

San Remo Manual on International Law Applicable to Armed Conflict at Sea

by Louise Doswald-Beck

1. Background

The law regulating the use of force at sea has long been due for a reevaluation in the light of developments in methods and means of warfare at sea and the fact that major changes have taken place in other branches of international law of direct relevance to this issue. This need was reflected in Resolution VII of the 25th International Conference of the Red Cross, which noted that “some areas of international humanitarian law relating to sea warfare are in need of reaffirmation and clarification on the basis of existing fundamental principles of international humanitarian law” and therefore appealed to “governments to co-ordinate their efforts in appropriate fora in order to review the necessity and the possibility of updating the relevant texts of international humanitarian law relating to sea warfare”.

Although the law relating to land warfare has been reaffirmed in recent treaties, in particular the two Protocols of 1977 additional to the Geneva Conventions of 1949, this has not been the case as regards the law of armed conflict at sea. The Second Geneva Convention of 1949 deals only with the protection of the wounded, sick and shipwrecked at sea, with some adjustments in Additional Protocol I of 1977, in particular the extension to shipwrecked civilians of the protection laid down in the Second Geneva Convention. However, these treaties do not address the law regulating the conduct of hostilities at sea. Almost all of the treaties on this subject date from 1907, when the Second International Peace Conference at The Hague adopted eight Conventions on the law of naval warfare. One of these has since been overtaken by the Second Geneva Convention and another, on the creation of an international prize

court, never entered into force. A third, which regulated bombardment of land targets by naval forces, has in practice been overridden by the rules regulating attacks in Protocol I of 1977. However, these rules in Protocol I apply only to naval attacks that directly affect civilians on land, and therefore do not cover attacks by naval forces on objects, in particular vessels and aircraft, at sea. The 1907 treaties themselves did not represent a complete codification of the law of war at sea, but dealt with certain subjects, namely, the status of enemy merchant ships and their conversion into warships, the laying of automatic contact mines and the immunity of certain vessels from capture. An attempt to draft a more complete treaty took place in London in 1909, but the final Declaration did not enter into force. A non-binding code was drafted by the *Institut de droit international* and adopted in Oxford in 1913. Together, the 1909 London Declaration and the 1913 Oxford Manual give a good idea of pre-First World War customary law.

Events in the First World War showed that the Hague treaties and traditional customary law had begun to be overtaken by developments in methods and means of warfare. The use of submarines, in particular, which were unable to follow procedures required of surface ships, resulted in the torpedoing of merchant vessels in ways which were in violation of the accepted law of the time. Efforts were made, in particular by Great Britain in the 1920s, to outlaw submarines altogether but as this proposal was not accepted a treaty was adopted in 1936 specifying that submarines must abide by the same rules as warships. However, this attempt at regulating new methods of warfare did not solve the problem, which was exacerbated by the subsequent widespread use of aircraft, seamines and long-range missiles. This led to many arbitrary sinkings in the Second World War, including many hospital ships and Red Cross vessels carrying relief supplies.

The customary law that developed prior to the First World War had made an appropriate balance between military and humanitarian needs that suited naval practices and the sailing ships of the nineteenth century. As it is not possible to return to those times, the law needs to be adjusted so that the same balance can be respected with rules that are appropriate for modern conditions. Another major factor is that there have been important developments in other areas of international law such as the United Nations Charter, the law of the sea, air law and environmental law since the Second World War which must be taken into account in any restatement of the law applicable to armed conflicts at sea. The development of the law of armed conflict on land is also of importance, in that all armed conflicts involve operations in which the land, air and sea forces

work in close cooperation and it would therefore not be appropriate to have totally different standards. Furthermore, all aspects of armed conflict should be in conformity with the basic principles of international humanitarian law, wherever the theatre of operations might be. However, at the same time it is recognized that there are certain specificities of naval operations that need to be taken into account, in particular the fact that neutral interests are involved at sea to an infinitely greater extent than is the case with land operations.

All these factors have led to a troubling degree of uncertainty as to the content of contemporary international law applicable to armed conflicts at sea. Although operations at sea are not at all as frequent as those on land, several recent conflicts have shown the need for greater certainty in the law applicable to naval warfare. The Falklands/Malvinas conflict brought the first major naval operation since the Second World War, and although it fortunately did not result in any serious problems as regards the safety of civilian or neutral shipping, it did raise significant questions with regard to the use of exclusion zones. Another problem which came to light was the negative effect on the efficiency of hospital ships of the rule in the Second Geneva Convention which prohibits hospital ships from using a secret code. The war between Iran and Iraq, on the other hand, saw extensive attacks on neutral civilian shipping as well as the use of exclusion zones by the belligerents. The downing of the Iranian airbus by the *Vincennes* forcefully brought to light the practical difficulties involved in the correct identification of civilian objects by belligerent naval forces and the unclear relationship between the work of civilian air traffic authorities and the perceived needs of belligerent forces in the area. The second Gulf war involved extensive naval activity when the Coalition forces established a blockade, without formally designating it as such.¹ Of particular interest were the methods used to enforce the blockade and the exceptions to it that were allowed for humanitarian reasons. The extent to which the United Nations Security Council was bound by the rules of international humanitarian law was also an important issue. Finally, it should be mentioned that the laying of seamines has created some difficulty. Such mines were laid in the Iran/Iraq war and some were removed by neutral States. In June 1995, a vessel chartered by the International Committee of the Red Cross to provide relief supplies to civilians in Sri Lanka was severely damaged and sank when it hit a seamine. The government of Sweden has on several occasions proposed a new treaty

¹ The term "interdiction" was used by the US forces.

to the international community on the use of naval mines, first of all in 1989 at the United Nations Disarmament Commission, then in 1991 before the First Committee of the UN General Assembly and now as an additional Protocol to the 1980 Convention on Certain Conventional Weapons.² Unfortunately, there is some doubt as to whether this latest initiative will be successful as the Review Conference of the 1980 Convention, which will meet in September-October 1995, will concentrate on landmines and, to a lesser degree, laser weapons.

In recent years some States have prepared naval manuals or further developed and updated military manuals which include sections on the law of naval warfare. The most notable recent naval manual is the United States Commander's Handbook on the Law of Naval Operations (NWP 9A) and its annotated supplement.³ The new German manual, Humanitarian Law in Armed Conflicts ZDv 15/2, published in 1992, has an important section on armed conflict at sea and a new manual, a large section of which will cover naval operations, is currently being prepared by the United Kingdom.

Although recent conflicts have not involved the very extensive sinking of civilian and other non-combatant shipping that occurred in the Second World War, it still needs to be clearly established that indiscriminate naval operations are unlawful and for this purpose detailed international regulations are necessary.

2. Development of the San Remo Manual and its intended purpose

The San Remo Manual was drafted over a period of six years and adopted in June 1994. It is accompanied by a full commentary, entitled the "Explanation".⁴ The participants in the groups of experts that prepared the Manual were a mixture of governmental personnel and academics attending in their personal capacity from twenty-four countries.

² The full title of this Convention is: "Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects".

³ NWP 9(Rev.A)/FMFM 1-10. A new revised version is due to appear shortly.

⁴ Both the Manual and the Explanation are published by Cambridge University Press, "San Remo Manual on International Law Applicable to Armed Conflicts at Sea: Prepared by a Group of International Lawyers and Naval Experts convened by the International Institute of Humanitarian Law" (ed. Louise Doswald-Beck) 1995.

A series of annual meetings, beginning in San Remo in 1987, were convened by the San Remo International Institute of International Law in cooperation with a number of other institutions, including the International Committee of the Red Cross and several National Societies. The second meeting, which was held in Madrid in 1988 in cooperation with the Spanish Red Cross, established a Plan of Action to draw up a statement of contemporary international law applicable to armed conflicts at sea. Subsequent meetings were held in Bochum, Toulon, Bergen, Ottawa, Geneva and, finally, Livorno. The first four of these meetings were organized in cooperation with the National Societies of Germany, France, Norway and Canada respectively. The ICRC played a major role throughout. Apart from coorganizing the meeting held in Geneva, it offered its advice to the Institute throughout the process, coordinated the drafting work and helped contribute to the administrative and secretarial work. The ICRC also convened three meetings of the rapporteurs, whose reports were the basis of discussion in the annual meetings, in order to organize the drafting of the "Explanation".

The Manual is not a binding document. In view of the extent of uncertainty in the law, the experts decided that it was premature to embark on diplomatic negotiations to draft a treaty on the subject. The work therefore concentrated on finding areas of agreement as to the present content of customary law, which were far more numerous than initially appeared possible. As a second step the experts discussed controversial issues with a view to reaching an agreed compromise on innovative proposals by way of progressive development. However, although the Manual was to contain provisions of this latter type, most of them were always meant to be an expression of what the participants believed to be present law. Thus in many respects the San Remo Manual was intentionally designed to be a modern equivalent of the Oxford Manual of 1913. The experts believed that the drafting of such a document would help clarify the law, thus removing the impression that there was such a degree of disagreement as to render its uniform development in customary law or eventual codification impossible.⁵ The experts particularly noted, when embarking on this project, that the result would be very helpful for dissemination purposes and would encourage the drafting of more national manuals.

⁵ There had been a few seminars on the subject of the law of naval warfare, for example, in Brest 1987, ASIL panel 1988, Newport 1990, which highlighted the disagreements.

In 1990, the experts decided that it was important to publish, at the same time as the Manual, a commentary which would indicate the sources of the rules found in the Manual, relate the discussion concerning the more controversial provisions and explain why certain decisions were made. The commentary would also be an indication of which provisions were generally accepted as being declaratory of customary law and which were in the nature of proposals for the progressive development of the law. The intention was that the Manual be read together with this commentary (later named the "Explanation").

3. Content of the San Remo Manual

The experts' intentions were achieved as regards the content of the Manual and Explanation, and indeed the success of the meetings was such that more issues were dealt with, for example the environment, than was initially planned.

The Manual consists of 183 paragraphs arranged in six parts.⁶

Part I, entitled "General Provisions", covers the scope of application of the rules, the effect of the United Nations Charter, the areas of sea in which military operations may take place and definitions of terms used.

Part II, "Regions of Operations", specifies the rules applicable to belligerents and neutrals in different areas of the sea: namely, internal waters, the territorial sea and archipelagic waters; international straits and archipelagic sea lanes; the exclusive economic zone and continental shelf; and, finally, the high seas and seabed beyond national jurisdiction.

Part III, "Basic Rules and Target Discrimination", is by far the longest part and begins by specifying the fundamental tenets of international humanitarian law, which are normally associated with the law applicable to land warfare, but which participants believed are also applicable to warfare at sea. After enunciating the rule that the right of the parties to choose methods or means of warfare is not unlimited, this section repeats the basic rules of the principle of distinction, including the prohibition of indiscriminate attacks, the rule prohibiting the use of weapons that cause unnecessary suffering or superfluous injury, the prohibition of the denial

⁶ See hereinafter, pp. 595-637.

of quarter, and the need to pay due regard to the natural environment. The rest of Part III contains sections on precautions in attack, enemy vessels and aircraft exempt from attack, enemy or neutral vessels or aircraft that may be subject to attack, and special precautions regarding civil aircraft.

Part IV is entitled “Methods and Means of Warfare at Sea” and contains rules on the use of certain weapons (missiles and other projectiles, torpedoes and mines), the rules applicable to blockades and “zones”, and a section on deception, ruses of war and perfidy.

Part V, “Measures Short of Attack - Interception, Visit, Search, Diversion and Capture”, contains seven sections covering the following subjects: determination of the enemy character of vessels and aircraft; visit, search and diversion of merchant vessels; interception, visit, search and diversion of civil aircraft; and capture of enemy or neutral vessels, civil aircraft and goods.

Part VI, “Protected Persons, Medical Transports and Medical Aircraft”, does not attempt to repeat the detailed provisions in the Second Geneva Convention and Additional Protocol I on these categories, but instead specifies that these detailed rules remain applicable and goes on to indicate certain additional rules largely based on recent developments.

Although certain sections of the Manual are not of direct relevance to the rules of international humanitarian law as such, in particular those sections dealing with the effect of the United Nations Charter and regions of naval operations, they were nevertheless felt by the participants to be a necessary component of this Manual, as they help to provide a framework of legal certainty which in turn helps to secure the correct implementation of the rules of international humanitarian law. In particular, the Manual specifies that the rules apply to all parties, irrespective of which party was responsible for the outbreak of the conflict, and that they also apply to operations authorized or undertaken by the United Nations.

However, the most important contribution of the Manual is the reaffirmation and updating of international humanitarian law, taking into account the four Geneva Conventions of 1949 and Additional Protocol I of 1977.

The most important innovation compared with the traditional pre-1914 law was the introduction of a clear formulation of the principle of distinction as formulated in Protocol I. Although in traditional law the only ships that could be attacked on sight were belligerent warships and auxiliaries, various military measures could be taken against both belligerent and neutral shipping that assisted the enemy’s war effort, for ex-

ample by carrying military materials or helping the enemy's intelligence. Such measures were usually limited to the capture of the merchant vessels concerned, and destruction of the vessels was allowed only in certain specific instances and subject to certain conditions, in particular that provision be made for the safety of the passengers and crew. As mentioned above, the introduction this century of new means of warfare, in particular submarines and aircraft, has led to difficulty in the implementation of the traditional law and to attacks on merchant shipping in both World Wars. In order to cope with this, and on the basis of recent State practice and Additional Protocol I, the experts decided to introduce the concept of the "military objective". The purpose was to limit attacks to warships (a category which includes submarines), auxiliaries and merchant vessels that directly help the military action of the enemy, while retaining the option of using traditional measures short of attack to other defined vessels. The Manual repeats the definition of "military objective" found in Article 52 of Additional Protocol I, and it was felt that this would accommodate military needs and at the same time benefit from the gains made by international humanitarian law since the Second World War. However, in addition to this general definition, and unlike Additional Protocol I, the Manual contains examples of activities that would normally cause vessels engaged in them to become military objectives, and this list is meant to provide some concrete guidance. The relevant paragraph⁷ reads as follows:

The following activities may render merchant vessels military objectives:

- (a) *engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;*
- (b) *acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;*
- (c) *being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;*
- (d) *sailing under convoy of enemy warships or military aircraft;*

⁷ Paragraph 60.

- (e) *refusing an order to stop or actively resisting visit, search or capture;*
- (f) *being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely deflective systems such as "chaff"; or*
- (g) *otherwise making an effective contribution to military action, e.g., carrying military materials.*

There is also a paragraph relating to the possible attack of neutral vessels, but which, not surprisingly, is narrower and stricter.

In addition, the Manual lists⁸ vessels that are specifically exempt from capture, on the basis of either treaty law or customary law:

The following classes of enemy vessels are exempt from attack:

- (a) *hospital ships;*
- (b) *small craft used for coastal rescue operations and other medical transports;*
- (c) *vessels granted safe conduct by agreement between the belligerent parties including:*
 - (i) *cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war;*
 - (ii) *vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;*
- (d) *vessels engaged in transporting cultural property under special protection;*
- (e) *passenger vessels when engaged only in carrying civilian passengers;*
- (f) *vessels charged with religious, non-military scientific or philanthropic missions; vessels collecting scientific data of likely military applications are not protected;*
- (g) *small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection;*

⁸ Paragraph 47.

- (h) *vessels designated or adapted exclusively for responding to pollution incidents in the marine environment;*
- (i) *vessels which have surrendered;*
- (j) *life rafts and lifeboats.*

The Manual contains a section on precautions to be taken before launching an attack, similar to those found in Article 57 of Protocol I, which is intended to help avoid unlawful attacks.

However, the Manual does not deal only with vessels. The experts recognized that aircraft play an important part in naval operations and that any realistic manual would have to take this fully into account. Therefore there are similar provisions, *mutatis mutandis*, on aircraft that may be attacked and those which are exempt from attack. There is also a section on special precautions in relation to civil aviation in order to try to avoid making attacks on innocent civilian aircraft. For this purpose, the experts made reference to international civil aviation rules promulgated by the ICAO. In general these provisions in the San Remo Manual are a pragmatic attempt to marry military necessities, international humanitarian law and civil aviation rules.

The use of different sea areas, although not strictly within the scope of international humanitarian law, was also an important innovation which needed to take into account the contemporary law of the sea, in particular as contained in the 1982 Law of the Sea Convention. Here again, it was not always so easy to combine military necessities whilst respecting as far as possible the provisions of that Convention. Controversial areas were rules relating to the protection of the environment, freedom of navigation and the special rights of exploration and exploitation in the exclusive economic zones of neutral States, and particularly the lawfulness or otherwise of the creation of "zones" (normally referred to as exclusion zones) which adversely affect the right of navigation of neutral shipping. Despite this, it may be seen as an important achievement that the Manual specifies that if such zones are created international humanitarian law must be nevertheless respected in its entirety.

Of great importance is the fact that the Manual includes rules relating to the protection of protected persons similar to those in both the Geneva Conventions of 1949 and Additional Protocol I of 1977. Since the last comprehensive international instrument on the law of naval warfare dates back to 1913, this inclusion was necessary.

The Manual does not repeat the entire content of the Second Geneva Convention and Protocol I, which would be unnecessary, but makes a specific reference to the fact that provisions on the protection of protected persons are to be found in those instruments. It does, however, contain a section on the status and treatment of all persons recovered at sea. In particular it specifies that civilians captured at sea are protected by the Fourth Geneva Convention; this is an improvement on the traditional law, which indicates only that they are "subject to the discipline of the captor".⁹ Apart from specific provisions on the treatment of the wounded, sick and shipwrecked found in the Second Geneva Convention and Additional Protocol I, much of the law in existing treaties and other authorities on the status and treatment of persons captured at sea is fragmentary and incomplete. Therefore in addition to clarifying accepted rules of customary law, some of the rules in the Manual are in the nature of progressive development. The same section of the Manual contains some specific rules relating to the protection of medical ships and aircraft found in Protocol I and encourages the use of the means of identification introduced by Annex I of that Protocol.

Finally, specific mention must be made of the fact that the Manual lays down that starvation blockades are unlawful and requires the blockading power to allow relief shipments if a secondary effect of the blockade is that civilians are short of food or other essential supplies. This is a definite departure from traditional law and reflects the new rules prohibiting the starvation of the civilian population and stipulating the provision of relief supplies which were introduced in Protocol I in 1977 and are now generally seen as having become an established part of international customary law.

4. Conclusion

As the San Remo Manual is the only comprehensive international instrument that has been drafted on the law of naval warfare since 1913, it is likely to have an important impact. It has already influenced the provisions relating to naval warfare in the German manual and it is quite likely that future manuals will also be so influenced. In this way the San

⁹ See, for example, the United States Manual, *supra* note 2 at pp. 8-9.

Remo Manual should help consolidate contemporary international customary law, promote its coherent development and thereby provide a much firmer foundation for possible future treaty developments than could otherwise have been the case. The Manual and accompanying Explanation will also be very useful for dissemination purposes, which should in turn promote a better respect for the law.

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