



FORUM

UNCLOS during Armed Conflict: Due Regard in the Exclusive Economic Zones of Neutral Coastal States

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Abstract

Armed conflicts often spill over from the land to the sea, rendering the law of naval warfare key for governing such conflicts. Against this background, the United States Naval War College developed the Newport Manual on the Law of Naval Warfare (Newport Manual) in 2023, which attempted to codify the existing rules of customary international law. However, this manual differs from the San Remo Manual on International Law Applicable to Armed Conflicts (San Remo Manual), adopted in 1994, particularly regarding the rights of neutral coastal States over their exclusive economic zones (EEZs). While the San Remo Manual requires belligerents to have due regard for such rights, the Newport Manual assumes that such due regard is not required under customary international law. These divergences are derived from different understandings of the relationship between the United Nations Convention on the Law of the Sea (UNCLOS) and the law of naval warfare. This article analyses this by examining the two manuals as well as the domestic military manuals of maritime powers. It concludes that due regard should be paid to neutral States' EEZ rights, but the standard of due regard during an armed conflict differs from that applicable during peacetime.

Keywords: UNCLOS; due regard; *lex specialis*; law of naval warfare; Newport Manual; San Remo Manual

1. Introduction

Several recent armed conflicts, including Russia-Ukraine and Israel-Hamas, have received global attention. While the main military confrontations have occurred on land, the two conflicts have also involved naval action, such as armed clashes in the Black Sea and the Israeli blockade of the Gaza Strip. These events indicate that the law of armed conflict in the maritime domain, namely, the law of naval warfare,¹ remains important and deserving of analysis. However, compared to the law of

¹ Some textbooks on the law of the sea, especially older ones, include a section or chapter on the law of naval warfare. Irrespective of whether the law of naval warfare is a part of the law of the sea, the former can be separated from the latter because the former is applicable only during armed conflict. See, e.g. CJ Colombos,

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armed conflict on land,² the law of naval warfare has been scarcely examined in existing literature.

One of the challenges in analysing the law of naval warfare is the lack of new treaties. Since the adoption of the several Hague Conventions in 1899 and 1907³ and the Second Geneva Convention in 1949,⁴ no treaty primarily addressing the law of naval warfare has been adopted, while the law of armed conflict on land has been updated by several treaties, such as the two Additional Protocols to the Geneva Convention in 1977,⁵ as well as treaties prohibiting the use of certain weapons, such as land mines.⁶ Partly as a result of this lack of treaties, most rules of the law of naval warfare derive from customary international law.⁷ A consequence of this is that the law of naval warfare remains somewhat unclear, not having been codified in a treaty. Since the Second World War, many new weapons have been developed, and the United Nations Convention on the Law of the Sea (UNCLOS)⁸ which dramatically changed peacetime law in the maritime domain,⁹ was adopted in 1982. These facts may have resulted in changes in State practice, which could constitute the customary rules of naval warfare, but these rules remain uncertain.

To overcome this lack of clarity, international military manuals have been created that are designed to reflect the existing rules of customary international law. With regard to naval warfare, two manuals have been published: the San Remo Manual on International Law Applicable to Armed Conflicts (San Remo Manual)¹⁰ in 1994 and the Newport Manual on the Law of Naval Warfare (Newport Manual)¹¹ in 2023. However, while the two manuals overlap in scope, they differ regarding the impact of UNCLOS during armed conflict. While the San Remo Manual accommodates UNCLOS, the Newport Manual states that where there are inconsistencies, the law of naval warfare

The International Law of the Sea (6th edn, Longmans 1967); DP O'Connell, *The International Law of the Sea* (Clarendon Press 1984) vol II.

² UNGA, 'Report of the Independent International Commission of Inquiry on Ukraine' (18 March 2024) UN Doc A/HRC/55/66.

³ For example, Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 331; Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 395.

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

⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I).

⁶ Landmines are prohibited by the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

⁷ LC Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester University Press 2008) 188; D Stephens and M Lewis, 'The Law of Armed Conflict: A Contemporary Critique' (2005) 6 MJIL 55, 79.

⁸ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

⁹ In this article, the term 'peacetime' is used for periods not qualifying as 'armed conflict', as provided for in Common Article 2 of the four Geneva Conventions of 1949.

¹⁰ International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995) (San Remo Manual).

¹¹ J Kraska et al, 'Newport Manual on the Law of Naval Warfare' (2023) 101 ILS 3 <<https://digital-commons.usnwc.edu/ils/vol101/iss1/1/>> (Newport Manual).

prevails over UNCLOS during times of armed conflict. In particular, while the San Remo Manual requests that belligerent parties pay due regard to the rights and obligations of coastal States over their exclusive economic zones (EEZ),¹² the Newport Manual says that the law of naval warfare divides the ocean into two spaces: first, neutral sea areas, i.e. the internal waters, archipelagic waters and territorial sea of neutral States, where those States have sovereignty; and, second, areas where belligerent rights may be exercised, which includes all waters beyond neutral sea areas under the sovereignty of coastal States, including those of neutral States.¹³ The Newport Manual does not require that belligerent parties pay due regard to the rights and obligations of other States in their EEZ, where coastal States only possess sovereign rights and jurisdiction, rather than sovereignty.¹⁴ Moreover, as will be explored in Section 3.1.2 below, according to the Newport Manual, due regard is a peacetime concept that is not applicable during armed conflict.¹⁵ Such divergence of views concerning the applicability of the due regard obligation has also been apparent during the process of updating the San Remo Manual, which started in 2019.¹⁶

Against this background, this article attempts to clarify the impact of UNCLOS during armed conflict, especially in relation to the rights of neutral coastal States in their EEZ. The reason for focusing on neutral States is that there seems to be a shared understanding that the EEZ of belligerent coastal States can be used as a battlefield.¹⁷ To elaborate on this further, Section 2 examines the relationship between UNCLOS and the law of naval warfare. Section 3 examines both the San Remo Manual and the Newport Manual as well as State military manuals. Finally, Section 4 analyses the applicability of the obligation of due regard during armed conflict. Section 5 follows with a conclusion.

2. The relationship between the law of the sea and the law of naval warfare

2.1. Application of UNCLOS during armed conflict

Since the formal division of the laws applicable to peace and war in the nineteenth century, it has been considered that the occurrence of an armed conflict does not automatically terminate a treaty.¹⁸ Whether a treaty is terminated, suspended or continues to apply during armed conflict must be carefully examined under the rules of international law. For this purpose, the International Law Commission (ILC) created the Draft Articles on the Effects of Armed Conflicts on Treaties (ILC Draft Articles) in 2011.¹⁹ According to Article

¹² San Remo Manual (n 10) 108.

¹³ Newport Manual (n 11) section 4.1.2.1, 77.

¹⁴ *ibid* section 4.1.2, 67. As for the concepts of sovereign rights and jurisdiction over EEZ, see R Churchill, V Lowe and A Sander, *The Law of the Sea* (4th edn, Manchester University Press 2022) 263.

¹⁵ Newport Manual (n 11) section 4.1.2, 76–78.

¹⁶ L Lijnzaad, 'The San Remo Manual on the Law of Naval Warfare—From Restatement to Development?' in N Klein (ed), *Unconventional Lawmaking in the Law of the Sea* (OUP 2022) 21, 39–40.

¹⁷ J Astley and MN Schmitt, 'The Law of the Sea and Naval Operations' (1997) 42 *AFLRev* 152. This article focuses on the EEZ rather than the continental shelf for the following two reasons: first, from a practical point of view, almost no hostile activities are conducted solely in the continental shelf and without using the water column, and second, in accordance with art 56(1) UNCLOS, sovereign rights of a coastal State in the EEZ include the natural resources in the seabed and its subsoil.

¹⁸ See, e.g. *Society for the Propagation of the Gospel v Town of New-Haven, and William Wheeler* 21 US 8, 464 (1823).

¹⁹ International Law Commission (ILC), 'Draft Articles on the Effects of Armed Conflicts on Treaties', UNYBILC, vol II, Part Two (2011) UN Doc A/66/10, 175–217.

4 ILC Draft Articles, where a treaty contains provisions concerning its operation during armed conflict, these provisions apply.²⁰ Therefore, whether UNCLOS applies during armed conflict is to be determined in the first instance by the text itself.

UNCLOS does not contain provisions which expressly refer to armed conflict. However, the preamble hints at the scope of the treaty's application during armed conflict, noting that the States Parties affirm 'that matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.²¹ Thus while armed conflict itself is regulated by rules outside UNCLOS, the provisions of UNCLOS themselves remain applicable during armed conflict along with the law of naval warfare.

Article 298(1)(b) UNCLOS can be used to support the assertion of the treaty's continued applicability during armed conflict. It allows States to opt out of the compulsory dispute settlement UNCLOS provides for in 'disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service'.²² This explicit provision allowing States to exclude 'military activities' from dispute settlement implies that such activities would otherwise fall within the substantive scope of UNCLOS, potentially including military operations during armed conflict at sea. In other words, the existence of the opt-out suggests that UNCLOS provisions (e.g. on freedom of navigation, EEZ rights, etc) apply even when military force is used. This provision may be interpreted broadly to include wartime naval operations, meaning that unless a State makes the Article 298(1)(b) declaration, an UNCLOS tribunal could in theory assess the legality of wartime actions, thus providing a concrete example of the applicability of UNCLOS rules during armed conflict. However, a narrow reading of the provision might interpret 'military activities' to mean only those conducted during peacetime, e.g. exercises or reconnaissance, which would suggest UNCLOS does not regulate or apply to wartime hostilities, which would thus fall entirely under the law of naval warfare. Whilst this latter interpretation is unconvincing given there is no reason to exclude hostile activities from the scope of Article 298(1)(b), the fact that the article is not clear on whether 'military activities' refers to wartime or peacetime actions means it does not decisively indicate whether UNCLOS applies during armed conflict. Such lack of clarity highlights the treaty's silence on the matter and the resulting uncertainty about its interaction with the law of naval warfare.

In such cases, the ILC Draft Articles have two provisions governing whether a treaty is terminated or continues to apply during armed conflict. According to Article 6(a), 'the nature of the treaty, in particular its subject matter ...' is important in deciding the impact of armed conflict on the treaty. Based on this provision, Article 7 and the Annex provide an indicative list of the subject-matters of treaties that are expected to continue to apply during armed conflict. Noting the nature of UNCLOS as the key treaty governing the law of the sea, it also

²⁰ *ibid* 175.

²¹ UNCLOS (n 8) preamble para 8.

²² UNCLOS *ibid* art 298(1)(b). The phrase 'UNCLOS tribunals' refers to courts and tribunals which have jurisdiction over UNCLOS disputes, based on art 287 UNCLOS, namely, the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the arbitral tribunal under Annex VII and the special arbitral tribunal under Annex VIII. On the practice of UNCLOS tribunals, see M Seta, 'Cross-Fertilisation and Conflicts between Courts and Tribunals: An Analysis from the Perspective of the United Nations Convention on the Law of the Sea' in ED Brabandere (ed), *International Procedure in Interstate Litigation and Arbitration: A Comparative Approach* (CUP 2021) 401, 403–14.

contains relevant subject matter.²³ Several of its provisions could be categorised as such according to the Annex of the ILC Draft Articles, namely: treaties establishing maritime delimitation (paragraph (a)); law-making treaties (paragraph (c)); treaties related to environmental protection (paragraph (g)); treaties to establish international organisations (paragraph (j)); and treaties for dispute settlement (paragraph (k)). Thus, if applicable, the ILC Draft Articles confirm that UNCLOS should continue to apply during armed conflict.

2.2. Law of naval warfare as *lex specialis*

Although it is clear that UNCLOS remains generally applicable during armed conflict, given that it does not contain provisions regarding hostile activities it cannot comprehensively regulate armed conflicts at sea. As Wilson and Kraska have aptly pointed out, UNCLOS is not intended to replace the existing rules of naval warfare,²⁴ it is predominantly the customary rules of the law of naval warfare that should regulate naval warfare. However, there is potential for conflict between the two regimes. For example, under the flag State principle in UNCLOS, non-flag States are not allowed to visit foreign vessels on the high seas except in certain limited situations.²⁵ In contrast, the law of naval warfare allows belligerent parties to visit foreign merchant vessels to verify enemy character²⁶ and, under specific conditions, they are even allowed to attack those vessels.²⁷

The notion of *lex specialis* as a method to resolve such discrepancies has been discussed since the era of Hugo Grotius.²⁸ The issue of determining priority of legal regimes has been grappled with by international courts since their inception. For example, in the *Mavrommatis* case, the Permanent Court of International Justice (PCIJ) considered the relationship between the Covenant of the League of Nations and Protocol XII to the Lausanne Treaty, and concluded that the latter prevailed.²⁹ Although the PCIJ did not explicitly state as much, it appears to have relied on two legal maxims: *lex posterior derogate lege priori* (a later law repeals an earlier law); and *lex specialis derogat legi generali* (special law repeals general laws) (*lex specialis* principle).³⁰

The function of the *lex specialis* principle in international law was developed by the International Court of Justice (ICJ) in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, which examined the relationship between the law of armed

²³ UNCLOS is sometimes called the constitution for the oceans: EM Borgese, 'A Constitution for the Oceans' in EM Borgese and D Krieger (eds), *Tides of Change: Peace, Pollution, and Potential of the Oceans*, (Mason/Charter 1975) 340. See also K Sellars, A "Constitution for the Oceans": *The Long Hard Road to the UN Convention on the Law of the Sea* (CUP 2025); R Lewis, 'The "Constitution for the Oceans"? The Law of the Sea Convention as a Living Treaty' (2025) 74 ICLQ 1.

²⁴ B Wilson and J Kraska, 'American Security and Law of the Sea' (2009) 40 ODIL 277.

²⁵ UNCLOS (n 8) arts 110 (right of visit) and 111 (right of hot pursuit) provide exceptions to the flag State principle.

²⁶ O'Connell (n 1) 1114.

²⁷ *ibid* 1117; ST Helmersen, 'The Use of Force against Neutral Ships outside Territorial Waters' (2022) 35 LJIL 317.

²⁸ H Grotius, *De jure belli ac pacis* (FW Kelsey trans, Clarendon Press 1925) book II section XXIX, 427–428; see also CW Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 BYIL 441.

²⁹ *The Mavrommatis Palestine Concessions (Greece v UK)* (Merits) [1924] PCIJ Ser A No 2, 31.

³⁰ D Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014) 322. The translation from Latin to English is based on AX Fellmeth and M Horwitz, *Guide to Latin in International Law* (OUP 2009) 174, 177.

conflict and international human rights law. According to the ICJ, ‘what is an arbitrary deprivation of life’, as prohibited by Article 6 of the International Covenant on Civil and Political Rights (ICCPR), is determined by the law of armed conflict.³¹ This assertion was based on two propositions: first, the law of armed conflict was considered *lex specialis vis-à-vis* international human rights law; and, second, *lex specialis* takes priority over general law.³² The law of armed conflict is considered to be *lex specialis*.³³ The law of naval warfare is applicable only during armed conflict and is a part of the law of armed conflict. As such, the law of naval warfare is *lex specialis vis-à-vis* UNCLOS during armed conflict. During the drafting process of the San Remo Manual, experts shared the view that the law of armed conflict is *lex specialis vis-à-vis* the rules of UNCLOS that may have an application during armed conflict.³⁴ Furthermore, the Newport Manual states that the law of naval warfare is *lex specialis* and, consequently, prevails over the law of the sea where there is a conflict between their relevant provisions.³⁵

Hence, to clarify the impact of UNCLOS as *lex generalis* during armed conflict, the function of the *lex specialis* principle must be identified. Under modern international law, the principle is used to solve the conflict of norms, by prioritising and/or making *lex specialis* ‘prevail’³⁶ over *lex generalis*.³⁷ On this point, paragraph 8 of the ILC’s Conclusions of the Work of the Study Group on the Fragmentation of International Law provides that ‘[m]ost of international law is dispositive. This means that special law may be used to apply, *clarify*, update or *modify*, as well as *set aside*, general law’.³⁸ Therefore, to identify the function of the principle for the relationship between UNCLOS and the law of naval warfare, the contents of the two bodies must be thoroughly verified and evaluated.

3. Neutral coastal States’ EEZ under the law of naval warfare

With regard to the neutrality of naval warfare, the Hague Convention XIII provides the relevant rules. Article 1 provides that ‘the Belligerents are bound to respect the *sovereign rights* of neutral Powers’.³⁹ As it uses the term ‘sovereign rights’, some States claimed during the Third UN Conference on the Law of the Sea that the newly introduced EEZ, an area in which coastal States enjoy sovereign rights, should be

³¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 240, para 25.

³² Fellmeth and Horwitz (n 30) 177.

³³ ILC, ‘Study on the Function and Scope of the *lex specialis* Rule and the Question of “Self-Contained Regimes”: Preliminary Report by Martti Koskenniemi, Chairman of the Study Group’ (2004) UN Doc A/CN.4/, para 76. See also Jenks (n 28) 446.

³⁴ See, e.g. WHV Heinegg (ed), *Visit, Search, Diversion and Capture & The Effect of the United Nations Charter on the Law of Naval Warfare: Reports and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea* (International Institute of Humanitarian Law 1995) 108.

³⁵ Newport Manual (n 11) section 1.1, 3.

³⁶ Fellmeth and Horwitz (n 30) 177.

³⁷ DM Banaszewska, ‘*Lex specialis*’ in *Max Planck Encyclopaedia of Public International Law* (2015) para 7 <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e2171>>.

³⁸ ILC, ‘Conclusions of the Work of the Study Group on the Fragmentation of International Law’, UNYBILC, vol II, Part Two (2006) UN Doc A/61/10, 178 (emphasis added).

³⁹ Hague Convention (XIII) (n 3) (emphasis added).

regarded as neutral waters and, therefore, hostile activities are prohibited within the EEZ.⁴⁰ However, because the coastal State's rights in the EEZ are limited to economic matters, such as the exploration and exploitation of natural resources under UNCLOS, such arguments are no longer widely accepted. Therefore, based on the premise that belligerents may use the EEZ of neutral States (i.e. that an EEZ does not constitute part of the neutral waters of a coastal State), this section explores the constraints imposed on belligerents in the EEZs of neutral States by examining both the two key international military manuals⁴¹ and national military manuals.⁴²

3.1. Different approaches in the two international manuals

3.1.1. San Remo Manual

The San Remo Manual was drafted between 1988 and 1994 by a group of legal and naval experts who participated in a series of roundtables organised by the International Institute of Humanitarian Law, founded in 1970 in San Remo. The manual aims to provide a current restatement of international law (*lex lata*) that applies to armed conflicts at sea. The manual also contains a few sections that can be regarded as progressive developments in the law (*lex ferenda*).⁴³

The San Remo Manual clearly respects the provisions of UNCLOS. According to paragraph 12 regarding the EEZ, 'belligerents shall have due regard for the legitimate rights and duties of those neutral States'.⁴⁴ The wording of this rule derives from Article 58(3) UNCLOS, which obliges non-coastal States to have due regard for the rights and duties of coastal States. More concretely, paragraph 34 of the San Remo Manual provides that even when hostile actions are conducted, belligerent parties shall have due regard for the rights of coastal States, especially for maritime structures over which coastal States are authorised to exercise jurisdiction (which is governed by Article 60 UNCLOS).

⁴⁰ F Francioni, 'Peacetime Use of Force, Military Activities, and the New Law of the Sea' (1985) 18 *Cornell Int'l J* 215; H Robertson, 'The "New" Law of the Sea and the Law of Armed Conflict at Sea' (1992) 3 *The Newport Papers* 1, 25–27.

⁴¹ Aside from these two manuals, the Oxford Manual of Naval Warfare (Oxford Manual), adopted by the Institute de Droit International (IDI) in 1913 and the Helsinki Principles of Maritime Neutrality (Helsinki Principles), adopted by the International Law Association in 1998, are two important instruments of scholarly work. However, the Oxford Manual is not relevant to EEZs, since it was adopted prior to UNCLOS. Furthermore, para 4 of the Helsinki Principles, which provides the rules applicable in EEZs, is similar to that of San Remo Manual. Therefore, these two manuals are not examined in this article. See IDI, 'Oxford Manual of Naval Warfare' in *Annuaire de l'institut de droit international* (1913) 23–169; 'Helsinki Principles of Maritime Neutrality' in International Law Association, 'Report of the 68th Conference' (Taipei 1998) 496–516.

⁴² The contribution of manuals to international law-making has recently gained attention. See, e.g. AO Petrov, *Expert Laws of War—Restating and Making Law in Expert Processes* (Edward Elgar 2020). Meanwhile, the legitimacy of such informal law-making has been challenged; on this point, see, e.g. E Crawford, *Non-Binding Norms in International Humanitarian Law: Efficacy, Legitimacy, and Legality* (OUP 2021) 228–33; R Geiß and A Pues, 'International Manuals in International Humanitarian Law: A Rejoinder to Wouter G Werner' in H Krieger and J Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law* (Edward Elgar 2021) 232, 236–39.

⁴³ International Committee of the Red Cross (ICRC), 'San Remo Manual on Armed Conflicts at Sea' (12 June 1994) <<https://ihl-databases.icrc.org/en/ihl-treaties/san-remo-manual-1994>>.

⁴⁴ San Remo Manual (n 10) 108.

Although the due regard obligation is incorporated into the San Remo Manual,⁴⁵ one participant in the drafting process commented that this obligation would be mere lip service without further clarification.⁴⁶ In response to this concern, paragraph 35 imposes more concrete obligations on belligerents by stipulating that:

If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, inter alia, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State.⁴⁷

Mines can remain even after armed conflicts have finished and could therefore cause long term damage to the economic activities of coastal States. If coastal States know where they have been set, they will be able to dramatically decrease the potential for damage by those mines.⁴⁸ This provision is thus highly valued by coastal States. Meanwhile, Article 3 Hague Convention VIII requires the belligerents to make an effort to notify the danger zones to all States (not limited to the coastal States of the EEZ) ‘as soon as military exigencies permit’.⁴⁹ In other words, Hague VIII provides that ‘military exigencies’ may provide a justification for delay in notification, whereas the San Remo Manual regards notification as an absolute duty.⁵⁰ Given the vastness of the area covered by an EEZ and the importance of information on laying mines,⁵¹ these duties on belligerents appear burdensome for their hostile activities because of the risk of enemy States obtaining information on their mine strategies.

3.1.2. Newport Manual

Since the adoption of the San Remo Manual, several important technologies, such as cyberweapons and unmanned vehicles, have been developed. The process for developing the San Remo Manual 2.0 is thus ongoing, but some members of the expert group were dissatisfied with the slow pace of the process. Consequently, they withdrew from the San Remo process to create an independent document, the Newport Manual,⁵² under the initiative of the United States (US) Naval War College at Newport, Rhode Island. Unlike the San Remo Manual, which also includes some rules *lex ferenda*,

⁴⁵ In the drafting process, the due regard obligation, generally used throughout the law of the sea, was finally introduced because of the close relationship between San Remo Manual and the law of the sea: *ibid* 84.

⁴⁶ WHV Heinegg (ed), *Regions of Operations of Naval Warfare: Reports and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea* (International Institute of Humanitarian Law 1995) 75.

⁴⁷ San Remo Manual (n 10) 109.

⁴⁸ Politakis stresses the importance, limitations and practicability of notifications when laying naval mines: GP Politakis, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (Kegan Paul International 1998) 263–65.

⁴⁹ For the nature and conditions of Article 3, see S Haines, ‘1907 Hague Convention VIII: Relative to the Laying of Automatic Submarine Contact Mines’ (2014) 90 ILS 412, 427–28.

⁵⁰ San Remo Manual (n 10) 110.

⁵¹ National Research Council: Committee for Mine Warfare Assessment, *Naval Mine Warfare: Operational and Technical Challenges for Naval Forces* (The National Academies Press 2001) 53.

⁵² WHV Heinegg, ‘In Honor of Yoram Dinstein: The San Remo and the Newport Manuals on the Law of Naval Warfare’ (Lieber Institute West Point, 23 April 2024) <<https://lieber.westpoint.edu/san-remo-newport-manuals-law-naval-warfare/>>.

the Newport Manual focuses solely on codifying *lex lata*. For this purpose, the contributors to the Newport Manual looked to State practice and *opinio juris* and collected those practices and lessons to influence future planning and operations.⁵³

According to Section 4.1 of the Newport Manual, while the territorial seas of neutral States are categorised as neutral seas where belligerent rights may not be exercised, the EEZ of neutral States does not fall within the scope of neutral waters.⁵⁴ Section 4.1.2.1 provides the rules for the Contiguous Zone, EEZ and Continental Shelf.⁵⁵ The first footnote of this section, footnote 323, notes the position taken by the San Remo Manual on these matters, and that the latter is not supported by international law:

The San Remo Manual suggests that belligerents shall have due regard for the resource rights of the neutral State when conducting hostilities in the EEZ or on the continental shelf. If a belligerent lays mines in a neutral State's EEZ or continental shelf, the San Remo Manual also requires it to notify the neutral State, as well as ensure that the size of the minefield and the types of mines employed do not interfere with the neutral State's resource rights. Belligerents shall additionally have due regard for the protection and preservation of the marine environment. These requirements of the San Remo Manual are a scholarly expression of progressive development of the law. This *lex ferenda* view is not formative of international law and it does not reflect the law of naval warfare as a *lex specialis* regime that displaces the law of the sea if the latter is inconsistent with the former.⁵⁶

The last paragraph of the Newport Manual section on the rules applicable beyond waters under the sovereignty of the coastal State concludes that:

The coastal State authority in the EEZ and on the continental shelf is without prejudice to the *lex specialis* of the law of naval warfare during armed conflict at sea. When conducting military operations in the EEZ and on the continental shelf, belligerents shall, consistent with military necessity and operational requirements, respect the rights and duties of neutral States.⁵⁷

This paragraph is somewhat ambiguous because its first sentence could be read to mean that neutral coastal States' rights in the EEZ and continental shelf do not constrain belligerents during armed conflict, which seems inconsistent with the second sentence that could be interpreted as requiring belligerents to respect the rights of neutral coastal States. This apparent tension is compounded by footnote 323, which suggests that treating coastal States' rights as protected during naval warfare reflects *lex ferenda*, not what the law actually is. However, footnote 329, which is added in the second sentence of the above paragraph, is helpful in clarifying its meaning. Footnote 329 notes that some national manuals provide for due regard of neutral coastal States' rights, but that this is 'the peacetime standard of "due regard", which is not applicable during times of armed conflict'.⁵⁸ As the Newport Manual takes the position that a State manual cannot replace a meaningful assessment of operational State practice when determining the

⁵³ J Kraska, 'The Newport Manual on the Law of Naval Warfare Facilitates Interoperability' (*Just Security*, 14 June 2023) <<https://www.justsecurity.org/86854/the-newport-manual-on-the-law-of-naval-warfare-facilitates-interoperability/>>.

⁵⁴ Newport Manual (n 11) section 4.1, 67.

⁵⁵ *ibid* section 4.1.2.1, 76–78.

⁵⁶ *ibid* section 4.1.2.1, 77 n 323.

⁵⁷ *ibid* section 4.1.2.1, 78.

⁵⁸ *ibid* 78 n 329.

latter for the purposes of the customary rules of naval warfare,⁵⁹ footnote 323 could be taken to indicate that there is insufficient evidence of State practice in the form of actual military operations to support the idea that due regard is paid to coastal States' rights over the EEZ. It could also be interpreted to mean that the content of the 'due regard' principle may be different in times of armed conflict, which reflects the approach to the relationship of international humanitarian law and international human rights law, where the interpretation of the latter is influenced by the former when it is applicable. However, given that the Newport Manual explicitly states that due regard is a peacetime concept, it is difficult to conclude that it envisages an armed conflict version of the principle, albeit with a different scope. It can thus be concluded that the reference to 'neutral States' in the last sentence of the above quotation from the Newport Manual ought instead to be to 'flag States', as it refers to flag States whose vessels are not party to the conflict and does not include the coastal State to which the EEZ belongs.

3.2. State manuals

As the Newport Manual indicates, the domestic military manual of a State cannot simply be considered as State practice that contributes to establishing customary rules. The status of these manuals may differ from State to State, and the expressions used in the manuals may also be relevant. Therefore, it is essential to examine each manual individually and consider the extent to which they are used for the formulation of customary rules. That said, it is also true that there is limited actual State practice in relation to hostile activities and, accordingly, the military manuals that the military of each State is expected to follow can have some relevance for formulating customary rules of the law of armed conflict.⁶⁰

In relation to the rights and duties of neutral coastal States within their EEZs, the Newport Manual appears to rely heavily on the US position, which does not recognise such rights during armed conflict. Even though the US is not a party to UNCLOS, section 7.3.8 of the Commander's Handbook on the Law of Naval Operations,⁶¹ which provides the rules applicable in the EEZs of neutral States, acknowledges the EEZ regime as provided in UNCLOS as customary international law.⁶² However, this is followed by the assertion that '(a) neutral State's EEZ is not neutral waters and coastal State rights and jurisdiction in the EEZ established in UNCLOS do not modify the law of naval warfare. Belligerents may conduct hostilities in a neutral State's EEZ'.⁶³ As a result, there is also no provision relating to duties regarding naval mines within neutral States' EEZs, such as that provided in paragraph 35 of the San Remo Manual.

⁵⁸ *ibid* 78 n 329.

⁵⁹ *ibid* 9 n 37, though note that national manuals are sometimes taken as evidence of State practice, e.g. by the International Committee for the Red Cross (ICRC) when seeking to ascertain rules of customary international humanitarian law; ICRC, 'Sources' in *Customary IHL Database* <<https://ihl-databases.icrc.org/en/customary-ihl/sources>>.

⁶⁰ WHV Heinegg, *Seekriegsrecht und Neutralität im Seekrieg* (Duncker & Humblot 1995) 247.

⁶¹ The newest version of this handbook was published in 2022 by the Departments of the Navy and Homeland Security. The handbook is expected to be used by operational commanders of the US Navy, Marine Corps and Coast Guard. See US Navy, US Marine Corps and US Coast Guard, 'The Commander's Handbook on the Law of Naval Operations' (March 2022) <https://stjcecmcsdusgva001.blob.core.usgovcloudapi.net/public/documents/NWP_1-14M.pdf>.

⁶² *ibid* 1–2.

⁶³ *ibid* 7–6.

Other States' manuals,⁶⁴ such as those of Australia,⁶⁵ Canada,⁶⁶ Denmark,⁶⁷ France,⁶⁸ Germany,⁶⁹ New Zealand,⁷⁰ Norway,⁷¹ Spain⁷² and the United Kingdom (UK),⁷³ provide for the rights and duties of neutral coastal States over their EEZs (see Table 1).⁷⁴ Although

⁶⁴ The listed manuals are those that were published after the adoption of the San Remo Manual and have relevant provisions on due regard for coastal States' sovereign rights. Unfortunately, domestic manuals of marine powers such as China, Russia, India and Iran are not publicly available. On this point, in the ongoing war against Ukraine, Russia has established a blockade in the EEZ of the neutral coastal State, Bulgaria. Although it is not clear whether Russia has had due regard for the rights of Bulgaria, it is evident that Russia is conducting hostile activities within the EEZs of neutral coastal States. On this Russian practice, see D Dobrev, 'Security Challenges in the Black Sea: Military Exercise or a Navy Blockade? Analysis of the Russian Navy Activities in Bulgaria's Exclusive Economic Zone in the Black Sea' (*Opinio Juris*, 10 November 2023) <<https://opiniojuris.org/2023/11/10/security-challenges-in-the-black-sea-military-exercise-or-a-navy-blockade-analysis-of-the-russian-navy-activities-in-bulgarias-exclusive-economic-zone-in-the-black-sea/>>.

⁶⁵ Australian Defence Force, 'Executive Series, Australian Defence Doctrine Publication 06.4, Law of Armed Conflict' (2006) <<https://www.onlinelibrary.ihl.org/wp-content/uploads/2021/05/AUS-Manual-Law-of-Armed-Conflict.pdf>> (Australian Manual). The Australian Defence Force published this doctrine, which does not have legal standing but provides authoritative guidance: see foreword, para 1.

⁶⁶ Office of the Judge Advocate General (Canada), 'Joint Manual: Law of Armed Conflict at the Operational and Tactical Levels' (2001) <https://usnwc.libguides.com/ld.php?content_id=2998098> (Canadian Manual). The Chief of the Defence Staff issued this manual to provide a practical guide for military personnel: see i.

⁶⁷ Danish Ministry of Defence, 'Military Manual on International Law Relevant to Danish Armed Forces in International Operations (Danish Manual)' (2016) <https://usnwc.libguides.com/ld.php?content_id=59166472> (Danish Manual). The Ministry of Defence published the manual for the purpose of training in, and application of, the law of armed conflict: see foreword, para 2.

⁶⁸ Ministère des Armées, 'Manuel de droit des opérations militaires' (2022) <https://www.defense.gouv.fr/sites/default/files/sga/Manuel%20de%20droit%20des%20op%C3%A9rations%20militaires_%C3%A9dition%202022.pdf> (French Manual). This manual was drafted by the Ministry of Armed Forces, and is expected to demonstrate French understanding on the law of the naval warfare. See 'Droit des opérations militaires: un manuel inédit au service des armées françaises' (Ministère des Armées, 3 February 2023) <<https://www.defense.gouv.fr/actualites/droit-operations-militaires-manuel-inedit-au-service-armees-francaises>>.

⁶⁹ Federal Ministry of Defence (Germany) (BMV), 'Humanitäres Völkerrecht in bewaffneten Konflikten' (2018) <<https://www.bmvg.de/resource/blob/93612/7d6909421eacad4ddc7dcdfdf58d42ca/b-02-02-10-download-handbuch-humanitaeres-voelkerrecht-in-bewaffneten-konflikten-data.pdf>>. The BMV published this textbook, which reflects the BMV's understanding of the law of armed conflict: see 1.

⁷⁰ New Zealand Defence Force, 'Manual of Armed Forces Law' (2017) <https://usnwc.libguides.com/ld.php?content_id=47364407> (NZ Manual). This manual was published by the New Zealand Defence Force and states that it is authoritative: see para 1.1.3.

⁷¹ Chief of Defence (Norway), 'Manual of the Law of Armed Conflict' (2013) <https://usnwc.libguides.com/ld.php?content_id=47416967> (Norwegian Manual). The Norwegian Chief of Defence published this manual on behalf of the Norwegian Ministry of Defence. The manual is expected to work as a practical guide for military personnel: see 1.

⁷² Ministry of Defence (Spain), 'Manual de Derecho del Mar II' (2016) <<https://publicaciones.defensa.gob.es/manual-de-derecho-del-mar-ii.html>> (Spanish Manual). Although the Ministry of Defence edited this manual, it mentions that the manual does not reflect the official views of Spanish authorities: see 5.

⁷³ Ministry of Defence (UK), 'The Joint Service Manual of the Law of Armed Conflict' (2004) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf>. The Ministry of Defence published this manual, which publically states the UK's interpretation of the law of armed conflict, as stated in the last paragraph of the foreword.

⁷⁴ Most States' manuals provide that due regard shall be paid especially to artificial islands, installations, structures and safety zones established by neutral States, as stipulated in the San Remo Manual (n 10) para 34. Furthermore, both the UK and New Zealand Manuals require due regard for fishing vessels: NZ Manual (n 70) section 10.3.32 (in the context of mine-laying); UK Manual (n 73) para 13.21.

Table 1. Overview of States' Manuals

Obligation States	Obligation to the coastal State within their EEZ in general		Obligation to the coastal State within their EEZ in relation to naval mines	
	Due regard	Similar concepts	Notification	Other obligations
Australia	O	—	X	X
Canada	O	—	O	O
Denmark	O	—	O	X
France	—	O	X	X
Germany	▲	▲	X	X
New Zealand	O	—	O	O
Norway	O	—	O	X
Spain	—	O	O	O
UK	O	—	X	X
US	X	X	X	X

O: contains such rights and obligations, X: does not contain such rights and obligations, ▲: not clear

most of them appear to be influenced by the San Remo Manual, some differences exist. The Canadian manual incorporates the San Remo Manual, and its content is almost identical to that of the San Remo Manual. There are three main differences among the other manuals.⁷⁵

First, the French and Spanish manuals do not use the term 'due regard'. These two manuals are written in French and Spanish, both of which are authentic languages of UNCLOS as per Article 320. According to the text of these two languages, 'due regard' is 'dûment compte' in French and 'debidamente en cuenta' in Spanish. However, these expressions are not used to describe the rules regarding the EEZ in their respective manuals. Instead, the two manuals use the simpler expression 'to take into account' ('tenir compte' in French and 'tener en cuenta' in Spanish), in respect of the duties and rights of coastal States in their EEZ.⁷⁶ This might indicate that these States' manuals consider that the standard of due regard vis-à-vis the rights of coastal States' rights regarding their EEZs differs in peacetime under UNCLOS from that applicable in wartime under the law of naval warfare.⁷⁷

Second, most manuals do not reflect the mining obligations provided in paragraph 35 of the San Remo Manual. While the manuals of Spain⁷⁸ and New Zealand⁷⁹ both

⁷⁵ Canadian Manual (n 66) paras 821–822.

⁷⁶ French Manual (68) 240; Spanish Manual (n 72) 36.

⁷⁷ Germany also uses different vocabulary in the manual from the UNCLOS translation ('gebührend zu berücksichtigen' and 'berücksichtigt ... gebührend') and due to grammatical differences, the German position cannot be confirmed. For a German language version, see <[https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:21998A0623\(01\)>](https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:21998A0623(01)>).

⁷⁸ Spanish Manual (n 72) 76.

⁷⁹ NZ Manual (n 70) section 10.3.32.

incorporate paragraph 35 of the San Remo Manual, those of Australia⁸⁰ and the UK⁸¹ simply provide for due regard to be paid to legitimate uses by other States in general, and not particularly to coastal States in relation to their EEZ.⁸² Denmark and Norway find a middle ground with their manuals saying that due regard should be paid;⁸³ simultaneously, they request that notification of laying mines be given to neutral coastal States, but other obligations, including the obligation not to endanger marine structures, are not included. This might indicate that the full text of paragraph 35 is unacceptable for these States, even though they accept the applicability of due regard obligations for coastal States' rights regarding their EEZs.

Third, while the San Remo Manual uses the auxiliary verb 'shall', which implies legal obligations, some manuals do not use it in certain contexts. For example, the Australian manual, which incorporates the EEZ into the meaning of 'international waters' together with the high seas, states that '(w)here mines are laid in international waters, belligerents should pay due regard'.⁸⁴ Given that the manual also uses the term 'shall' in different contexts, this usage of 'should' may indicate the Australian understanding that this is not a legal obligation.⁸⁵

4. Incorporation of the law of naval warfare into UNCLOS through the due regard obligation

As shown in Section 2, while the law of naval warfare is *lex specialis vis-à-vis* conflicting provisions of UNCLOS, many States (at least in military manuals) respect the rights and duties of coastal States regarding their EEZs, which are based on UNCLOS. Accordingly, the rights and duties that States enjoy under UNCLOS should 'continue to exist, with minor exceptions, during armed conflict'.⁸⁶ However, because the law of naval warfare is applied as *lex specialis*, the extent to which rights and obligations under UNCLOS prevail during armed conflicts depends on the relationship between these two legal regimes. This section elaborates on this relationship.

4.1. Function of *lex specialis*

The *lex specialis* principle may operate in various ways. As shown in Section 2, according to the ILC, *lex specialis* is used 'to apply, clarify, update or modify, as well

⁸⁰ Australian Manual (n 65) para 6.28.

⁸¹ UK Manual (n 73) para 13.60.

⁸² The French and German manuals also take a similar position. See French Manual (n 68) 245; German Manual (n 69) para 1049.

⁸³ Danish Manual (n 67) ch 14, para 4.4.1. The English translation of the Norwegian Manual uses the expression 'appropriate consideration'. However, the original manual in the Norwegian language uses 'tilbørlig hensyn', which is used to mean 'due regard' in UNCLOS. Norwegian Manual (n 71) para 8.42.

⁸⁴ Australian Manual (n 65) para 6.28.

⁸⁵ The Danish Manual also uses the term 'must' for the duty of notification: see Danish Manual (n 67) ch 14, para 4.4.1.

⁸⁶ Astley and Schmitt (n 17) 138. Klein also supports this idea as the most tenable: see N Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 259. If the EEZ and continental shelf regimes are not maintained in a situation of armed conflict, it also causes some practical problems in the case of occupation. On this point, see LM Monroy, 'UNCLOS and the Law of Occupation: On the Rights and Duties of Occupying States in Maritime Areas' (2024) 103 ILS 230.

as, set aside' *lege generali*.⁸⁷ Based on this classification, the US expects the law of naval warfare (*lex specialis*) to set aside conflicting provisions of the law of the sea (*lege generali*), especially coastal States' rights regarding their EEZs and due regard obligations under general law.⁸⁸ However, if States consider that coastal States may have some rights regarding their EEZs, the function of the *lex specialis* cannot be to set aside the EEZ rules under the law of the sea. Rather, it can be used to clarify or modify the general law (the law of the sea).

On this point, the chair of the ILC's study group, Koskenniemi, carefully examined the nature of the incorporation of the standard of the law of armed conflict into the concept of 'arbitrariness' in Article 6 ICCPR by the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, discussed in Section 2.2.⁸⁹ While the outline of the study group, which was used for discussion in 2003, classified the ICJ's remark as an elaboration or application of general law,⁹⁰ its preliminary report in 2004 classified it as an exception to the general rule.⁹¹ However, the preliminary report also admitted that, even in the case of exception, the general law that is being set aside by *lex specialis* does not vanish but, rather, operates in parallel.⁹² Therefore, irrespective of the different classifications of the study group, the ILC seems to take the position that the law of armed conflict, as *lex specialis*, can work to clarify or modify general law.

That said, this does not mean that the law of naval warfare always clarifies or modifies the law of the sea rather than setting it aside. One of the factors that led the ICJ to modify human rights law through the application of the law of armed conflict was the vagueness or flexibility of the term 'arbitrarily'. The concept is so vague that it could have different meanings in peacetime as opposed to during times of armed conflict.⁹³ Therefore, if UNCLOS also has a concept equivalent to 'arbitrarily', it might be able to accommodate the law of naval warfare through that concept. On this point, as several States try to use the due regard obligation under UNCLOS during armed conflict, that concept merits further examination.

4.2. Flexibility of due regard

Under UNCLOS, the due regard obligation within EEZs operates in two opposing directions. As shown in Section 3.1.1, Article 58(3) requires non-coastal States to 'have

⁸⁷ ILC (n 38) 178.

⁸⁸ Kraska strongly supports the US position: see J Kraska, 'The Obligation of "Due Regard" in the EEZ during Armed Conflict at Sea' (2025) 106 ILS 145. Green also echoes this position. According to him, if UNCLOS is considered *lex generalis*, 'it cannot invalidate any rights under *lex specialis* such as the law of armed conflict'. See Green (n 7) 191.

⁸⁹ *Legality of the Threat or Use of Nuclear Weapons* (n 31) 240.

⁹⁰ ILC Study Group on Fragmentation, 'Fragmentation of International Law: Study on the Function and Scope of the *lex specialis* Rule and the Question of "Self-Contained Regimes": An Outline' (2009) 6 <https://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf>.

⁹¹ Koskenniemi (n 33) para 75.

⁹² *ibid* para 76.

⁹³ AA Haque, 'Laws for War' in JD Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 25, 26; M Milanovic, 'The Lost Origins of *Lex Specialis*: Rethinking the Relationship between Human Rights and International Humanitarian Law' in JD Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 78, 81.

due regard to the rights and duties of coastal States' but, in reverse Article 56(2) requires coastal States to 'have due regard to the rights and duties of other States'. Therefore, both coastal and non-coastal States shall have reciprocal due regard for each other's rights and duties, and due regard may work to balance the interests of the relevant States.⁹⁴ Because these provisions are not further refined in UNCLOS or other instruments, the meaning of due regard must be determined on a case-by-case basis.⁹⁵ Meanwhile, as these two provisions are not limited to the rights and duties which derive from UNCLOS, like Article 56(1)(c), the rights and duties in these two provisions may include other 'legal rights as they otherwise arise as a matter of international law'.⁹⁶

Based on this understanding, in the *Chagos Marine Protected Area Arbitration*, the arbitral tribunal constituted under Annex VII concluded that the UK failed to have due regard to Mauritius' rights and interests arising from the Lancaster House Undertakings,⁹⁷ even though it did not take the form of an official treaty. Furthermore, in the *San Pedro Pio* case brought before ITLOS, Switzerland claimed that Nigeria failed to pay due regard under Article 56(2) to its rights under the ICCPR.⁹⁸ Because of the removal of the case from the list before ITLOS rendered its judgment, this point was not decided. However, given the decision in the *Chagos Marine Protected Area Arbitration* and the literal interpretation of Article 56(2), which does not impose any limitation on the sources of rights, the interpretation by Switzerland sounds plausible to some extent. One possible rebuttal to its argument is that the ICCPR provides individual rights, rather than rights owed to States.

Certainly, there have not been any decisions to the effect that the rights protected by the due regard obligation may also be derived from customary international law. However, given that there is no restriction on the sources of rights, there are no grounds to exclude rights guaranteed under customary international law. Therefore, rights under the customary rules of the law of naval warfare fall to be considered within the context of the obligation to have due regard. As a result of paying due regard to these customary rights, coastal States need to respect belligerent rights, for example, to attack enemy vessels under Article 56(2) and, at the same time, belligerent parties may not destroy marine structures within an EEZ without any compelling reasons under Article 58(3). The concept of due regard can also be balanced in times of armed conflict, even though what will be required in the two situations is different.⁹⁹

4.3. Requirements of due regard in neutral coastal States' EEZ

If the content of the due regard principle is different during armed conflict, it is essential to clarify what it contains. On this point, one attempt is paragraph 35 of the San Remo Manual, which provides that belligerents have several duties when they lay naval mines within the EEZs of neutral coastal States. However, given the non-acceptance of this rule

⁹⁴ MH Nordquist et al (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Brill 1993) vol II, 543.

⁹⁵ LN Nguyen, *The Development of the Law of the Sea by UNCLOS Dispute Settlement Bodies* (CUP 2023) 42.

⁹⁶ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Award) (18 March 2015) para 293.

⁹⁷ *ibid* paras 534–535.

⁹⁸ *M/T "San Padre Pio" (No 2) (Switzerland/Nigeria)* (ITLOS, Memorial of Switzerland, 23 June 2020) 86–88.

⁹⁹ During the discussion on the San Remo Manual (n 10), some participants argued that different standards of due regard should be applied during armed conflict. See Heinegg (n 46) 106, 128.

by many States' manuals, that clarification may not be regarded as reflecting the existing law of naval warfare. As the EEZ, which can extend up to 200 nautical miles, is much wider than a State's territorial waters which only extend up to 12 nautical miles, and EEZs cover almost 36 per cent of the world's oceans,¹⁰⁰ obligations of due regard owed to coastal States within their EEZs could easily be very burdensome for non-coastal belligerents.¹⁰¹ However, coastal States now utilise their EEZ and continental shelf for purposes other than the traditional fishing and exploitation of hydrocarbon resources. For example, some European States, including Denmark, have established wind farm turbines within their EEZs.¹⁰² Moreover, Norway has started carbon capture and storage (CCS) projects on its continental shelf.¹⁰³ By balancing these interests, due regard under the law of naval warfare within neutral States' EEZs can be established.

That said, given the limited amount of State practice on this point¹⁰⁴ and the improbability of a new treaty being concluded, both international and domestic manuals and academic teachings play a role in promoting such clarification and development. On this point, as discussed in the drafting process of the San Remo Manual, the values and principles of the law of armed conflict, like 'military exigencies', could serve as a guide.¹⁰⁵ Currently, there are some principles under the law of armed conflict, such as the principles of humanity, military necessity, distinction and proportionality,¹⁰⁶ that could assist in determining the scope of the due regard obligations during armed conflict. As examples of military activity within neutral coastal States' EEZs, Ronzitti states that 'belligerents are not allowed to destroy fixed platforms of a neutral State unless they become a base for hostile operations'.¹⁰⁷ Such an argument seems to derive from military necessity. Furthermore, Heinegg argues that if a choice between several military objects is possible in order to gain a comparable military advantage, the object whose damage could cause the most minor threat to those objects shall be chosen.¹⁰⁸ This argument seems to derive from the proportionality principle.

¹⁰⁰ RD Hodgson, 'National Maritime Limits: The Economic Zone and the Seabed' in FT Christy et al (eds), *Law of the Sea: Caracas and Beyond* (Ballinger Publishing Company 1975) 183, 186.

¹⁰¹ Kraska emphasises this point: Kraska (n 88) 119, 145. Rauch also indicates the EEZ's importance for military activities: E Rauch, 'Military Use of Ocean' (1985) 28 GYIL 250.

¹⁰² As for the current situation of offshore windfarms, see 4C Offshore, *Global Offshore Renewable Map* <<https://map.4coffshore.com/offshorewind/>>.

¹⁰³ Norwegian Offshore Directorate, *Carbon Storage* (2024) <<https://www.sodir.no/en/facts/carbon-storage/>>. According to art 56(1)(a) UNCLOS, sovereign rights of resources within the EEZ include resources of seabed and subsoil and, therefore, the EEZ regime could affect the development of the continental shelf.

¹⁰⁴ Kraska argues that the absence of complaints from Bulgaria and Romania regarding Russian military activities in their EEZs suggests that there is no obligation to pay due regard to the rights of neutral coastal States in the EEZ. However, Russia's actions primarily affected navigation rather than fishing. Consequently, it remains unclear whether Russia has failed to exercise due regard, particularly when assessed against the requirements of the principle during armed conflict, as discussed in this section: see Kraska (n 88) 144.

¹⁰⁵ WHV Heinegg (ed), *Methods and Means of Combat in Naval Warfare: Reports and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea* (1992) 107.

¹⁰⁶ ICRC, 'Fundamental Principles of IHL' (2024) <https://casebook.icrc.org/a_to_z/glossary/fundamental-principles-ihl>.

¹⁰⁷ N Ronzitti, 'Naval Warfare' in *Max Planck Encyclopaedia of Public International Law* (2009) vol VII, 559.

¹⁰⁸ Heinegg (n 60) 252.

However, Heinegg also claims that the duty to pay due regard is 'subject to considerations of military necessity'.¹⁰⁹ These scholarly arguments can be understood as follows: the principles of the law of naval warfare (military necessity and proportionality) simply displace due regard. Yet, because UNCLOS continues to apply during armed conflict, the principles of military necessity and proportionality do not displace due regard. Instead, they should be incorporated into the due regard obligation as a consequence of the modification of the rights and obligations under Articles 56(2) and 58(3) by the law of naval warfare, as *lex specialis*. The requirements of due regard during armed conflict should be informed by the rules of the law of naval warfare in a manner that balances military necessity and humanity.

In addition, thanks to their compulsory jurisdiction, UNCLOS tribunals may contribute to the development of the content of the principle of due regard in armed conflict. In fact, the principle of due regard in peacetime has been clarified and developed through case law.¹¹⁰ If a State claims that another State fails to comply with its due regard obligation during armed conflict and thereby violates Article 56(2) or 58(3), such claims fall within the scope of the dispute settlement procedures set out in Part XV of UNCLOS, because they are categorised as disputes concerning the interpretation or application of UNCLOS, over which UNCLOS tribunals have compulsory jurisdiction under Article 286. Even though the tribunals may make a decision *de facto* based on the law of naval warfare, in accordance with the recent jurisprudence of the UNCLOS tribunals, such reliance on external rules is widely accepted.¹¹¹ Meanwhile, it must be noted that military activities may be excluded from the compulsory jurisdiction of the UNCLOS tribunals, as Russian claims partially worked in the *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen*.¹¹²

5. Conclusion

UNCLOS, as the 'constitution for the oceans', is applied during armed conflict alongside the law of naval warfare. Under such circumstances, belligerents shall pay due regard to the rights and duties of neutral coastal States over their EEZs. Due regard in this context differs from that in peacetime, and the nature of the obligation may be informed by principles of the law of naval warfare, including military necessity and humanity. Given the rules outlined in States' military manuals and academic teachings examined throughout this article, a belligerent party would breach its due regard obligations if it causes damage to the offshore infrastructures or fishing vessels within neutral coastal States' EEZs when the same military objectives could be achieved without causing such damage and incurring additional burdens on its military activities.¹¹³

¹⁰⁹ WHV Heinegg, 'The Law of Armed Conflict at Sea' in D Fleck (ed), *The Handbook of International Humanitarian Law* (4th edn, OUP 2021) 516, 527.

¹¹⁰ See Nguyen (n 95) 40–46; BH Oxman, 'The Principle of Due Regard' in International Tribunal for the Law of the Sea (ed), *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016* (Brill 2018) 108, 115.

¹¹¹ See, e.g. *Obligations of States in respect of Climate Change* (Advisory Opinion) (ITLOS, 21 May 2024) paras 136–137. As for 'generally accepted international rules and standards', for a typical example of external rules see M Seta, 'The Contribution of the International Organization for Standardization to Ocean Governance' (2019) 28 RECIEL 304, 307–09.

¹¹² *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v Russian Federation)* PCA Case No 2019-28, Preliminary Objections (27 July 2022) para 125.

¹¹³ On this point, Mayama aptly noted 'where a neutral coastal State's rights in the EEZ have some bearing on the laws of armed conflict and neutrality at sea, the permissible scope of belligerent naval operations in

Since its entry into force, UNCLOS has been developed by States Parties and UNCLOS tribunals and appears to have strengthened its role as the constitution for the oceans. One of the factors for this strengthening is the incorporation of external rules, which was also emphasised by the recent ITLOS advisory opinion.¹¹⁴ Given the non-centralised structure of international law and the international community, it is inevitable that relevant treaties may be developed without formal arrangements. Therefore, to harmonise such external rules with the existing maritime order, the role of UNCLOS as the constitution for the oceans is essential. This article demonstrates how, in relation to the due regard obligation, UNCLOS may work during armed conflict at sea and accommodate the rules of the law of naval warfare, as developed (and developing) in the form of the Newport Manual and Amendment of the San Remo Manual, but not necessarily closely related to UNCLOS.

Regarding external rules, the impact of environmental laws has recently been strengthened. Paragraph 35 of the San Remo Manual states that due regard should also be paid to the marine environment. Furthermore, Rule 44 of the International Committee of the Red Cross' Study on Customary International Humanitarian Law also provides due regard for the natural environment in military operations.¹¹⁵ Given that fishing and seabed resource development are closely linked to environmental issues, due regard for coastal States' sovereign rights is also connected to due regard for the marine environment. For example, the destruction of a carbon capture and storage facility in an EEZ can cause significant environmental damage. Such damage is also important for determining the nature of the due regard obligation during an armed conflict. However, this question remains to be addressed in future research.

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neutral EEZs may be reduced': see A Mayama 'Combat Losses of Nuclear-Powered Warships: Contamination, Collateral Damage and the Law' (2017) 93 ILS 132, 143.

¹¹⁴ *Obligations of States in respect of Climate Change* (n 111) paras 136–137.

¹¹⁵ ICRC, 'Rule 44. Due Regard for the Natural Environment in Military Operations' in *Customary IHL Database* <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule44>>.

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