Convention); Convention on Fishing & Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285 (hereinafter Fishing Convention); Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (hereinafter High Seas Convention). UNCLOS, *supra* note 2, and its 1994 protocol, Agreement Relating to the Implementation of Part II of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 3, 42 (hereinafter 1994 Agreement) are not treaty law for the United States, although they have been reported out of the U.S. Senate Foreign Relations Committee favorably with many declarations and statements twice. See generally George K. Walker, *Filling Some of the Gaps: The International Law Association (American*

1958 conventions govern discrete sea areas and part of the sea bottom (territorial sea, contiguous zone, continental shelf, high seas) and fishing but do not cover important issues such as the breadth of the territorial sea or claims regarding the exclusive economic zone (EEZ). By contrast, the 1982 Convention has been hailed as a “constitution for the oceans” purporting to cover all sea areas, usages of ocean areas, and the sea bottom.⁹ What about treaties governing the humanitarian law, the law of naval warfare and maritime neutrality,¹⁰ including the

Branch) *Law of the Sea Definitions Project*, 32 FORDHAM INT’L L.J. 1336, 1345 (2009). UNCLOS and the 1994 Agreement, *supra* remain in the Foreign Relations Committee and may be reported out, undoubtedly with many declarations and statements, in the new Congress. The United States has declared that UNCLOS’ navigational articles represent U.S. customary practice. President Ronald Reagan, *United States Oceans Policy*, 19 Weekly Comp. Pres. Doc. 383 (No. 10, 1983). There are 158 States parties to UNCLOS, *supra* note 2; 136 to the 1994 Agreement, *supra*; 52 to the Territorial Sea Convention, *supra* note 2; 58 to the Continental Shelf Convention, *supra*; 38 to the Fishing Convention, *supra*; and 63 to the High Seas Convention, *supra*. United Nations Office of Legal Affairs, Treaty Section, United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary General, available at <http://treaties.un.org/Pages/ParticipationStatus.aspx> (visited June 12, 2009) (hereinafter Multilateral Treaties). Because UNCLOS, *supra* note 2, art. 311(1) declares that *id.* prevails among parties to UNCLOS instead of the 1958 Conventions, the legal effect of the latter treaties is much less than the numbers would suggest. They are only effective between States, like the United States, that are not UNCLOS parties.

⁹ Territorial Sea Convention, *supra* note 2; Continental Shelf Convention, Fishing Convention and High Seas Convention, *supra* note 8; UNCLOS, *supra* note 2; 1994 Agreement, *supra* note 8; Tommy T.B. Koh, *Statement: A Constitution for the Oceans*, 1 United Nations Convention on the Law of the Sea 1982: A Commentary 11 (Myron H. Nordquist ed.-in-chief, 1985) (hereinafter 1 Commentary).

¹⁰ Among the most important today is Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (hereinafter Second Convention), replacing Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (Hague X), Oct. 18, 1907, 36 Stat. 2371, in force as the humanitarian law standard during World Wars I and II. Other early treaties include Declaration Respecting Maritime Law, Apr. 16, 1856, 115 Consol. T.S. 1; Convention Relating to Status of Enemy Merchant Ships at the Outbreak of Hostilities (Hague VI), Oct. 18, 1907, 205 Consol. T.S. 305, never in force for the United States (hereinafter Hague VI); Convention Relating to Conversion of Merchant Ships into War-Ships (Hague VII), Oct. 18, 1907, 205 Consol. T.S. 319, also never in force for the United States (hereinafter Hague VII); Convention Relative to Laying of Automatic Submarine Contact Mines (Hague VIII), Oct. 18, 1907,

territorial sea involved with ports, in a self-defense situation? And if self-defense represents a customary norm, following the *Nicaragua Case* theory that a customary rule can develop alongside a Charter norm when the Charter does not apply,¹¹ might this tip the scales against applying LOAC treaties?¹² On the other hand, the Vienna Convention on the Law of Treaties, to which the United States is not a party, declares that a treaty breach does not suspend or end a treaty governing humanitarian law.¹³ Does this Vienna Convention

36 Stat. 2332 (hereinafter Hague VIII); Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX), Oct. 18, 1907, 36 Stat. 2351 (hereinafter Hague IX); Convention Relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War (Hague XI), Oct. 18, 1907, 36 Stat. 2396 (hereinafter Hague XI); Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII), Oct. 18, 1907, 36 Stat. 2415 (hereinafter Hague XIII); Convention on Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, 135 L.N.T.S. 188; Proces-Verbal Relating to Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, Nov. 6, 1936, 3 Bevans 298, 173 L.N.T.S. 353, analyzed *infra* Part III.

¹¹ Military & Paramilitary Activities in & Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (customary norm paralleling U.N. Charter art. 2[4]) (hereinafter *Nicaragua Case*).

¹² An example of this is the general rule against capture of coastal fishing vessels, governed by Hague XI, *supra* note 10, art. 3; in a self-defense situation, e.g., if one of these otherwise protected vessels, registered under a belligerent's flag, fires on an investigating warship, a warship's boat or a helicopter attached to a warship, the warship, boat or helicopter could exercise lawful self-defense instead of trying to board the vessel to determine its eligibility for protected status under Hague XI, *supra*. The same would be true for a fishing vessel of neutral registry during armed conflict or a fishing vessel in lawful passage in the territorial sea, perhaps adjacent to a port, that is subject to the law of the sea. In either case the warship, its boat or its helicopter may respond in self-defense. In all of these cases the right of self-defense is subject to the limitations of necessity, proportionality, and in anticipatory self-defense situations, circumstances permitting of no other alternative. See *infra* notes 14, 213-214 and accompanying text.

¹³ Vienna Convention, *supra* note 7, art. 60(5). There is a current debate on whether Article 60(5) covers human rights conventions as well as treaties regulating humanitarian law.

See generally ILC Draft Articles on State Responsibility, *supra* note 4, art. 50 & ¶ 8, in 2001 ILC Rep., *supra* note 4, at 333, 336, reprinted in Crawford, *supra* note 4, at 288, 290; Anthony Aust, MODERN TREATY LAW AND PRACTICE 238 (2d ed. 2007); (although negotiators had the 1949 Geneva Conventions, which include Second Convention, *supra* note 10, in mind, art. 60[5] "would apply equally to other conventions of a humanitarian character, or to human rights treaties, since they create rights intended to protect individuals irrespective of the conduct of the parties to each other"); Brownlie, *supra* note

limitation on breaches of a treaty apply in self-defense situations, given Articles 51 and 103, or if there is a parallel customary law of self-defense?¹⁴ The law of treaties gives no clear answer.¹⁵ Individual States may invoke the right of self-defense, but the Charter also recognizes the “inherent right of . . . collective self-defense . . . ,”¹⁶ and collective self-defense can be asserted through multilateral defense treaties such as the North Atlantic Treaty (*i.e.*, NATO)¹⁷ or bilateral

5, at 622-23; Jennings & Watts, *supra* note 4, § 649, at 1302; RESTATEMENT, *supra* note 5, § 335, cmt. c; Ian Sinclair, *The Vienna Convention on the Law of Treaties* 190 (2d ed. 1984); Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 1993 INT'L REV. RED CROSS 94; Crawford, *Introduction*, in Crawford, *supra*, at 41 (State cannot disregard human rights obligations because of another State's breach; no Vienna Convention, *supra* citation for the point); David Weissbrodt & Peggy L. Hicks, *Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict*, 1993 INT'L REV. RED CROSS 120. Aust, *supra* seems to be the only commentator applying Article 60(5) to human rights treaties; *see also* Crawford, *supra*. Preparatory works discussing other sources, *supra* and Article 60(5)'s text (“treaties of a humanitarian character”), as distinguished from “treaties of a human rights character,” suggests a misstating of the law if distinctions between humanitarian and human rights law remain.

¹⁴ This article does not enter debates over the lawfulness of anticipatory self-defense, or the U.S. “preemption doctrine.” *See generally* Baumgartner & Oliver, *supra* note 1, at 53; Walker, *supra* note 8, at 1355, and sources cited. The U.S. view is that the right of self-defense includes not only a right to react, subject to principles of necessity and proportionality, in self-defense (“reactive” self-defense to hostile attack), but also a right of anticipatory self-defense, *i.e.*, a response in anticipation of a hostile attack (*i.e.*, a response to hostile intent) that is necessary and proportional, when the need to respond is instant, overwhelming and admitting of no other alternative. Thomas & Duncan, *supra* note 2, ¶ 4.3.2.1.

¹⁵ George K. Walker, *The 2006 Conflict in Lebanon, or What Are the Armed Conflict Rules When Legal Principles Collide?*, ch. 15, in *ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW: A GUIDE TO THE ISSUES* (David K. Linnan ed., 2008), proposes a factorial analysis for this kind of situation.

¹⁶ U.N. Charter art. 51.

¹⁷ North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 224, 34 U.N.T.S. 243, to which there have been many protocols as other States have joined the North Atlantic Treaty Organization (hereinafter NATO). United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States of America on January 1, 2008*, at 413-14 (2008) (hereinafter TIF). The Treaty, *supra*, was invoked during Operation Enduring Freedom, which began the United States' campaign in Afghanistan in 2001 after the 9/11 attacks. George K. Walker, *The Lawfulness of Operation*

agreements.¹⁸ Multilateral self-defense also can be invoked in coalition operations, *i.e.*, if no formal treaty supports action.¹⁹ Multilateral action of States raises other issues, *e.g.*, where States have different views on the scope of self-defense, *i.e.*, countries involved in multilateral action taking a position that they may respond in anticipatory self-defense or only in reaction to attack, or differences on what is necessary or proportional in a self-defense response.²⁰ This kind of situation might arise in Indian Ocean operations off Somalia, where some warships are part of a NATO force established after 9/11, and others are there as coalition partners, if they, their small boats or their helicopters, are attacked.²¹

Enduring Freedom's Self-Defense Responses, 37 VALPARAISO L. REV. 489, 499 (2003).

¹⁸ The United States may have negotiated bilateral agreements with some participating States at the start of the campaign 1990-1991 campaign against Iraq; these have never been published. The Security Council recognized the right of self-defense early in the crisis. S.C. Resolution 660, U.N. Doc. S/RES/660 (1990), *reprinted in* 29 I.L.M. 1325 (1990); George K. Walker, *The Crisis Over Kuwait, August 1990 - February 1991*, 1991 DUKE J. COMP. & INT'L L. 25, 30. There is no international law obligation to publish these agreements; many may not come to light for years, an example being Articles of Agreement Governing Collaboration Between the Authorities of the United States of America and the United Kingdom in the Matter of Tube Alloys, U.K.-U.S., Aug. 19, 1943, 5 U.S.T. 1114, 214 U.N.T.S. 341, the World War II U.K.-U.S. executive agreement to develop the nuclear weapon; *see also* McNair, *supra* note 7, at 32-34. U.N. Charter art. 102 does not require publication, although a treaty must be filed with the United Nations if invoked before a U.N. agency; *see also* Goodrich et al., *supra* note 4, at 610-14; 2 SIMMA, *supra* note 4, at 1277-92. Otherwise, national security considerations may keep it in classified files. RESTATEMENT, *supra* note 5, § 312 r.n. 5. Mutual Defense Agreement, Japan-U.S., Mar. 8, 1954, 5 U.S.T. 661, 232 U.N.T.S. 169, is an example of a published bilateral self-defense treaty.

¹⁹ For the most part operations in Iraq since 1990 have been coalition actions. Walker, *supra* note 18, at 40-45 (early operations). Operations in Afghanistan have been a mix of actions pursuant to coalition agreements and self defense treaties. Walker, *supra* note 17, at 532-34 (early operations).

²⁰ *See supra* notes 7-16 and accompanying text; *see also* Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM J. INT'L L. 715, 719-37 (2008) (noting the distinction between proportionality in self-defense and LOAC situations, and four other situations).

²¹ The attacks might come on the high seas as well, but with U.N. Security Council authority to enter Somalia's territorial sea to engage pirates, there is a possibility of attacks in those waters, too. *See infra* notes 38-41, 56-67, 111-19 and accompanying text.

A decisionmaker faced with a self-defense situation should be held to what he or she knows, or reasonably should know, of applicable protections under humanitarian law or human rights law.²² (Hindsight can be 20/20; the fog of war,²³ *i.e.*, armed conflict, may cloud a decision on attacks during conflict. Similarly, the fog surrounding actions taken in self-defense or pursuant to a Council decision may cloud decisions for self-defense or for Council action when they are taken.)

These knowledge standards, *i.e.*, that decisionmakers are bound by that they know or reasonably should know, are taken from LOAC principles. Declarations of understanding²⁴ by countries party to Protocol I²⁵ to the 1949 Geneva Conventions²⁶ recite that for civilians' protection in Protocol I, Article 51,²⁷ civilian objects protection in

²² George K. Walker, *The Tanker War 1980-1988: Law and Policy*, 74 INT'L L. STUD. SER. 1, 160-61 (2000).

²³ CARL VON CLAUSEWITZ, ON WAR 117-21 (Michael Howard & Peter Paret ed. & trans. 1976).

²⁴ See generally George K. Walker, *Professionals' Definitions and States' Interpretative Declarations (Understandings, Statements or Declarations) for the 1982 Law of the Sea Convention*, 21 EMORY INT'L L. REV. 461 (2007) for analysis of understandings in the law of treaties.

²⁵ Protocol Additional to Geneva Conventions of 12 August 1949, & Relating to Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (hereinafter Protocol I).

²⁶ Convention (I) for Amelioration of Condition of the Wounded & Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (hereinafter First Convention); Second Convention, *supra* note 10; Convention (III) Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereinafter Third Convention); Convention (IV) Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (hereinafter Fourth Convention).

²⁷ Protocol I, *supra* note 25, art. 51. Arts. 51(2) and 51(5) prohibitions on attacks on civilians, absent other considerations, *e.g.*, civilians who take up arms, restate customary law. Michael Bothe et al., *New Rules for Victims of Armed Conflict* 299 & n.3 (1982); International Lawyers and Naval Experts Convened by the International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* ¶ 39 (Louise Doswald-Beck ed. 1995) (hereinafter *San Remo Manual*); Thomas & Duncan, *supra* note 2, ¶¶ 6.2.3.2 (Fourth Convention, *supra* note 26, art. 33 protections), 11.2 n.3, 11.3; 4 Jean S. Pictet, *Commentary* 224-29 (1958); Yves Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 618, 623-26 (1987); Julius Stone, *Legal Controls of International Conflict* 684-732 (1959 rev.); U.S. Department of the Air Force, *International Law — The Conduct of Armed Conflict and Air Operations*: AFP 110-31 ch. 14 (1976) (hereinafter *AFP 110-31*); Michael J.

Article 52,²⁸ and precautions to be taken in attacks in Article 57,²⁹ a commander should be liable based on that commander's assessment of information available at the relevant time, *i.e.*, when a decision to

Matheson, *Remarks*, in *Session One: The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the Geneva Conventions*, in Symposium, *The Sixth Annual American Red Cross - Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL. 419, 423, 426 (1987); William G. Schmidt, *The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions*, 24 AIR FORCE L. REV. 189, 225-32 (1984); Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM U.J. INT'L L. & POL. 117, 130-31 (1986). Civilians may not be used as human shields, nor may they be a subject of attacks intended to terrorize them, although otherwise legitimate attacks that happen to terrorize them are permissible. Specific intent to terrorize civilians gives rise to liability. Thomas & Duncan, *supra*, ¶¶ 11.2 (Fourth Convention, *supra*, arts. 28, 33 protections), 11.3; 4 Pictet, *supra* at 208-09, 224-29; Hans-Peter Gasser, *Prohibition of Terrorist Attacks in International Humanitarian Law*, 1985 INT'L REV. RED CROSS 200; Commission of Jurists to Consider and Report Upon Revision of Rules of Air Warfare, *Rules for Aerial Warfare*, art. 22 (hereinafter Hague Air Rules), reprinted in DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* 315, 319 (4th rev. ed. 2004); Matheson, *Remarks*, *supra* at 426; Schmidt, *supra* at 227.

²⁸ Protocol I, *supra* note 25, art. 52. Article 52 states a general customary norm, except its art. 52(1) prohibition on reprisals against civilians, upon which commentators divide. See generally Bothe et al., *supra* note 27, at 320-27; C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* §§ 510-11, 524-25, 528-29 (6th rev. ed. 1967); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF ARMED CONFLICT* ch. 4 (2004); Thomas & Duncan, *supra* note 2, ¶¶ 6.2.3 & n.36, 6.2.3.2 (Fourth Convention, *supra* note 26, art. 33 protections for some civilians from reprisals), 8.1.1 & n.9, 8.1.2 & n.12 (U.S. position that Protocol I, *supra*, art. 52[1] "creates new law"); 2 D.P. O'Connell, *The International Law of the Sea* 1105-06 (1984); 4 Pictet, *supra* note 27, at 131; Sandoz et al., *supra* note 27, at 630-38; Matheson, *Remarks*, *supra* note 27, at 426; Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, in *THE LAW OF MILITARY OPERATIONS: LIBER AMICORUM PROFESSOR JACK GRUNAWALT*, 72 INT'L L. STUD. SER. 197 (Michael N. Schmitt ed., 1998); Solf, *supra* note 27, at 131. Frank Russo, Jr., *Targeting Theory in the Law of Naval Warfare*, 30 NAV. L. REV. 1, 17 n.36 (1992) rejects Protocol I, *supra* art. 52(2) for naval warfare.

²⁹ Protocol I, *supra* note 25, art. 57; see also Bothe et al., *supra* note 27, at 359-69; Sandoz et al., *supra* note 27, at 678-89; Thomas & Duncan, *supra* note 2, ¶¶ 8.1-8.1.2.1.

attack is made.³⁰ Two 1980 Conventional Weapons Convention³¹ protocols have similar terms, *i.e.*, a standard for *jus ad bellum*, *i.e.*, a commander is bound by information available when a decision to attack is made.³² The Cultural Property Convention Second Protocol also recites the principle.³³ Protocol I to the 1949 Geneva Conventions,

³⁰ Declaration of Australia, June 24, 1991, *reprinted in* SCHINDLER & TOMAN, *supra* note 27, at 793; Declaration of Belgium, May 20, 1986, *reprinted in id.* 795, 796; Declaration of Canada, Nov. 22, 1990, *reprinted in id.* 796, 797-98; Declaration of Germany, Feb. 15, 1991, *reprinted in id.* 802; Declaration of Ireland, *reprinted in id.* 804, 805; Declaration of Italy, Feb. 27, 1986, *reprinted in id.* 807; Declaration of Netherlands, July 10, 1987, *reprinted in id.* 809, 810; Declaration of New Zealand, Feb. 12, 1988, *reprinted in id.* 810; Declarations of Spain, Nov. 24, 1989, *reprinted in id.* 812, 813; Declaration of United Kingdom, Dec. 12, 1977, *reprinted in id.* 814, 815.

³¹ Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, T.I.A.S. No. —, 1342 U.N.T.S. 137 (hereinafter Conventional Weapons Convention).

³² *Id.*, Protocol II on Prohibitions or Restrictions on Use of Mines, Booby-Traps & Other Devices, Oct. 10, 1980, art. 2(4), 1342 U.N.T.S. 168, amended May 3, 1996, art. 7(1)(I), *reprinted in* SCHINDLER & TOMAN, *supra* note 27, at 196, 200-01 (hereinafter Weapons Protocol II); Protocol on Prohibitions or Restrictions on Use of Incendiary Weapons (Protocol III), Oct. 10, 1980, art. 1(3), 1342 U.N.T.S. 171 (hereinafter Weapons Protocol III). The United States ratified the Convention, *supra* and Protocol on Non-Detectable Fragments (Protocol I), Oct. 10, 1980, 1342 U.N.T.S. 168 (hereinafter Weapons Protocol I) and Protocol II *supra*; Weapons Protocol III is not in force for the United States. TIF, *supra* note 17, at 467-68. Amended Weapons Protocol II, Protocol III and Protocol IV on Blinding Laser Weapons, May 3, 1995, 35 I.L.M. 1218 [hereinafter Weapons Protocol IV] are before the U.S. Senate. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 325 (1997). Weapons Protocols I and IV, *supra* do not have these provisions.

³³ Second Protocol to Hague Convention of 1954 for Protection of Cultural Property in Event of Armed Conflict, art. 1(f), Mar. 26, 1999, 38 I.L.M. 769 (hereinafter Second Protocol), referring to Convention for Protection of Cultural Property in Event of Armed Conflict, & Regulations, May 14, 1954, 249 U.N.T.S. 240 (hereinafter Cultural Property Convention); *see also* Protocol, May 14, 1954, 249 U.N.T.S. 358 (hereinafter First Protocol). Second Protocol, *supra* is in force for 52 States; 123 countries, but not the United States, which is a signatory, have ratified the Cultural Property Convention, *supra*; 100 have ratified its First Protocol, *supra*. International Committee of the Red Cross and Red Crescent (hereinafter ICRC), State Parties to the Following International Humanitarian Law and Other Related Treaties as of 29-Jan-2009, Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, Accessions and Successions (Dec. 3,

with its understandings, and the Conventional Weapons Convention Protocols are on their way to general acceptance among States.³⁴ These treaties' common statement, in text or declarations, that commanders are accountable based on information they have at the time for determining whether attacks are necessary and proportional has become a nearly universal norm. The *San Remo Manual* recognizes it as the naval warfare standard.³⁵ It can be said with fair confidence that this is the *jus in bello* customary standard. It should be the standard for self-defense. A national leader or military commander directing a self-defense response, or a response pursuant to a Council decision, whether reactive or anticipatory, should be held to the same standard as a commander in the field deciding on attacks, *i.e.*, being held accountable for what he or she, or those reporting to the leader, knew or reasonably should have known, when a decision is made to respond in self-defense or acting pursuant to a Security Council decision. As in the difference between necessity and proportionality standards for LOAC and self-defense situations, what is sufficient knowledge depends on each circumstance. What might be sufficient knowledge in an LOAC situation might not be sufficient knowledge in a self-defense situation, and vice versa.

Although multilateral self-defense is thought of in terms of open ocean operations, it could involve territorial sea situations, including waters close to ports. Recall offers of assistance by neighboring States, *e.g.*, Mexico, after Hurricane Katrina and similar offers of assistance to Myanmar (Burma) after a hurricane hit. If accepted, and hypothetically there were attacks on these forces, this might have involved responses in U.S. or Myanmar territorial waters and perhaps during operations ashore. The same problem arose after the tsunami in Indonesia, which was reluctant to accept U.S. naval task force and perhaps others' assistance except under limitations. A latent problem in the case of

2001), available at [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (visited Feb. 4, 2008) (hereinafter ICRC).

³⁴ Nearly all countries but not the United States are Protocol I, *supra* note 25, parties; ICRC, *supra* note 33, lists 168 States; 109 countries including the United States for Conventional Weapons Convention, *supra* note 31; 92 for Weapons Protocol II, *supra* note 32, including the United States; 92 for Amended Weapons Protocol II, *supra* note 32; 102 for Weapons Protocol III, *supra* note 32; 52 for Second Protocol, *supra* note 33.

³⁵ *San Remo Manual*, *supra* note 27, ¶46(b) & cmt. 46.3; *see also* Ben Cheng, General Principles of Law as Applied by International Courts and Tribunals 90 (1983); Myres S. McDougal & Florentino Feliciano, Law and Minimum World Public Order 220 (1961).

Indonesia, a former Netherlands colony, may have been concerned over territorial integrity and political independence.³⁶ This sort of issue may arise in other circumstances.

A final question is self-defense against non-state actors, e.g., terrorists or pirates. Does Charter law govern these actions today, or are they subject to other, perhaps analogous, principles?³⁷ Today a multinational naval force steams off Somalia's coast, attempting to deter piracy. The Security Council, with Somalia's consent, has given States limited authority to act in Somali territorial waters against pirates preying on merchant shipping off the Horn of Africa.³⁸ What standards would govern if a pirate ship, perhaps very foolishly or by mistake, attacks a warship³⁹ or a warship's small boats or patrol aircraft?

³⁶ U.N. Charter art. 2(4); see also Goodrich, *supra* note 4, at 43-55; Jennings & Watts, *supra* note 4, § 268, at 704; 1 SIMMA, *supra* note 4, at 112-36.

³⁷ Kenneth O'Rourke, *Commentary — Maritime & Coalition Operations*, in INTERNATIONAL LAW AND THE WAR ON TERRORISM, 79 INT'L L. STUD. SER. 297, 298 (Fred L. Borch & Paul S. Wilson, eds., 2003) (U.N. Charter art. 51 source for responding to terrorists at sea in MIO, maritime interception operations); Wolff von Heinegg, *The Legality of Maritime Interception/Interdiction Operations Within the Framework of Operation Enduring Freedom*, in *id.* 255, 264; see generally Baumgartner & Oliver, *supra* note 1, at 51-61 on anti-terrorist and anti-criminal measures the United States has taken with respect to ports and port security.

³⁸ S.C. Res. 1851, U.N. Doc. S/RES/1851 (2008), calling for action against pirates, and authorizing action for 12 months after the date of S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008), which had commended States and organizations working to suppress piracy, had called upon them to act to suppress the crime, and had decided to authorize action within Somalia's territorial sea, a mandatory command to participating States. Earlier the U.N. Security Council and the International Maritime Organization, a U.N. specialized agency dealing with shipping safety and related matters, had expressed its concern over the situation. See S.C. Res. 1816, U.N. Doc. S/RES/1816 (2008); Jane G. Dalton et al., *Introductory Note to United Nations Security Council Resolutions 1816, 1846 & 1851 — Piracy and Armed Robbery at Sea*, 48 I.L.M. 129 (2009); see also *infra* notes 56-67, 111-19 and accompanying text.

³⁹ UNCLOS, *supra* note 2, art. 29, "for the purposes of this Convention," defines "warship" 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;" High Seas Convention, *supra* note 8, art. 8(2) has a similar definition but applies only to high seas areas, a subtle difference (and deficiency) between the 1958

Council Resolutions on Somalia do not answer this question; the warship, its boats or patrol aircraft would have a right of unit self-defense.⁴⁰ Another troubling issue is whether States, with Council authority to suppress pirates in the Somali territorial sea, could unilaterally chase them ashore and destroy their dens there without Council authorization.⁴¹ Does Charter law cover those situations, since the authority to be in the territorial sea stemmed from Council resolutions, or are there other rules?

There are three more situations where Charter law may raise issues. If the Council "decides" on action through its authority in the Charter, maybe after receiving an Article 51 report but maybe through another state's report,⁴² U.N. Members must comply with the decision.⁴³ Second, if there is a Council resolution "calling" for or recommending action under Chapter VII of the Charter,⁴⁴ or if a General Assembly resolution recommends action if a matter is not before the Council, under the majority view these do not mandate

conventions and UNCLOS, *supra*. U.S. Navy and Coast Guard vessels are considered warships. Thomas & Duncan, *supra* note 2, ¶ 2.1.1. Hague VII, *supra* note 10, arts. 2-3 define warships in similar terms for LOAC situations. See also San Remo Manual, *supra* note 27, ¶13(g); *infra* notes 68, 203 and accompanying text.

⁴⁰ U.N. Charter arts. 51, 103; see also *supra* notes 3-35 and accompanying text.

⁴¹ S.C. Res. 1851, *supra* note 38, ¶ 6 declares that cooperating States may do so, but only with advance notice by the Somalia government to the U.N. Secretary-General, pursuant to the government's request. The narrow issue I pose is whether States may take unilateral action in the Somalia question. My answer is, likely not, since the Resolution covers the point. But what about other piracy situations?

⁴² A U.N. Member may also bring a dispute likely to endanger international peace and security to the General Assembly's attention. A non-Member State may raise these issues if it accepts U.N. Charter art. 33's pacific dispute settlement methods. *Id.* arts. 35, 51; see also Goodrich et al., *supra* note 4, at 270-77; 1 SIMMA, *supra* note 4, at 608-15, 804-05.

⁴³ U.N. Charter arts. 25, 48, 94(2), 103; see also Goodrich, *supra* note 4, at 207-11, 334-37, 555-59, 614-17; 1 & 2 SIMMA, *supra* note 4, at 454-62, 776-80, 1174-79, 1292-1302; San Remo Manual, *supra* note 27, ¶¶ 7-9; Churchill, *supra* note 4, at 148-49; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 87 (1993) (principles flowing from Council decisions pursuant to Articles 25, 48, 103 are treaty law binding U.N. Members and override other treaty obligations); *supra* notes 3-6 and accompanying text.

⁴⁴ U.N. Charter arts. 39-51, provisions for situations involving breaches of the peace or threats to international peace and security and the inherent right of individual and collective self-defense.

Members' action.⁴⁵ Under the Assembly's Uniting for Peace Resolution, however, by which the United Nations continued to operate after the USSR returned to the Council during the Korean War, some authorities say this raised a customary norm through State practice, binding on States.⁴⁶ The third is action by regional organizations under the Charter's Chapter VIII,⁴⁷ a source of authority for the 1962 Cuban Missile Crisis Quarantine.⁴⁸ Although use of Chapter VIII has not been

⁴⁵ U.N. Charter arts. 10-11, 13-14, 33, 36-37, 39-41; *see also* Sydney D. Bailey & Sam Daws, *The Procedure of the UN Security Council* 18-21, 236-37 (3d ed. 1998); Brownlie, *supra* note 5, at 15; Jorge Castenada, *Legal Effects of United Nations Resolutions* 78-79 (Alba Amoia trans. 1969); Churchill, *supra* note 4, at 146-48 (analysis in context of UNCLOS, *supra* note 2, noting division of authorities); Goodrich, *supra* note 4, at 111-29, 133-44, 257-65, 277-87, 290-314; Jennings & Watts, *supra* note 4, § 16; RESTATEMENT, *supra* note 5, § 103(2)(d) & r.n.2; 1 SIMMA, *supra* note 4, at 257-87, 298-326, 583-94, 616-43, 717-49.

⁴⁶ *See* W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. INT'L L. J. 57, 72-73 (2007-08), citing Uniting For Peace Resolution, G.A. Res. 377, ¶ 1, U.N. Doc. A.1775 (Nov. 3, 1950), employed during the Korean War to continue U.N. operations; Legal Consequences of Constr. of a Wall in the Occupied Palestine Terr., 2004 I.C.J. 136, 148-51 (adv. op. July 9); Certain Expenses of the United Nations, 1952 I.C.J. 151, 163-71 (adv. op. July 20). *See also* Walker, *supra* note 22, at 175-77. By parity of reasoning, an otherwise nonbinding Council resolution, e.g., a call for action, could evolve into a customary norm. The Supreme Court of the United States has held differently as to another important General Assembly resolution, the Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (Dec. 10, 1948). *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 n.12 (2004), declined to accept the Declaration, *supra* as part of U.S. customary international law because the then U.S. U.N. Permanent Representative, Eleanor Roosevelt, had declared the Declaration was not a binding standard. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) had reached the opposite conclusion. *Medellin v. Texas*, 128 S.Ct. 1346, 1358-60 (2008) reached a similar conclusion for International Court of Justice cases, stating, however, that they were entitled to great respect, but relying in part on I.C.J. Statute art. 59. This illustrates a dilemma for U.S. decisionmakers; choices made in conformity with U.S. law standards may not be the same as public international law norms. A related issue has been the growth of "soft law," i.e., standards, perhaps coming from an international organization, a nonbinding agreement or a nongovernmental organization (hereinafter NGO), that deserve consideration, even though they have not yet ascended to the status of a source of law. Aust, *supra* note 13, at 52-53.

⁴⁷ U.N. Charter ch. VIII; *see also* Goodrich et al., *supra* note 4, at 355-64; 1 SIMMA, *supra* note 4, at 807-95.

⁴⁸ Thomas & Duncan, *supra* note 2, ¶ 4.3.2, at 262; Walker, *supra* note 22, at 179; *see also* Abram Chayes, *The Cuban Missile Crisis* (1974); Robert A.

as media-visible as Chapter VII for situations involving breaches of the peace or threats to international peace and security, it has played a role throughout the Charter era and will do so in the future.⁴⁹ All of these situations invoke the same issues raised with respect to self-defense, whether it is individual State self-defense, collective self-defense under a self-defense alliance, coalition self-defense, or perhaps self-defense involving a response against an adversary that is not a State.⁵⁰ The same standards for knowledge, or what a decisionmaker should reasonably know, should apply to actions under these Council or Assembly resolutions, whether the decisionmaker is the Council, the Assembly or a commander operating under a resolution.⁵¹

I have proposed a multifactor analysis to resolve these kinds of issues.⁵² Space does not allow repeating it here, except to say that the foregoing Part I describes real problems, for which a ready, rules-driven solution is not easy, and that a multifactor analysis, taking into account the LOAC and other factors in self-defense and U.N. law oriented situations may be a better approach. Besides these general issues, there are specific situations where self-defense claims may arise in connection with ports and the territorial sea around ports.

The *S.S. Maersk Alabama* standoff with pirates in the Indian Ocean off Somalia in April 2009 partially illustrates the foregoing analysis. On April 8 four Somali pirates armed with assault rifles boarded the *Maersk Alabama*, a U.S.-flag vessel with a 20-member crew of U.S. citizens, on the high seas. The ship was bound for Mombasa, Kenya, with a World Food Program relief cargo destined for Somalia. The master, Richard Phillips, told the crew to lock themselves in a compartment and volunteered himself as a hostage in return for release of the rest of the crew. The pirates put Phillips into a *Maersk Alabama* lifeboat. The rest of the *Maersk Alabama* crew fought them and retained control of the ship. All pirates except those aboard

Divine, *The Cuban Missile Crisis* (1971); Michael Dobbs, *One Minute to Midnight: Kennedy, Krushchev and Castro on the Brink of Nuclear War* (2008); Robert F. Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (1969).

⁴⁹ 1 SIMMA, *supra* note 4, at 843-53 describes the work of the Organization of American States, the Organization of African Unity, the Arab League and the Organization for Security and Cooperation in Europe in resolving regional crises.

⁵⁰ See *supra* notes 3-22 and accompanying text.

⁵¹ See *supra* notes 22-35 and accompanying text.

⁵² See Walker, *supra* note 15.

and holding Phillips in the boat left for the mainland.⁵³ Operating hundreds of miles away on antipiracy patrol, the destroyer *U.S.S. Bainbridge* raced to the scene and hove to near *Maersk Alabama* and its lifeboat. The four pirates aboard the boat threatened to kill Phillips if they were not paid ransom, although other pirates ashore declared that all the pirates wanted was a safe route to shore and payment of a negotiated ransom later.⁵⁴ As part of the negotiations *Bainbridge* took the lifeboat in tow and supplied it with food and water; at one point the pirates fired on the *Bainbridge*; there was no return fire. On April 12 the Navy rescued Captain Phillips; SEALs marksmen had shot the three pirates holding him. Those aboard *Bainbridge* had observed Phillips “in imminent danger” when a pirate was seen with an assault rifle at his back; they had also observed that his captors were getting edgy. The fourth pirate was then aboard *Bainbridge* receiving medical help from a wound, probably inflicted by a *Maersk Alabama* crewman, and negotiating Phillips’ fate. He has been charged with U.S. law violations in the U.S. District Court for the Southern District of New

⁵³ Apparently the pirates began with the idea of exchanging Phillips for one of their number seized by the merchantman’s crew. The *Maersk Alabama* docked at Mombasa safely with its crew aboard. Pirates who had commandeered other merchantmen for ransom were directing those ships, and other pirate vessels, toward the site of the *Maersk Alabama* incident, to up the ante for ransom. Food aid agencies in East Africa have recently complained about the piracy menace. CBS Broadcasting, *Pirates Recapture Captain After Escape Attempt* (Apr. 12, 2009); Sarah Childress & Peter Spiegel, *Snipers Kill Pirates, Save Captain*, WALL ST. J., Apr. 13, 2009, at A1; CNN, *Hostage Captain Rescued; Navy Snipers Kill 3 Pirates* (Apr. 12, 2009); Chip Cummings et al., *U.S. Cargo Ship Repels Pirates*, WALL ST. J., Apr. 9, 2009, at A1, A10; Elizabeth A. Kennedy, *Crew Celebrates US Captain’s Release with Flares* (Assoc. Press Dispatch, Apr. 12, 2009); Robert D. McFadden & Scott Shank, *Navy Rescues Captain, Killing 3 Pirate Captors*, N.Y. TIMES, Apr. 13, 2009, at A1.

⁵⁴ Other U.S. Navy units, including *U.S.S. Halyburton*, a guided missile frigate, and *U.S.S. Boxer*, flagship for the multinational task force, also raced to the scene, and Navy SEALs (Sea, Air, Land, Navy Special Warfare personnel) parachuted into the water near *Bainbridge*. Federal Bureau of Investigation (FBI) agents came aboard to help with hostage negotiations. Patrol planes and a Navy helicopter hovered over the scene. Associated Press, *FBI, Navy Try to Win Release of Ship Captain by Pirates*, WINSTON-SALEM J., Apr. 10, 2009, at A8; CBS Broadcasting, *supra* note 53; Childress & Spiegel, *supra* note 53; CNN, *supra* note 53; Kennedy, *supra* note 53; McFadden & Shank, *supra* note 53. *U.S.S. Bainbridge* was the name of the U.S. Navy’s first destroyer (DD-1), and honors William Bainbridge, who led a U.S. squadron against the Barbary Pirates in 1815-16; he had been their prisoner for 19 months after his previous command, the frigate *Philadelphia*, ran aground outside Tripoli harbor.

York. Phillips and the crew were debriefed, received medical assistance as needed, and headed home to the United States. Some pirate chieftains threatened U.S. mariners' lives as a response to the deaths of their colleagues in crime; reaction to this ranged from fear for more risks to calls for arming merchant ship crews or more military action.⁵⁵

The LOS denounces high seas piracy;⁵⁶ *Bainbridge* could have operated under those principles if no U.S. nationals were aboard the pirated vessel or if no collective self-defense arrangement, through a formal treaty like the North Atlantic Treaty (*i.e.*, NATO), a coalition, or specific request from captured nationals' countries, invoked self-defense.⁵⁷ However, because the master, a U.S. citizen, was a captive of the pirates, and the United States, like many countries, claims a right of self-defense to succor its endangered nationals,⁵⁸ the destroyer and

⁵⁵ Unlike this incident, an India Navy warship returned fire from pirates, and an Italian-flag cruise ship with Israeli security guards aboard fired on pirates to fend them off. U.S. Secretary of Defense Robert Gates said that a stable Somalia government was the key to the problem. Although some NATO countries have released ship hijackers after seizing them, several States, France, Kenya and Netherlands among them, have begun cases against captured pirates. Additionally, local Somali leaders and the Somali government may begin acting against the pirates. Associated Press, *NATO's Lack of Authority Means It Must Let Pirates Go*, WINSTON-SALEM J., Apr. 19, 2009, at A19; Associated Press, *Pirates Fought Off by Security*, WINSTON-SALEM J., Apr. 27, 2009, at A7; Chad Bray, *Somali Teenager Is Indicted for Piracy in Cargo-Ship Seizure*, WALL ST. J., May 20, 2009, at A2; *Childress & Spiegel*, *supra* note 53; CNN, *supra* note 53; John W. Miller & Peter Spiegel, *U.S. Weighs Changes in Strategy to Fight Pirates*, WALL ST. J., Apr. 18-19, 2009, at A9; Jeffery Gettleman, *For Somali Pirates, Worst Enemy May Be Waiting Back on Shore*, N.Y. TIMES, May 9, 2009, at A9; Chip Cummings & John W. Miller, *Rescue at Sea Sparks Calls for Firepower*, *id.*, Apr. 14, 2009, at A9; Editorial, *Saving Captain Phillips*, *id.*, Apr. 13, 2009 (expressing hope for prosecution under U.S. law); McFadden & Shank, *supra* note 53; Peter Spiegel, *Gates Says Somalia Government Is Key to Problem*, WALL ST. J., Apr. 14, 2009, at A9; Benjamin Weiser, *A Young Somali in Manhattan, to Face U.S. Charges of Piracy*, N.Y. TIMES, Apr. 22, 2009, at A1; *see also* 18 U.S.C. §§ 1651-53, 1658-60 (2006) (U.S. statutes criminalizing piracy, related offenses); *supra* notes 38-41, *infra* notes 56-67, 111-19 and accompanying text.

⁵⁶ UNCLOS, *supra* note 2, arts. 100-07; High Seas Convention, *supra* note 8, arts. 14-22. Language in recent U.N. Security Council resolutions generally denouncing piracy would have lent support to action under the LOS. *See also supra* notes 38-41, *infra* notes 111-19 and accompanying text.

⁵⁷ *See supra* notes 3-35 and accompanying text.

⁵⁸ Thomas & Duncan, *supra* note 2, ¶ 4.3.2 & n.29 at 261; *see also infra* Parts III.A.5.a, III.A.5.b, further analyzing this situation and humanitarian intervention, *i.e.*, intervention to succor other countries' endangered nationals.

other U.S. forces and personnel (e.g., Navy SEALs and FBI agents trained for hostage situations⁵⁹) operated under self-defense principles. In this case it was at first reactive self-defense; the *Maersk Alabama* seizure and hostage-taking had already occurred. Self-defense principles trumped the LOS antipiracy rules.⁶⁰ Undoubtedly the United States operated with the LOS antipiracy rules and U.S. hostage situation rules as conditioning factors in the standoff.⁶¹ Perhaps it was interpretive application of these rules in the self-defense context, concern for hitting Phillips or concern that the pirates might kill him in response, that led *Bainbridge* crewmen in a small ship's boat not to return the pirates' small arms fire directed toward a *Bainbridge* boat or the ship.⁶² The *Bainbridge* boat crew or the destroyer could have responded in reactive self-defense.

When it was seen that Captain Phillips was in "imminent danger," an anticipatory self-defense situation arose; hostile intent against a U.S. national had been demonstrated. The need to act was instant and overwhelming, with no alternative; it also had to be necessary and proportional.⁶³ Only Phillips' three captors were shot. The weakness of arguments against anticipatory self-defense is illustrated by this situation. Few if any would say that the Navy had to wait to see Phillips shot before responding; the pirate holding a gun on Phillips was clearly a proper object of anticipatory response. The two pirates not directly involved in guarding Phillips were operating in a common cause and were also subject to an anticipatory self-defense response. Nothing under the circumstances would have preventing them from grabbing their assault rifles and killing Phillips when his guardian was shot. Whether pirates' later threat to kill U.S. mariners in the future can support an anticipatory self-defense response will depend on circumstances: credibility of the threat, display of hostile intent, whether the need to act is instant and overwhelming with no other

⁵⁹ See *supra* note 54 and accompanying text.

⁶⁰ U.N. Charter arts. 51, 103; see also *supra* notes 3-35 and accompanying text.

⁶¹ Cf. Walker, *supra* note 15; see also *supra* notes 53-55 and accompanying text.

⁶² In a nearly contemporaneous incident, in a shootout between pirates and the French Navy, which rescued hostages from a captured yacht, two pirates and a hostage died from gunfire. Earlier India's Navy sank a Thailand fishing boat, killing mariners and pirates after pirates fired on an India warship. CBS Broadcasting, *supra* note 53; Slobhan Gorman, *American Captain Tries to Escape from Sea Pirates*, WALL ST. J., Apr. 11-12, 2009, at A5; Miller & Spiegel, *supra* note 55.

⁶³ See *supra* notes 14, 20, 35 and accompanying text.

alternative, and necessity and proportionality of the response. If pirates attack in the future, the situation may become a reactive self-defense situation.

The *Maersk Alabama* incident also partially illustrates analysis of the relationship between U.N. actions under the Charter and the LOS. The Security Council passed resolutions deciding,⁶⁴ with Somalia's consent, to allow pursuing pirates into Somalia territorial waters.⁶⁵ These trumped the LOS rules⁶⁶ governing territorial sea passage. Thus if the incident had moved into Somalia waters, the *Bainbridge* and other antipiracy forces would have had authority to enter those waters, despite LOS restrictions on military actions in the territorial sea,⁶⁷ to deal with the pirates and effect rescues. Other naval forces in the antipiracy patrol could have responded in collective self-defense as well.

B. SPECIAL SELF-DEFENSE SITUATIONS INVOLVING PORTS AND THE TERRITORIAL SEA

There are situations where the LOS applicable to ports and the territorial sea may intersect with the law of self-defense.

1. WARSHIP AND MILITARY AIRCRAFT IMMUNITY; WARSHIP AND MILITARY AIRCRAFT SELF-DEFENSE

Warships as defined in UNCLOS⁶⁸ and military aircraft⁶⁹ have complete immunity in the territorial sea, in internal waters and in ports, which are usually located in internal waters, whether these be the U.S.

⁶⁴ U.N. Charter arts. 25, 48, 94, 103; *see also supra* notes 37-51 and accompanying text.

⁶⁵ S.C. Res. 1846, 1851, *supra* note 38; *see also supra* notes 38-41, *infra* notes 111-19 and accompanying text.

⁶⁶ UNCLOS, *supra* note 2, arts. 17-32; Territorial Sea Convention, *supra* note 2, arts. 14-23.

⁶⁷ *See infra* notes 136-38 and accompanying text.

⁶⁸ *See supra* note 39 and accompanying text..

⁶⁹ Convention on International Civil Aviation, *supra* note 2, art. 3(b) defines state aircraft as aircraft used in military services. San Remo Manual, *supra* note 27, ¶ 13(j); Thomas & Duncan, *supra* note 2, ¶ 2.2.1, citing AFP 110-31, *supra* note 27, ¶ 2-4b, define military aircraft as aircraft operated by commissioned units of the armed forces of a nation, bearing that nation's military markings, commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline.

territorial sea, U.S. internal waters or U.S. ports, or foreign territorial seas, internal waters or ports.⁷⁰ Although warships have a right of innocent passage in foreign States' territorial seas, military aircraft do not; warships and military aircraft must obtain prior permission to enter foreign States' internal waters and ports.⁷¹ Warships in port and steaming in the territorial sea or internal waters and ports, or moored or anchored in ports, and military aircraft lawfully flying over them, also have a right of individual and collective self-defense,⁷² as much as the States whose flag they fly have this right. This applies to foreign and U.S. ports. An example of an incident in a foreign port was the attack on the *U.S.S. Cole* in a Yemen port; the *Cole* had the right of self-defense. U.S. responses to attacking Japanese aircraft and submarines on Pearl Harbor Day in Hawaii and afterward until the U.S. war declaration were examples of self-defense following an attack in a U.S. port.

⁷⁰ UNCLOS, *supra* note 2, arts. 32 (warship territorial seas immunity, subject to being asked to leave the territorial sea if in noncompliance with innocent passage, flag

State responsibility for damage caused by warship noncompliance), 96 (warship high seas immunity), 236 (immunity from environmental damage claims); High Seas Convention, *supra* note 8, art. 8(1) (warship high seas immunity); Territorial Sea Convention, *supra* note 2, art. 22 (warship territorial sea immunity, subject to being asked to leave the territorial sea if in noncompliance with innocent passage); Thomas & Duncan, *supra* note 2, ¶ 2.2.2 (military aircraft sovereign immunity). Naval auxiliaries, State-owned vessels owned by or under the exclusive control of a State's armed forces, also enjoy immunity. UNCLOS, *supra* note 2, arts. 32, 96, 236; Territorial Sea Convention, *supra* art. 22; High Seas Convention, *supra* art. 8. There are many ships under the U.S. flag that fall within this category. See generally Thomas & Duncan, *supra* ¶ 2.1.3. Other States may similarly provide for naval auxiliaries, e.g., the United Kingdom's Ships Taken Up from Trade (STUFT) program, used during the 1982 Falklands/Malvinas war. U.S. military contract aircraft, i.e., civilian planes that the U.S. Air Mobility Command has chartered, are state aircraft entitled to immunity if the United States so designates them. *Id.* ¶ 2.2.3. Other countries may employ similar procedures.

⁷¹ Submarines must navigate on the surface and fly their flag. UNCLOS, *supra* note 2, arts. 18-23; Territorial Sea Convention, *supra* note 2, arts. 14-15; Convention on International Civil Aviation, *supra* note 2, art. 3(c); COLOMBOS, *supra* note 28, § 274, at 262; Thomas & Duncan, *supra* note 2, ¶¶ 1.4.1-1.4.2, 2.3.1-2.3.2.4; Baumgartner & Oliver, *supra* note 1, at 50.

⁷² Cf. Int'l L. Ass'n, Committee on Maritime Neutrality, Helsinki Principles on the Law of Maritime Neutrality, May 30, 1998, Principle 5.1.1, in International Law Association, Report of the 68th Conference, Taipei, 1998, at 496, 506 (1998) (hereinafter Helsinki Principles), reprinted in SCHINDLER & TOMAN, *supra* note 27, at 1425, 1428.

By extension of these principles, warship(s) or military aircraft guarding a convoy in territorial waters, if they are otherwise lawfully exercising the right of convoy granted by the territorial state,⁷³ may exercise self-defense to protect themselves and the convoy.

2. DEFENSE ZONES IN THE TERRITORIAL SEA

During World Wars I and II, the United States established coastal defense zones to limit shipping into certain ports, including Charleston, South Carolina.⁷⁴ The law of the sea conventions allow a coastal state to suspend, temporarily, in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential to protect its security, including weapons exercises. The suspension shall take effect only after being duly published.⁷⁵ This provision would seem not to forbid defense zones if the coastal state legitimately claims a right of self-defense and the claimed right of defense is necessary and proportional under the circumstances.⁷⁶ The law of the sea says nothing about establishing these zones in ports or internal waters, but

⁷³ UNCLOS, *supra* note 2, art. 19 publishes an exhaustive list of actions ships may not take while in territorial sea innocent passage. *Cf.* Joint Statement by the United States of America and the Union of Soviet Socialist Republics ¶ 3, Sept. 23, 1989, 28 I.L.M. 1445 (1989). Some commentators say this may not be an exclusive list of prohibited actions. 1 O'Connell, *supra* note 28, at 270; Thomas & Duncan, *supra* note 2, ¶ 2.3.2.1 n.27. However, if a coastal State allows a military convoy to transit its territorial sea, this permission includes the convoy's right to defend itself through its accompanying warships or military aircraft.

⁷⁴ Japan declared zones extending seven miles into the high seas during the 1904-05 Russia-Japan war. Some U.S. zones remained in effect until 1956. COLOMBOS, *supra* note 28, § 558; 3 Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* § 720 (3d ed. 1945-47); Brunson MacChesney, *Situation, Documents and Commentaries on Recent Developments*, in *INTERNATIONAL LAW SITUATION AND DOCUMENTS 1956*, 51 INT'L L. STUD. SER. 1, 603-04 (1957) (describing U.S. zones); 2 O'Connell, *supra* note 28, at 1109; 2 Lassa Oppenheim, *International Law* § 319a (Hersch Lauterpacht ed. 1955); Walker, *supra* note 22, at 403; L.F.E. Goldie, *Maritime War Zones and Exclusion Zones*, in *THE LAW OF NAVAL OPERATIONS*, 64 INT'L L. STUD. SER. 156, 158-60 (Horace B. Robertson, Jr. ed., 1991).

⁷⁵ The suspension shall not discriminate in form or fact among foreign ships. UNCLOS, *supra* note 2, art. 25(3); Territorial Sea Convention, *supra* note 2, art. 16(3).

⁷⁶ Although it would be highly unusual, presumably a defense area proclaimed under a right of anticipatory self-defense (necessary, proportional, with an instantaneous need admitting of no other alternative) would also be lawful. *See supra* notes 3-35 and accompanying text.

any state establishing a port or internal waters zone must take into account the effect on territorial sea innocent passage and access to ports.⁷⁷ Thus a coastal state might establish one of these zones to defend against an anticipated terrorist attack as well as under principles of anticipated or reactive self-defense against an enemy foreign state.

These zones must be distinguished from permanent high seas defense zones established by a handful of States, notably Libya and Democratic Peoples' Republic of Korea (North Korea), extending well out into the high seas. These zones, sometimes styled security zones, violate international law,⁷⁸ whether viewed from limitations on self-defense (necessity, proportionality, and in the case of anticipatory self-defense, admitting of no other alternative),⁷⁹ or the freedom of the seas.⁸⁰ They must also be distinguished from temporary zones declared for an immediate area of military operations.⁸¹

3. ADIZs

International law distinguishes defense zones from aircraft detection and identification zones (ADIZs), which the United States and other countries have declared. An ADIZ is an area where U.S. aircraft and their tracking support systems monitor for incoming aircraft, *e.g.*, the U.S. territorial sea and adjacent high seas waters (contiguous zone, EEZ, seas above the U.S. continental shelf⁸²)

The legal basis for an ADIZ is a nation's right to reasonable conditions for entry into its territory.⁸³ Although established to

⁷⁷ Nonmilitary shipping has freedom of access to ports, subject to safety, security, etc. considerations. Baumgartner & Oliver, *supra* note 1, at 34-49.

⁷⁸ RESTATEMENT, *supra* note 5, § 511 cmt. k; J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS ¶ 6.2 (2d ed. 1996); Thomas & Duncan, *supra* note 2, ¶ 2.4.4; Walker, *supra* note 22, at 267.

⁷⁹ See *supra* notes 3-35 and accompanying text.

⁸⁰ UNCLOS, *supra* note 2, pmb., arts. 87, 88, 301; High Seas Convention, *supra* note 8, pmb., arts. 1, 2.

⁸¹ See *infra* Part II.B.4.

⁸² Although LOS treaties describe these areas separately, their waters outside of the territorial sea are part of the high seas. UNCLOS, *supra* note 2, arts. 33, 55-85; Continental Shelf Convention, *supra* note 8, arts. 1, 3; Fishing Convention, *supra* note 8, arts. 1-2; Territorial Sea Convention, *supra* note 2, art. 24.

⁸³ Whether coastal States can apply these regulations to aircraft passing through an ADIZ and not inbound to the coastal State is not settled. AFP 110-

facilitate defense of the United States and other coastal countries from incoming aircraft from *inter alia* the high seas,⁸⁴ ADIZs can help identify drug runner aircraft, aircraft identified as a possible airborne terrorist attack on U.S. territory and other hostile threats. Aircraft operating in the high seas ADIZ in identification roles have LOS freedom of navigation rights, just like Navy and Coast Guard ships and other military vessels.⁸⁵ Operating radar and similar devices over high seas areas does not violate the law of the sea, so long as they do not interfere with other lawful high seas uses.⁸⁶ So long as radar emissions and the like do not interfere with the right of innocent passage or other rights in the atmosphere over the high seas, they are a lawful use of the territorial sea by the coastal state. The coastal state has a right to overfly its own internal waters, ports and territorial sea as part of its sovereign territory, so long as the aircraft does not interfere with innocent passage. Once an aircraft in a hostile act or acting with hostile intent or is detected, the law of self-defense comes into play⁸⁷ in response to a threat of harm to the coastal state and its ports. However, an ADIZ is not a self-defense measure in and of itself.

4. EXCLUDING SHIPPING FROM AREAS OF MILITARY OPERATIONS IN THE TERRITORIAL SEA

A customary law of naval warfare rule allows belligerents to exclude neutral merchant shipping and aircraft from, and to ask third-state warships to leave, high seas areas near an immediate area of military operations if hostilities are taking place or will occur in the near future, or where belligerent forces are operating, *e.g.*, conducting visit and search. A belligerent cannot deny territorial sea innocent passage to neutral States' coasts or to close an international strait to transit or innocent passage unless another route of similar convenience

31, *supra* note 27, ¶ 2-1g; Thomas & Duncan, *supra* note 2, ¶ 2.5.2.3; RESTATEMENT, *supra* note 5, § 521, r.n.2; Marjorie M. Whiteman, 4 Digest of International Law 496-97; Walker, *supra* note 22, at 410; Elizabeth Caudra, Note, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, 18 VA. J. INT'L L. 485 (1978).

⁸⁴ See 14 C.F.R. §§ 99.1-99.49 (2008) for current U.S. ADIZ areas and regulations.

⁸⁵ UNCLOS, *supra* note 2, arts. 87(1), 88, 301; High Seas Convention, *supra* note 8, arts. 1, 2.

⁸⁶ UNCLOS, *supra* note 2, art. 87(1); High Seas Convention, *supra* note 8, art. 2 (high seas freedoms listed are *inter alia* freedoms to use the high seas).

⁸⁷ See *supra* notes 3-35 and accompanying text.

is open to neutral traffic.⁸⁸ Although there is apparently no state practice with respect to the territorial sea during the Charter era, it would seem that coastal state naval forces could, under self-defense principles and limitations and the Charter's trumping principles,⁸⁹ impose a similar temporary zone in its territorial waters and ports by analogy. This situation is more likely today, given possibilities of 12-mile claims for a territorial sea⁹⁰ around ports as part of a state's coast, and those waters' expanse compared with the former three-mile rule. It would seem, also, that such an exclusion could be imposed in a self-defense response where the territorial sea is that of the state that initiated the hostile act or displayed hostile intent in anticipatory self-defense situations⁹¹ as part of the self-defense response. On the other hand, a state responding in self-defense might not be able to establish such a zone in a third state's waters, *i.e.*, where an attack originating in another state's forces occurs in a third state's waters, unless the third state allows the zone,⁹² or unless the establishment of the zone would be a lawful extension of the inherent right to self-defense.

⁸⁸ Declaration Concerning Laws of Naval Warfare, art. 1, Feb. 26, 1909, 208 Consol. T.S. 338; Declaration Respecting Maritime Law, *supra* note 10, ¶ 4; COLOMBOS, *supra* note 28, § 500; Commission of Jurists to Consider and Report Upon the Revision of the Rules of Air Warfare, Hague Air Rules, *supra* note 27, art. 30, reprinted in SCHINDLER & TOMAN, *supra* note 27, at 315, 320; Helsinki Principles, *supra* note 72, Principle 3.3 & cmt.; Institute of International Law, The Laws of Naval War Between Belligerents: Oxford Manual on Naval Warfare, art. 50 (Aug. 9, 1913) (hereinafter Oxford Manual), reprinted in SCHINDLER & TOMAN, *supra* at 1123, 1130; San Remo Manual, *supra* note 27, ¶ 146; 2 O'Connell, *supra* note 28, at 1109-12; 2 Oppenheim, *supra* note 74, § 325b; Thomas & Duncan, *supra* note 2, ¶ 7.8; Robert W. Tucker, *Blockade*, in THE LAW OF WAR AND NEUTRALITY AT SEA, 50 INT'L L. STUD. SER. 1, 300-01 (1955); Walker, *supra* note 22, at 395.

⁸⁹ U.N. Charter, arts. 51, 103; *see also supra* notes 3-35 and accompanying text.

⁹⁰ Coastal States have sovereignty over their claimed territorial seas. UNCLOS, *supra* note 2, art. 3; Territorial Sea Convention, *supra* note 2, art. 1; Convention on International Civil Aviation, *supra* note 2, arts. 1, 2; *see also supra* notes 2, 8 and accompanying text. The United States claims a 12-mile territorial sea. President Reagan, *supra* note 8.

⁹¹ *See supra* notes 3-35 and accompanying text.

⁹² If the third State is a self-defense treaty party to, *e.g.*, the North Atlantic Treaty, *supra* note 17, it would seem that permission would not be necessary if establishing a zone is seen as lawful collective self-defense unless other agreements under the Treaty provide otherwise or consensus under the Treaty is necessary.

5. INTERVENTION MISSIONS FROM THE HIGH SEAS

There are five situations where other States' military forces might enter a coastal state's territorial sea and often its ports or internal waters:

(a) intervention to succor other States' nationals in peril of their lives because of a chaotic situation in the coastal state and its port(s), which may be the natural site for landing a rescue mission;

(b) humanitarian intervention, now termed by some the duty to protect, where a coastal state is denying indigenous nationals their basic human rights, and for which intervention in ports might be better sites for carrying out the mission;

(c) intervention after an overwhelming natural disaster, where the coastal state is in difficulty coping with the disaster, and ports would be the better sites for landing aid, rather than beaches or airfields damaged by the disaster, or intervention to combat rampant international criminality, such as piracy, in the territorial sea;

(d) intervention to combat the international drug trade, or under the Proliferation Security Initiative to deal with weapons of mass destruction transport on the high seas; and

(e) rescue intervention, where the coastal state is incapable of rescuing persons in imminent peril on the sea, perhaps in the territorial sea near a port.

All five missions implicate a cardinal principle of the Charter prohibiting other States' action that involves the threat or use of force against the coastal state's territorial integrity or political independence.⁹³ These scenarios will not always involve self-defense issues⁹⁴ or actions under Charter law,⁹⁵ but they may.

⁹³ U.N. Charter art. 2(4); *see also supra* note 32 and accompanying text.

⁹⁴ *See supra* notes 3-35 and accompanying text.

⁹⁵ *See supra* notes 37-51 and accompanying text.

a. *INTERVENTION TO SUCCOR SAME-STATE OR OTHER STATES' NATIONALS IN PERIL*

The U.S. view, and the view of other countries, is that their forces may enter a coastal state's territory, including its territorial sea, internal waters or ports, to rescue their nationals that are in peril due to violence or threats to their safety in the coastal state.⁹⁶ This right of intervention extends to those States' nationals whose governments authorize the intervening state's action.⁹⁷ States may also intervene collectively, a early Twentieth Century case being the Boxer Rebellion intervention.⁹⁸ The right of individual or collective self-defense is the basis for this action; like all self-defense actions, these operations are subject to principles of necessity, proportionality and, in the case of anticipatory self-defense, instantaneous and admitting of no other alternative.⁹⁹ The U.N. Security Council, or the General Assembly acting through the Uniting for Peace resolution, may direct or authorize intervention.¹⁰⁰ The 1961 Congo rescue operation after the colonial power's departure¹⁰¹ is an example of U.N.-approved intervention. If a coastal state allows intervention, that permission eliminates issues of violating the coastal state's territorial integrity or political independence.¹⁰² However, issues of necessity and proportionality, or U.N. resolution compliance, may remain.

⁹⁶ International Commission on Intervention and State Sovereignty, Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty ¶ 4.27 (2001) (hereinafter Responsibility to Protect); Thomas & Duncan, *supra* note 2, ¶ 4.3.2 n.29, at 261. James Cable, *Gunboat Diplomacy 1919-1991*, at 158-213 (3d ed. 1994) recounts many such incidents, which, particularly before World War II, often were launched with other purposes in mind, e.g., protecting business interests or forcing a political decision, including occupation of territory by the intervening country, on the target State.

⁹⁷ Thomas & Duncan, *supra* note 2, ¶ 4.3.2 n.29, at 260.

⁹⁸ See Diana Preston, *The Boxer Rebellion* (2001). Some of these early Twentieth Century multilateral interventions had other, less lofty goals in mind as well. See *supra* note 96.

⁹⁹ See *supra* notes 3-35 and accompanying text.

¹⁰⁰ See *supra* notes 37-51 and accompanying text.

¹⁰¹ Klinton W. Alexander, *Ignoring the Lessons of the Past: The Crisis in Darfur and the Case for Humanitarian Intervention*, 15 J. TRANSNAT'L L. & POL'Y 1, 14-15 (2005).

¹⁰² Cf. U.N. Charter art. 2(4); see also *supra* note 36 and accompanying text.

b. *HUMANITARIAN INTERVENTION*

Humanitarian intervention, which some now style the responsibility to protect, involves a maritime power's intervening in a coastal state to succor third States' nationals if the third state has not requested or approved intervention, or if the coastal state has committed gross human rights or humanitarian law violations against its own people or an indigenous group within its territory.¹⁰³ The state of necessity doctrine, under which intervening state or states violate international law¹⁰⁴ to end a greater harm and violation of international

¹⁰³ The debate has rekindled since NATO's 1999 campaign in the former Yugoslavia, responding to the Kosovar repression. No clear resolution exists today. See High-Level Panel, *supra* note 7, ¶ 203 (emerging norm in 2001; collective responsibility to protect, exercisable by U.N. Security Council to authorize military intervention as a last resort if a government is powerless or unwilling to act); World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (sovereignty carries a responsibility to act); Responsibility to Protect, *supra* note 96, ¶¶ 2.14, 2.28-2.33, 4.1-4.19, 4.28, 4.37, 4.41, 6.28-6.35 (if State unable or unwilling to protect its population, international community has duty to act in exceptional circumstances, subject to limiting conditions, with first duty lying with Council, General Assembly, regional organizations); Thomas & Duncan, *supra* note 2, ¶ 4.3.2 n.29 at 261 (evolving concept has not received general acceptance, citing early commentators); Alexander, *supra* note 101, at 1 (forcible humanitarian intervention justified if human rights violations in a State are threat to international peace and security); Carlo Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention*, 13 J. CONFLICT & SEC. L. 191, 209-13 (2008) (not customary norm); Christopher Joyner, "The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention, 47 VA. J. INT'L L. 693, 704, 720 (2007) (a norm in process of becoming a legal principle); Ved Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm "Responsibility to Protect" Make a Difference?*, 35 DENVER J. INT'L & POL'Y 353 (2007); George K. Walker, *Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals*, 18 AM. U. INT'L L. REV. 35 (2002) (humanitarian intervention to aid oppressed indigenous nationals lawful under state of necessity, subject to limiting factors; survey of early cases, law immediately following Kosovo intervention). For earlier examples of humanitarian intervention, see Cable, *supra* note 96, at 161, 172-74, 185.

¹⁰⁴ *I.e.*, violating U.N. Charter art. 2(4), which forbids violating a State's territorial integrity or political independence. A State may not invoke necessity as a ground for precluding an otherwise wrongful act unless the act is the only means for the State to safeguard an essential interest against a grave and imminent peril, and the act does not seriously impair an essential interest of the State or States toward which the obligation exists, or the international

law, is one basis for this action. If a coastal state allows intervention, that permission eliminates issues of violation of its territorial integrity or political independence.¹⁰⁵ Similarly, if a U.N. resolution authorizes intervention,¹⁰⁶ that eliminates a claim of violation of territorial integrity or political independence. However, factorial issues of necessity and proportionality, or compliance with the resolution, may remain.¹⁰⁷

*c. INTERVENTION IN THE WAKE OF A NATURAL DISASTER OR
RAMPANT INTERNATIONAL CRIMINALITY, SUCH AS PIRACY*

Recent natural disasters and the rise of piracy off some coasts, notably Somalia but also elsewhere around the world, raise questions of intervention in those situations.

The 2004 Indian Ocean tsunami, earthquakes in Afghanistan, China and Pakistan and hurricanes that devastated Myanmar and U.S. Gulf of Mexico coastal areas, raise issues over when and under what circumstances third States or a multinational force may intervene in the territory of the afflicted state(s) to help with disaster relief if the state(s) apparently cannot cope with the emergency.¹⁰⁸ There is only a patchwork of treaties covering disaster assistance, some of them crisis-specific; most are bilateral, applying between European States.¹⁰⁹ "Soft law," *i.e.*, guidelines for acting after a disaster, have been developed.¹¹⁰

community as a whole. A State may not invoke necessity as a ground for precluding wrongfulness if the international obligation precludes invoking necessity, or the invoking State contributes to the situation of necessity. ILC Draft Articles on State Responsibility, *supra* note 4, art. 25 & ¶¶ 1-21, 2001 ILC Rep., *supra* note 4, at 194-206, *reprinted in* Crawford, *supra* note 4, at 178-86. State of necessity is not the same as necessity as a qualification for invoking the right of self-defense or as a qualification of standards for ordering an attack under the LOAC. *See also supra* notes 3-35, *infra* note 234 and accompanying text.

¹⁰⁵ U.N. Charter art. 2(4); *see also supra* note 36 and accompanying text.

¹⁰⁶ *See* Alexander, *supra* note 101, at 22-28 (U.N.-authorized interventions in Iraq, Somalia, Yugoslavia, Haiti); *see also supra* notes 37-51 and accompanying text.

¹⁰⁷ *See generally supra* notes 3-51 and accompanying text.

¹⁰⁸ Thomas & Duncan, *supra* note 2, ¶ 4.3.2 n.29, at 260 take the view that a serious danger to a nation's territory because of a natural catastrophe may justify intervention.

¹⁰⁹ David Fisher, *The Law of International Disaster Response: Overview and Ramifications for Military Actors*, in *Global Legal Challenges:*

Recently rampant piracy along and off its coast, the longest in Africa, has beset Somalia, which has not had a functioning government for over 10 years. Vessels of all sizes, from pleasure yachts to large tankers and containerships, have been seized. Although most ships have are manned by merchantmen employed by private shipping interests, the yachts have been navigated by pleasure boaters, and there have been seizures of ships bearing food aid cargoes under U.N. programs. In all cases the pirates are not interested in the ships or taking lives but in ransom for the vessels and their cargoes.¹¹¹

The LOS dealing with high seas piracy has been in place a long time,¹¹² but there is little law governing inshore pirates, *i.e.*, where

Command of the Commons, Strategic Communications and Natural Disasters 293, 296-99 (Int'l L. Stud. v. 83, Michael D. Karsten ed. 2007). Two general international efforts, the International Relief Union, *see* Convention Establishing an International Relief Union, with Statute, July 12, 1937, 135 L.N.T.S. 247, and Draft Convention on Expediting the Delivery of Emergency Assistance, 1984, failed. Fisher, *supra* at 295.

¹¹⁰ Evan Carlin, *Australian Defence Force Experience with Non-Government Organizations in Humanitarian Assistance and Disaster Relief Operations*, in Global Legal Challenges, *supra* note 90, at 267, 270; Fisher, *supra* note 90, at 300-01, inter alia citing U.N. General Assembly Resolution 46/182, Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, U.N. Doc. A/RES/46/182 (Dec. 19, 1991); United Nations Office for the Coordination of Humanitarian Affairs, Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, (Rev. 1, Nov. 2007) (Some States including the United States, NATO listed among conference participants), available at <http://ochaonline.un.org/> (visited Feb.6, 2009); ICRC, Principles of Conduct for the International Red Cross and Red Crescent and NGOs in Disaster Relief Programmes (1994, updated 2004), available at <http://www.irc.org/publicat/conduct/code.asp> (visited Feb. 6, 2009) (462 NGOs, United States among signatories). The Resolution, *supra* and these guidelines and principles are not per se binding law, but they may elevate to that status with practice under them that is recognized as law. *See, e.g., supra* notes 37-51 and accompanying text (nonmandatory U.N. Security Council or General Assembly resolutions or soft law may grow into custom with observance of them as binding law).

¹¹¹ Lives have been lost, however. Several pirates and Thailand fishermen were killed by the India Navy after pirates fired first, a yacht crew member and two pirates were killed when the French Navy rescued hostages, and U.S. Navy sharpshooters killed three pirates as it rescued the master of a U.S.-flag merchantman. *See supra* notes 55, 62 and accompanying text..

¹¹² UNCLOS, *supra* note 2, arts. 100-07; High Seas Convention, *supra* note 8, arts. 19-22, which apply only on the high seas; *see also* 18 U.S.C. §§ 7, 381-84 (2006) (special maritime and territorial jurisdiction of the United States, which includes the high seas, "any other waters within the

pirates lurk in a state's territorial waters or establish dens ashore, which has been the case in Somalia.¹¹³ Naval units must usually seek coastal state permission to continue pursuing pirates into the territorial sea; pursuit must end if the coastal state denies territorial seas entry for that purpose.¹¹⁴ However, the state of necessity doctrine suggests that in some cases territorial sea entry may be justified,¹¹⁵ and if the pirate uses an aircraft, which undoubtedly has no authorization to enter coastal state airspace, pursuit may be more justifiable.¹¹⁶ If the pirate has been so foolish as to display hostile intent or a hostile act toward a warship, pursuit in self-defense may also be more justifiable.¹¹⁷ In any of these cases the coastal state should be notified promptly. An unresolved issue is other States' action in situations of terrorism or other international crimes, *e.g.*, pursuing those accused of genocide, war crimes or crimes against humanity if they are aboard a vessel or an aircraft.¹¹⁸

admiralty and maritime jurisdiction of the United States," as well as U.S.-registered ships, aircraft; U.S. Code provisions for crime of piracy); Churchill & Lowe, *supra* note 5, at 209-11; COLOMBOS, *supra* note 28, §§ 457-64; 2 O'Connell, *supra* note 28, at 967-83; RESTATEMENT, *supra* note 5, § 522(2)(a) & cmt. c, r.n.2; Thomas & Duncan, *supra* note 2, ¶ 3.5. In the case of the Somali pirate in U.S. custody in connection with the April 2009 *Maersk Alabama* incident, there is U.S. jurisdiction to try him; *Maersk Alabama* was a U.S. flag merchantman.

¹¹³ See *supra* notes 38-41, 55-67 and accompanying text.

¹¹⁴ Thomas & Duncan, *supra* note 2, ¶ 3.5.3.2.

¹¹⁵ See *supra* notes 103-04 and accompanying text; *cf.* Thomas & Duncan, *supra* note 2, ¶ 3.5.3.2. The hot pursuit doctrine, to be applied to a ship fleeing a coastal State's territorial sea, UNCLOS, *supra* note 2, art. 111, High Seas Convention, *supra* note 8, art. 23, might be argued by analogy, but these articles declare hot pursuit must end if the fleeing ship reaches its flag State's or a third State's territorial sea.

¹¹⁶ See *supra* note 71 and accompanying text.

¹¹⁷ U.N. Charter arts 51, 103; see also *supra* notes 3-35 and accompanying text.

¹¹⁸ A coastal State may police its own territorial sea and ports for pirates and pirate activity aboard foreign flag ships as well as vessels flying its flag. See UNCLOS, *supra* note 2, art. 27(1) (arrest authority for any person in connection with an onboard crime [*i.e.*, piracy] during foreign flag ship's passage if consequences of the crime extend to the coastal State, or if the crime would "disturb the peace of the country or the good order" of the territorial sea); Territorial Sea Convention, *supra* note 2, art. 19 (same); see also 18 U.S.C. §§ 7, 381-84 (2006) (special maritime and territorial jurisdiction of the United States, which includes the high seas, "any other waters within the admiralty and maritime jurisdiction of the United States," as well as U.S.-registered ships, aircraft; U.S. Code provisions for crime of piracy); Churchill

Here again issues of violating nonconsenting States' territorial integrity or political independence arise, and perhaps the necessity doctrine and self-defense in the case of the pirates if it can be said that response to non-state actor outlawry like piracy can be characterized as self-defense, arise.¹¹⁹ Affected States can consent to the operation or assistance, as Pakistan did for earthquake assistance,¹²⁰ the United States did after Hurricane Katrina,¹²¹ and as Somalia did for piracy suppression in its territorial sea.¹²² An affected state may decline assistance, as China and Myanmar recently did for disasters affecting them. There may be mixed responses by affected States to the same disaster, as was the case in the tsunami. Indonesia allowed assistance under certain conditions;¹²³ other States welcomed it.¹²⁴ If the U.N. Security Council or the General Assembly mandates action, those resolutions *inter alia* raise issues of compliance, necessity and proportionality.¹²⁵

In two situations, the international drug trade and seaborne transport of weapons of mass destruction, the United States has sponsored programs to deal with these threats to the international legal order; Part I.B.5.d discusses these as they may relate to ports security and the adjoining territorial sea.

& Lowe, *supra* note 5, at 97-98; 2 O'Connell, *supra* note 28, at 956-63. Warships have sovereign immunity in the territorial sea. See *supra* note 70 and accompanying text.

¹¹⁹ U.N. Charter arts. 2(4), 51, 103; see also *supra* notes 3-35, 103-04 and accompanying text.

¹²⁰ See generally Ikram ul Haq, *Global Disasters: Pakistan's Experience*, in Global Legal Challenges, *supra* note 90, at 258, 262-63 (U.S. bilateral assistance through U.S. Central Command; NATO, U.N. High Commissioner for Refugees, World Health Organization multilateral assistance).

¹²¹ Kurt Johnson, *Disaster Assistance: Key Legal Issues for US Northern Command*, in Global Legal Challenges, *supra* note 90, at 277, 288 (e.g., assistance from Canada [ground troops], Mexico [mobile kitchen], Denmark and Germany [portable water pumps]), also advocating that the United States must adjust its rules for accepting disaster assistance from other States.

¹²² See *supra* notes 38-41, 56-67, 111-19 and accompanying text.

¹²³ Carlin, *supra* note 110, at 271 (Australia, Singapore, U.S. forces first on the scene). *Id.* 271-73 notes mixed results for NGOs involved in the crisis.

¹²⁴ *Id.* 268 (NGO assistance in Sri Lanka, Thailand).

¹²⁵ See *supra* notes 37-51 and accompanying text.

d. *COMBATING THE INTERNATIONAL NARCOTIC DRUG TRADE;
THE PROLIFERATION SECURITY INITIATIVE*

For two types of international criminality mentioned in Part I.B.5(c), the international seaborne narcotic drug trade and ocean transport of weapons of mass destruction, the United States has sponsored two programs: drug interdiction by U.S. Navy ships with U.S. Coast Guard personnel aboard as ship riders,¹²⁶ and, more recently, the Proliferation Security Initiative (PSI). Although drug traffic suppression and actions under PSI are usually considered high seas operations, there is a possibility of action under these programs within the territorial sea, including the U.S. territorial sea, adjacent to ports.

The United States has negotiated over 20 bilateral treaties dealing with drug traffic interdiction. These variously allow boarding, pursuit, entry to investigate, overflight and orders to land aircraft, seaward of the territorial sea of a state party, with western hemisphere countries and States with Western Hemisphere dependencies.¹²⁷ These treaties of themselves do not authorize territorial sea entry; the general LOS right of hot pursuit¹²⁸ does not extend to chasing a suspected drug transporter into the territorial sea, but might a coastal state agree to entry for that purpose in individual cases? In any event, self-defense issues or issues under Charter law can arise in relation to law

¹²⁶ The U.S. Coast Guard has arrest authority for federal crimes on the high seas and within waters over which the United States has jurisdiction. 14 U.S.C. § 89 (2006); *see also* 18 U.S.C. § 7 (2006) (special maritime and territorial jurisdiction of the United States, which includes the high seas, “any other waters within the admiralty and maritime jurisdiction of the United States,” as well as U.S.-registered ships, aircraft); Churchill & Lowe, *supra* note 5, at 219-20; Thomas & Duncan, *supra* note 2, ¶ 3.11.4.3, *inter alia* citing 46 U.S.C. App. §§ 1901-04 (2006); U.N. Convention Against Illicit Traffic in Narcotic Drugs & Psychotropic Substances, art. 17, Dec. 20, 1988, T.I.A.S. No. —, 1582 U.N.T.S. 165 (duty to cooperate to suppress sea traffic, in conformity with LOS), of which there are 184 parties. United Nations Office of Legal Affairs, Treaty Section, United Nations Treaty Collection, Multilateral Treaties, *supra* note 8.

¹²⁷ *See generally* Table A3-a, *Maritime Counterdrug/Alien Migrant Interdiction Agreements* (as of Sept. 1, 1997), in Thomas & Duncan, *supra* note 2, at 247-48.

¹²⁸ *See supra* note 115 and accompanying text.

enforcement in drug interdiction operations and trump interdiction treaty rules.¹²⁹

The U.S. PSI began in 2003.¹³⁰ It is a “global effort that aims to stop shipments of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide . . . Actions will be taken . . . consistent with relevant international law and frameworks. . . . PSI is a lasting initiative that over time will establish a web of counterproliferation partnerships to prevent trade in WMD, their delivery systems, and related materials.” It is not a formal organization, nor does it establish obligations for States but a set of partnerships establishing bases for cooperation on specific activities. Initially 11 countries, including the United States, agreed to and published the PSI.¹³¹ PSI may be another example of “soft law” to guide conduct; it may harden into custom through time, practice and

¹²⁹ Thomas & Duncan, *supra* note 2, ¶ 3.11.5.1, at 246; *see also supra* notes 3-35 and accompanying text.

¹³⁰ PSI was created after a 2002 incident in which Spanish Special Forces, acting at the behest of U.S. naval and intelligence personnel, boarded an un-flagged North Korean ship on the high seas. The *S.S. So San* was carrying missile parts to Yemen. After Yemen protested the United States released the ship and cargo. Baumgartner & Oliver, *supra* note 1, at 54-55; Timothy Meyer, *Soft Law As Delegation*, 32 FORDHAM INT’L L.J. 888, 933 (2009). In 2002 U.S. and Spanish ships off the Horn of Africa were part of antiterrorism forces after 9/11. Walker, *supra* note 17, at 513.

¹³¹ Undersecretary for Arms Control & International Security, Bureau of International Security and Nonproliferation, *The Proliferation Security Initiative* (July 28, 2004), <http://www.state.gov/t/isn/rls/other/34726.htm>; *see also* The Proliferation Security Initiative: Statement of Interdiction Principles (Sept. 4, 2003), *reprinted at id.*; Craig H. Allen, *A Primer on the Nonproliferation Regime for Maritime Security Operations Forces*, 54 NAV. L. REV. 51 (2007); James Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526 (2004). Today many other States participate, including flag of convenience countries that have signed away their registry State boarding rights. Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT’L L.J. 323, 340 (2008); Matthew Allen Fitzgerald, Note, *Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas Under Article 51 of the Charter*, 49 VA. J. INT’L L. 473, 475 (2009). Although PSI is a prior administration’s initiative, agreements to curb nuclear and radioactive materials proliferation continue. *See, e.g.*, United States Department of State, Bureau of Public Affairs, Office of the Spokesman, *U.S.-New Zealand Arrangement for Cooperation on Nonproliferation Assistance* (Apr. 7, 2009), <http://www.state.gov/r/pa/prs/2009/04/121363.htm>.

acceptance as law.¹³² PSI's commitment to international law means that PSI countries will observe the LOS, which on its face means that PSI interceptions cannot trump LOS rules for ports, the adjacent territorial sea and innocent passage.¹³³ However, cooperating States might agree to territorial sea entry in cooperation with maritime powers to implement PSI.¹³⁴ PSI cannot trump the right of self-defense or actions under the Charter.¹³⁵

e. RESCUE INTERVENTION

Rescue intervention situations might arise where an aircraft, perhaps a military aircraft, lawfully navigating over the high seas develops an emergency and must ditch in the territorial sea or on a beach of a coastal state. Another possible scenario involves a passenger airliner, lawfully en route from one airport to another airport on a previously-designated air route over land or water, that ditches in a coastal state's territorial sea or internal waters, or on a coastal beach, similar to the US Airways Hudson River emergency landing. A third

¹³² Meyer, *supra* note 130, at 922, 935. S.C. Res. 1540, U.N. Doc. S/RES/1540 (2004), passed after PSI became operational in 2003, might be considered authority for PSI. Nicholas D. Smith, Note, *Guarding Pandora's Box: Strengthening Physical Protection at Facilities that House Weapons of Mass Destruction*, 32 FORDHAM INT'L L.J. 1070-71 (2009).

¹³³ Wolff Heintschel von Heinegg, *The Proliferation Security Initiative: Security vs. Freedom of Navigation?*, in International Law Challenges: Homeland Security and Combating Terrorism 55, 63-64 (Thomas McK. Sparks & Glenn M. Sulmasy, Int'l L. Stud. v. 81, 2006); for analysis of innocent passage rules in the piracy context, see *supra* Part I.B.5(c).

¹³⁴ Consent of the flag state has been the basis for interceptions on the high seas. Von Heinegg, *The Proliferation*, *supra* note 133, at 65. Coastal state consent could authorize territorial sea PSI operations; it was part of the legal basis for antipiracy Security Council resolutions on Somalia. See *supra* notes 38-41, 56-67, 111-19 and accompanying text.

¹³⁵ Fitzgerald, *supra* note 131, at 477-505; see also *supra* notes 3-35 and accompanying text. A 2005 protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, T.I.A.S. No. —, 1678 U.N.T.S. 221, adds terrorist acts and transporting radioactive material to be used for terrorist purposes, WMD, fissionable material or material significantly contributing to design, manufacture or delivery of WMD to the Convention's purview. International Maritime Organization, 2005 Protocol to the SUA Convention. The protocol is in force for six States; the Convention binds 152. International Maritime Organization, Summary of Status of Convention (As of 31 March 2009), <http://www.imo.org/>. See also von Heinegg, *The Proliferation*, *supra* note 133, at 65.

involves a small boat or cruise liner, perhaps in innocent passage or navigating the high seas, that develops a problem (fire, grounding, or other accident) and tries to make it ashore but stops in coastal waters. In all of these cases, if the coastal state cannot assist in rescue, or chooses not to assist in rescue, perhaps because of limited or no resources, can a warship or military aircraft (maybe a helicopter) enter territorial waters, or perhaps land (in the case of an aircraft or warship small boats) to pick up survivors to take them to safety? Suppose in all of these cases the rescue platform discharges weapons, *e.g.*, to kill attacking sharks around the rescue area in the territorial sea.

UNCLOS declares an exclusive list¹³⁶ of actions a ship may not take while in innocent passage, among them:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

.

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

.

(I) any other activity not having a direct bearing on passage.¹³⁷

A foreign ship's passage is considered prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in any of these activities. UNCLOS also provides that "[p]assage shall be continuous and expeditious. However, passage

¹³⁶ Some commentators argue that the list is nonexclusive. *See supra* note 73 and accompanying text.

¹³⁷ UNCLOS, *supra* note 2, arts. 19(2)(a), 19(2)(b), 19(2)(e), 19(2)(f), 19(2)(I); *compare* Territorial Sea Convention, *supra* note 2, art. 14(4) ("Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.").

includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for . . . rendering assistance to persons, ships or aircraft in danger or distress.”¹³⁸

The first issue relates to a rescuing ship: Would it be considered innocent passage if it is on a high seas route and enters for rescue purposes only? Rescue entry does not seem to fit within the UNCLOS definition of innocent passage: “Passage means navigation through the territorial sea for . . . traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or . . . proceeding to or from internal waters or a call at such roadstead or facility.”¹³⁹ To be sure, if the warship receives permission to proceed to the coastal state’s port to discharge the accident victims, that might convert what appears not to have begun as innocent passage into innocent passage. However, the warship commander might conclude, or be ordered, to proceed elsewhere with the victims aboard, maybe to seek better emergency treatment, *e.g.*, in an aircraft carrier medical facility. There is also the problem of actions taken once in the territorial sea, assuming it is a valid innocent passage. Would its actions be taken as a threat by the coastal state? Would shooting sharks to save someone struggling in the water and needing rescue violate UNCLOS? Would launching, landing or taking on board a rescue helicopter or boat violate UNCLOS? Would launching, landing or taking on board the helicopter or boat be considered launching, landing or taking on board a military device? Would any of these actions be considered “any other activity not having a direct bearing on [innocent] passage”? Military aircraft do not have innocent passage rights;¹⁴⁰ even if the foregoing questions are answered favorably for warship entry and rescue, the answers do not apply to military aircraft flown from the high seas to effect rescue.

UNCLOS and the High Seas Convention require rescuing those in peril on the sea if the operation does not seriously endanger the rescuing ship, or its crew or its passengers, but these articles seem to apply only to the high seas.¹⁴¹ However, the treaties’ use of “at sea”

¹³⁸ UNCLOS, *supra* note 2, art. 18(2) (italics in original); compare Territorial Sea Convention, *supra* note 2, art. 14(3).

¹³⁹ UNCLOS, *supra* note 2, art. 18(1); compare Territorial Sea Convention, *supra* note 2, art. 14(2).

¹⁴⁰ See *supra* notes 70-71 and accompanying text.

¹⁴¹ Compare UNCLOS, *supra* note 2, arts. 98(1)(a), 98(1)(b) with High Seas Convention, *supra* note 8, arts. 12(1)(a), 12(1)(b); see also International Convention for Unification of Certain Rules of Law with Respect

means that they apply in the territorial sea as well.¹⁴² The Second Convention similarly has no limitation and applies to the high seas, the territorial sea and in certain cases, internal waters.¹⁴³ The question remains, however, whether and to what extent these rules would apply to aircraft in the territorial sea.

The United States takes the view that its warships may enter other States' territorial seas for saving those in danger at sea; U.S. aircraft may enter with notice to the coastal state and its permission.¹⁴⁴ This would seem to be the prudent rule, with notice given the coastal state if practicable if a warship enters for rescue assistance. However, in extreme, exigent circumstances, *e.g.*, where life will be lost because of stormy weather or sharks unless action is taken immediately, it would seem that the state of necessity doctrine¹⁴⁵ would allow limited entry for that purpose, with prompt reporting after the event.

II. *JUS COGENS*: A GHOST IN INTERNATIONAL LAW THAT MAY PLAY A ROLE

Jus cogens has developed since World War II during the Charter era as meaning those international law rules that are so fundamental that they supersede contrary treaty or customary rules, and

to Assistance and Salvage at Sea, arts. 11, 14, Sept. 23, 1910, 37 Stat. 1658 (not applicable to warships), being replaced by International Convention on Salvage, arts. 4, 10, Apr. 28, 1989, T.I.A.S. —, U.S. Treaty Doc. 102-12 (not applicable to warships unless State party applies Convention to them); International Convention for the Safety of Life at Sea, Regs. 2, 10, ch. V, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2; COLOMBOS, *supra* note 28, § 369; Thomas & Duncan, *supra* note 2, ¶¶ 3.2.1-3.2.1.2; Jennings & Watts, *supra* note 4, § 298.

¹⁴² 3 United Nations Convention on the Law of the Sea 1982: A Commentary ¶¶ 98.1, 98.11(g) (Myron H. Nordquist ed.-in-chief, 1995).

¹⁴³ Second Convention, *supra* note 10, arts. 12, 18; *see also id.* art. 5 (neutrals must apply by analogy the provisions to wounded, sick, shipwrecked, armed forces medical personnel, armed forces chaplains of parties to a conflict, and the dead found at sea); Hague X, *supra* note 10, art. 16, superseded by Second Convention, *supra*; 2 Oppenheim, *supra* note 74, §§ 204-05; 2 Jean S. Pictet, Commentary 41-45, 86-90 (1960). Besides treaty and custom-based law, commentators advocate applying humanitarian principles to armed conflict at sea. *See generally* COLOMBOS, *supra* note 28, §§ 509-11.

¹⁴⁴ Thomas & Duncan, *supra* note 2, ¶ 2.3.2.5; *see also supra* notes 70-71 and accompanying text (general rule against military aircraft innocent passage).

¹⁴⁵ *I.e.*, entry would be unlawful, but would avert a greater tragedy, loss of human life. *See supra* notes 103-04 and accompanying text.

perhaps general principles.¹⁴⁶ The International Court of Justice, limited to sources it can consider by its statute,¹⁴⁷ has never decided a case on *jus cogens* grounds, although it has twice ruled that Charter Article 2(4), requiring all Members to refrain from threats or use of force against the territorial integrity or political independence of any state, "approaches" *jus cogens* status. It has also been argued that self-defense under Charter Article 51 is entitled to *jus cogens* status.¹⁴⁸ The

¹⁴⁶ See Vienna Convention, *supra* note 7, pmbl., arts. 53, 64, 71. *Jus cogens* has uncertain contours. See generally Brownlie, *supra* note 5, at 5, 510-12, 626, 630, 666 (*jus cogens*' content uncertain); T.O. Elias, *The Modern Law of Treaties* 177-87 (1974) (same); Jennings & Watts, *supra* note 4, §§ 2, 642, 653 (same); McNair, *supra* note 7, at 214-15 (same); RESTATEMENT, *supra* note 5, §§ 102 r.n. 6, 323 cmt. b, 331(2), 338(2) (same); Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986*, at 281-88 (1989); 1 SIMMA, *supra* note 4, at 62 (dispute over self-determination as *jus cogens*); Sinclair, *supra* note 13, at 17-18, 218-26 (Vienna Convention principles considered progressive development in 1984); Tunkin, *supra* note 6, at 98; Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary Law*, 172 R.C.A.D.I. 219, 262-63 (1981); John N. Hazard, *Soviet Tactics in International Lawmaking*, 7 DENV. J. INT'L L. & POL. 9, 25-29 (1977); Jimenez de Arechaga, *International Law in the Last Third of a Century*, 159 R.C.A.D.I. 9, 64-67 (1978); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006); Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995). An International Law Commission study acknowledged primacy of UN Charter art. 103-based law and *jus cogens* ineffectively declined to catalogue what are *jus cogens* norms. International Law Commission, Report on Its Fifty-Seventh Session (May 2-June 3 and July 11-August 5, 2005), UN GAOR, 60th Sess., Supp. No. 10, pp. 221-25, UN Doc. A/60/10 (2005) (2005 ILC Rep.); see also Michael J. Matheson, *The Fifty-Seventh Session of the International Law Commission*, 100 AM. J. INT'L L. 416, 422 (2006).

¹⁴⁷ I.C.J. Statute arts. 38(1), 59; see also *supra* note 5 and accompanying text.

¹⁴⁸ Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 245 (hereinafter Nuclear Weapons); Nicaragua Case, *supra* note 11, 1986 I.C.J. at 100-01 (U.N. Charter art. 2[4] approaches *jus cogens* status); see also ILC Draft Articles on State Responsibility, *supra* note 4, art. 50 & Commentary ¶¶ 1-5, in 2001 ILC Rep., *supra* note 4, at 247-49, reprinted in Crawford, *supra* note 4, at 288-89 ("fundamental substantive obligations"); Jennings & Watts, *supra* note 4, § 2 (Art. 2[4] a fundamental norm); RESTATEMENT, *supra* note 5, §§ 102, cmts. h, k; 905(2) & cmt. g (same); Carin Kaghhan, *Jus Cogens and the Inherent Right Self-Defense*, 3 ILSA J. INT'L & COMP. L. 767, 823-27 (1997) (U.N. Charter art. 51 represents *jus cogens* norm); 2001 ILC Rep., *supra* at 177-80, art. 21 & Commentary, reprinted in Crawford, *supra* at 166, resolving the issue of conflict between UN Charter arts. 2(4) and 51 by saying that no art. 2(4) issues arise if there is a lawful self-defense claim, appears to give art. 51

result is that we are left today with a spectrum of claims by commentators that range from the very broad to a denial that *jus cogens* exists. Commentators declare that *jus cogens* does not play a major role in LOS considerations.¹⁴⁹ That may change; *jus cogens* may have a much more significant role where Charter-based law, the LOAC, or human rights or humanitarian law issues are on the stage. In any event, since the Vienna Convention recognizes the doctrine and declares rules for applying it to treaties,¹⁵⁰ *jus cogens*, although perhaps spectral in terms of content in the view of many, is a factor that must be considered in port security issues in peace or war.¹⁵¹

III. THE LAW OF ARMED CONFLICT AND PORTS, INTERNAL WATERS AND THE TERRITORIAL SEA

The law of naval warfare and neutrality at sea in international armed conflicts¹⁵² includes a patchwork of sometimes outmoded

the same status as art. 2(4); Armed Activities on Terr. of Congo (Dem. Rep. of Congo v. Rwanda), 2006 I.C.J. 3, 29-30, 49-50 (jurisdiction, admissibility of application) held a *jus cogens* violation allegation was not enough to deprive the Court of jurisdiction, preliminarily stating that the Convention on Prevention & Punishment of Crime of Genocide, T.I.A.S. No. —, 78 U.N.T.S. 277, represented *erga omnes* obligations. Vienna Convention, *supra* note 7, art. 53 was among other treaties cited; *see supra* note 146 and accompanying text. While also citing the Nicaragua and Nuclear Weapons Cases, *supra*, *Shelton*, *supra* note 146, at 305-06, says Armed Activities, *supra*, is the first I.C.J. case to recognize *jus cogens*, but its holding seems not quite the same as ruling on an issue and applying *jus cogens*. The case compromise included Vienna Convention, *supra*, which raises *jus cogens* issues that the Court could have decided under that law as well as more traditional sources. I.C.J. Statute arts. 36, 38, 59.

¹⁴⁹ Churchill & Lowe, *supra* note 5, at 6.

¹⁵⁰ *See supra* Part II. The United States is not a Vienna Convention, *supra* note 7, party. Unless rules for the law of treaties are customary law or general principles accepted by the United States, the United States is not bound by them. However, 109 countries, including many allies, coalition partners or trading partners of the United States, are parties to the Vienna Convention, *supra*. Multilateral Treaties, *supra* note 8. As references in this article demonstrate, many but not all of the Convention rules are considered customary law.

¹⁵¹ I offer a factorial analysis for solving the problem. *See generally* Walker, *supra* note 15.

¹⁵² Part III addresses the law of international armed conflicts. Law applying to noninternational armed conflicts (*e.g.*, civil wars) is similar but can differ in some respects. For example, Protocol I, *supra* note 25, applies to international armed conflicts; its companion, Protocol Additional to the Geneva

treaties that remain in effect;¹⁵³ today the LOAC is more often governed by custom and general principles, with a leavening of court decisions and treaties or national operational manuals. This is particularly true for air operations affecting the territorial sea, internal waters and ports. An exception to this patchwork is the Second Convention of 1949, which governs humanitarian law standards in armed conflicts at sea, and which is specific in its content and very much in force today as supplemented by 1977 Protocol I. Part III begins with examination of general standards, followed by rules in treaties, customary law or general principles that apply to military operations involving ports, internal waters around ports, and the territorial sea around ports.

A. THE "OTHER RULES" CLAUSES AND LAW OF TREATIES STANDARDS

The 1958 and 1982 LOS conventions are replete with declarations that their terms are subject to "other rules of international law," or similar language.¹⁵⁴ The traditional view is that the phrases

Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. Because of space limitations, this article does not analyze that body of law, intertwined as it is with the law of international armed conflicts; principles applying to civil wars and the like have become increasingly important.

¹⁵³ Although the list of States officially parties to some early treaties, *see, e.g., supra* note 9, is relatively small, the law of treaty succession may enlarge the numbers considerably. Since their ratification colonial empires have vanished, with former colonies achieving independent status; States like Czechoslovakia, Russia and Yugoslavia have sundered apart. Germany is now one State, however. Int'l L. Ass'n, Committee on Aspects of the Law of State Succession, Report of the Seventy-Third Conference held at Rio de Janeiro, Brazil, August 17-20, 2008, *Final Report* at 250, 360-62 (2008) (hereinafter *Final Report*) (general acceptance of U.N. succession conventions; recent practice); *see generally* Symposium, *State Succession in the Former Soviet Union and in Eastern Europe*, 33 VA. J. INT'L L. 253 (1993); George K. Walker, *Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent*, 6 TRANSNAT'L L. 1 (1993). Although the ensuing discussion concentrates on these treaties' terms, it must be borne in mind that many customary rules or general principles may also bind States that may or not bind them through treaties through succession principles, which as *id.* reveal, are less than clear. *See also supra* notes 5, 169, 194, 199, 203 and accompanying text.

¹⁵⁴ UNCLOS, *supra* note 2, pmbl., arts. 2(3) (territorial sea); 19, 21, 31 (territorial sea innocent passage); 34(2) (straits transit passage); 52(1)

mean the LOAC, although there is some indication that a broader meaning may be developing.¹⁵⁵ If these conventions, or at least some parts of them, represent customary law,¹⁵⁶ the result is that customary law declares a similar rule, *i.e.*, that in armed conflict situations, different rules may apply. For example, the LOS conventions have complex rules for the nationality of merchant ships; the LOAC rule is that merchant ships' nationality is determined by the flag they fly.¹⁵⁷

(archipelagic sea lanes passage; incorporation by reference of Articles 19, 21, 31); 58(1), 58(3) (EEZ); 78 (continental shelf; coastal State rights do not affect superjacent waters, *i.e.*, territorial or high seas; coastal State cannot infringe or unjustifiably interfere with "navigation and other rights and freedoms of other States as provided in this Convention"); 87(1) (high seas); 138 (the Area); 293 (court or tribunal having jurisdiction for settling disputes must apply UNCLOS and "other rules of international law" not incompatible with UNCLOS); 303(4) (archeological, historical objects found at sea, "other international agreements and rules of international law regarding the protection of objects of an archeological and historical nature"); Annex III, Article 21(1); High Seas Convention, *supra* note 8, art. 2; Territorial Sea Convention, *supra* note 2, arts. 1(2), 22(2). Although the Continental Shelf and Fishing Conventions, *supra* note 8, do not have other rules clauses, these treaties declare that waters within their competence are high seas areas. Continental Shelf Convention, *supra* art. 3; Fishing Convention, *supra* arts. 1-2. The same is true for the contiguous zone next to the territorial sea; beyond the territorial sea, the contiguous zone is a high seas area. UNCLOS, *supra* art. 33(1); Territorial Sea Convention, *supra* art. 24(1). *See also* High Seas Convention, *supra* art. 1, defining "high seas" as all parts of the sea not included in a State's territorial sea or internal waters.

¹⁵⁵ Law of the Sea Committee, *Report*, in Proceedings of the American Branch of the International Law Association 2007-2008, at 300-07 (2008) (hereinafter *Report*).

¹⁵⁶ High Seas Convention, *supra* note 8, pmbl. (treaty provisions "generally declaratory of established principles of international law"); President Reagan, *supra* note 8 (UNCLOS, *supra* note 2 navigational articles are customary law). Commentators have agreed with the U.S. view. RESTATEMENT, *supra* note 5, Part V, *Introductory Note*, at 3-5; Thomas & Duncan, *supra* note 2, ¶ 1.1; John Norton Moore, *Introduction*, in 1 Commentary, *supra* note 9, at xxvii; Bernard H. Oxman, *International Law and Naval and Air Operations at Sea*, in The Law of Naval Operations, *supra* note 55, at 19, 29; *but see* Churchill & Lowe, *supra* note 5, at 24; 1 O'Connell, *supra* note 28, at 48-49.

¹⁵⁷ Compare UNCLOS, *supra* note 2, arts. 91, 94; High Seas Convention, *supra* note 8, art. 5, with San Remo Manual, *supra* note 27, ¶¶ 112-17&cmts.; Thomas & Duncan, *supra* note 2, ¶¶ 7.5, 12.3.1; *see also Report*, *supra* note 155, at 234-36, 239-43.

Law of treaties principles may apply to nullify or suspend application of LOS convention rules during armed conflict: impossibility of performance or fundamental change of circumstances,¹⁵⁸ or armed conflict itself.¹⁵⁹ Human rights

¹⁵⁸ Fundamental change under Vienna Convention, *supra* note 7, is different from the *rebus sic stantibus* doctrine, which the Convention would supersede. *Force majeure* or distress also might be claimed; it is an excuse for nonperformance so long as circumstances giving rise to it exist, while impossibility justifies terminating a treaty. The LOS conventions refer to *force majeure* and distress. UNCLOS, *supra* note 2, arts. 18(2) (territorial sea innocent passage includes stopping, anchoring but only if necessary because of *force majeure* or distress, or for helping persons, ships, aircraft in danger of distress), 39(1)(c) (exception for straits transit passage, which otherwise requires continuous, expeditious transit); Territorial Sea Convention, *supra* note 2, art. 14(3) (same as UNCLOS, *supra* art. 18[2]). Compare ILC Draft Articles on State Responsibility, *supra* note 4, arts. 23, 24, 25(2)(b), 2001 ILC Rep., *supra* note 4, at 183, 189, 194, reprinted in Crawford, *supra* note 4, at 170, 174, 178, with Vienna Convention, *supra* arts. 61-62, 1155 U.N.T.S. at 346-47; see also Gabčíkovo-Nagymoros Project (Hungary v. Slovakia), 1997 I.C.J. 7, 39 (Arts. 61, 62 customary norms) (hereinafter Project Case); Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 18 (same for Art. 62); Aust, *supra* note 13, at 239-42; Brownlie, *supra* note 5, at 623-25; Arie E. David, The Strategy of Treaty Termination ch. 1 (1975); Elias, *supra* note 114, at 119-30; Harvard Draft Convention on the Law of Treaties, art. 28, 29 AM. J. INT'L L. 657, 1096-1126 (Supp. 1935) (hereinafter Harvard Draft Convention) (*rebus sic stantibus*); Jennings & Watts, *supra* note 4, §§ 650-51; RESTATEMENT, *supra* note 5, § 336; Sinclair, *supra* note 13, at 190-96; International Law Commission, Report on the Work of Its Eighteenth Session, U.N. Doc. A/6309/Rev. 1 (1966), reprinted in 2 (1966) Y.B. Int'l L. Comm'n 211, U.N. Doc. A/CN.4/Ser.A/1966/Add. 1, at 169, 255-58 (hereinafter 1966 ILC Rep.); Gyorgy Haraszti, *Treaties and the Fundamental Change of Circumstances*, 146 R.C.A.D.I. 1 (1975); Robert D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970); (Vienna Convention, *supra* drafting negotiations); Oliver J. Lissitzyn, *Treaties and Changed Circumstances*, 61 AM. J. INT'L L. 895 (1967); Walker, *supra* note 153, at 65-68 (1993). McNair, *supra* note 7, at 685 does not recognize a separate impossibility rule; some of his examples are impossibility situations and might be cited as such. The International Law Commission has begun analyzing the issue of the relationship of armed conflict and treaties. 2005 ILC Rep., *supra* note 114, at 44-72; see also Matheson, *The Fifty-Seventh*, *supra* note 146, at 422-24.

¹⁵⁹ 5 Hackworth Digest of International Law § 513, at 383-84; Harvard Draft Convention, *supra* note 158, art. 35(a), at 664; Institut de Droit International, *The Effects of Armed Conflicts on Treaties*, Aug. 28, 1985, arts. 3-4, 61(2) Annuaire 278, 280 (1986); *id.*, *Regulations Regarding the Effect of War on Treaties*, 1912, art. 5, reprinted in 7 AM. J. INT'L L. 153, 154 (1913); Jennings & Watts, *supra* note 4, § 655; McNair, *supra* note 7, ch. 43;

conventions' derogation clauses may circumscribe application of many of those treaties' rules.¹⁶⁰ However, the Vienna Convention makes it clear that a breach of a humanitarian law treaty does not excuse performance by States; this echoes 1949 Geneva Convention principles.¹⁶¹ Moreover, the principle of *pacta sunt servanda*, i.e., treaties must be observed in good faith,¹⁶² may be thrown in the balance against claims of otherwise justified non-performance. Some international agreements may declare that they apply in peace and war. Bilateral and multilateral treaties between the belligerent(s) and the state(s) not party to a conflict remain in force as to the treaty relationship, and they remain in force between States not party to a conflict,¹⁶³ unless there are successful impossibility of performance or fundamental change of circumstances claims.¹⁶⁴

RESTATEMENT, *supra* note 5, § 335, cmt. c; G.G. Fitzmaurice, *The Judicial Clauses of the Peace Treaties*, 73 R.C.A.D.I. 255, 312 (1948); Cecil J.B. Hurst, *The Effect of War on Treaties*, 2 BRIT. Y.B. INT'L L. 37, 42 (1921); *see also* Vienna Convention, *supra* note 7, art. 60(5), *supra* note 13, *infra* note 161 and accompanying text.

¹⁶⁰ E.g., International Covenant on Civil and Political Rights, art. 4, Dec. 6, 1966, T.I.A.S. No. —, 999 U.N.T.S. 171.

¹⁶¹ Vienna Convention, *supra* note 7, art. 60(5); e.g., Second Convention, *supra* note 10, art. 2; *see also* 2 Pictet, *supra* note 143, at 26-31; *supra* notes 13, 159 and accompanying text.

¹⁶² Vienna Convention, *supra* note 7, pmb. ("... *pacta sunt servanda* rule [is] universally recognized"), art. 26; *see also* U.N. Charter pmb., ("respect for obligations arising from treaties"); Project Case, *supra* note 158, 1997 I.C.J. at 78-79 ("What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the [Vienna Convention, *supra*] is that the Parties find an agreed solution within the cooperative context of the Treaty."); Aust, *supra* note 13, at 144-45, 187; Brownlie, *supra* note 5, at 620 (general principle of law); Harvard Draft Convention, *supra* note 158, art. 20, at 977 (rule of law); 1966 ILC Rep., *supra* note 158, at 211 (*pacta sunt servanda* a rule of law); Jennings & Watts, *supra* note 4, §§ 12, at 38, 584 (*pacta sunt servanda* a customary rule); Hans Kelsen, *Pure Theory of Law* 214-17 (Max Knight trans., 2d rev. ed. 1967) (*pacta sunt servanda* comes from custom); McNair, *supra* note 7, at 465, 493; RESTATEMENT, *supra* note 5, § 321 & cmt. a (*pacta sunt servanda* at core of law of international agreements and is "perhaps the most important principle of international law"); 1 SIMMA, *supra* note 4, at 35-36, 92-93, 96-97; Sinclair, *supra* note 13, at 83-84, 119 (no suggestion *pacta sunt servanda* a fundamental norm); Kearney & Dalton,

¹⁶³ Institut de Droit International, *The Effects*, *supra* note 159, arts. 2, 3, 5, 11, at 280-82; *id.*, *Regulations*, *supra* note 159, arts. 1, 4, 7-10, at 153-55; Clark v. Allen, 331 U.S. 503, 513 (1947); Karnuth v. United States, 279 U.S. 231, 240-42 (1929); Techt v. Hughes, 128 N.E. 185, 191 (N.Y. 1920), *cert. denied*, 254 U.S. 643 (1920); Jennings & Watts, *supra* note 4, § 655, referring

These law of treaties rules do not apply to parallel customary norms or general principles, which are alternate sources of law coequal with treaties.¹⁶⁵ However, given the LOS conventions' other rules clauses and development of parallel custom to exclude LOS standards in armed conflict situations, the customary law of naval warfare and neutrality and general principles related to it, sails a separate course from the LOS in LOAC situations. A major exception is humanitarian law embodied in the Second Convention and similar treaties that may also support customary norms.

Charter law may govern LOAC situations. Here the same rules apply: supremacy of Security Council decisions over rules grounded in treaties and perhaps customary law, and perhaps the primacy of other resolutions of the Council and the General Assembly. Self-defense responses against third States continue to have primacy over treaty rules, *e.g.*, belligerent state A conducting lawful operations in an opposing belligerent B's territorial sea and an attack by state C. Self-defense standards would apply to the A vs. C confrontation. However, conditioning factors, *i.e.*, due regard for LOAC standards, may apply in all of these circumstances.¹⁶⁶ For example, a state engaged in armed conflict with another country might establish defense zones or continue to operate its ADIZs, with the same rules applying to them as in a peacetime situation.¹⁶⁷

B. RULES IN TREATIES AND CUSTOMARY LAW APPLYING TO PORTS, INTERNAL WATERS AND THE TERRITORIAL SEA

Treaties, augmented by customary law and general principles, touch upon issues involving ports, internal waters and the territorial sea during armed conflict.

to 2 Oppenheim, *supra* note 74, §§ 99(4)-99(5); *see also* George B. Davis, *The Effects of War Upon International Conventions and Private Contracts*, 1927 AM. SOC'Y INT'L L. PROC. 124-29; Fitzmaurice, *The Judicial*, *supra* note 159, at 307-17; Harvard Draft Convention, *supra* note 158, art. 35(b), at 664-65; Cecil J.B. Hurst, *The Effect of War on Treaties*, 2 BRIT. Y.B. INT'L L. 37, 40 (1921); James J. Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions*, 20 GEO. L.J. 129, 173-77 (1946). Formerly when hostilities began belligerents would declare that all treaties with opponents were thereupon terminated. *Id.* 146.

¹⁶⁴ *See supra* note 158 and accompanying text.

¹⁶⁵ I.C.J. Statute arts. 38(1), 59; RESTATEMENT, *supra* note 5, §§ 102-03; *see also supra* note 5 and accompanying text.

¹⁶⁶ *See supra* notes 3-51 and accompanying text.

¹⁶⁷ *See supra* Part I.B.3.

1. HUMANITARIAN LAW

Among the most important treaty provisions today are those dealing with humanitarian law. The Second Convention, augmented by 1977 Protocol I,¹⁶⁸ has been in force for nearly every state for years.¹⁶⁹ The Convention, dealing with the wounded, sick and shipwrecked members of armed forces at sea, applies only to forces aboard ship; once forces put ashore they become subject to the First Convention, which applies to care of these persons on land.¹⁷⁰ The Second Convention's Articles 1-3 are the same as those of the other 1949 conventions.¹⁷¹

Protections for the wounded, sick and shipwrecked include are also available to those persons in aircraft forced down at sea or who bail out of aircraft over the sea.¹⁷² They, as well as personnel, ships or

¹⁶⁸ The United States is not a Protocol I, *supra* note 25, party but recognizes many of its provisions as customary law. See *supra* note 34. Protocol I, *supra*, arts. 48-67 declaring general protection against effects of hostilities, do not apply to naval warfare at sea or in the air, but they do apply to sea or air warfare that may affect the civilian population, individual civilians or civilian objects on land and to attacks from the sea or the air against objectives on the land. *Id.* art. 49(3). *Id.* is in addition to rules for humanitarian protection in the Fourth Convention, *supra* note 26, as well as other international law rules relating to protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities. Protocol I, *supra* art. 49(4); see also *id.* arts. 68, 72, referring to Fourth Convention, *supra*; Bothe et al., *supra* note 27, at 291, 427-29, 440-45; Sandoz et al., *supra* note 27, at 605-08, 809-10, 841-44.

¹⁶⁹ TIF, *supra* note 17, at 438-39 lists 198 parties, but the number is subject to treaty succession principles. *Final Report*, *supra* note 153; Symposium, *supra* note 153; Walker, *supra* note 153.

¹⁷⁰ Second Convention, *supra* note 10, art. 4, referring to First Convention, *supra* note 26; see also 2 Pictet, *supra* note 143, at 39-41.

¹⁷¹ Compare Second Convention, *supra* note 10, art. 1 (respect for Convention in all circumstances), 2 (applicability to declared war or "any other armed conflict" and to conflicts with a Power not party to the Convention if that Power accepts and applies its provisions), 3 (noninternational armed conflicts, e.g., civil wars, minimum standards) with First Convention, Third Convention, Fourth Convention, *supra* note 26, arts. 1-3; see also 1 Jean S. Pictet, Commentary 24-61(1952); 2 Pictet, *supra* note 143, at 24-38; 3 Jean S. Pictet, Commentary 17-44 (1960); 4 Pictet, *supra* note 27, at 15-44.

¹⁷² Second Convention, *supra* note 10, arts. 5, 12-13; see also Protocol I, *supra* note 25, art. 10; 2 Pictet, *supra* note 143, at 41-45, 84-104. Protocol I, *supra* art. 8(b) defines "shipwrecked," for purposes of the Protocol, as "persons, . . . military or civilian, . . . in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and

equipment protected by the Second Convention, cannot be the subject of reprisals.¹⁷³ There is a general obligation that those shipwrecked or otherwise in peril on the sea must be rescued, if the rescuing platform (ship, aircraft) can do so without endangering itself or its crew or passengers. After each military engagement parties to a conflict must, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, protect them against pillage and ill-treatment, ensure their adequate care, and search for the dead, preventing bodies from being despoiled. This requirement applies to civilians, *e.g.*, passengers, as well as military personnel.¹⁷⁴ Parties to a conflict may appeal to masters of neutral merchant ships or other vessels, including neutral-flagged ships owned or operated by neutral governments, to take aboard and care for the wounded, shipwrecked or

who refrain from any act of hostility . . . [and if] they continue to refrain from any act of hostility, . . . continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol.” *Id.* art. 8(a), for purposes of the Protocol, defines “wounded” and “sick” as military or civilian persons “who, because of trauma, disease or other mental or physical disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility[.]” including maternity cases, the newborn, or others needful of immediate medical assistance or care, *e.g.*, the infirm or expectant mothers, and who refrain from any act of hostility.

¹⁷³ Second Convention, *supra* note 10, art. 47; *see also* First Convention, *supra* note 26, art. 46 (same); Third Convention, *supra* note 26, art. 13 (reprisals against prisoners of war forbidden); Fourth Convention, *supra* note 26, art. 33 (reprisals against persons protected under Convention forbidden); Protocol I, *supra* note 25, art. 20 (reprisals against medical personnel, objects protected by *id.* arts. 8-34 barred), 51(6), 52(1) (reprisals against civilians, civilian objects forbidden), 53(c) (reprisals against cultural objects, places of worship), 54(4) (reprisals against objects indispensable to survival of civilian population prohibited), 55(2) (reprisals against natural environment barred), 56 (4) (reprisals against works, installations containing dangerous forces prohibited); 1 Pictet, *supra* note 171, at 341-47 (reprisals prohibition does not bar retorsions); 2 Pictet, *supra* note 143, at 252-56 (same); 3 Pictet, *supra* note 171, at 139-42; 4 Pictet, *supra* note 27, at 224-29 (reprisals prohibition does not bar retorsions); *infra* notes 241-44 and accompanying text.

¹⁷⁴ This is a general obligation in peace or war. Second Convention, *supra* note 10, arts. 5, 12, 18; *see also supra* notes 109-12 and accompanying text. Burial at sea, carried out individually as far as circumstances permit, must be preceded by careful examination, if possible by a medical examination, to confirm death and establish identity so that a report can be made to proper authorities. If bodies are landed, First Convention, *supra* note 26 rules for disposing of remains apply. Second Convention, *supra* art. 20. *See also* Protocol I, *supra* note 25, arts. 32-34 (additional rules for the missing, dead); 2 Pictet, *supra* note 143, at 41-45, 84-92, 129-36, 146-50.

sick, and to collect the dead. Ships responding to these calls, and those acting of their own accord, "shall enjoy special protection and facilities to carry out such assistance." These vessels may not be captured because they are transporting these persons or the dead, but absent a promise to the contrary, remain liable to capture for any violations of neutrality they commit.¹⁷⁵ A belligerent's warships may demand that hospital ships and merchant vessels surrender the wounded, sick or shipwrecked that are aboard them if the warship has adequate care facilities available, and the wounded are in a condition to be moved.¹⁷⁶ If a neutral-flagged warship or military aircraft takes aboard a belligerent's wounded, sick or shipwrecked, "it shall be ensured, where so required by international law, that [these persons] can take no further part in operations of war."¹⁷⁷ A belligerent's wounded, sick and shipwrecked who fall into enemy hands are prisoners of war. The captor may decide to hold them, convey them to a port in the captor's state, convey them to a neutral port, or to a port in enemy territory. In the last case prisoners of war returned to their home state may not serve for the war's duration. Neutral powers must guard the wounded, sick or shipwrecked landed in their ports with local authority consent so that they do not again take part in operations of war.¹⁷⁸ If the wounded, sick and shipwrecked prisoners of war are aboard a warship disarmed in a neutral port, the warship crew must be interned, but the former prisoners of war must be set free.¹⁷⁹ If the shipwrecked, wounded and sick arrive aboard a neutral warship, they must be interned.¹⁸⁰ If they arrive aboard a neutral merchantman, they must be set at liberty.¹⁸¹ If they come ashore on their own in, *e.g.*, a lifeboat or after escaping, they

¹⁷⁵ Second Convention, *supra* note 10, art. 21; *see also* 2 Pictet, *supra* note 143, at 150-52.

¹⁷⁶ Second Convention, *supra* note 10, art. 14; *see also* 2 Pictet, *supra* note 143, at 104-07.

¹⁷⁷ Second Convention, *supra* note 10, art. 15; *see also* 2 Pictet, *supra* note 143, at 107-12.

¹⁷⁸ Second Convention, *supra* note 10, arts. 16-17; *see also* Third Convention, *supra* note 26; 2 Pictet, *supra* note 143, at 117-29.

¹⁷⁹ 2 Pictet, *supra* note 143, at 120, citing Hague XIII, *supra* note 10, art. 24; *but see* 2 Oppenheim, *supra* note 74, §§ 345, 348a (disputing freedom for former prisoners of war).

¹⁸⁰ Second Convention, *supra* note 10, art. 15; *see also* 2 Pictet, *supra* note 143, at 120.

¹⁸¹ 2 Pictet, *supra* note 143, at 120, commenting on Second Convention, *supra* note 10, art. 15.

are also entitled to not being interned.¹⁸² With one exception, practice during the World Wars has displaced Hague XI rules for merchant ship crews.¹⁸³

Although the foregoing provisions often do not recite rules for ports, internal waters or the territorial sea, their effect on these areas is obvious, whether these areas are in enemy or neutral hands. Sooner or later these persons will likely be landed, and to be landed, perhaps in a port where there are nearby care facilities, whether by boat or by aircraft, they must traverse the territorial sea and perhaps internal waters.

The Second Convention has rules for hospital ships, including those under private ownership, coastal rescue craft and shore establishments established under the First Convention for treating the wounded and sick. They may not be attacked, unless after they have been first warned they have lost their protections by committing acts harmful to the enemy. Several other provisions deserve comment. state-operated coastal rescue craft and their fixed coastal installations must be protected insofar as operational requirements permit. Hospital ships in ports falling to the enemy must be authorized to leave the port. These vessels operate in areas of military operations at their own risk. Hospital ships as described in the Convention are not warships with respect to how long they may remain in port. They may arm their crews or sickbays to maintain order, for personal self-defense (e.g., personal side arms), or to defend the wounded and sick. Hospital ships' religious personnel, medical personnel, and crews in the service

¹⁸² 2 Pictet, *supra* note 143, at 120. A case can be made for internment, however, by analogy to enemy aviators who land their warplanes on neutral territory.

¹⁸³ I.A. Shearer, *Commentary*, in Natalino Ronzitti, *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* 183, 187-88 (1988), noting that Hague XI, *supra* note 10, art. 5 has been confirmed by Second Convention, *supra* note 10, art. 4(A)(5), declaring that seafarers aboard enemy merchantmen may be detained and made prisoners of war, but that practice has changed the art. 5 rule, which says that crew who are nationals of a neutral State aboard an enemy-flagged merchant ship cannot be made prisoners of war, and that the master and officers are entitled to this status if they give parole not to serve on an enemy ship during the war. *Id.* art. 6 would apply the parole standard to officers and crew of an enemy merchantman who are enemy nationals. *Id.* art. 8 says that arts. 5-7 principles do not apply to ships taking part in hostilities. *Id.* does not cover the situation of enemy crews aboard neutral merchantmen; World War II customary practice declared them prisoners of war.

of the ship, may not be captured and must be respected.¹⁸⁴ Although the Convention recites general rules for hospital ships and shore establishments, it is obvious that these ships, if they are not already in territorial or internal waters or a port, may head for a port through the territorial sea and/or internal waters. These principles would then come into play for the LOS areas in this analysis.¹⁸⁵ It is likely that First Convention-covered shore establishments may be in ports.

Medical aircraft, *i.e.*, those used exclusively for removing wounded, sick and shipwrecked and to transport medical personnel and equipment, may not be attacked and must be respected by parties to a conflict while these planes fly at heights, at times and on routes agreed to by the parties. These flights cannot go over enemy or enemy-occupied territory. Medical aircraft must obey summonses to land on land or water. After examination, the aircraft and its occupants may continue the flight. If a medical aircraft lands involuntarily on land or water in enemy or enemy-occupied territory, the wounded, sick and shipwrecked, and the aircraft crew become prisoners of war. Medical personnel must be treated like other medical personnel under the Convention.¹⁸⁶ Medical aircraft may fly over neutral territory, land

¹⁸⁴ First Convention, *supra* note 26, art. 20; Second Convention, *supra* note 10, arts. 22-37. Protocol I, *supra* note 25, art. 22 adds that Second Convention provisions also apply if hospital ships carry shipwrecked, wounded or sick civilians. Protocol I, *supra* art. 23, says that medical ships and craft other than those referred to in *id.* art. 22 must be respected and protected in the same way as mobile medical units under the 1949 Conventions and Protocol I. See also Bothe et al., *supra* note 27, at 143-45; Helsinki Principles, *supra* note 72, Principle 5.1.1 & cmt. (hospital ships in belligerent ports); 1 Pictet, *supra* note 171, at 199-200; 2 Pictet, *supra* note 143, ch. 3; San Remo Manual, *supra* note 27, ¶¶ 47(a), 48-51 & cmts; Sandoz et al., *supra* note 27, at 253-78. By contrast, unless there are issues of seaworthiness, Hague XIII, *supra* note 10, art. 14 limits warship stays in neutral ports to 24 hours. See *infra* notes 222-24 and accompanying text. Protocol I, *supra* arts. 8(c)-8(g), 8(1)-8(j) define, for purposes of the Protocol, "medical personnel," "religious personnel," "medical units," "medical transportation," "medical transports," "medical ships and craft," and "medical aircraft." See also Bothe et al., *supra* at 97-101; 2 O'Connell, *supra* note 28, at 1119-22; San Remo Manual, *supra* ¶¶ 13(e), 13(f); Sandoz et al., *supra* at 124-32.

¹⁸⁵ A hospital ship is protected even if it is in a port where there are military objectives. 2 Pictet, *supra* note 143, at 157.

¹⁸⁶ Second Convention, *supra* note 10, art. 39, referring to *id.* arts. 36-37; see also Protocol I, *supra* note 25, arts. 24-30 (additional rules for medical aircraft agreements, operations, notifications, landing and inspections); Third Convention, *supra* note 26; Bothe et al., *supra* note 27, at 149-63; 2 Pictet, *supra* note 143, at 215-22; San Remo Manual, *supra* note 27, ¶53(a);

there if necessary, or use that territory as a port of call. Neutral States must be notified of projected passage. These aircraft are immune from attack while they fly on routes and at heights and times specifically agreed among belligerents and the neutral state. Neutrals may condition or restrict passage or landing of these aircraft on their territory; conditions or restrictions must apply equally to all warring States. If the wounded, sick or shipwrecked are disembarked with neutral local authorities' consent on neutral territory, they must be detained by the neutral where international law requires it so that they cannot further take part in operations of war. The Power upon whom they depend must bear the cost of their accommodation and internment.¹⁸⁷ The medical aircraft rules do not declare their specific applicability to the territorial sea, internal waters or ports, but as in the case of hospital ships, it is obvious that these rules apply to these areas, particularly since treatment of the wounded may depend on getting them to the nearest medical facility ashore, *i.e.*, in a port.

Medical transports, *i.e.*, vessels chartered to carry equipment exclusively intended for treating the wounded and sick or to prevent disease, are subject to cartel arrangements for sailing, provided the adverse Power is notified of, and approves, their voyage. The adverse Power has the right to board these carriers but cannot capture them or seize the equipment. Parties may agree to place neutral observers aboard transports to verify equipment carried.¹⁸⁸ Belligerents cannot deprive opponents of humanitarian relief supplies sent by sea.¹⁸⁹ As in the case of hospital ships and medical aircraft, the territorial sea, inland

Sandoz et al., *supra* note 27, at 279-324; *supra* note 152 and accompanying text.

¹⁸⁷ Second Convention, *supra* note 10, art. 40; *see also* Protocol I, *supra* note 25, art. 31 (additional rules for flights over territory of neutral States or States not party to a conflict); Bothe et al., *supra* note 27, at 163-67; 2 Pictet, *supra* note 143, at 120, 222-25; Sandoz et al., *supra* note 27, at 339-42.

¹⁸⁸ Second Convention, *supra* note 10, art. 38. Protocol I, *supra* note 25, art. 23, says that medical ships and craft other than those referred to in *id.* art. 22 and in Second Convention, *supra* art. 38 must be respected and protected in the same way as mobile medical units under the 1949 Conventions and Protocol I. *See also* Bothe et al., *supra* note 27, at 146-49; 2 Pictet, *supra* note 143, at 212-15; San Remo Manual, *supra* note 27, ¶¶ 47(b), 48 & cmts.; Sandoz et al., *supra* note 27, at 261-82.

¹⁸⁹ Fourth Convention, *supra* note 26, arts. 23, 59; Protocol I, *supra* note 25, arts. 54, 69-70; Bothe et al., *supra* note 27, at 334-42, 429-37; Helsinki Principles, *supra* note 72, Principle 5.3 & cmt.; San Remo Manual, *supra* note 27, ¶47(c)(ii), 48 & cmts. (vessels exempt from attack if they do not lose immunity by acting contrary to their normal role); Sandoz et al., *supra* note 27, at 651-59, 809-29; Thomas & Duncan, *supra* note 2, ¶ 8.4.1.2.

waters or ports and their facilities may play a role in observance of these rules.

As noted above, once persons entitled to Second Convention protections are ashore in port or on land, rules applying to the wounded and sick on land,¹⁹⁰ protections for prisoners of war,¹⁹¹ or for civilians,¹⁹² depending on these persons' status, apply to them.

2. TREATIES GOVERNING WAR AT SEA AND NEUTRALITY

International agreements governing maritime neutrality and methods and means of warfare have implications for the territorial sea, ports and inland waters. Many of these have become obsolescent with respect to their specific rules and have been supplemented by customary law and general principles.

The earliest general agreement on rules for war at sea, the Declaration Respecting Maritime Law (1856), abolished privateering, provided that a neutral flag covers enemy goods except contraband, which is liable to capture, and that blockades must be effective, *i.e.*, maintained by a force sufficient to prevent access to an enemy's coast.¹⁹³ Its principles are now considered customary law. Privateering, the commissioning of merchantmen to attack enemy shipping carrying contraband, is now obsolete.¹⁹⁴ What is contraband continues to be debated, but the principle of neutral flags covering

¹⁹⁰ First Convention, *supra* note 26; *see also supra* notes 140-53 and accompanying text.

¹⁹¹ Third Convention, *supra* note 26; *see also supra* notes 140-53 and accompanying text.

¹⁹² Fourth Convention, *supra* note 26; *see also supra* notes 140-53 and accompanying text.

¹⁹³ Declaration Respecting Maritime Law, *supra* note 10.

¹⁹⁴ Although U.S. Const. art. I, § 8, cl. 11 empowers Congress to issue letters of marque and reprisal, the United States, then and now is almost alone among maritime States that is not a party, declared it would abide by the privateering prohibition of Declaration Respecting Maritime Law, *supra* note 10, during the Civil War and the 1898 Spain-U.S. War. *Introductory Note*, SCHINDLER & TOMAN, *supra* note 27, at 1055; Hisakazu Fujita, *Commentary*, in Ronzitti, *supra* note 183, at 66, 68, 70; *see also* COLOMBOS, *supra* note 28, §§ 500, 536-38; 2 O'Connell, *supra* note 28, at 1102-03. No State has acceded to the Declaration since 1909, but treaty succession principles and acceptance of the Declaration as custom binds much of the world. *See generally Final Report*, *supra* note 153; Symposium, *supra* note 153; Walker, *supra* note 153. U.S. legislation criminalizes certain acts of privateering. 18 U.S.C. § 1654 (2006).

enemy goods except contraband continues as a customary rule.¹⁹⁵ The rule of effective blockade remains a customary norm.¹⁹⁶ Blockades cannot prevent passage of relief supplies consigned for humanitarian purposes.¹⁹⁷

The 1907 Hague Conventions may be effective within their scope. Although their *inter se* clauses¹⁹⁸ would seem to limit their usefulness as treaty law today, if treaty succession principles apply,¹⁹⁹ or a treaty rule has evolved into or codifies custom or a general principle of law, they remain significant.

Hague VI declares that if a merchant ship registered under an enemy flag is in an adversary's port at the beginning of hostilities, that ship should be allowed to depart immediately or after a reasonable time and to proceed directly to its destination. Those ships in an enemy port and unable to depart because of force majeure may not be confiscated;

¹⁹⁵ Fujita, *supra* note 162, at 68-69, 71-72; *see also* Helsinki Principles, *supra* note 72, Principles 5.2.2-5.2.5 & cmts., *inter alia* makes the important point that goods with a neutral destination coming from a belligerent's port do not constitute contraband. These goods may be seized, however, if they contribute to the enemy's warfighting or war-sustaining effort. San Remo Manual, *supra* note 27, ¶60(g) & cmts.; Thomas & Duncan, *supra* note 2, ¶¶ 8.1.1, 8.2.2.

¹⁹⁶ What is an effective blockade, *i.e.*, a blockade other than a paper blockade, remains an issue. Fujita, *supra* note 162, at 69, 72-73. Most blockade rules are in customary law. U.N. Charter art. 42 authorizes blockade by U.N. Security Council resolution; *see also* COLOMBOS, *supra* note 28, §§ 503-05, 760-93, 714-844; Goodrich et al., *supra* note 4, at 314-17; 1 SIMMA, *supra* note 4, at 749-59; Naval Conference of London, Declaration Concerning the Laws of Naval War, Feb. 26, 1909, arts. 1-21 (hereinafter London Declaration), *reprinted in* SCHINDLER & TOMAN, *supra* note 27, at 1143, 1113-15 and never ratified as a treaty; 2 O'Connell, *supra* note 28, at 1115, 1142-47, 1150-58; San Remo Manual, *supra* note 27 ¶¶ 93-104; Helsinki Principles, *supra* note 72, Principle 5.2.10; Thomas & Duncan, *supra* note 2, ¶ 7.7 recites blockade rules. *See also* *Introductory Note*, in SCHINDLER & TOMAN, *supra* at 1111 (London Declaration was never ratified but its rules are recognized in practice); Frits Kalshoven, *Commentary*, in Ronzitti, *supra* note 183, at 257, 259-62, 274.

¹⁹⁷ Helsinki Principles, *supra* note 72, Principle 5.3 & cmt., citing Fourth Convention, *supra* note 26, art. 61; Protocol I, *supra* note 25, arts. 69, 70. *See also supra* note 189 and accompanying text.

¹⁹⁸ Hague VI, *supra* note 10, art. 6; Hague VII, *supra* note 10, art. 7; Hague VIII, *supra* note 10, art. 7; Hague IX, *supra* note 10, art. 8; Hague XI, *supra* note 10, art. 9; Hague XIII, *supra* note 10, art. 28.

¹⁹⁹ *See generally* *Final Report*, *supra* note 153; Symposium, *supra* note 153; Walker, *supra* note 153.

they may only be detained with no obligation to pay for detention, and must be restored to owners at the end of the war. Enemy cargo aboard these ships is subject to the same rules, except that it may be requisitioned on payment of compensation. Enemy merchantmen on the high seas that touch port are subject to the law of naval warfare. Because major maritime States did not ratify the Convention or later denounced it, Hague VI has little impact today²⁰⁰ and may be in desuetude,²⁰¹ although conceivably its terms, on paper, could affect the LOAC governing ports.

States continue to ratify Hague VII, which declares rules for converting merchant ships into warships.²⁰² Hague VII's provisions defining a warship carry over into the LOS conventions, albeit in slightly different language.²⁰³ The treaty does not discuss ports as such, but there are obvious implications for a port where a conversion takes place, *i.e.*, a possibility of attack on that shipyard during armed conflict.

Hague VIII, stating rules for laying automatic submarine contact mines, is a good example of technological obsolescence. Although these kinds of mines may still be used, and the Hague rules continue to apply to them as treaty and customary law, Hague VIII was one of the least successful of the 1907 agreements and only questionably applies to new generations of naval mines, *e.g.*, mines that

²⁰⁰ These rules do not apply to merchant ships whose build shows they are intended for conversion into warships. Hague VI, *supra* note 10, arts. 1-5. The Convention, not in force for the United States and some maritime powers and denounced by others, is insignificant today, except for its rules declaring that some merchant ships and cargoes have a different status in the law of naval warfare. COLOMBOS, *supra* note 28, §§ 676-80; 2 O'Connell, *supra* note 28, at 1103; Andrea de Guttry, *Commentary*, in Ronzitti, *supra* note 183, at 102, 108-09.

²⁰¹ San Remo Manual, *supra* note 27, ¶ 136 cmt. 136.2.

²⁰² Hague VII, *supra* note 9; *see also* COLOMBOS, *supra* note 28, §§ 539-57; Gabriella Venturini, *Commentary*, in Ronzitti, *supra* note 183, at 120-26.

²⁰³ Compare Hague VII, *supra* note 10, arts. 2-3 with UNCLOS, *supra* note 2, art. 29; High Seas Convention, *supra* note 8, art. 8(2); *see also supra* notes 35, 49 and accompanying text. Treaty succession principles may make Hague VII, *supra* applicable to more States. *See generally* Final Report, *supra* note 153; Symposium, *supra* note 153; Walker, *supra* note 153. The similar warship definitions in the LOS conventions and Hague VII strongly suggests that it is a universal customary rule. *See supra* notes 39, 68 and accompanying text.

lie on the sea bottom and rise to hit a target.²⁰⁴ One provision, forbidding laying anchored automatic contact mines off an enemy coast and ports with the sole object of intercepting commercial shipping, has become a customary rule applying to all kinds of mines.²⁰⁵ Another is the requirement to notify States of danger zones.²⁰⁶ A third is a minelaying state's duty to remove its mines at war's end.²⁰⁷ (The *San Remo Manual* and the *Helsinki Principles* add that a neutral may remove illegally laid mines.²⁰⁸)

Hague IX's rule, forbidding bombardment by naval forces of undefended ports, towns, villages, dwellings and buildings, or because automatic submarine contact mines are anchored off the harbor, was ignored in World Wars I and II and is probably obsolete today.²⁰⁹ A commentator suggests use of Protocol I's military objective standard as a more appropriate general principle,²¹⁰ also noting that Hague IX,

²⁰⁴ Howard S. Levie, *Commentary*, in Ronzitti, *supra* note 183, at 140, 146, discussing Hague VIII, *supra* note 10; *see also* COLOMBOS, *supra* note 28, § 566; 2 O'Connell, *supra* note 28, at 1103, 1138-39; *San Remo Manual*, *supra* note 27, at 168-69; Thomas & Duncan, *supra* note 2, ¶ 9.2.1.

²⁰⁵ Neutral States laying automatic contact mines must observe the same rules and take the same precautions, *e.g.*, notifying States of where mines have been laid. Hague VIII, *supra* note 10, arts. 2, 4; Levie, *supra* note 204, at 143-44. *San Remo Manual*, *supra* note 27, ¶¶ 85-89 and Thomas & Duncan, *supra* note 2, ¶ 9.2.3, at 444-47 recite much more detailed rules to assure passage and to deny belligerents a right to mine neutral waters. COLOMBOS, *supra* note 28, § 563 comments that this provision seems useless; no belligerent will likely admit laying mines solely to destroy enemy merchantmen and not enemy warships.

²⁰⁶ Neutrals have the same duty. Hague VIII, *supra* note 10, arts. 2, 3; Levie, *supra* note 204, at 143-44; *see also* *San Remo Manual*, *supra* note 27, ¶ 83 & cmts.; Thomas & Duncan, *supra* note 2, ¶ 9.2.3, at 443.

²⁰⁷ Hague VIII, *supra* note 10, art. 5; Levie, *supra* note 204, at 144-45, says that this was the basis for mine clearance after World Wars I and II and the Vietnam War, noting Agreement Relative to the Postwar Mine Clearance in European Waters, Nov. 22, 1945, 3 Bevans 1322. *See also* *San Remo Manual*, *supra* note 27, ¶¶ 84, 90-91 & cmts.; Thomas & Duncan, *supra* note 2, ¶ 9.2.3, at 444 & n.29.

²⁰⁸ *San Remo Manual*, *supra* note 27, ¶ 92 & cmt.; *Helsinki Principles*, *supra* note 72, Principle 6.2 & cmt.

²⁰⁹ 2 O'Connell, *supra* note 28, at 1139; Horace B. Robertson, Jr., *Commentary*, in Ronzitti, *supra* note 183, at 161, 163-66, on Hague IX, *supra* note 10, art. 1, *inter alia* citing COLOMBOS, *supra* note 28, § 587. *See also id.* §§ 580-87.

²¹⁰ Robertson, *Commentary*, *supra* note 209, at 164-65, referring to Protocol I, *supra* note 25, art. 52(2); *see also* Robertson, *The Principle*, *supra* note 28; *supra* note 28 and accompanying text. Except its bar on reprisals on

Articles 2 and 5 seem to sub silentio adopt the military objective principle in listing what are valid targets.²¹¹ Other provisions appear largely irrelevant to modern naval warfare; the need for a separate modern treaty has been questioned.²¹²

Hague XI places limits on seizing postal correspondence, except in cases of blockade; vessels used exclusively for coastal fishing or local trade, which are not subject to capture unless they take part in hostilities; and vessels on religious, scientific or philanthropic missions, which are not subject to capture unless they take part in hostilities.²¹³ These standards for coasters have implications for the territorial sea and, by extension, internal waters and ports. The mail ship prohibition has little relevance today, since most correspondence goes by air or other means, e.g., telex or e-mail. The rule against seizing coastal fishing or trading vessels unless they aid the enemy remains highly relevant and is a customary rule. The exemption for ships on scientific, religious or philanthropic missions is also a customary rule and is relevant today, particularly if some terrorists may use these vessels as masks for their operations.²¹⁴

civilians, Protocol I, *supra* art. 52 represents customary law. *See supra* note 28 and accompanying text.

²¹¹ Robertson, *Commentary*, *supra* note 209, at 166-67, discussing Hague IX, *supra* note 10, arts. 2, 6, and citing Protocol I, *supra* note 25, art. 52(2) and Hague Air Rules, *supra* note 27, art. 24, in SCHINDLER & TOMAN, *supra* note 27, at 319.

²¹² Robertson, *Commentary*, *supra* note 209, at 166-68, 170, referring to Hague IX, *supra* note 10, arts. 5-8.

²¹³ Hague XI, *supra* note 10, arts. 1-4. UNCLOS, *supra* note 2, arts. 21(1)(g), 40, 87(1), 143, 238-65, 275, 277, 297 lays down comprehensive marine scientific research (MSR) standards; among these is the rule that coastal States may regulate MSR in the territorial sea. *See also Report*, *supra* note 155, at 273-77, defining MSR. These UNCLOS provisions, like the rest of the LOS Conventions, are subject to the LOAC, self-defense principles, and mandatory Charter law. *See supra* notes 3-51 and accompanying text.

²¹⁴ Shearer, *supra* note 183, at 183-87, 189-90. *See also* COLOMBOS, *supra* note 28, §§ 656-59, 662-63, 665-73; 2 O'Connell, *supra* note 28, at 1122-24; San Remo Manual, *supra* note 27, ¶¶ 47(f), 47(g), 48 & cmts.; Thomas & Duncan, *supra* note 2, ¶¶ 8.2.3 at 417, 8.3.2, 8.4.1; The *Pacquete Habana*, 175 U.S. 677 (1900); *supra* note 212 and accompanying text for analysis of Hague XI, *supra* note 10, arts. 5-8. Fishing and scientific mission vessels are also exempt from attack unless they violate conditions of their immunity. San Remo Manual, *supra* ¶¶ 136(e), 136(f), 137 & cmts., notes that the Hague XI, *supra* mail ship exclusion never became a customary norm.

So long as they do not depart from their normal role, *e.g.*, by committing a hostile act, other vessels not listed in Hague XI that have or may have immunity from capture or attack include: cartel vessels;²¹⁵ ships transporting cultural property;²¹⁶ passenger ships when engaged only in carrying civilian passengers;²¹⁷ vessels designed or adapted exclusively for responding to maritime environmental pollution incidents;²¹⁸ vessels that have surrendered;²¹⁹ life rafts and lifeboats.²²⁰

Besides medical aircraft, aircraft granted safe conduct by agreement between parties to a conflict, and civil airliners, if innocently employed in their agreed or normal (in the case of airliners) roles and do not intentionally hamper combatants' movements, are exempt from attack unless, *inter alia*, circumstances of noncompliance with the rules indicate the aircraft has become a military objective.²²¹

²¹⁵ San Remo Manual, *supra* note 27, ¶¶ 47(c)(ii), 48, 136(c)(I), 137 & cmts., *inter alia* citing Third Convention, *supra* note 26, art. 118, noting that cartel ships are a traditional means for exchanging prisoners of war or official communications between States. They have also been used to return an enemy's embassy staff at war's outbreak. They are immune from attack if they do not violate terms of the agreement or otherwise commit hostile acts. *see also* COLOMBOS, *supra* note 28, §§ 660-61; 2 O'Connell, *supra* note 28, at 1123; Thomas & Duncan, *supra* note 2, ¶¶ 8.2.3 at 413, 8.3.2, 8.4.1.

²¹⁶ San Remo Manual, *supra* note 27, ¶¶ 47(d), 48, 136(d), 137 & cmts., referring to Cultural Property Convention, *supra* note 33, art. 12(3); *quaere* whether this exemption is mandatory or discretionary for countries like the United States that have not ratified the Convention. As a policy, as distinguished from a rule of law, it seems wise to exempt these ships if they do not contribute to the enemy war effort. Thomas & Duncan, *supra* note 2, does not list them as exempt from attack.

²¹⁷ San Remo Manual, *supra* note 27, ¶¶ 47(e), 48 & cmts.; *see also* Thomas & Duncan, *supra* note 2, ¶¶ 8.2.3 at 418, 8.3.2, 8.4.1. San Remo Manual, *supra* ¶ 140 would prohibit destruction of liners carrying only civilians; they should be diverted to an appropriate area or port to complete capture.

²¹⁸ San Remo Manual, *supra* note 27, ¶¶ 47(h), 48, 136(g) & cmts., suggesting that this exemption is progressive development and not customary law.

²¹⁹ *Id.* ¶¶ 47(i), 48 & cmts.; *see also* Thomas & Duncan, *supra* note 2, ¶ 8.2.1, listing methods to signal surrender.

²²⁰ San Remo Manual, *supra* note 27, ¶¶ 47(j), 48 & cmts. (customary law), *inter alia* citing Second Convention, *supra* note 10, arts. 12, 18; Protocol I, *supra* note 25, art. 8(b); *see also supra* notes 109-12, 174 and accompanying text.

²²¹ Cartel aircraft must also comply with the details of the agreement, including availability for inspection. San Remo Manual, *supra* note 27, ¶¶

These lists of vessels and aircraft immune from capture, and in some cases attack (*e.g.*, liners carrying only civilians), might be considered as subjects for open ocean warfare; however, all of them could be subject to capture or attack in the territorial sea. To give one horrific example that helped push the United States into World War I, the *Lusitania* today lies, at least in part, on the bottom in Ireland's territorial sea.

Hague XIII, reciting neutral States' rights and duties during naval warfare, continues to be relevant today for ports, internal waters and the territorial sea. Belligerents must respect neutrals' rights and to abstain from acts in neutral territory or waters that would be a violation of neutrality. Acts of hostility, including belligerents' search and capture in neutral territorial waters, are violations of neutrality. A neutral state, if it has the means to do so, must try to release a prize captured by a belligerent. If the neutral cannot do so, the captor must release the prize with its officers and crew.²²² Although a neutral is not bound to prevent export or transit of war goods, it must not supply a belligerent or allow, within means at its disposal, outfitting or arming a ship that it has reason to believe is intended to operate against a state with which the neutral is at peace. It must also prevent, within means at its disposal, departure of such a ship if that vessel has been adapted for war within its jurisdiction.²²³ A neutral must impartially apply its prohibitions on port, roadstead or territorial sea entry by belligerent warships or their prizes. If a belligerent ship fails to obey the rules, it may be barred from entry.²²⁴ Enemy warship or enemy prize passage through a neutral's territorial sea, or belligerents' employing neutral state pilots, do not affect a coastal state's neutral status.²²⁵ Warships

53(b), 53(c), 55-56, 62-64 & cmts.; Thomas & Duncan, *supra* note 2, ¶¶ 8.2.3 at 413, 417, 418, 8.3.2, 8.4.1.

²²² Belligerents may not establish prize courts on neutral territory or aboard ships in neutral waters. Hague XIII, *supra* note 10, arts. 1-4; *see also* Helsinki Principles, *supra* note 72, Principle 1.4 & cmt.; San Remo Manual, *supra* note 27, ¶¶ 14 (neutral waters definition), 15 (belligerents' hostile actions forbidden in neutral waters), 17 (belligerents may not use neutral waters as sanctuary), 18 (belligerent entry into neutral airspace forbidden). If a coastal State allows or tolerates use of its waters or airspace above them for belligerent purposes, the other belligerent may act to take necessary and appropriate action to end such use. Helsinki Principles, *supra*, Principle 2.1 & cmt.; San Remo Manual, *supra* ¶ 22.

²²³ Hague XIII, *supra* note 10, arts. 5-8.

²²⁴ *Id.* arts. 9-10.

²²⁵ *Id.* arts. 10-11; *see also* San Remo Manual, *supra* note 27, ¶¶ 19,

cannot remain in a neutral port or roadstead longer than 24 hours, unless the vessel must make essential repairs or there is bad weather. These warships cannot use neutral ports, roadsteads or territorial waters to replenish or increase war supplies, or to augment their crews. They may take aboard food supplies, up to the peacetime standard, and only enough fuel to get home. The maximum number of warships in a neutral port is three unless there are special provisions to the contrary. If there are warships of both belligerents in port at the same time, which might be the case at outbreak of an armed conflict, 24 hours must elapse between departure of warships of different nationality. If a belligerent warship does not leave the neutral's port when it is not entitled to remain, the neutral state must take measures to bar the ship's departure and intern its officers and crew.²²⁶ A neutral's exercising rights under Hague XIII cannot be considered an unfriendly act by a belligerent.²²⁷ (The *Helsinki Principles* make the important points, not directly stated in Hague XIII, that neutral ships in belligerent ports have the same protections as civilian objects in land warfare, neutral warships in belligerent ports retain their right of self-defense, and that neutral ships have the right of innocent passage through a belligerent's territorial sea, subject to the belligerent's right to impose reasonable defense requirements.²²⁸) With some exceptions, e.g., the impact of UNCLOS and questions on belligerent warship "passage" through neutral territorial waters, Hague XIII's rules have largely become customary law, although the treaty covers only a small part of

²²⁶ These warships cannot refuel in that neutral State's port during the next three months. Prizes, convoyed by a warship or sailing independently, may be admitted to neutral ports pending a prize court decision. A crew of a convoyed prize may go aboard its accompanying warship. If the prize is not convoyed, the prize crew is "left at liberty." Neutrals must exercise such surveillance as it has at its disposal to prevent violations of the treaty. Hague XIII, *supra* note 10, arts. 12-25; *see also* San Remo Manual, *supra* note 27, ¶¶ 20, 21. A neutral may impartially suspend innocent passage if it is essential to protect its security. Helsinki Principles, *supra* note 72, Principle 2.3 & cmt, *inter alia* citing UNCLOS, *supra* note 2, art. 25(3); San Remo Manual, *supra* ¶ 19; *see also* Helsinki Principles, *supra*, Principle 2.2 & cmt.; *supra* notes 2, 68-72, 73-75, 86-87, 136-40, 154, 158 and accompanying text.

²²⁷ Hague XIII, *supra* note 10, art. 26.

²²⁸ Neutrals may convoy neutral vessels through other neutral countries' waters in accordance with innocent passage rules or with the coastal State's approval. *Cf.* Helsinki Principles, *supra* note 72, Principles 5.1.1, 5.28, 5.29, 6.1 & cmts.

neutrality law in naval warfare. Most of its rules have not been applied since World War II.²²⁹

Since 1907 no general international agreements have laid down LOAC rules that specifically affect ports, internal waters or the territorial sea. There are two regional treaties that recite LOAC rules related to these areas: the 1928 Havana Convention on Maritime Neutrality and the 1938 Stockholm Declaration Regarding Similar Rules of Neutrality,²³⁰ both of which echo Hague XIII rules and thereby strengthen them.²³¹ As analyses of the 1856 Declaration and Hague Conventions demonstrate, most rules have developed as customary law or as general principles of law, repeated and sometimes included in national military manuals²³² or NGO publications.²³³

C. GENERAL PRINCIPLES OF THE LAW OF NAVAL WARFARE AND NEUTRALITY

If no specific rules apply to a naval warfare or neutrality situation, there are general principles of warfare governing military operations, whether on land, sea or in the air. Attacks must be carried

²²⁹ Dietrich Schindler, *Commentary*, in Ronzitti, *supra* note 183, at 211-21; see also COLOMBOS, *supra* note 28, §§ 722, 725-44.

²³⁰ Declaration for the Purpose of Establishing Similar Rules of Neutrality, May 27, 1938, 188 L.N.T.S. 294; Convention on Maritime Neutrality, *supra* note 10.

²³¹ Ove Bring, *Commentary*, in Ronzitti, *supra* note 183, at 839, 843; L.D.M. Nelson, *Commentary*, in *id.* 779, 783.

²³² E.g., Thomas & Duncan, *supra* note 2, the text of which is on the bridge of every U.S. warship and aboard many other States' warships. Michael N. Schmitt, *Preface*, in *The Law of Military Operations*, *supra* note 28, at xi. Dieter Fleck et al., *The Handbook of Humanitarian Law in Armed Conflicts* 555-63 (1999) lists humanitarian law handbooks published by States. Some of these sources may publish more than humanitarian law rules; all are subject to revision and updating. Two cases in point are Thomas & Duncan, *supra*, the annotated version of the U.S. Commander's Handbook on the Law of Naval Operations, *supra* note 2, and UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), which replace the sources Fleck et al., *supra* cite. On-line sources, e.g., the U.S. Naval War College website for the Commander's Handbook, should be researched for amendments and newer editions. Fleck et al., *supra* publishes the 1992 German Joint Service Regulations (Zdv) 15/2 in bold type. Dieter Fleck, *Introduction*, in *id.* xi, xii.

²³³ Chief among these are the Helsinki Principles, *supra* note 72, published by the International Law Association; the San Remo Manual, *supra* note 27, sponsored by the International Institute for Humanitarian Law. The Oxford Manual, *supra* note 88, published in 1913 by the Institute de Droit International, was an early attempt at comprehensive treatment.

out against military objectives and not civilian objects,²³⁴ observing principles of necessity and proportionality.²³⁵ Military commanders are held to a standard of what they know, or should have known, at the time an attack order is given.²³⁶ Necessity and proportionality standards during armed conflict may be different from those governing self-defense.²³⁷ For example, a deliberate attack on a port facility during armed conflict demands more consideration of what is a proper military objective than may be possible if a warship in the territorial sea, internal waters or a port faces imminent or actual missile attack. If a country is in an armed conflict situation, the same rules apply to its responses to attacks or displays of hostile intent by States other than its enemies.

D. THE DUE REGARD PRINCIPLE

The *San Remo Manual* developed the “due regard” principle, taken from clauses in the LOS conventions, for situations involving the maritime environment, declaring that belligerents must have due regard for the maritime environment in combat operations.²³⁸

²³⁴ Protocol I, *supra* note 25, arts. 48, 52(2); *see also* San Remo Manual, *supra* note 27, ¶¶ 38-41; Robertson, *The Principle*, *supra* note 28; *supra* note 28 and accompanying text.

²³⁵ Protocol I, *supra* note 25, arts. 51(5)(b), 57(2)(a)(iii); San Remo Manual, *supra* note 27, ¶ 46; Thomas & Duncan, *supra* note 2, ¶ 5.2, at 292, 294 nn.6, 7; *supra* notes 27, 29 and accompanying text.

²³⁶ *See supra* notes 22-35 and accompanying text.

²³⁷ Walker, *supra* note 22, at 352; *see also supra* notes 3-35 and accompanying text.

²³⁸ San Remo Manual, *supra* note 27, ¶¶ 12, 34, 36, 88, 106(c) & cmts.; *see also id.* ¶ 36 (“take care” to avoid damaging cables, pipelines not exclusively serving belligerents); International Committee of the Red Cross, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (1994), *reprinted* in Thomas & Duncan, *supra* note 2, Annex 8A-1; *id.* ¶ 8.1.3; Walker, *supra* note 22, ch. 6 (*inter alia* criticizing San Remo Manual, *supra*); Horace B. Robertson, Jr., *The “New” Law of the Sea and the Law of Armed Conflict at Sea*, in John Norton Moore & Robert F. Turner, *Oceans Law*, in READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1978-1994, 68 INT’L L. STUD. SER. 45, 263, 302 & n.1 (1995). On the LOS, *see generally*, e.g., UNCLOS, *supra* note 2, art. 87(2) (states exercising LOS high seas freedoms must pay due regard to others’ high seas rights); High Seas Convention, *supra* note 8, art. 2 (“reasonable regard” to other States’ interests). *Report*, *supra* note 155, at 220-28, offers definitions for due regard; the phrase occurs over 20 times in UNCLOS, *supra*.

E. *SPECIAL SITUATIONS IN THE LAW OF NAVAL WARFARE AND NEUTRALITY*

As noted above, the rules for excluding merchantmen from, and asking third state warships to leave, an immediate arena of military operations might apply in the territorial sea by analogy in LOAC situations where self-defense is not implicated. States engaged in these military operations retain the right of individual, unit, national and collective self-defense and immunity status for ships and military aircraft.²³⁹ Military aircraft and ships may enter territorial waters and ports in distress situations during armed conflict, although they and their crews may be subject to internment for the duration of the conflict if they are belligerents, depending on circumstances.²⁴⁰

IV. REPRISALS; RETORSIONS; STATE OF NECESSITY

States may commit reprisals to compel an opposing state to cease its breach of international law. A reprisal is a proportional breach of the law; before imposing a reprisal, a state must notify the wrongdoer of its intended action to give the wrongdoer a chance to end its unlawful course.²⁴¹ Reprisals might be contrasted with retorsions,

²³⁹ See *supra* Parts II.B.1, II.B.4.

²⁴⁰ A belligerent's warship or aircraft entering territorial waters of a co-belligerent (alliance or coalition partner) in distress obviously would not be interned. There may be other situations where the LOAC does not require internment. See *supra* notes 138, 222-29 and accompanying text.

²⁴¹ Most commentators say use of force as a reprisal during situations not involving armed conflict violates international law. Project Case, *supra* note 158, 1997 I.C.J. at 54; Nicaragua Case, *supra* note 11, 1986 I.C.J. at 127; Friendly Relations Declaration, *supra* note 7; Roberto Ago, *Addendum to Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/318 & Add. 1-4, Y.B. INT'L L. COMM. 13, 69-70 (1981); D.W. Bowett, *Self-Defence in International Law* 13 (1958); Brierly, *supra* note 7, at 401-02; Ian Brownlie, *International Law and the Use of Force by States* 281 (1963); COLOMBOS, *supra* note 28, § 863; Goodrich et al., *supra* note 4, at 340-47; 2 Oppenheim, *supra* note 74, §§ 43, 52a; Stone, *supra* note 27, at 286-87; Thomas & Duncan, *supra* note 2, ¶¶ 6.2.3, 6.2.3.1; D.W. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 20 (1972); Rosalyn Higgins, *The Attitude of Western States Toward Legal Aspects of the Use of Force*, in Anthony Cassese, *The Current Legal Regulation of the Use of Force* 435, 444 (1986); but see, e.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 215-16 (2d ed. 1988) (States can use reprisals involving force during peacetime). For analysis of wartime reprisals for breach of blockade rules, see COLOMBOS, *supra* note 28, §§ 845-62; see also Franck, *supra* note 20, at 719-42 (noting

which are unfriendly but proportionate lawful acts²⁴² that have the same purpose, compelling law compliance by a wrongdoer. Both might be invoked in LOAC situations. There are important exceptions to the right of reprisal, e.g., the Second Convention bar on reprisals against the wounded, sick and shipwrecked and personnel, ships and equipment entitled to that Convention's protections; however, that bar that does not forbid retorsions.²⁴³ Sometimes the LOAC may declare that certain acts cannot be considered retorsions.²⁴⁴

The state of necessity principle may apply in a given situation. Recently the U.N. General Assembly approved the International Law Commission *Draft Articles on State Responsibility*, whose Article 25 lays down principles for circumstances justifying a breach of international law to avert a greater harm.²⁴⁵ An example might be a belligerent's entering a neutral state's territorial sea without notice to the neutral because of exigent circumstances to effect rescue of civilians in a sinking boat where the alternative would be loss of human life. This would be a technical breach of neutrality principles but should be excusable under the circumstances.²⁴⁶ State of necessity as an excuse for breach of law is different from use of the term in self-defense or LOAC situations, where the word means a limitation on action, rather than a justification for the action.

V. CONCLUSIONS

This article demonstrates that rules of international law different from those in the law of the sea applying to ports, port

distinction among proportionality in self-defense, LOAC and reprisal situations, and three other situations).

²⁴² Brierly, *supra* note 7, at 399; 2 Hyde, *supra* note 55, § 588; Frits Kalshoven, *Belligerent Reprisals* 27 (1971); 2 Oppenheim, *supra* note 74, § 135; RESTATEMENT, *supra* note 5, § 905 & r.n. 8; Stone, *supra* note 27, at 288-89. ILC Draft Articles on State Responsibility, *supra* note 4, Part 3, ch. 1, 2001 ILC Rep., *supra* note 4, at 324-54, reprinted in Crawford, *supra* note 4, at 281-302, would chart a new course away from traditional reprisal and retorsion law and substitute a new term, countermeasures.

²⁴³ Second Convention, *supra* note 10, art. 47; 2 Pictet, *supra* note 143, at 252-56; see also *supra* notes 28, 173 and accompanying text.

²⁴⁴ E.g., Hague XIII, *supra* note 10, art. 26, declaring that a neutral's exercising rights in *id.* may not be considered "an unfriendly act." See also *supra* note 195 and accompanying text.

²⁴⁵ See *supra* note 103-04 and accompanying text.

²⁴⁶ Previous hypotheticals, *supra* Part II.B.5.d, were in the LOS, not the LOAC, context posited here.

security and the nearby territorial sea may apply in armed conflict situations. These range from individual and collective self-defense under the Charter and customary law, or Charter law-based standards in binding U.N. resolutions, to law of armed conflict rules, which apply through the law of the sea conventions' "other rules" clauses. Law of treaties rules —e.g., *pacta sunt servanda*, impossibility of performance, fundamental change of circumstances, and armed conflict justifying suspending or nullifying treaty-based rules during the conflict — may apply. However, the law of treaties rules does not apply to rules that are part of customary international law. Belligerents must give due regard to standards for environmental protection. Special treaty rules and standards based on international custom and general principles for naval warfare and neutrality must be followed, as well as the general rules of military objective, necessity and proportionality during attacks, and customary law and general principles related to the LOAC, and these standards can be different than those applied in self-defense or Charter law situations. Today *jus cogens* is an additional factor that must be considered in the analysis

Sometimes the result can be quite different from law of the sea standards governing ports, ports security and the surrounding territorial sea. The *Maersk Alabama* piracy incident is an example. Although this case involved high seas issues at the start, the attacked vessel sought and reached Mombasa, Kenya, its port of destination after crossing Kenya's territorial sea.²⁴⁷ The law of ports, port security, and the territorial sea around all ports, will necessarily implicate these issues in the future.

²⁴⁷ See *supra* note 53 and accompanying text.