

The ever-existing “crisis” of the law of naval warfare

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Abstract

Although the subject of law of naval warfare was first in modern treaty-making in international humanitarian law (IHL), further treaty-making efforts that comprehensively deal with all matters of the law of naval warfare never really took off. This particular part of IHL has always been primarily governed by custom. Scholarly calls for revision have not pressed States into further treaty-making efforts, which gives the law of naval warfare a semblance of being continuously in a state of crisis. Conveniently for States, the San Remo Manual solved a significant portion of this crisis, but perhaps too successfully, as it may have taken away incentives for States to further develop the law. While the law of the sea has been steadily growing as a – codified – legal regime and protective rules of IHL garnered much attention, the law of naval warfare seems somewhat forgotten and crumbling in its details.

Keywords: Law of naval warfare, Second Geneva Convention, *San Remo Manual*, law of the sea, international humanitarian law at sea.

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Introduction

Naval forces continue to play a role in armed conflict. Navies were part of military operations that include Afghanistan (2001), the Second Gulf War (2003), Lebanon (2006), Gaza (2009), Libya (2011), Ukraine (since 2014) and Syria (2015). The reignited Russian–Ukrainian conflict of 2022 has also seen Russian naval forces

involved in the country's military operations.¹ Whereas, traditionally, the public consciousness imagines naval warfare mainly as “warship-to-warship” engagements, contemporary history and current naval operations predominantly tell a different story. Rather than conflict at sea, naval warfare increasingly involves contributing to armed conflict from the sea, in support of land operations. Illustratively, the Syrian conflict saw Russian warships firing missiles from the Caspian Sea onto Syrian territory,² American warships engaged Syrian airfields from the Mediterranean Sea³ and the UK, during the North Atlantic Treaty Organization's (NATO's) Operation Unified Protector, struck targets in Libya from the sea.⁴

Although naval forces continue to play a role in armed conflict, the law of naval warfare seems to stay behind in efforts to keep current. Ever since the Iraq–Iran War in the 1980s, scholars have been pressing the view that the laws of war applicable to naval warfare are outdated, unclear, to some extent obsolete and in any case in need of revision.⁵ The call for revision has since been a standard theme when discussing this particular subject of international humanitarian law (IHL). Existing treaties on the law of naval warfare regulate only specific portions. As a result, regulation primarily comes in the form of customary international law that has never been codified in treaties. For example, navies still employ blockades, but apart from the one rule in the Paris Declaration (1856), which requires that blockades must be effective,⁶ blockades are completely

- 1 Heather Mongilio, “Russian Navy Taking on Resupply Role Nearly 50 Days into Ukrainian Invasion”, *USNI News*, 11 April 2022, available at: <https://news.usni.org/2022/04/11/russian-navy-taking-on-resupply-role-nearly-50-days-into-ukrainian-invasion> (all internet references were accessed in September 2022).
- 2 Joshua Menks and Michael B. Petersen, “The ‘Kalibrization’ of the Russian Fleet. Destruction of Critical Infrastructure by Long-Range Precision Strikes Has Become the Russian Navy's Newest Mission”, *U.S. Naval Institute*, May 2022, available at: www.usni.org/magazines/proceedings/2022/may/kalibrization-russian-fleet; BBC, “Russian Missiles ‘Hit IS in Syria from Caspian Sea’”, 7 October 2015, available at: www.bbc.com/news/world-middle-east-34465425.
- 3 U.S. Department of Defense, “Statement from Pentagon Spokesman Capt. Jeff Davis on U.S. Strike in Syria”, 6 April 2017, available at: www.defense.gov/News/Releases/Release/Article/1144598/statement-from-pentagon-spokesman-capt-jeff-davis-on-us-strike-in-syria/.
- 4 See the pamphlet of the UK Royal Navy, “The Royal Navy & Libya: How Your Royal Navy Contributed to the Tri-Service, Multi-National Campaign in 2011”, available at: www.royalnavy.mod.uk/About-the-Royal-Navy/~/_media/Files/Navy-PDFs/About-the-Royal-Navy/The%20RN%20Contribution%20to%20Libya.pdf. It mentions that “Nuclear-powered attack submarines *HMS Triumph* and *HMS Turbulent* launched Tomahawk Land Attack Missiles against regime targets ashore. Helicopter carrier *HMS Ocean* operated Apache attack helicopters from 656 Squadron Army Air Corps which were able to target pro-Gaddafi forces with a high degree of precision.”
- 5 For the most recent example, see Andrew Clapham, “Belligerent Rights and the Future of Naval Economic Warfare”, in A. Clapham, *War*, Oxford University Press, Oxford, 2021; see also Andrew Clapham, “Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law”, *International Law Studies*, Vol. 97, 2021. More classic calls for revision are Natalino Ronzitti, “The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for its Revision”, in N. Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff Publishers, Dordrecht/Boston, MA/London, 1988; J. Ashley Roach, “The Law of Naval Warfare at the Turn of Two Centuries”, *American Journal of International Law*, Vol. 94, No. 1, 2000.
- 6 *Declaration Respecting Maritime Law*, 16 April 1856. Rule 4 states: “Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.”

governed by custom.⁷ To date, there has not been a comprehensive treaty governing all the rules of naval warfare. The most recent treaty on the war at sea is the Second Geneva Convention (GC II) on the wounded, sick and shipwrecked of 1949,⁸ which served primarily to update pre-existing treaties on IHL applicable at sea. Next to – or perhaps, because of – the fact that naval warfare has primarily been governed by customary law, soft law instruments, such as the Oxford Manual of 1913,⁹ the Helsinki Principles on the Law of Maritime Neutrality of 1998¹⁰ and the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*,¹¹ adopted in 1994, have attempted to further develop the law. In short, it seems that treaty-making and the rules of naval warfare have never been a good marriage. Why is that the case? This contribution will briefly touch upon this question.

Treaties and naval warfare

Even before the first Geneva Convention of 1864, the Paris Declaration of 1856, which was drafted in the aftermath of the Crimean War, already contained internationally agreed rules on naval warfare. Although the Paris Declaration must be credited as the beginning of modern IHL treaty law, treaty-making around naval warfare did not take off in the aftermath of that first instrument. The Hague Peace Conferences of 1899 and 1907 were the birthplace of most existing treaties on naval warfare: Hague Convention no. III (1899) applied the First Geneva Convention of 1864 to the maritime dimension.¹² This Convention was replaced at the 1907 Conference by Hague Convention no. X, as a result of the revision of the 1864 Convention in 1906.¹³ These treaties provide what I will call “IHL at sea” – that is, they applied certain pre-existing IHL rules to the context of naval warfare. Apart from these protective measures, the 1907 Hague Conference also addressed certain pressing aspects specific to naval warfare, such as naval contact mines,¹⁴ coastal bombardment,¹⁵ maritime neutrality,¹⁶ the

7 See, also, Phillip Drew, “Blockade Law”, in P. Drew, *The Law of Maritime Blockade: Past, Present, and Future*, Oxford University Press, Oxford, 2017.

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

9 *Manual of the Laws of Naval War*, Oxford, 9 August 1913.

10 Helsinki Principles on the Law of Maritime Neutrality, adopted by the International Law Association at its Taipei Conference, 30 May 1998.

11 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994 (entered into force 12 June 1994) (*San Remo Manual*).

12 Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, The Hague, 29 July 1899.

13 Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907.

14 Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, The Hague, 18 October 1907.

15 Convention (IX) concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907.

16 Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907.

status of enemy merchant vessels at the outbreak of hostilities,¹⁷ the conversion of merchant vessels into warships,¹⁸ restriction on the right of capture¹⁹ and an international prize court.²⁰ No general treaty, however, emerged, nor did legal provisions regarding long-standing methods used for the purpose of economic warfare at sea, such as blockades and contraband. The year 1909 nearly saw the conclusion of such a treaty, with the London Declaration of 1909.²¹ The preamble of the Declaration mentioned that the treaty, concerned the establishment of an international prize court, urged States to arrive at an agreement as to what the generally recognized rules would be, “animated by the desire to insure henceforward a greater measure of uniformity in this respect”.²² However, due to the realities of the First World War, the London Declaration never entered into force. Rules set out in that text that were seen as unfit for the aims of belligerent States were set aside or ignored, and the London Declaration was amongst the legal victims of the First World War.²³ Although it has become a reference for both scholars and States on the rules of naval warfare, it was never ratified, rendering also its contents easily debatable. In turn, Hague Convention XII on the establishment of an international prize court was ratified only by one State.²⁴ This means that the courtroom enforcement of prize law measures continues to be a national matter, and, arguably, prone to a diversity of national legal opinions. This is precisely what Hague Convention XII and the London Declaration aimed to address.²⁵

The use of the submarine against merchant shipping during the First World War as a new destructive naval weapon and efforts to limit naval armament after the war pressed States to agree on a Protocol concerning the rules of submarine warfare in 1936.²⁶ This Protocol requires that “in their actions against merchant vessels submarine must conform to the same rules as surface vessels”.²⁷ In addition, the Protocol provides for how to deal with persons and papers of seized merchant vessels that are about to be sunk or otherwise be rendered incapable of navigation.²⁸

17 Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, The Hague, 18 October 1907.

18 Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, The Hague, 18 October 1907.

19 Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, The Hague, 18 October 1907.

20 Convention (XII) relative to the Creation of an International Prize Court, The Hague, 18 October 1907.

21 Declaration concerning the Laws of Naval War, London, 26 February 1909.

22 *Ibid.*, preamble, para. 5.

23 A. C. Bell, *A History of the Blockade and The Countries Associated with her in the Great War: Austria-Hungary, Bulgaria and Turkey 1914–1918*, Naval & Military Press, Uckfield, 1938, pp. 1–23.

24 The one State was Nicaragua. See ICRC database, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=235.

25 Arthur Effyinger, “A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference”, *Netherlands International Law Review*, Vol. 54, No. 2, 2007, pp. 209–11.

26 Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930 (London, 6 November 1936), available at: www.gov.uk/government/publications/procès-verbal-relating-to-the-rules-of-submarine-warfare-set-forth-in-part-iv-of-the-treaty-of-london-of-april-22-1930-london-6111936.

27 *Ibid.*, Art. 1.

28 *Ibid.*, Art. 2.

GC II, adopted in 1949, is the last treaty that came into force governing naval warfare. As a result of the experiences of the Second World War, this treaty develops the protective, humanitarian side of the rules on naval warfare rather than the belligerent rights. The Convention annuls Hague Convention X (1907)²⁹ and revises its content, establishing a fuller degree of protection for victims of armed conflict at sea.³⁰ It also establishes a comprehensive protective regime for hospital ships and coastal rescue crafts.³¹ Apart from protective measures, the Convention also deals with some other issues regarding hospital ships. Article 31 of GC II, for example, allows belligerents to exercise a right to control and search a hospital ship. Furthermore, Article 29 of GC II allows a hospital ship to leave a port that has fallen into enemy hands.

The drafters of the Additional Protocols to the Geneva Conventions of 1977 kept the law of naval warfare outside the scope of revision. The diplomatic conferences on the Additional Protocols were concerned about undertaking any revisions of the rules of armed conflict applicable at sea, because the conditions of naval warfare during the Second World War and subsequent conflicts had drastically changed, making it difficult to determine exactly which rules still applied.³² As a result, Article 49(3) of Additional Protocol I (AP I)³³ excludes sea-to-sea engagements from the general targeting rules set forth in the rest of the document. Although general targeting rules apply in naval warfare by virtue of custom, existing law leaves room for the existence of belligerent rights and special targeting rules in the maritime dimension, particularly regarding engagements against enemy or neutral merchant shipping and the practice of blockades.³⁴ For example, a vessel becomes liable to attack when a vessel believed to be carrying contraband actively resists visit, search or capture, or when it attempts to break through a blockade.³⁵

The recent treaties on arms control do not specifically touch upon the maritime dimension. For example, the 1997 Ottawa Treaty³⁶ does not affect the use of mines at sea, which is still governed by the 1907 Hague Convention no. VIII. Although arms control treaties, in their application, may affect naval operations as they are in general not bound by any geographical dimensions, no

29 See GC II, above note 8, Art. 58.

30 ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017, nos. 75–7.

31 See GC II, Arts 22–37.

32 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, nos. 1894–9.

33 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 35(1).

34 William H. Boothby, “Maritime Targeting”, in W. H. Boothby, *The Law of Targeting*, Oxford University Press, Oxford, 2012.

35 See *San Remo Manual*, above note 11, Section 67.

36 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 (entered into force 1 March 1999) (Ottawa Treaty).

specific treaty has been drafted that deals with banning or controlling any typically naval weapon, such as naval mines or torpedoes.

The law of the sea

Although treaty-making on the law of naval warfare has found itself at a standstill since the end of the Second World War, treaty-making on the international law of the sea has progressed. In fact, the law of the sea has developed and been codified greatly during the second half of the twentieth century. Before that, as Mark Janis notes, “the traditional law of the sea was much more the creature of customary than conventional development.”³⁷ After the four conventions drafted during the first United Nations (UN) Conference on the Law of the Sea in 1958 – dealing with the territorial sea and the contiguous zone, the continental shelf, the high seas and fisheries – in 1982, the UN Convention on the Law of the Sea (UNCLOS) was adopted, aiming to deal with “all matters relating to the law of the sea”.³⁸ UNCLOS, which entered into force in 1994 applies at all times, including situations of armed conflict. While it does not contain any rules on naval warfare – which is part of IHL – it does have an impact on the geographical scope and navigational rules for belligerent naval forces conducting hostilities.³⁹ New issues therefore arose in harmonizing pre-existing rules of naval warfare and the law of the sea, for instance, on belligerent naval operations and the use of mines in international straits⁴⁰ and conducting military operations in exclusive economic zones. It also caused minor definitional issues, such as the possible difference between mere passage⁴¹ and innocent passage and the use of the term “neutral waters” in the law of naval warfare, that does not exist in UNCLOS.

While the law of the sea became extensively codified under international law during the latter part of the 20th century, the law of naval warfare somehow seems to have been of shrinking importance. Notwithstanding existing practice, in particular during the Falklands/Malvinas conflict, the Iran–Iraq War and the Gulf War, academically, in legal handbooks of both the law of war and the law of the sea, the subject of the law of naval warfare appeared to be falling by the wayside.⁴² Even though calls for revision existed, or perhaps because of this repeated idea that this body of law felt outdated, it disappeared from legal parlance, both within the context of the law of the sea and from the perspective of IHL. Subsequently, there

37 Mark W. Janis, *Sea Power and the Law of the Sea*, Lexington Books, Toronto, 1976, p. 76.

38 UN General Assembly Resolution 3067, 16 November 1973, para. 3.

39 Bernard H. Oxman, “The Regime of Warships Under the United Nations Convention on the Law of the Sea”, *Virginia Journal of International Law*, Vol. 24, 1984.

40 Wolff Heintschel von Heinegg, “Minelaying and the Impediment of Passage Rights”, *International Law Studies*, Vol. 90, 2014.

41 See Hague Convention XIII, above note 16, Art 10.

42 In legal handbooks, the law of naval warfare seems diminished to a single chapter, often shared with other legal subjects of naval operations within the wider maritime security scope. See, for example, Donald R. Rothwell and Tim Stephens, “Military Uses of the Oceans”, in D. R. Rothwell and T. Stephens, *The International Law of the Sea*, Hart Publishing, Oxford, 2010; or Yoshifumi Tanaka, “Maintenance of International Peace and Security at Sea”, in Y. Tanaka, *The International Law of the Sea*, Cambridge University Press, Cambridge, 2019.

was a decline of knowledge, and debates focused on more detailed issues of doctrines and rights, such as the doctrine of continuous voyage,⁴³ the right of angary,⁴⁴ the issue of conversion of merchant vessels into warships at sea,⁴⁵ attempted breach of blockade, or the legality of destruction of seized prizes at sea.

The new world order

Apart from a growing focus on the law of the sea, another reason for a diminishing role of the law of naval warfare was the new role that the UN Security Council (UNSC) started playing after the Cold War. In the conflicts that emerged since the 1990s, the UNSC started adopting coercive economic measures based on the UN collective security system. The strategic means of taking economic measures at sea against unwilling States was now brought within the realm of the UN Charter and in the hands of the Security Council. Commodore (UK Navy) Neil Brown mentions that during maritime interdiction operations during the 1991 Gulf War, States took different approaches in identifying the source of their authority.⁴⁶ According to him, while the UK and Australia based authorities on UN Resolution 665, the US Navy in addition sought to “establish the necessary mechanisms to be able to exercise the belligerent rights of visit and search”. For that purpose, “A contraband list was produced, US courts to conduct prize court hearings and special commissioners were identified, and a concept of operations developed.”⁴⁷ Despite the varying interpretations on the legal basis for enforcement authority at sea since the UNSC stepped up in taking economic measures based on the collective security system, the legal construct for the Maritime Interception Force that started operations during the Gulf War in the Persian Gulf at the beginning of the 1990s set a firm precedent for a modus of UN mandated maritime embargo operations for years to come.⁴⁸ During the Libya conflict in 2011, arguably, in addition to maritime enforcement actions at sea under UN resolutions,⁴⁹ the legal character of the conflict between individual NATO States and the governmental forces of Libya would have allowed for taking measures under the law of naval warfare, if one would accept that an international armed conflict (IAC) existed between Libya and enforcing States. Instead, NATO States based their rights at sea on the extant UN resolutions.

43 See, on this doctrine, Phillip Drew, “The Law of Maritime Blockade in the 21st Century”, in Dale Stephens and Matthew Stubbs (eds), *The Law of Naval Warfare*, LexisNexis Butterworths, Chatswood, NSW, 2019.

44 The requisition, on compensation, of neutral vessels when necessary for the defence of a belligerent State. See W. I. Jennings, “The Right of Angary”, *The Cambridge Law Journal*, Vol. 3, No. 1, 1927.

45 Hague Convention VII, above note 18, allows for the conversion of merchant vessels into warships. It does, however, not regulate whether a vessel can be converted while at sea.

46 Neil Brown, “Legal Considerations in Relation to Maritime Operations against Iraq”, *International Law Studies*, Vol. 86, No. 1, p. 133.

47 *Ibid.*, p. 133.

48 See Martin Fink, “The UN Collective Security System and Maritime Interception Operations”, in M. Fink, *Maritime Interception and the Law of Naval Operations: A Study of Legal Bases and Legal Regimes in Maritime Interception Operations*, T.M.C. Asser Press, The Hague, 2018.

49 UN Security Council, Resolution 1971 (2011), UN Doc. S/RES/1971 (2011), 3 March 2011; and UN Security Council, Resolution 1973 (2011), UN Doc. S/RES/1973 (2011), 17 March 2011.

Another implication of UNSC activities involves whether the law of maritime neutrality applies during conflicts in which the UNSC has decided on taking measures against an aggressor State. The law of maritime neutrality regulates belligerent State actions in neutral waters, aiming at ensuring that neutral States do not become unwillingly involved in the conflict and to that end have legal instruments at their disposal. When the UNSC authorizes measures, could, in light of Article 25 of the UN Charter, any State still be seen as neutral? Or, as the UNSC does not oblige but authorizes States to take part in military operations against an aggressor State, can they still make use of maritime neutrality rules?⁵⁰ Could States, for instance, base a decision to forbid warships part of a UN-mandated enforcement operation to use their ports and waters in light of Article 5 of the Hague Convention no. XIII on neutrality in naval war? In any event, as Heintschel von Heinegg notes, State practice reveals “that there is no longer room for automatic application of that law in every international armed conflict”.⁵¹

Practice

With regard to practice, Steven Haines, looking back at naval operations and hostilities at sea since the Second World War, provides a number of observations in relation to the use of the law of naval warfare.⁵² First, all conflicts since the Second World War were limited in naval scope, “with none having strategical naval influence beyond the immediate region of the core conflict”.⁵³ Second, naval operations were all subordinate to land operations. And third, economic warfare has not played a major role in modern wars. These points emphasize the minor role in these conflicts for the use of the law of naval warfare. Haines also notes that naval conflicts have indeed caused debate on legal questions of application of the law of naval warfare, but this “has not caused any discernible trend towards customary development of the law”.⁵⁴ Practice in the last seventy years, in his view, has not surfaced a real need for States to update or revise the law. Interestingly, with regard to the *Mavi Marmara* incident in 2010 during the Gaza blockade, although lively debate existed on the application of the law of blockade, no State concluded that it was time to codify or revise the law of blockade to better deal with issues of blockade in modern conflict. In any case, the fact is that, apart from scholarly debate, these conflicts in the maritime dimension did not create any effort or formal desire from States to codify existing custom or emerging new rules.

50 See, on these matters, Andrea Gioia, “Neutrality and Non-Belligerency”, in Harry H. G. Post (ed.), *International Economic Law and Armed Conflict*, Martinus Nijhoff Publishers, Dordrecht, 1994.

51 Wolff Heintschel von Heinegg, “Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships, and Maritime Neutrality”, *International Law Studies*, Vol. 80, No. 1, 2006, p. 224.

52 Steven Haines, “War at Sea: Nineteenth-Century Laws for Twenty-First-Century Wars?”, *International Review of the Red Cross*, Vol. 98, No. 902, 2016.

53 *Ibid.*, p. 428.

54 *Ibid.*, p. 429.

During recent decades, military operations conducted during non-international armed conflicts (NIACs) have come more on the foreground than IACs. Although naval forces have also been part of NIACs, the law of naval warfare is left unused because this body of law only applies in IACs.⁵⁵ In essence, applying the law of naval warfare outside IAC would mean that belligerent rights are impermissibly used against vessels of States that are not involved in the conflict. Challenges for the applicability of the law of naval warfare lie in the issue of conflict classification. In some instances, applying instruments allowed under the law of naval warfare caused debate, and in others it never really emerged as an issue. Examples of the former include the Israeli blockade of Gaza and the blockade-type measures taken against Yemen.⁵⁶ An example of the latter is the use of the belligerent right of visit, instrumental to enforcing prize law measures, and the question whether it, in a developing situation of conflict classification, could legally be used during Operation Enduring Freedom to board and search for Al-Qaida terrorists in the context of the war in Afghanistan.

To summarize, while naval operations continue to play a significant role in current conflicts, we appear to have lost track of the law of naval warfare somewhere along the way while developing international law at sea and the law of armed conflict. Considering that the law of naval warfare has never been extensively codified, the rise of the law of the sea, the lack of attention in IHL due to a more protective focus and ambiguity regarding its rules, the manner in which economic enforcement measures are more frequently part of the UN collective security system since the nineties and the non-international character of many of today’s conflicts, the law of naval warfare has disappeared somewhat from both the operational and academic theatres. On the other hand, the law of naval warfare is discussed when it is clearly used. For example, related to the use of blockades in recent conflicts is not without attention and discussion. This is, however, only intermittent and has so far not spurred additional constructive thinking on how to develop and codify the law of naval warfare. It remains to be seen whether these instances and current-day developments in maritime security issues, including an IAC within European borders,⁵⁷ will renew sense of interest for the law of naval warfare.

55 See, e.g., Wolff Heintschel von Heinegg, “The Law of Military Operations at Sea”, in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2015, p. 375; Wolff Heintschel von Heinegg, “Methods and Means of Warfare in Non-International Armed Conflict”, *International Law Studies*, Vol. 88, 2014.

56 See, e.g., James Kraska, “Rule Selection in the Case of Israel’s Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?”, *Yearbook of International Humanitarian Law*, Vol. 13, 2010; Douglas Guilfoyle, “The *Mavi Marmara* Incident and Blockade in Armed Conflict”, *British Yearbook of International Law*, Vol. 81, No. 1, 2011; Martin David Fink, “Contemporary Views on the Lawfulness of Naval Blockades”, *Aegean Review of the Law of the Sea and Maritime Law*, Vol. 1, 2011.

57 See, e.g., Michael N. Schmitt, “Providing Arms and Materiel to Ukraine: Neutrality, Co-belligerency, and the Use of Force”, *Lieber Institute, West Point*, 7 March 2022, available at: <https://lieber.westpoint.edu/tag/schmitt/page/4/>.

Challenges of revising or codifying the law of naval warfare

As mentioned, the law of naval warfare is an uncrystallized part of public international law, based mostly on custom. A lack or an underdeveloped body of law is, however, by itself not a reason for States to start updating laws. Also, though there have been calls to revise and update the law of naval warfare, it is worth noting that those calls have mostly come from scholars and not from States. If States consider the law of naval warfare to be in a state of crisis, that urgency has yet to be reflected in concrete action in the form of new treaty-making. The reality is that the underdeveloped state of the law is probably insufficient impetus for States. Rather, States arguably work to develop international law when there is a concrete need to do so – when, for example, that development is necessary to promote States' own political goals while balancing international coexistence. In addition to need, some consensus must exist among States that this need can actually develop into rules that are acceptable to relevant States. In other words, there must also be a chance that development of the law will actually succeed. In his report on the centennial commemoration of Hague Conferences, Christopher Greenwood rightly opined that:

While the case for major revision of the law of naval warfare remains a strong one, any attempt to address this issue by means of an international conference would present considerable difficulties and would be doomed unless it had the active support of the major naval States.⁵⁸

The question may therefore also be whether major naval powers are in line regarding their views on the current status of the law, its fundamentals and rules and what it should develop into, or whether these powers hold different, opposing views.

In addition, for States, reference to custom may at times also be a way out for difficult situations. Certain vagueness of rules could become handy in political turmoil. For example, there is no black-letter or generally accepted rule on the question of where exactly a vessel attempting to breach a blockade can be stopped and captured. Must it actually breach the blockaded zone, or is information that there is reasonable cause to believe that the vessel will attempt to breach the blockade while still far out from the blockaded zone enough to capture the vessel? It could leave the lawfulness of actions sometimes unanswered. Non-codification and relying on customary law have not put States in some sort of legal or political trouble, enough to press for change or more clarity between States, by relying on custom. As Janis notes, "States make claims about the nature of the law by way of their own maritime practice."⁵⁹ In other

58 Christopher Greenwood, "International Humanitarian Law (Laws of War): Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899", in Frits Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports & Conclusions*, Kluwer Law International, The Hague, 2000, p. 55.

59 M. W. Janis, above note 37, p. 76.

words, States will have somewhat more grip on what the course of the law should be, which in the case of the law of naval warfare is closely related to political–strategic motives.

Admiral Sir Herbert Richmond wrote in his treatise *Sea Power in the Modern World* (1934) that after the signing of the Paris Declaration “it was widely felt that British sea power had been disarmed”.⁶⁰ This reflects a political–strategic critique of the Declaration and view about law that, as a point of departure, naval warfare should not be constrained by rules in achieving its political and military ends. As they stand, the laws of naval warfare contain a set of belligerent and neutral rights for States, in which the regulated methods of naval warfare primarily aim at economic coercion of the opponent State, through naval instruments such as blockades and contraband warfare. As such economic pressure on other States is a strategic means, the views on what the law should allow is closely linked to States’ political–naval strategy. In that context, the law of naval warfare provides interesting tools for States additional to the use of force. As O’Connell notes, States can exert pressure more vigorously than through diplomacy and less dangerously than through other forms of force through their navies that also can be anywhere at sea, making use of their high seas freedoms.⁶¹ This also means that it would be hard finding generally accepted rules when major (naval) powers are opposed to each other. Crystallizing or developing rules on the law of naval warfare is then very much prone to the right timing of such an effort.

Humanitarian needs, arguably, could transcend the political–strategic motives that have otherwise impeded State action in developing the law. The challenge here is that the core of what is traditionally considered as the law of naval warfare does not contain rules aiming and obliging to protect and respect persons. One can easily imagine that there is no immediate incentive from humanitarian actors to start thinking about applying or crystallizing belligerent rights in IAC or applying them to NIACs, unless those rules directly make an impact on human life. The one example that does come to mind, obviously, is naval blockades. Arguably, naval blockades or other forms of naval control of shipping could also lead to starvation of the population. The debates deriving from the Yemen conflict may serve as an example.⁶² However, apart from this subject, the methods and means within the law of naval warfare are very much a tool for States to use in their military enforcement goals and oriented on economic grounds rather than humanitarian grounds. Also, pressure to regulate from humanitarian actors is perhaps felt to a lesser extent in the maritime dimension in circumstances where sea warfare does not have effect on land, as this is an operational theatre where civilians are transients by definition and no

60 Herbert W. Richmond, *Sea Power in the Modern World*, G. Bell & Sons Ltd, London, 1934, p. 67.

61 D. P. O’Connell, *The Influence of Law on Sea Power*, The University Press, Manchester, 1975, p. 3.

62 Martin D. Fink, “Naval Blockade and the Humanitarian Crisis in Yemen”, *Netherlands International Law Review*, Vol. 64, No. 2, 2017.

one permanently resides. In this context, while GC II contains rules on wounded, sick and shipwrecked, they are mostly limited to members of the belligerent parties.

The alternative: The success of the *San Remo Manual*

The *San Remo Manual*, adopted in 1994, provides an interesting counterpoint in the form of a success story. The *Manual* was the result of an effort by renowned experts on the law of naval warfare to restate the existing law and has made significant strides to silence the cry for treaty updates or development in the law of naval warfare. The *Manual* answered a general feeling that the law of naval warfare needed updating.⁶³ Although not a treaty, it has become a contemporary and complete reference concerning the law of naval warfare. The *Manual* has been widely acknowledged as a source that carries legal weight, at least because of its work to restate current practice.⁶⁴ The International Committee of the Red Cross (ICRC) notes on the *Manual* that it “includes a few provisions which might be considered progressive developments in the law but most of its provisions are considered to state the law which is currently applicable”.⁶⁵ The *San Remo Manual* has been frequently referenced as legal guidance, including during the Gaza-blockade crisis.⁶⁶ In its report on the *Mavi Marmara* incident, the Human Rights Council noted that, while “not authoritative”, the *Manual*’s “codification effort has had a significant impact on the formulation of military manuals and it has been expressly relied upon by Israel”.⁶⁷

The *Manual* not only answered to cries of ambiguity on the law of naval warfare, but also incorporated the legal developments of the law of the sea, combining both strands of laws applicable at sea into a single reference document. This is reflected, for example, in the sections regarding “regions of operations” that have included the UNCLOS maritime zones, but also newly developed concepts of the law of the sea, such as the navigational rights of transit

63 For the process and challenges of development of the Manual, see Wolff Heintschel von Heinegg, “The San Remo Manual – History, Methodology and Future Application”, in D. Stephens and M. Stubbs (eds), above note 43.

64 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2005, p. 12; UK Ministry of Defence, “Maritime Warfare”, in *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2005, p. 348; James Kraska and Raul Pedrozo, *International Maritime Security Law*, Martinus Nijhoff Publishers, Leiden/Boston, MA, 2013, p. 859.

65 ICRC, “San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994”, Commentary, available at: <https://ihl-databases.icrc.org/ihl/INTRO/560>.

66 See, e.g., *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011 (Palmer report), available at: www.un.org/unispal/document/auto-insert-205969/; J. Kraska, above note 56; James Farrant, “The Gaza Flotilla Incident and the Modern Law of Blockade”, *Naval War College Review*, Vol. 66, No. 3, 2013.

67 UN General Assembly, Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli attacks on the Flotilla of Ships Carrying Humanitarian Assistance, UN Doc. A/HRC/15/21, 27 September 2012, para. 50.

passage and archipelagic sea lane passage. The *Manual* also sought, where possible, to apply existing principles of IHL in the maritime dimension. It introduced basic targeting discrimination rules based on the rules of AP I. In this effort, it also inserted rules that may not be seen as pre-existing custom. For instance, Sections 102–4 regarding blockade attempt to merge Articles 54 and 70 of AP I and the principle of proportionality with the law of blockade.⁶⁸

The *Manual* is the first of its kind in modern efforts of developing law through an informal process. This has since been emulated by others and has become a sort of practice for subject matter experts to work to define and develop new areas of law. In this process, States appear to have taken on a modified role, which sees them accepting or rejecting proposals and views of experts, rather than developing the law themselves through treaty-making or official State policy and military manuals. States’ reactions to and uptake of the *Manual* have, predictably, varied. A number of States adopted or refer to some rules of the *San Remo Manual* in their military law manuals, officializing them as a State position.⁶⁹ Denmark’s military manual notes that the *San Remo Manual* rules, although not a treaty, “are widely considered to reflect customary international law” and therefore bind Denmark.⁷⁰ Germany’s military manual notes more carefully that “it should not be assumed” that the *San Remo Manual*’s contents “automatically coincide with the positions of the German Government and/or the Federal Ministry of Defence”.⁷¹ The *US Department of Defense Law of War Manual* does not refer to the *Manual* at all.⁷² Likewise, the updated *US Commander’s Handbook on the Law of Naval Operations* contains no references to the *Manual*.⁷³

As noted, the *Manual* has done much to satisfy the call for revision – and has probably also provided enough legal reference for States to avoid meaningfully considering a revision of the law in the near future. It has provided a useful stopgap. In that sense, it has served its purpose perhaps too successfully for a number of reasons. First, the *Manual* is not law and States can easily oppose it or question

68 M. D. Fink, above note 56.

69 E.g. UK, Norway, New Zealand and Canada. For the process of the UK Manual, see Steven Haines, “The United Kingdom’s Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared”, in Fania Domb and Yoram Dinstein (eds), *Israel Yearbook on Human Rights*, Vol. 36, Martinus Nijhoff Publishers, Leiden/Boston, MA, 2006.

70 Danish Ministry of Defence, Defence Command Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, 2016, p. 579, available at: www.forsvaret.dk/globalassets/fko---forsvaret/dokumenter/publikationer/-military-manual-updated-2020-2.pdf.

71 Federal Ministry of Defence, *Law of Armed Conflict – Manual, Joint Service Regulation (ZDv) 15/2*, Berlin, 1 May 2003, para. 131, available at: www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf.

72 Except for in one footnote, where it says that the participants of the *San Remo Manual* opined that hospital ships should be allowed to use cryptographic equipment. US Department of Defense, *Department of Defense Law of War Manual*, Washington, DC, December 2016, p. 482, footnote 324, available at: <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf>.

73 U.S. Navy NWP, U.S. Marine Corps and U.S. Coast Guard, *The Commander’s Handbook on the Law of Naval Operations (NWP 1-14M)*, March 2022, available at: https://usnwc.libguides.com/ld.php?content_id=66321384.

its weight, which is a much smaller concern with traditional treaty-making. Second, the *San Remo Manual* intertwines with provisions of AP I, which is not necessarily accepted by all relevant major naval Powers. Third, the *Manual* has been in existence for more than twenty-five years. Against the background of a high pace of technological evolution of warfare, questions are raised for how long the *Manual* will manage to survive in its current form and what should be done to future-proof it.⁷⁴ One specific example to note on future-proofing is the emergence of unmanned maritime vehicles in relation to the question of belligerent rights of attack and taking prize that are limited to warships. Considering that the definition of a warship⁷⁵ includes a commander and a crew, the question of whether unmanned maritime vehicles also have belligerent rights is still unsettled. Another example is revisiting the sections on zones, which were a significant but still confusing theme during the Falkland/Malvinas and Iran–Iraq War, some years before the efforts of the *San Remo Manual* started. Today, the question of zones might be somewhat more crystallized. Having said that, still there are outstanding questions, for instance with regard to the question whether a zone could be seen as a method of warfare that would also generate belligerent rights.

Treatymaking, on what exactly?

Leaving aside the issue of incentivizing the revision or codification of the law of naval warfare by States or other actors, in order to practically deal with this “continuous crisis” of the state of the law, it is pertinent to consider where to start. Do we start by trying to translate customary international law into treaties and come up with a London Declaration 2.0? Do we take a spade deeper and first question the core principles of the law of naval warfare and whether they are still valid in this day and age? Do we replicate the text of the *San Remo Manual* in treaty form, including its more progressive rules? Or do we leave custom as-is, including its shortcomings and debates, and focus instead on the possible future of conflict and the application of the law of naval warfare? Three remarks can be made on this.

First, is there a clear enough picture of the current state of the law that can be codified? As mentioned earlier, Article 49(3) of AP I has left certain aspects of maritime targeting out of the general law of targeting. This provision could be viewed as a placeholder until such time as we do know how the law of targeting in the naval dimension has developed or should develop. It is invariably used as an opportunity to underline the special targeting rules that have since long

74 Wolff Heintschel von Heinegg, “The Current State of the Law of Naval Warfare: A Fresh Look at the *San Remo Manual*”, *International Law Studies*, Vol. 82, 2006. See also on current initiatives regarding updating the *San Remo Manual*, Wolff Heintschel von Heinegg, “Updating the Law of Naval Warfare”, *Lieber Institute, West Point*, 6 January 2022, available at: <https://lieber.westpoint.edu/year-ahead-2022/>.

75 See UNCLOS, Art. 29, available at: www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

existed in war at sea.⁷⁶ So, has the dust of the Second World War now finally settled to answer the question that the Additional Protocol could not answer? The mentioned retreat of the law of naval warfare from the operational and legal theatres and the continuous call for revision might signal that we could still be at a difficult stage in which, in fact, States no longer know what the rules are. Retracing the existing law, instead of crystallizing or even developing new law, might be the stage where States find themselves. On the other hand, if rules fall into desuetude, it does not automatically mean that they become obsolete or lose their validity. Neither does the age of treaties have such an effect. The same is underlined by the 2017 Commentaries on GC II, of which some provisions have not been used in six decades.⁷⁷ That no practice took place on certain issues in more recent years does not mean that, for example, the 1907 Hague Convention XIII has lost its validity on the basis of desuetude alone. The 2017 update of the ICRC commentary on GC II only very sporadically touched upon the law of naval warfare. The drafters have not been tempted to linger into the law of naval warfare side of IHL at sea. The commentaries do not go beyond a few statements mentioning that certain rules of the law of naval warfare are well established, underlining perhaps its customary character.⁷⁸

Apart from practice and official State policy, some evidence on the status of the law of naval warfare is found in military manuals of States. Some States are elaborate on this subject, such as Germany, the UK and the United States. Others list a few rules reflecting some general notions of the law of naval warfare amongst subjects that mainly reflect the law of the sea.⁷⁹ The listed rules do somehow give a feeling of a lacking degree of detail and are not a comprehensive overview on the laws concerning naval warfare.

Different reasons might exist for this. A State might simply have no explicit views on subjects of naval warfare. The majority of States are not naval powers. There may not be a need to focus on these matters and a lack of (own) practice prevents them from having any views. Unlike fundamental obligatory humanitarian issues of IHL, States can choose not to be involved or not interested in the law of naval warfare, for instance because a State is not likely to be affected by naval strategies of other States. Another reason might be a fading legal knowledge on the subject. In that context, some degree of uncertainty of the

76 W. H. Boothby, above note 34.

77 ICRC, above note 30, paras 65–6.

78 See, for instance, paragraph 2323 and further regarding Article 32 of GC II, referring to well-established rights and obligations of neutrals and belligerents in Hague Convention XIII, or certain paragraphs in Article 33 of GC II.

79 The references used are a collection of (mostly English, French and Spanish) manuals; see U.S Naval War College, Stockton e-Portal: Military Legal Manuals, available at: <https://usnwc.libguides.com/c.php?g=86619&p=557511>. That does, however, not mean that other States, such as Russia, China, Israel and Japan, may not have elaborate chapters on the law of naval warfare, which are inaccessible to me. The Dutch do not have a manual that includes the law of naval warfare. The Netherlands Admiralty Manual on the law of naval warfare, written by M. W. Mouton in the 1950s, is the only official reference known to me. It is unknown, however, whether it is still in force. M. W. Mouton, *Instructie betreffende de toepassing van het internationale en nationale zeeoorlogsrecht tijdens een oorlog, waarin het Koninkrijk der Nederlanden is betrokken*, Ministry of Defence, 1956.

law is not rooted in the law itself, but to a certain extent rooted in the fact that the rules of this body of law are simply unknown, both within relevant ministerial departments and admiralties who only sporadically deal with these issues. The same accounts for the judiciary, whose role is to adjudicate seized prizes. Before the codification of the law during the Hague conferences of 1899 and 1907 and until the Second World War, the laws of naval warfare were, in fact, quite sophisticatedly developed through the jurisprudence of national prize courts.⁸⁰ Even when not at war, the nature of prize law made an impact on neutral States' vessels and goods and was therefore an important issue for States to have views on. Jurisprudence as a legal source, especially for deepening operational detail, has fallen to the background due to a lack of prize cases in current conflicts. The Israeli prize judgments of the *Estelle* and the *Mavi Marmara* are rare recent cases of prize, but do underline that prize courts are not legal history.⁸¹ Also, interestingly, although the incident itself had much attention, the legal endgame in the courts did not garner any attention. Furthermore, international courts do not seem to really pick up on issues of the law of naval warfare even if their might actually be reasons to do so.⁸² With the exceptions of the Israeli cases, in general, crystallization or development of the law through national and international case law has come to a standstill. With not much to turn to, States do not have anything to develop a clear view or position on.

Second, as mentioned above, Greenwood opined that there is a case for a major revision of the law of naval warfare. However, what constitutes a "major revision"? Should States also question whether the fundamental principles underlying the law of naval warfare are still valid today? For example, one of the legal principles is that enemy civilian property can be captured; all enemy merchant vessels can be seized and captured, and goods on board enemy and neutral merchant vessels can, when considered contraband, be taken.⁸³ In addition, actively resisting seizure may not be a breach of the laws of armed conflict, but it does make merchant vessels liable for attack. On this notion of liability of civilian property and belligerent rights, Clapham opines that: "Rather than suggesting that such Belligerent Rights apply in all armed conflicts, we should accept that they no longer can be upheld in the face of States' obligations under the UN Charter."⁸⁴ In his view, because war is outlawed under the Charter, aggressors should not be able to acquire belligerent rights and keep what they can capture under prize law. Although one might view that, as a principle, civilian

80 See, for instance, James Wilfred Garner, *Prize Law During the World War. A Study of the Jurisprudence of the Prize Courts, 1914–1924*, The Macmillan Company, New York, 1927.

81 Eran Shamir-Borer, "The Revival of Prize Law – An Introduction to the Summary of Recent Cases of the Prize Court in Israel", in Yoram Dinstein and Jeff Lahav (eds), *Israel Yearbook on Human Rights*, Vol. 50, Koninklijke Brill, Leiden, 2020.

82 One recent case might be the case that came before the International Tribunal for the Law of the Sea on the Kerch Strait incident between Russia and Ukraine.

83 Wolff Heintschel von Heinegg, "Maritime Warfare", in Andrew Clapham, Paola Gaeta, Tom Haeck and Alice Priddy (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 170–80.

84 A. Clapham, "Booty, Bounty, Blockade, and Prize", above note 5, p. 1222.

property cannot not be taken, Clapham’s argument, however, seems to blur the distinction between *ius in bello* and *ius ad bellum*. His thought on changing the fundamentals of the law, however, seems exceptional. Scholars on the law of naval warfare do not usually question the fundamental principles on which the law of naval warfare is based and instead repeat what should be seen as special rights conferred on States through long-standing custom. This is convenient for States, as it comes, for instance, with extensive State authorities such as the belligerent right of visit and search, allowing to board vessels without former consent and the possibility to list items on contraband lists, forbidding trade with the enemy on these items and therefore liable to confiscation. In this context, States probably are not likely to review the law in such a thorough manner if they risk losing far-reaching authorities to impact the opponent’s trade.

Third, instead of finding firmer ground for the law of naval warfare through codification of rules that are possibly customary law or reviewing its fundamental principles, States could also choose to look to the future, trying to keep up with current technical and legal challenges. That would in fact continue the practice of treaty-making in this area of the law on only very specific subjects. The aim is then to future-proof the law of naval warfare in relation to challenges such as unmanned warships, unmanned underwater vehicles, smart naval mines, use of cyber tactics in the maritime domain, the use of long-range weapons and the use of air assets at sea. Other more remote issues emerging as a result from technological developments are the legal status of sunken warships and their protection (perhaps also relating to Article 18 of GC II regarding the dead at sea), the protection of submarine cables at sea and the issue of flag-verification in defining a vessel’s enemy in character. Attention could also be brought to the legal regime for the use of methods of naval warfare in NIAC. And, lastly, the law could address new international waterways or canals. These are by virtue of their geographical place maritime spaces that are also of military strategic value and should probably, similar to existing canals such as the Suez, Panama or the Bosphorus, need some governing on military-related issues. All these issues and themes by themselves would give States more than a plateful of legal issues to chew on without having to look back and crystallize and codify custom.

Conclusion

Is there a continuous or ever-existing “crisis” of the law of naval warfare and could treaty-making help to clarify the law? The answer is probably yes, as there is simply no comprehensive treaty on all matters of the law of naval warfare, an unending feeling exists that existing treaties might be out of date, customary rules are known only to a small number of scholars and practitioners, knowledge and discussion on the details of the law are crumbling and, meanwhile, technological developments of warfare at sea are forcing old laws onto new situations. This felt lack of clarity of rules should frustrate any lawyer. Although scholars who are well versed in the law of naval warfare are, in general, fairly consistent in what

the law is, official State positions are a missing link, preferably provided by treaty. On the other hand, viewed from States' perspective, since the development of modern IHL, the law of naval warfare has always been in this uncertain state, has never crystallized into a regime codified in treaties with clear and detailed provisions and has always been and accepted as a creature of customary law. With very few exceptions did States show the need to change this situation. Former, commendable efforts, such as the London Declaration, have never been picked up again. However unclear the law of naval warfare might be, relying on custom with manoeuvre space to support one's own political–strategic position might very well be a suitable and acceptable modus for naval powers. This “continuous crisis” appears to be the normal modus and typical nature for this area of law, which, other than revising soft law instruments, will probably stay as-is.