# War at Sea: 19th Century Laws for 21st Century Wars?

**Steven Haines**
Steven Haines is Professor of Public International Law, University of Greenwich, and a retired British naval commander. He chaired the Editorial Board of the UK's official *Manual of the Law of Armed Conflict* (2004) and co-authored its chapter on 'Maritime Warfare'. He had previously written the Royal Navy's maritime strategic doctrine (*British Maritime Doctrine*, 1999).

## Abstract

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 Elements of it, especially that regulating economic warfare at sea, seem outdated and it is not clear that the law is well placed to regulate so-called 'hybrid' warfare at sea.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

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

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

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

Red Cross (ICRC), for its Customary International Humanitarian Law Study, which remains a 'live' project.[1]

One element of the *lex specialis* has been largely overlooked, however. The law regulating the conduct of hostilities in naval war – the law of armed conflict (LOAC) applicable at sea - has attracted little general attention or focused scrutiny. There have been very few instances of armed conflict at sea and those that have occurred have not brought seriously into question the detailed rules regulating it. There have been no naval cases dealt with by the international tribunals and, compared with the law regulating armed conflict on land, in the air and even in cyberspace, that applied at sea has failed to attract very much academic analysis.[2] Finally, the ICRC did not research practice in naval warfare during its study into customary international humanitarian law (IHL).[3] Its stated reason for not doing so was that it believed IHL applied at sea had already been adequately covered during work carried out in the early-1990s under the auspices of the International Institute of Humanitarian Law (IIHL) in Sanremo, resulting in the publication of the *San Remo Manual*.[4]

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

---

1 J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (2 Vols) (Cambridge: Cambridge University Press for the ICRC, 2005); hereafter *Customary Law Study*. The ICRC Customary Law Database is kept updated at www.icrc.org/en/war-and-law/treaties-customary-law/customary-law . (All internet sources were accessed in May 2017.)

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

3 It is important to clarify terminology, not least because there is a tendency today to regard the law of armed conflict (LOAC) as synonymous with international humanitarian law (IHL). This is not the place to debate the overlaps and distinctions between LOAC and IHL but it is important to state what this paper addresses and what it does not. The law that is the focus of this paper is that which regulates the conduct of hostilities at sea. Traditionally known as the 'law of war and neutrality at sea', it is now more commonly referred to as the 'law of armed conflict (LOAC) applicable at sea'. The paper is not about the application of International Humanitarian Law (IHL) at sea and will not address that subject (which derives from *1949 Geneva Convention II for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* - hereafter GCII - and related instruments).

4 ICRC *Customary Law Study*, as Note 1, Vol.1, p.xxx. The manual's full citation is: L Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: Cambridge University Press, 1995) (hereafter SRM). It should be noted that while the IIHL is located in Sanremo (one word) in Italy, the manual is invariably referred to as being associated with 'San Remo' (two words).

meant to regulate. Nevertheless, how such engagement might be achieved may be a sensible issue briefly to address.

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

## Naval roles

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

Naval operations can be categorised under three headings: 'benign'; 'constabulary'; and 'military'. Constabulary and military operations both involve the application of force but neither benign nor constabulary operations involve combat. While benign and constabulary operations are not the focus of this paper, a brief explanation of each will be useful before the discussion moves on to the military functions of navies.[5] Later in the paper, the overlap between military and constabulary roles will become relevant to the discussion of hybrid-warfare.

[5] This is the way that operations have been categorised by the British navy (the Royal Navy, or RN); see Defence Council *BR1806 British Maritime Doctrine* (2nd Ed) (London: The Stationery Office, 1999), pp.57-58. Other navies have admittedly departed slightly from this formula; see for example: Royal Australian Navy Sea Power Centre, *Australian Maritime Doctrine* (Canberra: Defence Publishing Service, 2000), p.57; Maritime Concepts and Doctrine Centre, *Indian Maritime Doctrine* INBR8 (Mumbai: Ministry of Defence (Navy), 2009), p.91. For a

## Benign operations

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

## Constabulary operations

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

On the high seas, navies exercised exclusive flag State jurisdiction over their own States' merchant ships and other civilian vessels. They also engaged in anti-piracy operations, ensuring that the seas were free for safe and secure trading activities. This was a naval function with a long history dating back many centuries.[7] During the 19th century, the suppression of

leading academic treatment, see G Till, *Seapower: A Guide for the Twenty-First Century* (2nd Ed) (Abingdon: Routledge, 2009) which discusses both military tasks and 'maintaining good order at sea'.

6 Interestingly, the United States Coastguard traces its origins to before those of the United States Navy. For a discussion of different navy/coastguard arrangements see Till, *Seapower* (as Note 5), pp.314-319.

7 Grotius makes reference in his 'Defence of Chapter V of *Mare Liberum*' to Julius Ceasar's involvement in countering piracy; see D Armitage (Ed), Hugo Grotius' *The Free Sea* (Indianapolis: Liberty Fund, 2004), p.129. A notable early 19th century example of naval action against pirates was that ordered by President Thomas Jefferson and conducted by the United States Navy (USN) against the Barbary Pirates; see R Turner, 'President

slavery became a further significant role for navies.[8] Both anti-piracy and anti-slavery operations remain potential naval functions today, although the former has been more in evidence recently than the latter.[9]

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

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

It is important here to distinguish maritime embargo operations from what may appear at first sight to be a very similar naval operation – belligerent blockade. Constabulary UN maritime economic embargo operations are emphatically not a modern form of belligerent blockade, which is a method of economic warfare (discussed in more detail below). The UN

---

Thomas Jefferson and the Barbary Pirates' in B Ellerman et al (Eds), *Piracy and Maritime Crime: Historical and Modern Case Studies* (Newport, RI: Naval War College Press, 2011), pp.157-172.

8 For a recent comprehensive treatment of its subject see P Grindal, *Opposing the Slavers: The Royal Navy's Campaign against the Atlantic Slave Trade* (London: IB Taurus, 2016). The USN was also employed suppressing the slave trade, despite slavery itself remaining lawful in its own southern states until the Civil War. Congress outlawed the slave trade in 1808 and a West African USN squadron was established in 1821 to suppress it. See C Symonds, *The US Navy: A Concise History* (Oxford: Oxford University press, 2016), pp37-38.

9 Although navies are currently doing little to suppress slavery, it is of growing concern at sea, in particular with slave crews in fishing vessels engaged in illegal, unregulated and unreported (IUU) fishing. See the website of Human Rights at Sea at www.humanrightsatsea.org .

10 1833 UNTS 397 (31363).

11 This was mounted by the British navy off the Mozambique port of Beira between 1966-1975 to enforce economic sanctions against the white minority ruled British colony of Rhodesia, which had illegally declared its independence of Britain. The operation was authorised by UN Security Council Resolution 217(1965). The author himself served on 'Beira Patrol', but see R Mobley, 'The Beira Patrol: Britain's Broken Blockade against Rhodesia' *US Naval War College Review*, Vol.LV, No.1 Winter 2002, pp.63-84. It is incorrect to describe this law enforcement operation as a 'blockade'; see the discussion immediately below.

12 J Kraska and R Pedrozo, *International Maritime Security Law* (Leiden and Boston: Martinus Nijhoff, 2013) at pp.903-923.

Charter is very clear in that regard. While it mentions 'blockade', it does so deliberately in Article 42 dealing with military sanctions and not in Article 41 which explicitly addresses 'measures not involving the use of armed force' to enforce economic sanctions. Blockade and embargo operations have very different purposes, are conducted in different ways, one is an act of war (blockade) and the other a constabulary operation (maritime embargo) and they have completely different legal bases.[13]

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

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

## Military operations

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

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

---

[13] This distinction has admittedly been difficult for some to discern, but see R McLaughlin, *United Nations Naval Peace Operations in the Territorial Sea* (Leiden and Boston: Martinus Nijhoff, 2009), at pp.129-152.

[14] For these constabulary operations on the high seas two conventions are of some importance: *1988 Vienna Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (the SUA Convention) together with its Protocol of 2005; and the *1988 Vienna Convention on the Suppression of the Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. See also Kraska and Pedrozo, *International Maritime Security Law* (as Note 12), pp.801-858 and pp.531-540.

[15] Kraska and Pedrozo, *International Maritime Security Law* (as Note 12) pp.1-5.

[16] D Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford: Oxford University Press, 2016), p.91.

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

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

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

In the age of sail, surface fleets fought surface fleets for sea-control. In the early 20th century, however, following the emergence of effective sea-denial technologies (sea-mines and submarines armed with torpedoes), powerful surface fleets could no longer be assured of dominance at sea. By the outbreak of the Second World War, aircraft had further complicated the achievement of sea-control. Since then, both shore-based and ship-borne missiles have caused surface forces yet more sea-control difficulties.[19]

Julius Caesar's and William of Normandy's invasions of Britain in 55BC and 1066 were each major amphibious assaults; there is nothing new about 'naval power projection'. The traditional shore-bombardment and amphibious landing retain their utility, but modern manifestations of power projection are far more varied and extensive. Naval forces can launch long-range attacks using both aircraft launched from carriers and land-attack missiles launched from both surface warships and submarines. The big-gun battleships that were dominant in the

[18] N Roger, *The Command of the Ocean: A Naval History of Britain 1649-1815* (London: Allen Lane, 2004), especially pp.542-544.

[19] M Van Creveld, *Technology and War: From 2000BC to the Present* (London: Brasseys, 1991), pp.204-216; and M Boot, *War Made New: Technology, Warfare and the Course of History 1500 to Today* (New York: Gotham Books, 2006), at pp.241-267.

early-20th century gave way to aircraft carriers during the Second World War as the capital ship of choice for major naval powers, with the more ambitious subsequently procuring nuclear powered submarines. While such warships may have originally been developed principally for sea-control and sea-denial operations, they are today frequently employed as powerful platforms for long-range power projection. The cruise missile, capable of reaching targets hundreds of miles inland, is routinely the weapon used by the more sophisticated naval forces when deployed to apply persuasive force against States. They have been a prominent feature of past attacks against targets in Iraq and Afghanistan, for example, and sea-launched attacks on Syria today are naval power projection involving both missiles and ship-launched aircraft (these days both manned and un-manned).

Economic warfare at sea was a distinctive feature of general naval warfare from the 16th century until the Second World War. It consisted of a combination of commerce-raiding and blockade operations to prevent an enemy benefiting from maritime trading activities, especially in goods (contraband) that were likely to enhance its ability to continue waging war. There has been scant employment of this type of operation in the past seventy years because there has not been a general naval war during that period. Economic warfare is addressed in much more detail below; it is not necessary, therefore, to say more about it at this stage.

## Armed conflict at sea since 1945

The most recent period of major naval war was between 1939 and 1945. Historically, the naval conflicts then, in the Atlantic and Mediterranean, and in the Pacific theatres, were the most recent in a long line of general and great power naval wars stretching back to the 16th and 17th centuries. Some significant examples of these included the series of Anglo-Dutch wars between 1652-74, the Seven Years War of 1756-63, the American Revolutionary War of 1775-84, the French Revolutionary and Napoleonic Wars from 1792-1815, the Anglo-American Naval War of 1812, and the Russo-Japanese War of 1904-5.[20] All were struggles for power of an imperial nature in the era of maritime empires, which stretched from the early-17th to the mid-20th

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

centuries.[21] These wars had potentially global impact, with navies frequently utilising the extent of the free oceans to carry on their conflicts, especially in relation to the interdiction of trade. It was these wars that influenced the development of the laws of war and neutrality at sea.

While there has been no general naval war since 1945, there have been at least a dozen armed conflicts with naval dimensions worth mentioning. The Arab-Israeli Wars which commenced in 1948, included the 1956 Anglo-French amphibious assault on the Suez Canal Zone in Egypt, and continue today with the conflict between Israel and the Palestinians, which recently featured the Israeli naval blockade of Gaza.[22] The Korean War (1950-53) included the September 1950 amphibious assault by UN forces at Inchon.[23] The Vietnam War (1955-75) included various naval operations, with substantial US involvement following the August 1964 Tonkin Gulf incident and concluding with the *Mayaguez* incident in May 1975. In between, naval operations included the provision of naval support from the sea and extensive riverine operations.[24] The Indo-Pakistan War (1971) lasted a mere thirteen days but included submarine attacks on surface warships and an Indian blockade of the East Pakistan/Bangladesh coast in the Bay of Bengal.[25] Between 1971-74, the 'Troubles' in Northern Ireland arguably crossed the threshold into non-international armed conflict in the early-1970s and, perhaps surprising to some, involved a significant naval element in 1972 when substantial British military reinforcements were landed into the province from Royal Navy amphibious shipping.[26] The Battle of the Paracels lasted just two days in January 1974 and involved the armed forces of the Peoples' Republic of China and Vietnam. The outcome was Chinese control over the islands, still today a source of dispute in the South China Sea.[27] In stark contrast, the Iran-Iraq War (1980-88) was a long drawn out conflict, the naval dimension of which lasted from 1984 to 1987. It was initiated by Iraqi attacks on Iranian oil facilities on Kharg Island, and included

---

[21] Arguably, the age of empires (including maritime-based empires) came to an end in the middle of the 20th century. See: J Burbank and F Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton and Oxford: Princeton University Press, 2010), especially Chapter 13, pp.413-433; and M Mann, *The Sources of Social Power Volume 3: Global Empires and Revolution 1890-1945* (Cambridge: Cambridge University Press, 2012).

[22] K Kyle *Suez: Britain's End of Empire in the Middle East* (London: I B Tauris, 2003) and in relation to the Gaza Blockade see *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* at www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf (hereafter The Palmer Report).

[23] J Patterson, *Grand Expectations: The United States 1945-1974* (Oxford: Oxford University Press, 1996), pp.218-219.

[24] S Karnow, *Vietnam: A History* (London: Guild Publishing, 1983), pp.366-373, 687.

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

[26] See S Haines, 'Northern Ireland 1968-1998', in E Wilmshurst (Ed), *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), pp.117-143, at p.126.

[27] See T Yoshihara, 'The 1974 Paracels Sea Battle: A Campaign Appraisal'. *US Naval War College Review*, Vol.68, No.2, Spring 2016, pp.42-65.

attacks on neutral shipping and an Iranian blockade of the Iraqi coast.[28] The Falklands/Malvinas War (April-June 1982) was fundamentally a maritime campaign involving classic sea-control and sea-denial operations coupled with power projection through amphibious assault. A number of surface warships were sunk, with the Argentine cruiser *General Belgrano* and the British destroyers *Sheffield* and *Coventry* being prominent casualties.[29] The Sri Lankan Civil War (1983-2009) had a notable naval dimension, with the Tamil Tigers operating forces at sea (an unusual capability for an armed non-State actor in a non-international armed conflict).[30] The Gulf of Sidra action in 1986 involved air and sea forces of Libya and the US Sixth Fleet and resulted in the sinking of two Libyan warships.[31] Both of the Gulf Wars against Iraq (1990-91 and 2003) had naval dimensions, with coalition forces defeating Iraqi naval forces and conducting landings in Kuwait and Southern Iraq.[32] Finally, of interest is the Kosovo armed conflict in 1999 between the NATO Alliance members and Serbia - although the most significant observation is to do with naval inactivity. A naval blockade of the Montenegrin port of Bar was considered within NATO because there was a fear that Serbia might be resupplied with war materiel by neutral vessels through Bar. The Kosovo operation was mounted without a UN Security Council resolution authorising NATO's intervention. For that reason, there was certainly no possibility of putting a UN maritime embargo in place to prevent ships entering Bar. Having considered blockade as an option, the Alliance rejected the idea, however. While this decision not to employ blockade may seem irrelevant in terms of State practice, the reasons for not doing so included a belief within some NATO capitals that, while the Alliance was engaged in an armed conflict, this method of naval warfare was not a lawful option and would be too controversial.[33]

These post-1945 conflicts have all been markedly limited in their naval scope, with none having strategic naval influence beyond the immediate region of the core conflict. Only three (the Battle of the Paracels, the Falklands/Malvinas War, and the Gulf of Sidra Action) were

---

[28] See R O'Rourke, 'The Tanker War', *US Naval Institute Proceedings*, Vol.114, No.5, available at www.usni.org/magazines/proceedings/1988-05/tanker-war

[29] Sir L Freedman, *The Official History of the Falklands Campaign* 2 Vols (London: Routledge, 2005).

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

[31] A Silj, 'The Gulf of Sidra Incident: March-April 1986', in *The International Spectator: Italian Journal of International Affairs*, Vol.28, No.1, 1993, pp.75-105.

[32] See I Ballantyne, *Strike from the Sea: The Royal Navy and the US Navy at War in the Middle East 1949-2003* (Barnsley: Pen and Sword Maritime, 2004).

[33] The author was serving in the UK Ministry of Defence at the time and was consulted by the Director of Naval Operations. He suggested blockade as an option, absent a UN Security Council resolution allowing for the possibility of UN maritime embargo operation - caused by a likely Russian veto in the Council.

principally maritime conflicts at the operational level.[34] In the others, the main operational level focus was on land campaigns, with the naval dimensions being clearly subordinate. These armed conflicts were certainly not global in scope and none had the characteristics of the notable naval wars of the maritime imperial era. Economic warfare has not figured as a major component, although belligerent blockades have been imposed, including, for example: the Indian blockade of Bangladesh in the Bay of Bengal in 1971; the blockade of Haiphong Harbour in 1972 during the Vietnam War; and the controversial Israeli blockade of Gaza. There was also the serious interference with shipping during the so-called 'tanker war' phase of the Iran-Iraq war. Two of the conflicts were non-international (Sri Lanka and Northern Ireland), but there were also non-international features of the Vietnam War and the Indo-Pakistan War of 1971, which saw East Pakistan (Bangladesh) break away from West Pakistan. The recent naval activities of the Tamil Tigers in Sri Lanka in particular, have served as a reminder that civil wars (or non-international armed conflicts) can involve the bringing to bear of naval influence. It is worth stressing here that no post-1945 war has involved the principal naval powers in major and sustained combat operations against each other.

Compliance with the law during these naval engagements was mixed, with the Falklands/Malvinas War being largely compliant while the Iran-Iraq 'tanker war' certainly breached the rules on the interdiction of shipping.[35] The Israeli conduct of the Gaza blockade operation was tactically compliant with the *jus in bello*, albeit controversial and resulting in a UN enquiry.[36] All other engagements raised legal issues but none in a manner or to an extent that seriously challenged the existing law. While there has clearly been some evidence of practice resulting from these recent wars, this has not caused any discernible trend towards customary development of the law.[37] Nor has there been any demand for new conventional

---

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

[35] Mention of the 1982 conflict in the South Atlantic must not pass without some comment on exclusion zones declared by the British, in one instance seemingly establishing what one distinguished international lawyer has described as an unlawful 'free-fire zone' (a description with which this author agrees), although this did not result in any unlawful action. See W Heintschel von Heinegg, 'How to Update the San Remo Manual on International Law Applicable to Armed Conflict at Sea' in *Israel Yearbook on Human Rights*, Vol.36, (2006), pp.119-148, at pp.144-145.

[36] See The Palmer Report at www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf,

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

law. The status quo is a comfortable place for States to occupy, especially when they are not being challenged by circumstance.

## Potential for naval war in the 21st century

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

There are three times as many navies today than there were at the end of the Second World War. [38] Not all are capable of high-intensity and sustained operations at significant distance from their home waters, but an increasing number are. A useful hierarchy of navies currently in use places each in one of eight categories based on an assessment of size, reach, combat capability and general utility.[39] The single remaining 'major global force projection navy' is that of the United States. Below it are a growing number of medium ranked well developed navies, whose force structures are predicated principally on the need to engage in combat operations. These include the second rank navies of China, France, India, Japan, Russia and the United Kingdom, and third rank navies like those of Australia, Brazil, Canada, Italy, Germany, Singapore and South Korea, together with those of Denmark, Norway and Sweden. The majority of the world's navies are in ranks four to six but, while less capable, it has been combat capability that has driven their force development. Only seventh ranking 'constabulary navies', capable of law enforcement operations within their own States' offshore jurisdictional zones, and eighth ranking 'token navies' fail to deploy effective combat capability.

---

[38] The principal reference book on the world's navies listed fifty-six navies in 1950; see R Blackman, *Jane's Fighting Ships 1949-50* (New York: McGraw Hill, 1949). The volume covering the period 2016-17 lists just over one hundred and sixty; see S Saunders and T Philpott (Eds), *Jane's Fighting Ships 2016-17* (116th Ed) (London: Jane's Information Group, 2016).

[39] In descending order, they are: major global force projection navies; medium global force projection navies; medium regional force projection navies; adjacent force projection navies; offshore territorial defence navies; inshore territorial defence navies; constabulary navies; and token navies. See S Haines, 'New Navies and Maritime Powers' in N Roger, *The Sea in History Volume Four: The Modern World* (Martlesham: Boydell and Brewer, 2016), pp.81-91, at pp.88-89.

Nevertheless, the lower ranked navies, with limited combat capacity, still possess potential for low intensity applications of force that could cross the armed conflict threshold. Given the proliferation of navies and the range of States in politically unstable regions of the globe, it is perhaps surprising that there have so far been so few conflicts at sea.

Of the over 160 navies currently operating, only the USN has the capability to operate globally in the true sense. It has no peer competitor and is unlikely to face one for decades to come. Those navies that might aspire to compete at that level (perhaps the Chinese and Russian), fall well short at present and would take some time to reach it. Even so, the USN does not enjoy the dominance and full command of the oceans that the collective naval power of the British Empire did during the 19th century *Pax Britannica*.[40] It is even doubtful that it could adequately defend its own trade globally from concerted submarine attack.

If that sounds surprising, one might reflect on some figures from the Second World War, focusing on just one of the powers involved, to give some impression of how its naval forces coped with the conflict. Overall, the combined British Empire navies deployed a total of almost 885 significant warships (battleships, battle-cruisers, aircraft carriers, cruisers, destroyers and submarines) during the Second World War, of which 278 (31%) were lost to enemy action.[41] (The losses alone then amounted to around the same number of significant warships currently possessed by the USN.) During the Battle of the Atlantic in the 1940s, the Allied navies (including the USN after US entry as a belligerent in December 1941) had around 300 destroyers available for convoy escort duty. The British Empire alone lost 153 destroyers to enemy action while defending trans-Atlantic shipping.[42]

Technology has developed since then, with faster, more powerful and far more capable warships fitted with advanced sensors and weapon systems. Without conducting operational analysis around the subject, it would be difficult to predict both force requirements for defensive economic warfare, given current maritime trade volumes, and the likely losses defensive forces would face. Nevertheless, with submarine technology also vastly improved and with quantity having a quality of its own when it comes to convoy escort tasking, it is difficult indeed to imagine a re-run of the sort of campaign that was fought in the North Atlantic between 1940 and 1943. In the 1930s and 1940s the design, development and construction of new warships

---

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

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

[42] Figures from the Naval History site at www.naval-history.net/WW2aBritishLosses10tables.htm .

took merely a matter of weeks or months. Today's equivalent vessels take years from drawing-board to operational deployment and the sort of rapid force generation possible during the Second World War would now be impossible to achieve. The strategically vital battle - for both sides – in the Atlantic theatre in the middle of the last century represented an extreme manifestation of warfare at sea, with the focus on threats to shipping. The Pacific theatre saw a greater concentration of naval power than the Atlantic and was more about the projection of power from sea to shore. Both theatres witnessed extremes in terms of sea control and denial operations, with the war against submarines being the focus in the Atlantic, while the maritime air war dominated the Pacific theatre. While prediction is fraught with difficulty, it seems unlikely that a global great power naval war on that scale will occur again, no matter what combinations of naval powers are ranged against each other. The end of empires does appear to have brought an end to conflict between the major powers, with none having occurred since 1945. Why might that be?

There seem to be a number of reasons: increased number of international organizations, including the impact of the United Nations; the rapidity/immediacy of international communications and the fundamental changes it has ushered in as far as international political and diplomatic practice are concerned; and the positive effect of nuclear weapons, which seem to have had a calming and beneficial influence on great power relations, reducing the tendency for them to resort to force against each other. If the major powers today did engage in war, then it is fair to say that general naval war would be a likely feature. This would have potentially catastrophic economic consequences, with a considerable risk of a halt to globalisation through the disruption to oceanic trade. There would be likely to be considerable international diplomatic effort to avoid it.[43] It is difficult to imagine international order breaking down to the extent that the world becomes embroiled in another global conflict.

This is not to say that there will not again be war at sea having some of the characteristics of the naval war in the 1940s. If a significant and sustained naval war were to occur between combat capable naval powers, it is even possible that aspects of economic warfare could return to the oceans. Nevertheless, on the balance of probability, future armed conflicts at sea seem most likely to be limited geographically and almost certainly to be confined to a single region

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

or even locality. Obvious potential flash-points currently are in the South and East China Seas, in proximity to the Korean Peninsular, in the Gulf, the Eastern Mediterranean and in parts of Africa (although few African navies are equipped for sustained naval confrontation, regardless of the potential for bloody conflict ashore). One should also be conscious of the unpredictable occurring in regions not thought of as high risk – and over time, of course, new tensions will undoubtedly emerge in places that are currently relatively benign.

## The conduct of naval hostilities: The established law

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

In common with all laws regulating war, those dealing with the conduct of war at sea were entirely of a customary nature until the middle of the 19th century. The development of the relevant treaty law occurred in the eighty year period between 1856 (the Paris Declaration) and 1936 (the London Protocol on Submarine Warfare), with the bulk of it emerging from the Hague Conference of 1907.

There were eight naval conventions agreed that year, although only five of them remain extant: [46]

---

[44] See the chapter on 'Basic Principles of the Law of Armed Conflict' in UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004) (hereafter *UK Manual*), pp.21-26.

[45] 'Article 36' being a reference to the provision in *1977 Additional Protocol I* requiring such reviews. Although not all states are party to AP1, the requirement for legal reviews is more than simply a requirement of treaty law. Indeed, the US, which is not party, has long conducted such reviews to ensure the legality of weapons being procured.

[46] *Convention VI Relative to the Legal Status of Enemy Merchant Ships at the Outbreak of Hostilities* has fallen into desuetude; *Convention X* is now covered by GCII, and *Convention XII Relative to the Establishment of an International Prize Court* did not enter into force - see A Roberts and R Guelff, *Documents on the Laws of War* 3rd Edition (Oxford: Oxford University Press, 2007) (hereafter Roberts and Guelff, *Documents*), p.67.

- Convention VII Relating to the Conversion of Merchant Ships into Warships[47]
- Convention VIII Relative to the Laying of Automatic Submarine Contact Mines[48]
- Convention IX Concerning Bombardment by Naval Forces in Time of War[49]
- Convention XI Relative to Certain Restrictions with Regard to the Exercise of Capture in Naval War[50]
- Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War[51]

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

Since 1936, there has been no substantial conventional development of the law, despite naval power having changed in important respects.[52] Operations have also been affected by fundamental changes to the general maritime legal environment and in the nature of ocean governance ushered in by conventional developments in the law of the sea. While that regulates the relations of States in peacetime, it also affects the areas within which naval armed conflict could legitimately be waged. The post-UNCLOS extensions and enhancements in coastal State jurisdiction mean that the seas are not as 'free' as once they were. This was well recognised as *1982 UNCLOS* was moving towards ratification, with calls then to review the law of naval warfare.[53]

---

47 205 Consolidated Treaty Series (CTS) (1907) 319.
48 205 CTS (1907) 331.
49 205 CTS (1907) 345.
50 205 CTS (1907) 367.
51 205 CTS (1907) 395.
52 The diplomatic conference that negotiated the *1977 Additional Protocols* did not have the purpose of reforming the law regulating naval operations and was careful to avoid becoming seized of naval issues (see API Article 49(3)), although it admittedly did have some influence on naval conduct in hostilities.. There have also been no protocols added to the *1980 UN Convention on Certain Conventional Weapons* to do with specifically naval weapons – its *1980 Protocol II* (and the 1996 Amendment to it) on mines did not deal with sea-mines.
53 N Ronzitti, 'The Crisis in the Law of Naval Warfare' in N Ronzitti (Ed), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Dordrecht, Boston, London: Martinus Nijhoff, 1988) (hereafter Ronzitti *Law of Naval Warfare*), at pp.1-58, especially the section on 'The Theatre of Naval Operations' at pp.13-41 (which includes some comment on the effects of *1977 Protocol I Additional to the 1949 Geneva Conventions* – hereafter API).

Once the Cold War was over, the IIHL in Sanremo, supported by the ICRC, initiated its project to produce a contemporary restatement of the international law applicable in armed conflict at sea. The results were published in 1995.[54] Its methodology was rigorous and thorough, involving a series of meetings of the leading scholars in the subject, as well as representatives of many of the world's navies – and all the major naval powers were represented, albeit informally.

The SRM's influence is significant, and for very good reason. Both the USN and the British Ministry of Defence have quoted the SRM rules in their manuals dealing with LOAC.[55] The SRM was used in its entirety as the 'first draft' of the *UK Manual's* 'Maritime Warfare' chapter.[56] It was quoted by Israel in support of its conduct of the blockade of Gaza, following the May 2010 attempt by a flotilla of neutral vessels to enter the territory.[57] In subsequent enquiries into that incident, the SRM was again relied upon.[58] Most recently, the editors of a guide to human rights law applications in armed conflict have relied on a combination of the SRM and the *UK Manual* in their own 'Maritime Warfare' chapter.[59] There is, therefore, strong evidence that the SRM is widely regarded as a reliable statement of the LOAC to be applied at sea.

One does need to be circumspect in assuming that the SRM is definitive of the law, however. Its Foreword describes it as 'a contemporary restatement of the law, together with some progressive development, which takes into account recent State practice, technological developments and the effects of related areas of the law.'[60] It is neither conventional law nor a codification of customary law, but it very clearly relies on both. It is authoritative, in so far as it is the product of a rigorous process of review, but that authority is limited by the fact that

---

[54] See Note 4 above. Reference to the *San Remo Manual* rules hereafter will give the rule number prefixed by 'SRM'

[55] US Navy NWP 1-14M *The Commander's Handbook on the Law of Naval Operations* available online at: http://www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf and *UK Manual* (as Note 55). .

[56] The current author was one of the joint authors of that chapter, together with Professor Vaughan Lowe QC (then the Chichele Chair of Public International Law in the University of Oxford), Miss Elizabeth Wilmshurst (then the Deputy Legal Adviser in the Foreign and Commonwealth Office), and Commodore Jeff Blackett (then the Chief Naval Judge Advocate).

[57] See, for example, www.abc..au/lateline/content/2010/s2914517.htm quoting the Israeli Government spokesman, Mark Regev, in an interview to the Australian Broadcasting Corporation in which he quoted the SRM, on 31 May 2010. The Israeli Ministry of Foreign Affairs have also relied on both the US Navy's *Commander's Handbook* and the *UK Manual* as containing authoritative statements on blockade; see: http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/gaza_flotilla_maritime_blockade_gaza-legal_background_31-may-2010.aspx .

[58] See, for example, The Palmer Report) (as Note 22).

[59] D Murray et al (Eds), *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford: Oxford University Press, 2016), at pp.289-303. The editorial team who produced this guide consists of a distinguished group of leading UK based experts on both international Human Rights Law and LOAC/IHL; their reliance on the SRM is indicative of its status as a reference on extant LOAC applicable at sea..

[60] SRM, p.ix (emphasis added)

States were not officially represented in the process of consultation, with all officials contributing in their 'personal' capacities. Not all of its rules are invariably accepted. For example, while the *UK Manual's* 'Maritime Warfare' chapter relied heavily on the SRM, the rules were modified to reflect the UK's position.[61] Nor is the SRM declaratory of customary law. One might be forgiven for assuming it is; the ICRC's Customary Law Study deliberately excluded any practice in naval warfare, because "this area of law was recently the subject of a major restatement, namely the San Remo Manual".[62] Nevertheless, it is appropriate to regard the SRM as a basic statement of the extant law. This is convenient for the purposes of this paper, which alludes to the SRM rules, and thereby avoids lengthy reference to conventional sources and historic practice.

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

## Economic Warfare at Sea

Naval economic warfare, and the law regulating it, were developed largely during the 17th and 18th centuries, the classic period of European maritime imperial rivalry. A normative regime evolved through practice that allowed belligerents to target each other's trade while at the same time respecting that of neutrals. It provided for the interdiction of the opposing belligerent's merchant trade on the high seas and on the imposition of belligerent blockade off an enemy's coast and ports. Belligerent trade could be carried in hulls registered in neutral powers as well as the belligerents' own. Procedures developed to allow for visit and search of all shipping to check for contraband. Not all enemy goods were contraband, their status depended on their likely contribution to the enemy's war effort. Belligerents gained the right to stop and search merchant ships of all registrations on the high seas to check their cargoes. Genuinely neutral trade, non-contraband and private goods would be allowed to proceed, regardless of the flag under which they were being transported. Enemy ships, those carrying contraband and others

---

61 The present author has previously provided a full account of the differences between the SRM and the *UK Manual* and the reasoning behind them in S Haines, 'The United Kingdom's Manual on the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared', in *Israel Yearbook on Human Rights*, Vol.36 (Leiden/Boston: Martinus Nijhoff, 2006) (hereafter Haines 'UK Manual and SRM'), at pp.89-118.

62 *ICRC Customary Law Study Vol.1: Rules*, at p.xxx.

either resisting stop and search or attempting to breach a blockade were subject to seizure as prizes of war. A remarkable body of 'prize law' evolved, through the jurisprudence of prize courts convened in belligerent states, to confirm or deny the legitimacy of ship and cargo seizures.[63] In 1856, with the *Paris Declaration*, the methods of economic warfare achieved recognition in conventional law. This remains extant today and forms the basis of the current international law regulating commerce-raiding and blockade operations.[64]

The *Paris Declaration* rules were not uncontroversial and, in the late-19th century through to the First World War, naval interests were in tension with the commercial interests that favoured free trade and regarded the freedom of the seas as essential for it. This tension surfaced in particular in debates within Britain between naval and commercial lobbies whose rival views were reflected in the policies of the main political parties. On the one hand were free trade Liberals; on the other were navally inclined Tories. The former wished to maintain maximum freedom of uninterrupted movement on the high seas, while the latter wished to retain as much flexibility as possible to apply economic pressure at sea.[65] This is not the place to rehearse these debates but, in important respects, they became moot once general naval war broke out in 1914 (and again in 1939). While the legal rules were promulgated and in force, naval operations, especially the actions of submarines, pushed the law to one side as the strategic stakes rose to existential levels. The law proved incapable of preventing unrestricted submarine warfare (attacks on merchant ships without warning) and the process of belligerent visit and search was marginalised. The *1936 London Protocol* was swept aside as the Battle of the Atlantic got underway.

Following the end of the Second World War, and until 1990, the Cold War maritime confrontation between NATO and Warsaw Pact naval forces in the North Atlantic suggested serious potential for future attacks on shipping. The Alliance's need to maintain vital sea lines of communications between Europe and North America meant that the major navies involved

---

63 D Petrie, *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail* (Annapolis MD: Naval Institute Press, 1999). See also E Roscoe, *A History of the English Prize Court* (London: Lloyd's, 1924); T Holland, *A Manual of Naval Prize Law* (London: HMSO, 1888); and R Hill, *The Prizes of War: The Naval Prize System in the Napoleonic Wars 1793-1815* (Stroud: Sutton, 1998).

64 See the text and commentary in both: Roberts and Guelff, *Documents*, at pp.47-52; and N Ronzitti (Ed), *The Law of Naval Warfare:* (as Note 53) text and 'Commentary' by H Fujita, pp.63-75.

65 See the discussion of debates within *The Naval Review* (the professional journal of Royal Navy officers) on the subject in S Haines, 'Law, War and the Conduct of Naval Operations', in P Hore (Ed), *Dreadnought to Daring: 100 Years of Comment, Controversy and Debate in The Naval Review* (Barnsley: Seaforth Publishing, 2012), pp.299-315; the recent excellent study of the consequences of the *1856 Paris Declaration* in J Lemnitzer, *Power, Law and the End of Privateering* (Basingstoke: Palgrave Macmillan, 2014); and the revisionist account of British naval planning in N Lambert, *Planning Armageddon: British Economic Warfare and the First World War* (Cambridge MASS: Harvard University Press, 2012).

remained focused on the prospect of economic warfare. The Soviet naval threat caused Western navies to prepare for a defensive campaign in response – including naval control of shipping and convoying.[66] A considerable naval control of shipping organisation existed within NATO to organise a convoying system. Since 1990, however, these arrangements are no longer exercised in the way they once were.

There is now no particular focus on offensive economic warfare. British doctrine is telling in this regard. In the first edition of *British Maritime Doctrine* (1995), operations against enemy merchant shipping were hinted at under 'Operations against Enemy Forces', although the volume contained no substantial treatment of economic warfare.[67] The second edition (1999) omitted even the suggestion that shipping would be subject to interdiction by the Royal Navy (RN).[68] Nor, was economic warfare a feature of the third edition (2004).[69] There has been no revival of economic warfare in RN doctrine in the years since. The dominant role of navies now is power projection.

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

- While such warfare has always been a feature of general great power war at sea in the modern era, is it likely to be so in future?
- Would a sustained attack on commercial shipping any longer be regarded as permissible from a moral and normative (as distinct from strictly legal) perspective?
- If economic warfare were to occur, would the existing law governing it be compatible with contemporary circumstances?

---

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

67 Directorate of Naval Staff Duties, *BR1806: The Fundamentals of British Maritime Doctrine* (London: HMSO, 1995), p.95.

68 Naval Staff Directorate, *BR1806 British Maritime Doctrine* 2nd Edition (as Note 5). The draft was subjected to comprehensive scrutiny by the range of relevant naval directorates in the Ministry of Defence and by the staff of the Commander-in-Chief Fleet. While it would have been perfectly understandable for naval traditionalists to criticize the deliberate omission of economic warfare, none did so.

69 The Defence Council, *BR1806: British Maritime Doctrine* 3rd edition (London: TSO, 2004).

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

Both the world wars of the 20th century witnessed considerable naval campaigns against commercial shipping, with civilian crews becoming frequent casualties of war. This was even then controversial, especially in relation to unrestricted attacks on shipping. It seems unlikely, given shifts in attitudes to war and civilian casualties in recent years, that it would be generally regarded as acceptable for warships deliberately to target civilian manned merchant ships on the high seas today. While no such concerns prevented attacks on merchant ships in the Second World War – and would probably not prevent them in the future – legal, ethical and moral restraints might make a difference. The possibility of post-conflict justice, which has become more likely in recent years, would hopefully be an increasingly powerful factor enhancing the law's restraining influence. That will be more likely if the law itself makes sense in relation to the conditions in which it will be expected to function. Unfortunately, the current law seems less than ideal, for two important practical reasons: one to do with the evolved structure of the international commercial shipping industry; and the other with the manner the goods are now shipped globally. The first reason raises issues at the maritime strategic level; the second is of naval tactical concern.

From the early 19th century until the middle of the 20th century, most shipping was formally associated with the major maritime powers, especially those with colonies overseas, and was defended by the navies those powers possessed.[70] By the 20th century, there had developed an almost symbiotic relationship between navies and merchant fleets, with the trade being defended by navies generating the imperial wealth that rendered major fleets of warships affordable. Merchant ships flagged in a maritime power had crews which tended to consist of

[70] Formal ship registrations did not emerge until the middle of the 19th century following the example of Britain, which established its registry in law in 1823. For this reason, there is a dearth of reliable data on the size of States' merchant fleets and nationality of merchant ships. Nevertheless, the navies of the major maritime powers traditionally had a significant role to play in protecting their own trade, with the neutrality or belligerency of merchant vessels having become recognised in the laws of naval warfare by the 18th century. By the Second World War, the two largest merchant fleets were those of the US and Britain, neither of which are now ranked in even the top ten of merchant flags. See J Mansell, *Flag State Responsibility: Historical Developments and Contemporary Issues* (Berlin: Springer, 2009), pp.13-23.

subjects of the flag State (although the sea-going community has always had a significant international character). They also carried goods, a substantial proportion of which would be destined for the ports of that State. As a result, identifying 'enemy' and 'neutral' shipping in time of war was relatively straightforward and there was a good chance that the cargo being carried had some connection with the State in which the ship was registered.

This is no longer the case. The international shipping industry is now profoundly international in all respects and goods transported around the globe are carried in vessels registered in States that have never been - and are never likely to be - classed as major 'maritime powers'. Open registries carry most global trade today and they would almost certainly have neutral status in time of war between great powers.[71] Defensive measures taken by a maritime powers through naval control of shipping and the mustering of vessels into convoys for protection provided by the State's naval forces, are now no longer as feasible as once they were. A commerce raiding operation would need to cope with merchant shipping, the bulk of which would be neutrally registered. Global maritime trade has more than quadrupled in the past fifty years – and continues to grow - while the number of warships that would be available to defend against attacks on shipping have reduced markedly. Since 1970, for example, the RN has reduced to a quarter of its then size.[72] Compared to the hundreds of escorts the RN was able to deploy in the Second World War, the twenty currently available render an effective defensive economic warfare campaign impossible to mount. Despite the proliferation of navies and the still impressive size of the USN in particular, there are quite simply insufficient warships to engage in either offensive or defensive economic warfare of the sort witnessed in the most recent general naval war, especially given the substantially increased volume of maritime trade. Strategic decisions to wage war have to take into account the military capacity to do so.

At the tactical level, it is also difficult, if not impossible, to imagine the belligerent right of visit and search functioning in the context of 21st century shipping. Even if a visit and search policy was adopted, it would be impossible to establish whether or not a general cargo vessel was carrying contraband in the manner that this was achievable in the past. The bulk of general cargo is these days transported in containers (which did not exist before the mid-1950s). These are transported in ships that have been growing in size ever since containers first had an impact

---

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

[72] For trade figures, see M Stopford, *Maritime Economics* 3rd Ed (London and New York: Routledge, 2009), pp.38-39. For naval statistics over time see *Jane's Fighting Ships* (as Note 38) various editions.

on global trade in the late 1960s.[73] It is genuinely difficult to imagine how a warship would exercise the right of visit and search in relation to an 18,000 container capacity vessel whose master had no idea what was being carried in the containers embarked in his ship. The very large container ships will certainly be bound for certain specialist cargo handling ports – the major container terminals - capable of taking vessels of that size and handling the numbers of containers involved. Ships' masters could certainly not react to an order to berth in any port in order to facilitate a search of their cargo (and containers are deliberately stacked to make them inaccessible at sea for security reasons). Container ship operations are largely computerised. All information is computer-based: contents, weight, location of stowage, order of loading and unloading, etc. The searching of such ships by boarding parties from warships is simply not feasible. The law that provides for visit and search operations has been rendered unsuitable by the containerisation of a substantial proportion of trade.[74] Importantly, it is these sorts of vessels that would be most likely to carry goods of a nature to be classed as contraband. The characteristics of the contemporary shipping industry make it difficult to imagine how the law relating to contraband would be enforced, either through effective interdiction at sea or through the application of the law of prize – including in proceedings in prize courts.

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

---

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

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

## Hybrid warfare at sea

While the risk of a general naval war between major maritime powers – and of a consequential return to traditional economic warfare – is considered to be low, there can be little doubt that conflict at sea will continue to occur in some form. Hostilities involving navies in combat with other navies must not be ruled out. In important respects, however, the end of the Cold War seems to have ushered in a new phase or generation of armed conflicts that have proved particularly challenging from both military and legal perspectives.[75] A particular feature of these conflicts on land has been the increase in those of a non-international character, which have predominated. As demonstrated, these have not resulted in significant naval engagement between parties (the only one that did being in Sri Lanka, involving the Sri Lankan navy and the Tamil Tigers). One important reason is that naval forces are generally too expensive and sophisticated to be deployed by non-state actors, most of which would experience significant challenges mounting effective maritime operations. Nevertheless, the sea cannot be divorced from the land entirely, not least because even predominantly naval wars have ultimately been about resolving issues to do with the political control of territory and communities ashore. Wars on land can result in conflict extending to seawards.

The increase in non-international armed conflict (NIAC) in recent years has resulted in asymmetries becoming more marked, as non-state armed groups operating against the regular forces of States are forced into the use of low-intensity forms of conflict, including insurgency. Asymmetric, hybrid and mixed forms of conflict involving methods that are difficult to combat, employed by forces whose identity can be profoundly ambiguous, are now a frequent challenge for regular forces. Distinguishing between combatants and civilians can be virtually impossible, especially when armed groups operate within communities to conceal their presence and their activities prior to the mounting of carefully targeted attacks. In conflict on land today, someone who appears to be a civilian may not be revealed as a participant in conflict until he or she acts. The motives of those involved may be ambiguous as well, with criminal gangs using methods and to intensities similar to those employed by those fighting for political purpose. The methods employed by drug cartels in Mexico, for example, led to a criminal insurgency that presented

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

particular challenges to the authorities trying to combat them.[76] The sorts of conflicts that result have the potential to confuse those trying to counter them. Is the law enforcement (or constabulary) paradigm the defining approach to the application of force in such circumstances, or is it the more permissive LOAC approach? Is there a legitimate role for private companies deploying combat veterans on security operations? These two question alone have become commonplace in conflict zones on land.

The issues raised are becoming increasingly relevant in the maritime sense as well. The experience with Somali based piracy, with well organised pirate groups operating in accordance with sound 'business plans', has demonstrated the potential for criminal activity at sea to pose serious threats to security.[77] Pirate operations have been conducted by experienced mariners turned pirate and it is entirely conceivable that similar threats could materialise involving groups having political rather than financial motive. One of the difficulties experienced with counter-piracy operations has been that pirate vessels are often not revealed as such until they launch an attack on vulnerable shipping. This presents problems not unlike those experienced by forces attempting to counter insurgencies ashore, in which the identification of the enemy is by no means a straightforward process. The identity of vessels at sea can be as ambiguous as the identity of armed groups ashore. An important feature of the efforts to protect shipping off the coast of Somali and in the Gulf of Aden has been the deployment of private security companies, contracted by shipping companies to provide defence on board their merchant ships transiting through the region. Navies do not have a monopoly of the use of legitimate force at sea in constabulary operations, where the principles of self-defence allow for necessary and proportionate force.

Following the outlawing of privateering by the 1856 Paris Declaration, the legitimate application of force on the high seas in time of war became the preserve of navies.[78] In recent years, however, that monopoly has been effectively removed. Civilian manned coastguards are being added to the equation through their increasingly routine involvement in constabulary operations. The more capable coastguard cutters are sufficiently similar in design and capability to warships that, if manned by naval personnel, they would be classified as such. Warships have a particular status in international law and are endowed with powers that other ships do not possess. They are defined in Article 29 of 1982 UNCLOS and, strictly speaking, State

---

[76] J Sullivan and A Elkus, 'Plazas for Profit: Mexico's Criminal Insurgency' in *Small Wars Journal* 26 April 2009, available at www.smallwarsjournal.com

[77] A Palmer, *The New Pirates: Modern Global Piracy from Somalia to the South China Sea* (London and New York: I B Taurus, 2014) in particular the chapter on 'Pirate Operations' at pp.163-204.

[78] 138 CTS (1868-69) 297

owned and operated coastguard cutters are not warships. They are, however, able to operate lawfully in similar ways to warships if they are conducting counter piracy operations on the high seas in accordance with Article 107 of 1982 UNCLOS. If a constabulary operation escalated and, through the use of force, exceeded the threshold for armed conflict, coastguards could easily find themselves engaged in armed conflict at sea. With a recent proliferation of coastguards and the likelihood of tensions at sea caused by a variety of issues initially demanding constabulary responses, there seems to be a growing risk of coastguards becoming involved in the early or lower-intensity stages of armed conflict.

States do not only deploy coastguards, however. There are now also quasi-official 'militia' forces operating in coastal waters in particular. For example, the Iranian 'Navy of the Army of the Guardians of the Islamic Revolution' (the 'Revolutionary Guards' Navy') operates in unconventional ways in the waters of the Gulf. Its legal status and that of the maritime forces it deploys is not entirely clear. To quote one Iranian defector, 'It's something like the Communist Party, the KGB, a business complex, and the Mafia."[79] It has managed seriously to embarrass both the USN and RN by seizing patrol boats operating in international waters close to the Iranian coast. It exists side by side with the more traditional Islamic Republic of Iran Navy. A similar example of maritime hybridity is provided by the forces of the Peoples' Republic of China. It has a traditional navy (the Peoples' Liberation Army Navy, or PLAN) as well as a coastguard force and a maritime militia, the latter made up of civilian manned fishing vessels that are also deployed by the State to assist in asserting sovereignty in disputed areas and to interfere with other States' fishing vessels, especially in the South China Sea.[80] Chinese coastguard vessels, which are ostensibly deployed on constabulary tasks, are effectively operating as warships in all but name, while claiming civilian status.[81]

What is the dividing line between 'constabulary' action and military applications of force? The use of coastguards and other civilian manned vessels in aggressive operations injects ambiguity into a situation such that, if the defensive response is mounted by a traditional

---

[79] See a recent brief from the Council for Foreign Relations at www.cfr.org/iran/irans-revolutionary-guards/p14324.

[80] See, for example, 'S Stashwick, 'Crying Wolf? Contrary to Reports, No Dredges at Scarborough Shoal Yet' in *The Diplomat*, 8 Sep 16 accessed at www./thediplomat.com/2016/09/crying-wolf-contrary-to-reports-no-dredges-at-scarborough-shoal-yet/ .

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

naval force applying military force, it risks being portrayed as the aggressor in a propaganda campaign waged to scale an international moral high ground.[82] Hybrid warfare implies the use of various methods to 'win', including the use of propaganda and the manipulation of the media. A warship in an exchange of fire with a civilian manned coastguard cutter will almost certainly experience difficulties justifying its use of force in the international sense.

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

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

The sorts of questions alluded to here have been posed time and again in relation to operations on land, with the answers debated at length. They are only now emerging as serious issues in the naval context but they are doing so to the extent that it is now time for some consideration to be given to the relevance of existing LOAC to contemporary and future hybrid

[82] See an interesting and well informed analysis of hybrid warfare at sea from a US Navy perspective by a former NATO Supreme Allied Commander Europe, Adm J Stavridis, 'Maritime Hybrid Warfare is Coming' available at http://navalinstitute.com.au/maritime-hybrid-warfare-is-coming/ ,

conflict at sea. The existing LOAC deals principally with traditional forms of naval war that were common until the middle of the 20th century. It was never developed to cope with the challenging circumstances of contemporary low-intensity conflict today.

## Challenging the existing law

There is no better or more convenient summary of the existing law governing the conduct of hostilities at sea than the 183 rules contained in the SRM. They represent what the experts who produced the manual believed the law of naval warfare to be on the eve of the 21st century. For reasons of brevity in this paper it is entirely appropriate, therefore, to make reference to the SRM rather than to the various recognised sources of the law. Its contents are organised as follows:

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

Again, for the purposes of this paper, Part VI dealing with humanitarian issues, together with a total of 35 rules dealing with aircraft and air operations, can be put on one side and not be considered further.

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

are naval specific weapons. There are no SRM rules dealing with power-projection because the rules for it are identical to those on targeting applied on land – and once a military force has landed from sea, the law of land warfare applies to its activities.[83]

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

While the SRM is a very valuable reference, it is not regarded universally as a clear and unambiguous statement of the law. When the UK utilised the manual as a starting point for its own treatment of the subject, for example, it subsequently modified seventeen of the rules and excluded ten.[84] Those subjects with which the *UK Manual* took issue, were: the applicability of the law of armed conflict (SRM Rule 1); the areas of naval warfare (SRM Rule 11); neutrality (SRM Rule 13d); the '24 Hour Rule' (SRM Rule 21); notice of passage (SRM Rule 26); the notification of mining in neutral exclusive economic zones and in the waters above neutral continental shelves (SRM Rule 35); and ruses of war and perfidy (SRM Rule 111). The UK's decision not merely to repeat the SRM rules word for word, suggests that there is some scope for reviewing their content. It is the existing content of the SRM dealing specifically with economic warfare, however, for which a review is considered especially necessary.[85] For hybrid warfare, which is not addressed at all in the extant law, it would certainly seem to be timely to consider the relationship between maritime constabulary and military operations and to consider how the principle of distinction should be applied at sea in circumstances involving interaction between warships, coastguard vessels and other 'militia' and similar vessels of profoundly ambiguous status. It may well be possible to argue that the law is capable of being applied in the 'messy' circumstances of hybrid warfare and that little change is necessary.

---

[83] The *1907 Hague Convention IX Concerning Bombardment by Naval Forces in Time of War* clearly deals with naval power projection but its provisions are not included in the SRM. The convention has not been a success and was not complied with during the two subsequent world wars. 1977 API has a bearing on this subject today, especially Articles 35, 40, 41 and 59, dealing with basic rules, quarter, enemy combatants *hors de combat*, and non-defended localities respectively.

[84] S Haines, 'The UK Manual and the San Remo Manual' (as Note 61), p.98 for a summary table of SRM rules and their treatment in the *UK Manual*. The present author's choice of this comparison with the SRM, and his position on the rules quoted, is no mere coincidence, given his role in the production of the *UK Manual*. For further suggestions see also von Heinegg 'How to update the San Remo Manual (as Note 35).

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

Nevertheless, it is almost certainly worth exposing the issues raised to informed debate – if only to reject any substantive change to the existing law. Any debate needs to involve both informed lawyers and experienced naval operators for the practical application of the law to be fully and adequately addressed.

## Concluding comments

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

Armed conflict at sea certainly remains likely, especially given the current rivalries in evidence today. The South and East China Sea disputes, China's enhanced naval ambitions and the resurgence of Russian naval power are all undoubtedly significant indicators of the potential for armed confrontation (and there are others). There are more navies capable of engaging in some form of maritime conflict than at any time in history; their proliferation has been a marked feature of the second half of the 20th century. The possibility that the major maritime powers are unlikely to wage war against each other in the future does not mean that conflict at sea is to be relegated to history. Clearly, it will occur and rules need to be in place to regulate it.

It has been suggested that two issues in particular deserve serious review. First, economic warfare at sea would appear to be impossible to conduct using the current range of rules. The substantial changes to the shipping industry since the Second World War have certainly not been matched by changes to the law dealing with the interdiction of maritime

trade. While it is possible that economic warfare, a distinctive feature of war in the era of maritime imperial rivalry, may no longer be likely, it cannot be ruled out altogether. That being the case, there is a need for legal rules to be in place that would be realistic given contemporary and future conditions.

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

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

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

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