

***Merchant Ship 'Conversion' in Warfare,  
The Falklands (Malvinas), and the Requisition of the QE2***

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**Abstract**

In May 1982, the British government requisitioned numerous private vessels, including the transatlantic liner the RMS Queen Elizabeth 2, for use during the Falklands (Malvinas) War. In taking up ships from trade, the rules contained in the 1907 Hague Convention VII relating to the conversion of merchant ships into warships afforded some guidance to Britain. This article reviews the development of the use made by governments of private ships during wartime, the need for Hague Convention VII, and the relevance of that Convention to the British requisition exercise undertaken in 1982.

**Introduction**

Of the many occurrences in 2007, three are of note here: the centenary of the Second Hague Peace Conference,<sup>1</sup> the 25<sup>th</sup> anniversary of the Falklands (Malvinas) War (2 April – 25 June 1982),<sup>2</sup>

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<sup>1</sup> See, generally, 'The Second Hague Peace Conference: A Centennial Commemoration (1907 – 2007)', Netherlands International Law Review, Vol. 54 (2007).

<sup>2</sup> The war essentially concerned a long-standing dispute over sovereignty of the islands, but its causes are beyond the scope of this

and the sale of the former Cunard transatlantic liner, the RMS Queen Elizabeth 2 ('QE2'), after 40 years of active passenger service.<sup>3</sup> What links all three events was the British government's requisition in May 1982 of the QE2 for use in the Falklands War as a troop ship along with many other merchant ships taken up from trade (termed 'STUFT') to perform auxiliary duties for Britain during the military campaign in the Falklands.<sup>4</sup> British sovereign powers of ship requisition are found generally within the loosely-defined residual powers of the Crown (the 'Royal Prerogative'), currently held by H.R.H. Queen Elizabeth II, and known to have been used at least since 1189 during the Third Crusade.<sup>5</sup> The exercise of the Royal Prerogative is delegated generally

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discussion. The Falklands form part of the British Sovereign Territories. Argentina also claims sovereignty, calling them the Islas Malvinas. For a brief account, see, e.g., D.J. Harris, Cases and Materials on International Law (London: Sweet & Maxwell, 3d ed., 1983), at p. 171. The controversy is ongoing. Contrast, e.g., R. Dolzer, Territorial Status of the Falkland Islands (Malvinas) (Dobbs Ferry: Oceana, 1993); G. Pascoe and P. Pepper, 'Getting It Right: the Real History of the Falklands/Malvinas: A Reply to the Argentine Seminar of 3 December 2007', accessed at <http://www.falklandshistory.org/gettingitright.pdf>.

<sup>3</sup> An investment arm of the Dubai government paid £50 million to purchase the ship for use as a floating hotel. The QE2 was the longest-serving ship in the 168-year history of the Cunard line, and was the last liner to be launched from the Clyde, in 1967. See, e.g., J. Kollwe and J. Orr, 'QE2 heads to luxury retirement home in Dubai', [guardian.co.uk](http://guardian.co.uk), 18 June 2007.

<sup>4</sup> The STUFT are listed in The Falklands Campaign: The Lessons (London: Command Paper 8758, 1982), Appendix A: Tables 4 and 5, pp. 39 – 40.

<sup>5</sup> R. Villar, Merchant Ships at War: the Falklands Experience (London: Conway Maritime, 1984), p. 11.

to the government of the day by means of Orders in Council, and is utilised, inter alia, for foreign policy and war powers.<sup>6</sup>

Governments have long made use of private ships during wartime, but procedures have varied. Calls came in 1904 from the U.S. President, Theodore Roosevelt, and subsequently in 1906 from the Russian Czar, Nicholas II,<sup>7</sup> for a Second Hague Peace Conference to be convened. Various maritime issues had by that time become pressing for the steadily-increasing number of sovereign states.<sup>8</sup> Of the thirteen conventions adopted in 1907, eight concerned maritime warfare,<sup>9</sup> including Hague Convention VII which remains in force. The formal requirements contained in the 1907 Hague Convention VII, for the conversion of merchant ships into warships,<sup>10</sup> were principally

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<sup>6</sup> See, e.g., H. Barnett, Constitutional and Administrative Law (Abingdon: Routledge-Cavendish, 6<sup>th</sup> ed., 2006), pp. 115 – 149. S. 21 of the 1998 Human Rights Act categorises Orders in Council under the Royal Prerogative as primary legislation.

<sup>7</sup> W.I. Hull, The Two Hague Conferences and Their Contributions to International Law (New York: Kraus Reprint Co., 1970; first published 1908), pp. 4 – 5, and 8 – 9. See also R. Rosenne, 'Introduction', in R. Rosenne (ed.), The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents (The Hague: T.M.C. Asser Press, 2001), pp. xiii – xvii.

<sup>8</sup> For example, 26 governments claiming independent sovereignty were represented at the 1899 Hague Conference, while 44 of 57 such powers attended in 1907. W.I. Hull, *supra* note 7, pp. 10, and 15.

<sup>9</sup> Conventions VI to XIII. See A. Roberts and R. Guelff, Documents on the Laws of War (Oxford: O.U.P., 3d ed., 2000), p. 95.

<sup>10</sup> U.K.T.S. 11 (1910), Command Paper 5115; 205 C.T.S. 319 – 331 (1907); in force 26 January 1910. See 'International Humanitarian Law - Treaties & Documents: Convention (VII) relating to the conversion of merchant ships into warships. The Hague, 18 October

intended to abolish privateering once and for all.<sup>11</sup> Formal conversion also served to distinguish between those ships entitled to use lawful military force and those which were not, and thereby to attribute state responsibility for infractions of naval warfare.<sup>12</sup>

The British government turned quickly to private shipping in early April 1982 on the invasion of the Falkland Islands by Argentina, but mere requisition alone did not convert the STUFT into fully-commissioned warships. Requisition therefore raises serious questions as to the precise status of the STUFT in terms of the rules of armed conflict generally, and of Hague Convention VII, in particular. In view of the enduring importance of the merchant marine and its trained personnel in modern warfare, the structure of this discussion is as follows. First, a short, general background to the 1907 Hague Convention VII is provided, after which subsequent developments are outlined. The requisition procedure utilised by the British government to convert the STUFT, and specifically, the QE2, for auxiliary use in the Falklands, is then critiqued. It is concluded that a gap in practice between the formalities of Hague Convention VII and mere requisition attracted unnecessary risks.

## **1. Merchant Ship Conversion in Wartime**

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1907, Explanation', accessed at [www.icrc.org/ihl.nsf/INTRO?OpenView](http://www.icrc.org/ihl.nsf/INTRO?OpenView). Britain signed Convention VII on 18 October 1907, and ratified it on 27 November 1909.

<sup>11</sup> Purportedly accomplished in the 1856 Paris Declaration respecting Maritime Law. See *infra* notes 17 - 19, and accompanying text.

<sup>12</sup> G. Venturini, '1907 Hague Convention VII relating to the conversion of merchant ships into warships – Commentary', in N. Ronzitti, ed., The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries (London: Martinus Nijhoff, 1988), pp. 120, 127 n. 24 (citation omitted).

## Background to Hague Convention VII

Prior to 1856, states typically turned to privateers on the outbreak of war to increase their sea-power rapidly. Privateers were privately-owned vessels awarded official commissions (or, letters of marque) by a belligerent state.<sup>13</sup> The commissioning of privateers entitled such ships to use offensive force on the high seas, and thus differentiated their acts from acts of piracy. While privateers were authorised to attack all opposing belligerent ships, they generally exercised their rights to use force on the high seas to interrupt trade, and to capture cargoes and ships as 'prize'.<sup>14</sup> Most importantly, the profits from the sale of prize were subsequently divided between a belligerent state and the privateer, which afforded a private profit motive to public war. Privateering was thus profitable, yet costly in legal and diplomatic terms as controversial or unlawful seizures of prize could readily be perceived as piracy.<sup>15</sup> Thus, over time, privateers acquired a reputation 'as tending to encourage a spirit of lawless depredation'.<sup>16</sup>

The lure of private profit did nothing to professionalise warfare, and sporadic efforts were made to abolish privateering. For example,

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<sup>13</sup> J. Westlake, International Law, Part II (War) (Cambridge: C.U.P., 1913), p. 177. Letters of marque derive from the system of reprisals. Ibid., pp. 9, 12.

<sup>14</sup> Plunder, effectively, the seizure of which was subject to subsequent adjudication in prize courts.

<sup>15</sup> The distinction between piracy and privateering goes to jurisdiction. A. Cassese, International Criminal Law (Oxford: O.U.P., 2d ed., 2008), p. 12. See also D.J. Harris, *supra* note 2, p. 330.

<sup>16</sup> G.G. Wilson (ed.), Wheaton's Elements of International Law: the Literal Reproduction of the Edition of 1866 by R.H. Dana, Jr. (Oxford: Clarendon Press, 1936), p. 380 n. 173.

letters of marque were eschewed mutually by all the belligerents during the Crimean War (1853 – 1856),<sup>17</sup> the peace terms after which included, as the last Act, the four rules of the Declaration of Paris Respecting Maritime Law.<sup>18</sup> The first rule abolished privateering,<sup>19</sup> which meant that for signatory states privateers could henceforth be treated as pirates or war criminals. Unfortunately, the alternative - official merchant ship conversion - had one unforeseen consequence: carelessly-converted ships could still be accused of privateering. Thus, in 1870, a German Confederation plan to create a volunteer fleet for use in the Franco-German War met with objection as a revival of privateering.<sup>20</sup> The scheme entailed the offer to private ship owners

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<sup>17</sup> Between Russia on the one hand, and Turkey, France, Britain, Prussia and Sardinia on the other. See, e.g., C.H. Stockton, 'The Declaration of Paris', A.J.I.L., Vol. 14 (1920) 357; H. Wheaton, History of the Law of Nations in Europe and America (New York: Gould, Banks and Co., 1845; reprinted 1973), p. 556.

<sup>18</sup> Reprinted in A. Roberts and R. Guelff, Documents on the Laws of War (Oxford: O.U.P., 2d ed., 1989), p. 24. See also H. Fujita, 'Commentary: 1856 Paris Declaration, in N. Ronzitti, *supra* note 12, at p.66; H.W. Malkin, 'The Inner History of the Declaration of Paris', B.Y.I.L., Vol. 8 (1927) 1.

<sup>19</sup> The United States of America never formally joined the Declaration due to disagreement over the seizure of private property at sea. Thus, privateering remained an option during the U.S. Civil War (1861 – 1865). See, e.g., J.B. Moore, History and Digest of the International Arbitrations to which the U.S. has been a Party, Vol. 1 (Washington, D.C.: Government Printing Office, 1898), pp. 464, 594 – 595; H. Fujita, 'Commentary: 1856 Paris Declaration', *supra* note 18, pp. 66, 70; G.G. Wilson, *supra* note 16, p. 383.

<sup>20</sup> The war was originally termed the war between France and the North German Confederation and the States of Southern Germany (Bavaria, Wurttemberg, Baden and Hessen) owing to the constitutional

of ten percent of a ship's assessed value up-front in cash as the charter price.<sup>21</sup> However, the additional offer of a premium of between £1500 and £7500 for the capture or destruction of any French warship fatally combined public war, private ownership and command, and profit.<sup>22</sup>

The logistics of expanding sea power rapidly in the event of war thus continued to vary: Spain converted merchant ships into warships during the Spanish-American War of 1898, while other countries chose to co-operate with steamship companies in anticipation of future war needs.<sup>23</sup> Disagreement concerning the proper locale for lawful conversion, and whether a ship could revert back to its normal functions prior to war's end, made a private ship's

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position at the time. J.H.W. Verzijl, International Law in Historical Perspective: The Law of Neutrality, Vol. X Part IX-B (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979), at p. 124. See also G.A. Craig, Germany 1866 – 1945 (Oxford: O.U.P., 1982), p. 303; A. Roberts and R. Guelff, *supra* note 9, p. 50.

<sup>21</sup> Charters are essentially contracts for the use of a vessel. See, e.g., S. Baughen, Shipping Law (London: Cavendish Publishing Ltd., 3d ed., 2004), pp. 191 – 259.

<sup>22</sup> The plan failed in any event, as private ship owners did not respond. Volunteer navies were often used to avoid accusations of privateering. See H. Lauterpacht, Oppenheim's Treatise on International Law, Vol. II (Disputes, War and Neutrality) (London: Longmans, Green and Co., 7<sup>th</sup> ed., 1952), pp. 262 – 263; E. Castren, The Present Law of War and Neutrality (Helsinki: Academia Scientiarum Fennica, 1954), p. 252; G. Venturini, *supra* note 12, p. 120.

<sup>23</sup> H. Lauterpacht, *supra* note 22, p. 263; E. Castren, *supra* note 22, p. 252.

true nature uncertain at any point in time. Venturini provides the following example:

During the Russo-Japanese War (1904 – 1905), two Russian ships belonging to the auxiliary navy were authorised by the Turkish Sultan to pass through the Bosphorus and the Dardanelles as merchant ships. Then they transited across the Suez Canal and were subsequently converted into warships in order to exercise the right of visit and search on neutral shipping; thereupon they captured a British ship.<sup>24</sup>

As only belligerent warships had undisputed rights to stop, search and capture ships during naval warfare, belligerent merchant ships involved in trade or assisting as auxiliaries had no clear right to do likewise. In turn, the treatment of all intercepted ships depended on whether they were merely engaged in trade, were acting as enemy auxiliaries, or were enemy warships. Nonetheless, lingering uncertainties in practice remained, and formal requirements for merchant ship conversion into warships were finally tabled for consideration at the Second Hague Peace Conference in 1907.

### The Second Hague Peace Conference

A system of mutual disarmament was an important aspiration underlying both Peace Conferences convened in The Hague, in 1899 and 1907, respectively, but that topic was so deeply controversial in a world of industrial competition that the Russian government had to omit it from the 1907 programme entirely, leaving it as ‘unfinished

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<sup>24</sup> G. Venturini, *supra* note 12, p. 120 (ship names and citations omitted).



business'.<sup>25</sup> The second purpose of each conference - to ensure greater humanitarian protections during times of war - succeeded far better. Due in no large part to the extension of the suffrage,<sup>26</sup> the impetus at the time was to humanise war to the greatest extent possible.<sup>27</sup> As it had also long been felt that naval practice needed to provide for similarly rigorous rules and/or protections as those provided for the participants in war on land, maritime warfare formed the central focus at The Hague in 1907.

The non-combatant/combatant distinction central to the lawful use of armed force both on land and at sea, and hence, central to the laws of armed conflict, also reflected a long-standing effort to professionalise warfare itself, as evidenced by the adaptation of the minimal humanitarian principles of the first Geneva Convention<sup>28</sup> in 1864 to naval warfare on a preliminary basis at the first Hague Peace Conference in 1899.<sup>29</sup> It was again revised and expanded in 1907 by

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<sup>25</sup> See, e.g., R. Rosenne, *supra* note 7, pp. xiii – xvii; W.I. Hull, *supra* note 7, pp. 456 - 457.

<sup>26</sup> However, the general participation clause reduced available protections, as the conventions only applied if all the belligerents were signatories.

<sup>27</sup> See, e.g., the 1868 St. Petersburg Declaration renouncing the use, in time of war, of explosive projectiles under 400 grammes weight, 58 B.F.S.P. 16 - 17 (1867 – 1868) (French); 138 C.T.S. 297 – 299 (1868 – 1869) (French).

<sup>28</sup> 1864 Geneva Convention for the amelioration of the condition of the wounded in armies in the field, 22 August 1864, revised in 1906.

<sup>29</sup> 1899 Hague Convention III for the adaptation to maritime warfare of the principles of the Geneva Convention of 22 August 1864.

Additional Articles in 1868 to add naval protections to the 1864 instrument had been unsuccessful. Accessed at [www.icrc.org/ihl.nsf/INTRO/125?OpenDocument](http://www.icrc.org/ihl.nsf/INTRO/125?OpenDocument). See also G.

Hague Convention X for the adaptation to maritime warfare of the principles of the 1906 Geneva Convention.<sup>30</sup> Such early efforts to protect the wounded, sick and shipwrecked members of the naval forces and other persons assimilated to those forces did not however regulate the more fundamental entitlement to naval combatant status.<sup>31</sup> Specifically, as the mere assistance of merchant ships to a war effort by no means entitled them automatically to use offensive force, precise requirements for official ship conversion (and hence, entitlement to the full rights and duties of combatants) needed standardisation.

## **2. Convention VII**

The delegates of 44 states assembled at The Hague in June 1907 were divided into six commissions, as well as sub-commissions and committees of examination. The Commission on Maritime Law, termed the 'IV Commission', was not subdivided; the specific remit of its 114 members was to discuss any questions concerning maritime

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Werner, 'Les prisonniers de guerre', Recueil des Cours, Vol. 21 (1928) 5, 13 – 14.

<sup>30</sup> Articles 11 and 14 of Hague Convention X extended protection to 'other persons officially attached to fleets or armies' when sick or wounded. Subsequent revision of the 1906 Geneva Convention occurred in 1929, and again in the 1949 Geneva Convention II for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea.

<sup>31</sup> Contrast the Regulations annexed to the 1907 Hague Convention IV respecting the laws and customs of war on land, Articles 4 – 20. See Col. J.E. Edmonds and L. Oppenheim, Land Warfare: An Exposition of the Laws and Usages of War on Land, for the Guidance of Officers of His Majesty's Army (London: Harrison and Sons, 1914), Paras. 54 – 116.

warfare not dealt with by the III Commission of War on Sea.<sup>32</sup> The topic of ‘merchant ships transformed into cruisers’, or warships, was the first one assigned to the IV Commission, the president of which was the Russian delegate, Professor de Martens.<sup>33</sup> In fact, no member of the IV Commission was opposed to the practice of conversion,<sup>34</sup> but a central difficulty in standardising procedure was the imperative to maintain a fundamental distinction between conversion and privateering, as merchant ships engaged in normal commerce could have no combatant rights, at least until forced to act in self-defence.<sup>35</sup> Other proposals left open were the types of eligible vessels, the place and the required duration of conversion.<sup>36</sup>

Ultimately, Convention VII on the lawful conversion of merchant ships was adopted by the IV Commission, with six abstentions; in the plenary session of the Conference, 32 delegates fully approved it.<sup>37</sup> The main stipulations in the Convention were a mere six, each of

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<sup>32</sup> W. I. Hull, *supra* note 7, p. 32.

<sup>33</sup> See, e.g., V.V. Pustogarov, ‘Fyodor Fyodorovich Martens (1845-1909) - a humanist of modern times’, *I.R.R.C.*, Vol. 312 (1996) 300; and ‘The Martens Clause in International Law’, *J.Hist.Int.L.*, Vol. 1(2) (1999) 125.

<sup>34</sup> W.I. Hull, *supra* note 7, p. 105.

<sup>35</sup> Which contingency could transform their status. H. Lauterpacht, *supra* note 22, p. 267, who relies indirectly on Article 8 of the 1907 Hague Convention XI, and directly on Articles 5 – 7, to base this assertion. See also W.I. Hull, *supra* note 7, p. 105.

<sup>36</sup> See the Preamble to Convention VII. See also E. Castren, *supra* note 22, p. 254.

<sup>37</sup> Turkey made a reservation, Nicaragua and Paraguay were absent, and nine states (the U.S., Columbia, China, the Dominican Republic, Ecuador, Guatemala, Persia, Salvador, and Uruguay) abstained. W.I. Hull, *supra* note 7, p. 108.

which went directly to state responsibility inasmuch as they were intended to ensure that all those on board converted merchant ships respected laws of warfare in exchange for the entitlement to exercise the rights and duties of lawful combatants. Article 1 requires the converted ship to be placed ‘under the direct authority, immediate control, and responsibility of the Power whose flag it flies’. Article 2 requires the converted ship to bear the national distinguishing marks of a warship. Article 3 requires the commander to be in the service of the state, to be duly commissioned, and to have his name listed among fighting fleet officers. Article 4 requires crew members to be subject to military discipline. Article 5 requires converted ship operations to follow the laws and customs of war. Finally, Article 6 requires belligerents to announce ship conversion in their official list of warships as soon as possible.<sup>38</sup>

The six rules of Convention VII went some way towards affording a more transparent public status to converted merchant ships. Further, by requiring a converted ship to be placed ‘under the direct authority’, etc., of a belligerent state, the Convention was designed to discourage any indirect renewal of privateering.<sup>39</sup> Specifically, any attempt to ‘depredate’ could both obviate and incur belligerent state obligations to pay compensation, depending on the circumstances.<sup>40</sup> Standards were even more precise in the relations

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<sup>38</sup> Article 7 contains the ‘general participation clause’, standard at the time. See *supra* note 26.

<sup>39</sup> W.I. Hull, *supra* note 7, p. 484 n. 1: the United States neither signed nor ratified Convention VII due to its stance regarding the capture of private property at sea.

<sup>40</sup> See, e.g., Article 3 of the 1907 Hague Convention IV. Cf. E.A. Posner and A.O. Sykes, ‘An Economic Analysis of State and Individual Responsibility under International Law’, *Am.L.&Econ.Rev.*, Vol. 9 (2007) 72.

between belligerent and neutral states. Under the 1907 Hague Convention XIII concerning the rights and duties of neutral powers in naval war, enemy merchant ships had to pursue a purely-commercial purpose to avoid incurring liability,<sup>41</sup> thus underscoring the higher obligations owed by belligerents to neutral states than as between themselves.

### The Non-Combatant/Combatant Status

Hague law now provided rules for recognising the lawful combatant rights of fully-converted vessels, including rights of stop, search and capture. Issues left open or otherwise undecided by Convention VII however underscored the traditional degree of compromise characteristic of naval law, and Castren noted that a greater proportion of rules for naval warfare than for war on land remained rooted only in customary rules.<sup>42</sup> For example, few express standards existed for persons caught up in war other than the minimal provisions found in the Regulations annexed to the 1907 Hague Convention IV regarding the laws and customs of war on land. Accordingly, states retained much flexibility when called upon to recognise the public character of converted ships, with concomitant consequences for their crews in the event of attack, capture, and/or ship destruction.<sup>43</sup> As for mere auxiliary ships, i.e., those ships neither formally incorporated into the belligerent naval forces nor employed on purely commercial matters, the position remained even less clear.

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<sup>41</sup> Lauterpacht bases this assertion on Convention XIII, Preambular Paragraph 4. H. Lauterpacht, *supra* note 22, p. 705 n. 4.

<sup>42</sup> E. Castren, *supra* note 22, p. 244.

<sup>43</sup> See, e.g., H. Lauterpacht, *supra* note 22, pp. 265 – 266. See also Articles 5 – 8 of Hague Convention XI.

As war should only be fought between lawful combatants,<sup>44</sup> laws of war depend for their effectiveness on status, and long-standing distinctions have developed to differentiate between civilians and combatants, and between lawful and unlawful combatants. Thus, ‘a transformed merchant ship [acquired] the rights and privileges of warships only when’ the six rules of Convention VII were observed,<sup>45</sup> and unlawful combatants could be treated as war criminals. From the humanitarian basis of the non-combatant/combatant distinction flowed a further Hague rule: that of proportionality, in that ‘the right of belligerents to adopt means of injuring the enemy is not unlimited’, and unnecessary suffering and damage were to be avoided.<sup>46</sup> Only that force required to over-power the enemy was permitted,<sup>47</sup> but state responsibility for infractions of war law remained tightly circumscribed, not least on the basis of the ‘general participation clause’.<sup>48</sup>

However, and quite apart from the question of arming merchant ships for mere defensive purposes, e.g., against pirates,<sup>49</sup> if a merchant ship utilised force in a public war when its entitlement to do so was in doubt, its crew could be treated as unlawful combatants or

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<sup>44</sup> See, e.g., Regulations annexed to the 1907 Hague Convention IV, Articles 1 and 2, but see also Article 3 (non-combatants may also form part of a belligerent’s armed forces).

<sup>45</sup> Emphasis added. W.I. Hull, *supra* note 7, pp. 483 – 484.

<sup>46</sup> Regulations annexed to the 1907 Hague Convention IV, Articles 22 and 23(e).

<sup>47</sup> See the Preamble to the 1868 St. Petersburg Declaration, reprinted in A. Roberts and R. Guelff, *supra* note 9, at p. 54.

<sup>48</sup> E.g., Article 7 of Hague Convention VII.

<sup>49</sup> A practice discontinued after 1856, but revived during World War I. See A. Roberts and R. Guelff, *supra* note 9, p. 169; E. Castren, *supra* note 22, pp. 248 - 252.

war criminals.<sup>50</sup> The British view was that those on board enemy merchant vessels retained their rights of self-defence which, once exercised, could transform crew members into legitimate combatants,<sup>51</sup> but speaking generally, prisoner-of-war treatment received minimal attention at The Hague. Thus, an enemy merchant ship using force needed to show evidence it had acted solely in self-defence.<sup>52</sup> If so, the 1907 Hague Convention XI on capture in naval warfare provides the following rules:

Article 6. On giving an undertaking in writing not to engage in any service connected with the war, enemy subjects, whether officers or crew members, may not be held prisoner;<sup>53</sup>

Article 7. The names of all individuals free on parole must be notified to the enemy, which is then forbidden to employ them for any service prohibited by the terms of parole.

Otherwise, Article 8 removed these protections from 'ships taking part in the hostilities', e.g., the crew of auxiliary ships.

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<sup>50</sup> H. Lauterpacht, *supra* note 22, p. 467. The term 'war crime' at the time was defined in a military and legal sense as, inter alia, illegitimate armed hostilities committed by individuals who were not members of the armed forces. See Col. J.E. Edmonds and L. Oppenheim, *supra* note 31, Paras. 441 – 442.

<sup>51</sup> The German view was that resistance was unlawful. H. Lauterpacht, *supra* note 22, p. 467.

<sup>52</sup> Ibid., p. 267, reaches this conclusion by analogy with Article 8 of Hague Convention XI. See also ibid., p. 475.

<sup>53</sup> Contrast World War I, when all captured enemy civilians of military age were interned. Ibid., p. 267.

In short, the strict contours of Hague Convention VII may have helped to ‘bring all naval combatants within the rules adopted for the humanising of warfare’,<sup>54</sup> but the result in combination with other Hague rules, was as follows: first, the officers and crew of enemy warships were to be treated as lawful combatants; secondly, those serving on enemy merchant ships which employed force in self-defence might be treated as lawful combatants. As for unincorporated enemy auxiliaries vessels deemed to have employed offensive force without lawful authority, no special protections existed.<sup>55</sup> It was expected that gaps in coverage would be filled by reference to custom and accepted military usage.

### **3. Subsequent developments**

#### Up to World War II

A subsequent attempt to clarify certain peripheral issues was made in 1908 at the London Naval Conference. The Declaration of London concerning the Laws of Naval Warfare<sup>56</sup> was signed on 26 February

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<sup>54</sup> Emphasis added. W.I. Hull, *supra* note 7, p. 484.

<sup>55</sup> Those ships immune from attack at the time included hospital ships, 1899 Hague Convention III, 1907 Hague Convention X; small coastal and fishing boats, and scientific ships, 1907 Hague Convention XI; and cartel ships (e.g., for the exchange of prisoners). See J. Westlake, *supra* note 13, p. 162. See also Article 47 of the 1913 Oxford Manual on the Laws of Naval War.

<sup>56</sup> Reprinted in D. Schindler and J. Toman (eds.), The Laws of Armed Conflict (Leiden: Sijthoff, 1973), p. 625; A.J.I.L., Vol. 3 (Suppl. 1909) 179. See, e.g., F. Kalshoven, ‘Commentary: 1909 London Declaration’, in N. Ronzitti, *supra* note 12, p. 257.



1909, and constituted the successor to Hague Convention XII.<sup>57</sup> Intended to resolve various controversies which had impacted on Hague Convention VII, such as the right to stop and search at sea, the Declaration did largely confirm the customary law of the time regarding, *inter alia*, the determination of enemy character, but the Declaration remained unratified. Other maritime issues, in terms of the guidance available in World War I,<sup>58</sup> had to await the 1913 Oxford Manual adopted by the Institute of International Law on 9 August 1913.<sup>59</sup> A non-binding code of practice, the Oxford Manual of the Laws of Naval War,<sup>60</sup> together with the 1909 London Declaration, provides an accurate, if incomplete, account of the pre-World War I customary law of sea warfare.

The formalities of Hague Convention VII for converted merchant ships are found in Articles 3 to 8 of the Oxford Manual, but in relation to the place of conversion, a matter left unresolved in 1907, Article 9 specified that

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<sup>57</sup> Relative to the creation of an international prize court (never in force).

<sup>58</sup> See, e.g., E. Chadwick, 'The "Impossibility" of Maritime Neutrality During World War 1', in *supra* note 1, at p. 337.

<sup>59</sup> The Institute was established in Belgium in 1873 by eminent jurists including Gustave Rolin-Jaequemyns, Tobias Asser, and K. Bluntschli, and was highly influential in the progressive development of international law. The Institute also adopted the 1880 Oxford Manual of the Laws and Customs of War on Land.

<sup>60</sup> Reprinted in D. Schindler and J. Toman (eds.), The Laws of Armed Conflicts (The Hague: Martinus Nijhoff, 2d ed., 1988), pp. 858 - 875. See, e.g., P. Verri, 'Commentary: 1913 Oxford Manual', in N. Ronzitti, *supra* note 12, p. 329.

The conversion of a vessel into a warship may be accomplished by a belligerent only in its own waters, in those of an allied state also a belligerent, in those of the adversary, or, lastly, in those of a territory occupied by the troops of one of these states.

Thus, lawful conversion could not occur on the high seas, or in neutral or other non-aligned state waters. Article 10 prohibited the re-conversion of a warship back into a public or private vessel for the duration of the hostilities. Article 12 reiterated the prohibition of privateering, and specified the following parameters for the use of offensive force:

Apart from the conditions laid down ..., neither public nor private vessels, nor their personnel, may commit acts of hostility against the enemy. Both may, however, use force to defend themselves against the attack of an enemy vessel.<sup>61</sup>

For those found to have assisted the hostilities unlawfully, the following provisions were made:

Article 60. When a public or a private ship has directly or indirectly taken part in the hostilities, the enemy may retain as prisoners of war the whole personnel of the ship, without prejudice to the penalties he might otherwise incur.

Article 61. Members of the personnel of a public or of a private vessel, who are personally guilty of an act of hostility towards the enemy, may be held by him as prisoners of war, without prejudice to the penalties he might otherwise incur.

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<sup>61</sup> Cf. Article 8 of Hague Convention XI.

Already, release on parole had become discretionary, but in a provision analogous to Hague Convention IV Article 3, imprisonment was ‘without prejudice to’ an obligation to pay compensation ‘if the case demands’.<sup>62</sup>

Unfortunately, the perfidious means and methods of warfare adopted in World War I illustrated more the urge to employ industrialised weaponry than respect for rules designed to make warfare more humane. Afterwards, attempts to supplement and update the rules of armed conflict proved unpopular and largely unsuccessful,<sup>63</sup> notable exceptions being the 1936 London Process-Verbal,<sup>64</sup> and the 1929 Geneva Convention relative to the treatment of prisoners of war but ratified only by 39 states when war broke out again in 1939. As for belligerent use of private ships during World War II, Castren noted that ‘conversions and re-conversions [were] carried out on a large scale ... although all states have not recognised these measures’.<sup>65</sup>

### Post-1945

A central concern of the United Nations since World War II has been to restrain the use of force in international relations.<sup>66</sup> Such restraint has required an expanding body of laws intended both to ensure

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<sup>62</sup> Section IX ‘Additional Article’.

<sup>63</sup> E.g., the 1922 Washington Treaty relating to the use of submarines and noxious gases in warfare. The 1930 International Treaty for the limitation and reduction of naval armaments expired on 31 December 1936. A. Roberts and R. Guelff, *supra* note 9, p. 169.

<sup>64</sup> Part IV of the 1930 Treaty of London, and extending to submarines the rules applicable to warships. U.K.T.S. 29 (1936).

<sup>65</sup> E. Castren, *supra* note 22, p. 255.

<sup>66</sup> See, e.g., U.N. Charter Article 2(4).

peace and to broaden humanitarian respect in the event of an armed conflict.<sup>67</sup> The Geneva Conventions were revised and supplemented in 1949, and the general participation clause in common article 2(3) made humanitarian obligations a matter of unilateral state obligation rather than of mutual reciprocity. Prisoner-of-war status was extended, *inter alia*, to members of regular armed forces professing allegiance to a government not recognised by the detaining power, and to the crew of the merchant marine 'who do not benefit by more favourable treatment under any other provisions of international law';<sup>68</sup> equivalent treatment was extended to those whose status was yet to be determined by a competent tribunal.<sup>69</sup> Civilians for the first time were made the subject of a Geneva Convention, in the new Convention IV.<sup>70</sup>

The 1977 Protocol 1 additional to the four 1949 Geneva Conventions, and relating to the protection of victims of international armed conflicts,<sup>71</sup> again extended combatant eligibility in recognition of new forms of warfare. It required the armed forces to be organised

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<sup>67</sup> On the issue of legal prioritisation, see, e.g., W. Heintschel von Heinegg, 'The Current State of International Prize Law', in H.H.G. Post (ed.), International Economic Law and Armed Conflict (Dordrecht: Martinus Nijhoff, 1994), pp. 5, 21 – 25.

<sup>68</sup> 1949 Geneva Convention III Relative to the Treatment of Prisoners-of-War, Article 4.

<sup>69</sup> 1949 Geneva Convention III, Article 5. Prisoner-of-war treatment is distinct from prisoner-of-war status.

<sup>70</sup> Relative to the protection of civilians.

<sup>71</sup> U.K.T.S. 29 (1999); 1125 U.N.T.S. 3 (1979). See, e.g., M. Bothe, 'Commentary: 1977 Geneva Protocol 1', in N. Ronzitti, *supra* note 12, p. 760.

under responsible command, to comply with international rules of armed conflict,<sup>72</sup> and to

distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. [Where that is impossible], he shall retain his status as a combatant provided that, in such situations, he carries his arms openly:

- (a) during each military engagement,
- and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.<sup>73</sup>

In turn, the feigning of civilian, non-combatant status was listed as an example of perfidy.<sup>74</sup> Also for the first time, lawful military objectives were specified. Article 52(2) permitted attack only on those objects which, on the facts, can be justified as they ‘make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage’. As for proportionality in attack,<sup>75</sup> Protocol 1, Article 85(3), made the wilful targeting of civilians or their objects a grave breach.

The accession of Argentina to Protocol 1, on 26 November 1986, post-dated war in the Falklands. Britain, too, had only signed the

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<sup>72</sup> 1977 Protocol 1, Articles 43(1) and 44(2).

<sup>73</sup> 1977 Protocol 1, Article 44(3).

<sup>74</sup> 1977 Protocol 1, Article 37(1)(c). Perfidy is defined as an act ‘inviting the confidence of an adversary ... with intent to betray that confidence’. Article 37(1).

<sup>75</sup> See also Articles 35(2), 51(5)(b), 56, 57(2)(a)(iii), and 57(2)(b).

Protocol,<sup>76</sup> but its 1977 signature at least obliged it not to act contrary to the Protocol's 'object and purpose'.<sup>77</sup> Thus, in 1982, nowhere in treaty provision had it been stated that the general principles applicable in armed conflict on land were also relevant to the conduct of hostilities at sea. Further, most legal rules in force concerning the formalities and conduct of maritime hostilities still dated from the Second Hague Peace Conference in 1907, including those contained in Hague Convention VII, as is now discussed in the context of the 1982 Falklands War, British ship requisition, and the use made during that conflict of the QE2.

#### **4. The Falklands War**

##### Brief Background

The Falkland Islands are located 8000 miles south-west of Britain, 3500 miles from Ascension Island, but only 400 miles from the coast of Argentina.<sup>78</sup> Concern about an imminent invasion of the Falklands by Argentina had been raised by British intelligence for many weeks before it occurred,<sup>79</sup> and particularly after Argentine 'scrap metal merchants landed illegally in the tiny port of Leith, South Georgian,

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<sup>76</sup> On 19 July 1995, the U.K. Geneva Conventions (Amendments) Act 1995 (c. 27) to implement the Additional Geneva Protocols 1 and 2 received the Royal Assent.

<sup>77</sup> 1969 Vienna Convention on the Law of Treaties, Article 18. Britain signed the Protocol on 12 December 1977 on the basis of 10 'understandings'; at ratification on 28 January 1998, it made 16 'statements'.

<sup>78</sup> The Falklands Campaign, supra note 4, Para. 107.

<sup>79</sup> 'A Brief History of the Falkland Islands, Part 7: The 1982 War and Beyond', Falkland Islands Information Web, accessed at [www.falklands.info/history/history/7.html](http://www.falklands.info/history/history/7.html).

and hoisted the Argentine flag' on 19 March 1982.<sup>80</sup> A first planning meeting was held at the Ministry of Defence on 31 March,<sup>81</sup> when it was pointed out that temporary powers of requisition taken under the Royal Prerogative would be necessary to acquire certain ships deemed essential for British defence.<sup>82</sup> The Royal Fleet Auxiliary was also available for deployment.<sup>83</sup> Although the entire R.F.A. fleet was brought 'into commission for the first time in its history' during the campaign,<sup>84</sup> more ships were needed for the supply of fuel, food, stores and ammunition to warships, aviation and amphibious support, and for troop transport,<sup>85</sup> all of which tasks made them legitimate objects of Argentine attack.

Actual hostilities began on 2 April 1982 and escalated quickly, as each belligerent claimed an entitlement to use force in self-defence.<sup>86</sup> A 200-mile exclusion zone imposed by Britain on 12 April

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<sup>80</sup> Provoking a diplomatic protest from Britain. See [www.teamportsmouth.com/Mem-DaveHutchings.html](http://www.teamportsmouth.com/Mem-DaveHutchings.html). A similar incident on 9 January 1981 had also led to a formal protest. '1982 Falklands War Timeline: Chronology', accessed at [www.falklands.info/history/82timeline.html](http://www.falklands.info/history/82timeline.html).

<sup>81</sup> R. Villar, *supra* note 5, p. 11.

<sup>82</sup> The Falklands Campaign, *supra* note 4, Para. 306 (military expenditure capped at 3% above inflation).

<sup>83</sup> The R.F.A. is owned by the Ministry of Defence, and dates back essentially to Elizabethan times. It was granted a Royal Charter in 1911. See R. Villar, *supra* note 5, p. 145.

<sup>84</sup> *Ibid.*, p. 154, and generally, pp. 145 – 160.

<sup>85</sup> See 'Falkland Islands: keeping the supply line filled', The Economist, 1 May 1982, p. 28.

<sup>86</sup> See, e.g., S. Gul, 'The Bells of Hell: an Assessment of the Sinking of ANR General Belgrano in the Context of the Falklands Conflict', N.Y.I.L.Rev., Vol. 18 (2005) 81, at 84 - 91. For an overview of United

around the Falklands against Argentine naval ships was subsequently extended on 30 April to exclude all ships and aircraft of any country, whether commercial or military.<sup>87</sup> From 7 May, any Argentine warship or military aircraft over 12 miles from the Argentine coast was deemed hostile.<sup>88</sup> Britain mobilised civilian resources on an emergency basis, including the requisition of merchant ships.<sup>89</sup> Necessary modifications to the STUFT required as few as two or three days,<sup>90</sup> and somewhat longer in some cases.<sup>91</sup> Within seven weeks, a task force of 28000 men and over 100 ships in total had been assembled, and sent to the Falklands.<sup>92</sup>

The conflict between Argentina and Britain over the islands was the first major naval belligerent operation since 1945, but the 1949 Geneva Conventions and Protocol 1 did not generally regulate the conduct of purely naval hostilities such as ‘attacks by naval forces on

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Nations activity during the war, see, e.g., D.J. Harris, *supra* note 2, pp. 661 – 667.

<sup>87</sup> See ‘Invasion: best guesses’, The Economist, 1 May 1982, p. 26.

<sup>88</sup> The Falklands Campaign, *supra* note 4, Paras. 103 – 104. An Argentine 200-mile exclusion zone was declared on 30 April. ‘Mayday in the South Atlantic’, The Economist, 8 May 1982, pp. 25, 26.

<sup>89</sup> See generally The Economist, 24 April 1982, p. 6, 22 May, p. 25, and 12 June, pp. 29 and 31.

<sup>90</sup> E.g., the P & O Roll-on Roll-off general cargo ship, the MV Elk (taken up 4 April, modified 6 – 9 April in Southampton). R. Villar, *supra* note 5, Appendix I, p. 169.

<sup>91</sup> E.g., the QE2 (taken up 4 May, modified 4 – 12 May in Southampton). *Ibid.*, Appendix I, p. 170.

<sup>92</sup> The Falklands Campaign, *supra* note 4, Para. 108.



objects, in particular vessels and aircraft, at sea'.<sup>93</sup> As the STUFT eventually outnumbered the British warships sent to the Falklands,<sup>94</sup> and as warships remain distinct from mere auxiliaries both legally and militarily,<sup>95</sup> Hague Convention VII on the conversion of merchant ships into warships was relevant to the British requisition exercise only to the extent that Britain complied with Convention formalities. If not, even when considered in light of the additional details on conversion practice provided in the unofficial 1913 Oxford Manual, it must be queried what if any additional precautions Britain needed to consider in order to safeguard the requisitioned ships from indiscriminate attack, as is now discussed.

### Requisition Procedure

Two days after Argentina invaded the Falkland Islands, the decision by the British government to utilise the Royal Prerogative to requisition ships was given effect by the Requisitioning of Ships Order in Council of 4 April 1982, the scope of which was extensive.<sup>96</sup> The Order delegated the power of requisition, in pertinent part, as follows:

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<sup>93</sup> L. Doswald-Beck, 'San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994' [1995] 309 I.R.R.C. 583.

<sup>94</sup> R. Villar, *supra* note 5, p. 15.

<sup>95</sup> A point made by G. Venturini, *supra* note 12, p. 125.

<sup>96</sup> Requisitioning of Ships Order in Council, 4 April 1982 (Statutory Instrument No. 1982, p. 1693), reproduced along with a sample notice of requisition in R. Villar, *supra* note 5, pp. 8 – 10. Orders in Council may be legislative, executive or judicial, and give effect to decisions made under the Royal Prerogative and under statute. H. Barnett, *supra* note 6, p. 265.

2. A Secretary of State or the Minister of Transport (...) or the Lords Commissioners of the Admiralty may requisition for Her Majesty's service any British ship and anything on board such ship wherever the ship may be.

The term 'requisition' was defined by the Order as meaning to 'take possession of the ship or thing or require the ship or thing to be placed at the disposal of the requisitioning authority'.<sup>97</sup> Ships subject to requisition included those registered in the U.K., and in 'any country outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of the Government of the U.K'.<sup>98</sup> The requisition exercise, codenamed 'Operation Corporate', thus entailed the immediate (and frequently unexpected) government use of privately-owned ships.

As is evident from the Order, there was neither any mention of Hague Convention VII formalities, nor of additional guidelines such as those found in Articles 9 and 10 of the Oxford Manual. However, to the extent that Hague Convention VII was intended to draw a bright line between publicly-accountable military service and private activity, the Convention formalities were clearly evident from the start of the requisition exercise. For example, there is no doubt that British requisition duly authorised the STUFT to participate in a public war. Governmental financial liability was quickly evident as provision was made 'from the outset to maintain the cash flow of owners whose ships were taken up'.<sup>99</sup> Requisitioning was cheaper in that the

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<sup>97</sup> Requisitioning of Ships Order in Council, 4 April 1982, *supra* note 96, Article 5(2).

<sup>98</sup> *Ibid.*, Article 5(3).

<sup>99</sup> See the Compensation (Defence) Act 1939 (ch. 75), ss. 1(b), 4, and 10, which Villar, *supra* note 5, p. 19, characterises as 'not altogether satisfactory', having been designed for total war. Ultimately,

government only covered the companies' operating costs,<sup>100</sup> while chartered vessels, several of which were oil tankers, were paid for at commercial rates. However, insurance cover from the British War Risk Clubs was quickly unobtainable.<sup>101</sup>

The STUFT were manned generally by volunteer civilian crews and supplemented by small naval or R.F.A. parties.<sup>102</sup> A Declaration of Active Service placed everyone on board under the jurisdiction of the 1957 Naval Discipline Act,<sup>103</sup> and thus subject to military discipline (Hague Convention VII, Article 4). However, while positive obligations to follow the laws and customs of war (Article 5) were imposed, the requisition exercise alone did not extend combatant rights to the STUFT. The vessels were not placed under the direct authority of fully-commissioned commanders (Article 3), but did remain under overall British military authority and control (Article

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guidelines on compensation were announced. Fees by mid-May for the 51 ships requisitioned or chartered amounted to £30 million. 'Cost to Britain: the price for the job', The Economist, 15 May 1982, p. 30.

<sup>100</sup> 'The fuel-guzzling QE2 cost \$125,000 a day to run, but cargo ships cost less.' 'Requisitioning: England expects ...', The Economist, 8 May 1982, p. 36.

<sup>101</sup> R. Villar, *supra* note 5, pp. 11, 19. For the modern position, see the Merchant Shipping Act 1995 (ch. 21), Part VII (liability of ship owners and others: application to Crown and its ships) s. 192A (compulsory insurance or security).

<sup>102</sup> The Falklands Campaign, *supra* note 4, Para. 246.

<sup>103</sup> R. Villar, *supra* note 5, p. 15. See the Naval Discipline Act 1957 (ch. 53), ss. 111 (naval forces, volunteers and trainees), and 132 (definitions of Her Majesty's ships, forces, etc.).

1).<sup>104</sup> As for structural challenges, necessary modifications included the fitting of temporary flight decks (constructed over swimming pools in the case of some liners),<sup>105</sup> the equipping of trawlers as minesweepers, and the provision of additional communication, navigation and cryptographic equipment.<sup>106</sup> Defensive capability was acquired to protect against lawful means of attack,<sup>107</sup> such as by ramming, use of torpedoes, and by air,<sup>108</sup> but there was no express provision for 'distinguishing marks' (Article 2).

The involvement of the R.F.A. made the situation rather more complicated. The R.F.A. is comprised of public merchant ships owned by the Ministry of Defence; its personnel are certificated Merchant Navy officers and civilians with substantial naval training for use in an operational environment. It provides naval auxiliary services when called upon to do so, but there is little question of 'warships' and it is not a permanent part of the armed forces.<sup>109</sup> Its separate status is signalled by the Blue Ensign, rather than the White Ensign of the Royal Navy. Thus, the few STUFT fully-commissioned in 1982 would have displayed the White Ensign; any taken into Ministry of Defence ownership would have displayed the Blue Ensign. All three British

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<sup>104</sup> Commander-in-Chief, Fleet, Admiral Sir John Fieldhouse, had overall responsibility for Operation Corporate.

<sup>105</sup> R. Villar, *supra* note 5, pp. 20 - 21.

<sup>106</sup> The Falklands Campaign, *supra* note 4, Para. 247.

<sup>107</sup> See G. Venturini, *supra* note 12, p. 125.

<sup>108</sup> The STUFT relied typically on the weaponry carried by troops. R. Villar, *supra* note 5, p. 163.

<sup>109</sup> See Royal Fleet Auxilliary, 'Basic Facts: Command', accessed at [www.royal-navy.mod.uk/server/show/nav.5860](http://www.royal-navy.mod.uk/server/show/nav.5860); 'The Royal Fleet Auxiliary in the South Atlantic', accessed at [www.britains-smallwars.com/Falklands/rfa.htm](http://www.britains-smallwars.com/Falklands/rfa.htm). The Ministry of Defence is its own insurer.

ensigns (White, Blue, and Red for ordinary shipping) are ‘ensigns of Her Majesty’s Fleet’,<sup>110</sup> but as this domestic arrangement is not binding on other states, a ‘quite delicate’ situation is created for ‘states whose regulations do not provide for a distinction between the ensigns of the navy and the merchant marine’.<sup>111</sup>

### Requisition of the QE2

Effected six weeks after the Argentine flag appeared in Leith, South Georgia,<sup>112</sup> the QE2 was requisitioned on 3 May 1982 on its return to England from New York and Philadelphia. Requisition apparently came as a surprise to its owners,<sup>113</sup> even though the ship was ‘requisitioned under a previous contract rather than chartered’.<sup>114</sup> The operative paragraph of the message received both by the vessel and its owners stated ‘Your vessel Queen Elizabeth 2 is requisitioned by the Secretary of State for Trade under the Requisitioning of Ships Order 1982 and you are accordingly required to place her at his disposal forthwith’.<sup>115</sup> All future cruises were cancelled, and the QE2

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<sup>110</sup> Capt. Malcolm Farrow, O.B.E., R.N., President of the British Flag Institute, very kindly supplied these distinctions by emails dated 10 and 11 September 2008. He also noted that ‘those few STUFT (trawlers) that were commissioned wore the White Ensign ... all other civilian ships retained their civilian ensigns’.

<sup>111</sup> G. Venturini, *supra* note 12, p. 126 n. 8.

<sup>112</sup> See [www.teamportsmouth](http://www.teamportsmouth), *supra* note 80.

<sup>113</sup> See, e.g., C. Thatcher (with E. Flounders and M. Gallagher), QE2: Forty Years Famous (London: Simon and Schuster, 2007), p. 157.

<sup>114</sup> Email from the Royal Naval Museum, 15 October 2007. No verification of this point has been forthcoming from Cunard.

<sup>115</sup> Quoted in C. Thatcher, *supra* note 113, p. 157.

proceeded immediately to Southampton docks for modification as a troop and supply vessel.<sup>116</sup>

The ship was fitted with two helipads, after large parts of the superstructure were sliced away. It received refuelling-at-sea gear for fuel and water supplies, and additional communications equipment. Accommodation was increased by 1000 camp beds to carry 3150 service personnel from 5 Infantry Brigade,<sup>117</sup> and it was loaded with large quantities of stores totalling 71 tons. Defensive protection, e.g., against magnetic mines, was supplied. Captain Peter Jackson was placed in command,<sup>118</sup> but he, unlike most Cunard officers, was not in the Royal Navy Reserve, and the liner continued to display the Red Ensign of the Merchant Service to signify its non-combatant status. Some 650 of the QE2's crew volunteered for the Falklands trip,<sup>119</sup> including its First Officer, an R.N.R. Lieutenant requested to travel south as the ship's liaison officer,<sup>120</sup> and Naval Party 1980.<sup>121</sup> The

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<sup>116</sup> See [www.teamportsmouth](http://www.teamportsmouth), supra note 80.

<sup>117</sup> Comprising the Scots Guards, the Welsh Guards and the 7<sup>th</sup> Gurkha Rifles. C. Thatcher, supra note 113, p. 159. Nepalese Gurkhas swear an oath to the Queen, so are not considered mercenaries. 'It's a long way to Paklihawa', The Economist, 12 June 1982, p. 30. See 1977 Protocol 1, Article 47.

<sup>118</sup> Having met with Cunard officials, representatives from the Ministry of Defence and Department of Trade, Lloyds insurers, and Royal Naval and military personnel on 4 May. [www.teamportsmouth](http://www.teamportsmouth), supra note 80.

<sup>119</sup> R. Villar, supra note 5, Appendix 2, p. 173; C. Thatcher, supra note 113, pp. 158 – 159. See also [www.teamportsmouth](http://www.teamportsmouth), supra note 80. Merchant seaman's pay received a premium of 150%. 'Cost to Britain', supra note 99.

<sup>120</sup> See [www.teamportsmouth](http://www.teamportsmouth), supra note 80.

ship's departure from Southampton for the Falklands was widely publicised by British and European mass media.<sup>122</sup>

As war between belligerents can be waged anywhere on the high seas, the QE2 was vulnerable to attack throughout the journey. By continuing to fly the Red Ensign to signal what it considered to be its non-combatant status, the QE2 should in theory have invited less curiosity, but the public nature of its departure from Southampton and its assigned duties as a troop ship made it an important Argentine military objective. Allegedly, Argentina employed a Boeing 707 to search for it in the South Atlantic.<sup>123</sup> To better conceal its identity, the QE2's windows were blacked-out after departing Ascension (roughly, the half-way point).<sup>124</sup> The liner had brushes with extreme danger, including acutely-low visibility due to fog; as it neared the war zone, its radar was switched off and it navigated massive iceberg fields in the vicinity of South Georgia without it, where it offloaded troops onto other vessels on 28 May. The following day, the

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<sup>121</sup> A Naval Party travelled on board each STUFT. Headquarters Land Forces, Falklands Islands, and Captain (acting) N.C.H. James of the Royal Navy boarded the QE2 on 12 May, but Captain Jackson remained in overall command of the ship.

<sup>122</sup> See [www.teamportsmouth](http://www.teamportsmouth), supra note 80. See also B.B.C. film coverage of 12 May 1982, of the ship's departure from Southampton displaying the Red Ensign: 'A Queen Goes to War (1982)', accessed at [www.bbc.co.uk/hampshire/content/articles/2007/06/19/qe2\\_feature.shtml](http://www.bbc.co.uk/hampshire/content/articles/2007/06/19/qe2_feature.shtml).

<sup>123</sup> R. Villar, supra note 5, pp. 48 – 49. See also C. Thatcher, supra note 113, pp. 160 – 161.

<sup>124</sup> Encrypted radio communications with Britain were relayed via the American communications centre on Ascension. 'Falkland Islands: keeping the supply line filled', supra note 85.

ship turned back towards Britain, carrying nearly 700 survivors,<sup>125</sup> and arrived back on 11 June. On 25 June, the campaign was effectively over.<sup>126</sup> The QE2 resumed normal cruising service on 15 August 1982.<sup>127</sup>

### Critique

To what extent were the formalities of Hague Convention VII relevant to the QE2's requisition, and to what extent did both belligerents encounter difficulties in terms of the wider aspects of Hague and Geneva rules? As noted above, the STUFT were subject to military discipline but were not all placed under direct military command. Moreover, there was no express provision for 'distinguishing marks' (Hague Convention VII, Article 2). Such omissions then implicate the long-standing non-combatant/combatant distinction,<sup>128</sup> particularly as it was speculated at the time that, rather than target the Royal Navy, Argentina would have done better to husband its air force 'for use against the support ships which enabled the task force to stay in place'.<sup>129</sup> Indeed, few specific rules concerning attack on military

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<sup>125</sup> C. Thatcher, supra note 113, p. 161.

<sup>126</sup> The Defence Ministry's annual White Paper published 22 June 1982 made no mention of the war. 'Wot, no Falklands?', The Economist, 26 June 1982, p. 25.

<sup>127</sup> Re-conversion cost £7 million, of which the government paid £2 million. The rest was accounted for by Cunard improvements. C. Thatcher, supra note 113, p. 163.

<sup>128</sup> See, e.g., Regulations annexed to the 1907 Hague Convention IV, Article 1(2).

<sup>129</sup> 'Falkland Islands: the noose round Port Stanley', The Economist, 5 June 1982, p. 21.



objectives were yet in force,<sup>130</sup> and even those in existence were based more on a general prohibition of indiscriminate attack, yet it was already clear by 1982 that any military gains to be achieved from particular operations needed to be obtained both lawfully and discriminately.

Accordingly, not only must it appear necessary to attack a military objective, but the consequences of attack should be limited by, or proportional to, the value of the objective, taking into account any foreseeable civilian loss or other damage.<sup>131</sup> The 1977 Geneva Protocol 1 was even more specific. Article 52 provided that civilian objects ‘shall not be the object of attack or of reprisals’ unless they constituted military objectives; military objectives were then limited to those objects which ‘make an effective contribution to military action’, the destruction, capture or neutralisation of which ‘offers a definite military advantage’.<sup>132</sup> Thus, the QE2, when acting as a troop ship under official requisition, was a legitimate Argentine military objective for attack. Even had it been engaged on its normal business, it might still have constituted a legitimate military objective, if to do so would have made ‘an effective contribution to [Argentine] military action’.

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<sup>130</sup> Regulations annexed to the 1907 Hague Convention IV, Article 27 and Hague Convention IX, Article 5 (protection of civilian objects); 1949 Geneva Convention I, Article 19(2), and Convention IV, Article 18(4) (hospitals and medical units).

<sup>131</sup> See, e.g., the United States Naval Handbook [1995] s. 8.1.2.1, and s. 9.1.2: ‘provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained’, quoted in J.-M. Henckaerts and L. Doswald-Beck (eds.), Customary International Humanitarian Law, Vol. II: Practice, Pt. 1 (C.U.P., 2005), at Ch. 4, Para. 48, p. 305.

<sup>132</sup> Article 52 already constituted customary international law, arguably, due to other post-1945 developments in international law.

Obviously, an evaluation of ‘effective contribution’ can be somewhat speculative, which then leads to an additional difficulty. Flying the enemy flag provides ready evidence of national character, and the regulations of many third states do not allow for distinctions to be made between the domestic ensigns of enemy ships.<sup>133</sup> As collateral damage should also be considered prior to attack on a military objective, it is useful to consider what options exist other than attack. For example, the traditional rights of belligerent visit and search at sea, the procedures for which arose from the prize laws of former times, still influence naval decision-making. The QE2 lacked offensive capabilities, so outright attack could have been deemed excessive, making capture more proportional, but as the ship carried troops,<sup>134</sup> destruction would certainly have offered Argentina a definite military advantage. Further, by aiding the hostilities, the civilians crewing the QE2 could have been regarded as combatants, a view reflected in customary humanitarian rules at the time,<sup>135</sup> but

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<sup>133</sup> G. Venturini, *supra* note 12, p. 126 n. 8.

<sup>134</sup> Including Major General Sir John Jeremy Moore, commander (designate) of the British land forces for the Falklands, who joined the QE2 from Ascension. General Moore received the Argentine surrender on 14 June. See G. Smith, Battle Atlas of the Falklands War 1982, by Land, Sea and Air (Lulu.com, 2006, and based on Battles of the Falklands War (Ian Allan, 1989)), accessed at [www.naval-history.net/F37weekseven.htm](http://www.naval-history.net/F37weekseven.htm).

<sup>135</sup> See, e.g., the 1989 United States memorandum of law concerning the prohibition of assassination: ‘there is general agreement among law-of-war experts that civilians who participate in hostilities may be regarded as combatants’, quoted in J.-M. Henckaerts and L. Doswald-Beck (eds.), *supra* note 131, at Ch. 1, Para. 805, p. 112 (citation omitted).

combatant status requires ‘a fixed distinctive sign recognisable at a distance’.<sup>136</sup>

It is thus the QE2’s continued display of the ‘non-combatant’ Red Ensign of the Merchant Service that raises concern. At the time of accession to Protocol 1 in 1986, Argentina registered ‘interpretations’ for Protocol 1, Article 44 (‘Combatants and Prisoners-of-War’).<sup>137</sup> Specifically, Argentina rejected any interpretation

- (a) as conferring on persons who violate the rules ... any kind of immunity exempting them from the system of sanctions which apply to each case;
- (b) as specifically favouring anyone who violates the rules the aim of which is the distinction between combatants and the civilian population;
- (c) as weakening respect for the fundamental principle of the international law of war which requires that a distinction be made between combatants and the civilian population, with the prime purpose of protecting the latter.<sup>138</sup>

Further, Protocol 1, Article 39(3), provided that the Protocol’s rules applicable to perfidy or the use of flags in the conduct of armed conflict at sea ‘shall not affect the existing generally-recognised rules

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<sup>136</sup> 1949 Geneva Convention II, Article 13(2)(b).

<sup>137</sup> Combatants who do not comply with the principle of distinction forfeit their right to be prisoners-of-war, but Article 44(4) extends equivalent protections.

<sup>138</sup> Quoted in A. Roberts and R. Guelff (3d), *supra* note 9, pp. 499 – 500. ‘Civilian’ is defined in Article 50 of Protocol 1 as those persons not falling within the terms of Article 4A(1)(2)(3) and (6) of the Third Geneva Convention of 1949, and of Article 43 of Protocol 1.

of international law',<sup>139</sup> but given the absence by Argentina of any further qualification made along those lines, it becomes arguable that the Argentine 'interpretations' of Protocol 1, Article 44, were intended to be applicable both on land and at sea. Moreover, the feigning of civilian, non-combatant status - an act of 'perfidy'<sup>140</sup> - is condemned both in Argentina's Law of War Manual,<sup>141</sup> and in Britain's Law of Armed Conflicts,<sup>142</sup> and perfidious behaviour can be tried and punished as a war crime.<sup>143</sup> Thus, while it could be argued equally that the QE2 was justified in displaying its chosen form of self-identification, in that it had not been converted into a warship in full compliance with Hague Convention VII,<sup>144</sup> it would appear that its civilian command and volunteer crew were carelessly endangered as there is little to indicate that Argentina would have felt under any special obligation to consider the alternatives to outright attack.

## 5. Further Developments

In view of practices adopted in modern naval confrontations, the San Remo Manual was produced by the International Institute of

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<sup>139</sup> See, e.g., E. Chadwick, *supra* note 58, at pp. 338, 356 – 358 (discussion of Q-ships and the Baralong incident of August 1915).

<sup>140</sup> Protocol 1, Article 37, was adopted by consensus. Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law ('CDDH'), Official Records, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

<sup>141</sup> Argentina, Law of War Manual [1989], s. 1.05(2)(3).

<sup>142</sup> U.K., Law of Armed Conflicts [1981], Section 4, p. 12, s. 2(a).

<sup>143</sup> U.S., Naval Handbook [1995], ss. 12.7 and 12.7.1.

<sup>144</sup> But see The Falklands Campaign, *supra* note 4, Para. 250 (post-war option agreed between Cunard and the Ministry of Defence to incorporate 'militarily useful features' in the ship built to replace the SS Atlantic Conveyor, and to conduct subsequent yearly exercises).

Humanitarian Law in 1994.<sup>145</sup> The San Remo Manual is an up-dated restatement on maritime warfare intended to be the modern equivalent of the 1913 Oxford Manual,<sup>146</sup> is non-binding, and has become highly influential on accepted theory and practice. It required six years to draft, numbers 183 paragraphs, and reflects a combination of customary and progressive development in international law. The Manual does not deal specifically with the conversion of merchant ships into warships, and concentrates instead, *inter alia*, on the necessary precautions to take when determining enemy character prior to military attack. State practice is examined in order to formulate clear principles for distinguishing between lawful and unlawful military objectives, and the fundamental tenets of international humanitarian law applicable alike to land-based and maritime warfare are specified.

In relation to developments since the 1982 requisition of the QE2, the Manual is enlightening. Auxiliary vessels are defined in Paragraph 13 as follows:

[A] vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service.<sup>147</sup>

Paragraph 39 requires the parties to a conflict to distinguish at all times between civilians and combatants, and between ‘civilian or

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<sup>145</sup> L. Doswald-Beck (ed.), San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Cambridge: C.U.P., 1995). See also L. Doswald-Beck, *supra* note 93, p. 584.

<sup>146</sup> ‘Introduction’, San Remo Manual, *supra* note 145, p. 5.

<sup>147</sup> Paragraph 65: ‘... enemy auxiliary vessels ... are military objectives within the meaning of Paragraph 40’.

exempt objects and military objectives’,<sup>148</sup> a formulation going beyond the 1977 Additional Protocol 1, Article 48, in that the latter deals only with the protection of civilians and their objects. Paragraph 40 defines ‘military objectives’ as

[T]hose objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

This formulation, too, goes beyond Protocol 1, Article 52, as the latter does not deal explicitly with the question of collateral damage resulting from attacks directed against military objectives. The Explanation to Paragraph 40 notes that, as civilian objects can lose their immunity from attack, a direct connection with combat operations is not required.<sup>149</sup> Paragraph 41 states that ‘[m]erchant vessels ... are civilian objects unless they are military objectives ...’, but ‘[t]he possibility of collateral damage does not as such render an attack unlawful’.<sup>150</sup> Paragraph 46 also supplements Protocol 1, Article 57 (precautions in attack), by requiring ‘all feasible’ target information and identification in order to avoid or minimise collateral casualties or damage. However, while ‘a remote advantage to be gained at some time in the future is not to be included’,<sup>151</sup> ‘[a] violation of the rule

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<sup>148</sup> See also U.N.G.A. Resolution 2444 (XXIII) of 19 December 1968, which requires the non-combatant/combatant distinction to be respected at all times during an armed conflict.

<sup>149</sup> ‘Explanation’, L. Doswald-Beck (ed.), *supra* note 145, Para. 40.12.

<sup>150</sup> *Ibid.*, Para. 41.1.

<sup>151</sup> *Ibid.*, Para. 46(d).

cannot be established if planners and commanders took a decision in good faith on the basis of such information'.<sup>152</sup>

The San Remo guidelines thus make it increasingly difficult to argue that Britain's requisition exercise should have been more in compliance with Hague Convention VII, as the formal requirements of the 1907 Convention appear increasingly irrelevant to modern naval warfare. However, the proportionality principle has been strengthened. In other words, were a belligerent today to consider outright destruction of a ship like the QE2, modern practice would certainly permit it if the ship were to be deemed a military objective capable of affording a concrete military advantage. However, this could have been said about any British ship encountered at sea during the war, including the STUFT, and one requisitioned vessel was in fact destroyed.<sup>153</sup> Nonetheless, even were a war such as that which occurred over the Falklands to be re-played today, it remains the case that ship destruction is never automatically required and is instead only rarely necessary, depending of course on the applicable rules of engagement and available target information.<sup>154</sup>

## **Conclusion**

Modern laws of war owe their development generally to wider societal influences which have broadened political accountability for war itself.

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<sup>152</sup> Ibid., Para. 46.3.

<sup>153</sup> The SS Atlantic Conveyor, supra note 144, was struck on 25 May and sunk while transporting Harriers, Sea Harriers and Chinook helicopters. See, e.g., 'Falkland Islands: keeping the supply line filled', supra note 85.

<sup>154</sup> See, e.g., Cmdr. C. Griggs, 'Legal Constraints on Maritime Operations Affecting Merchant Shipping', M.L.A.A.N.Z.J., Vol. 19 (2005) 148.

A central purpose of the conversion formalities found in Hague Convention VII was to separate public warships from privateers, and thus to formalise conditions for state responsibility regarding the potential excesses of economic warfare at sea. Accordingly, fully-commissioned warships became the only vessels comprehensively authorised to exercise belligerent rights during public war. Subsequent instruments made no advance on this essential arrangement other than in relation to small details. The 1977 Geneva Protocol 1 was more specific regarding lawful uses of armed force, the identification of military objectives, and the principle of proportionality. The 1995 San Remo Manual deals with all questions of collateral civilian damage.

British ship requisition in 1982 owed more to the need to increase British supply line capabilities than to Hague Convention VII conversion formalities. Indeed, requisition actually only enabled the British government to exercise a wider discretion in strategic choice, and hence, to secure what it considered to be its territorial integrity. However, the main difficulty was that Britain's recourse to the Royal Prerogative and its own domestic state constitutional arrangements for requisition powers produced no binding effect at the international level.<sup>155</sup> While the minimal cost of requisition in 1982 may no doubt have been more important to Britain's ability to respond rapidly than nice questions of ensigns for use in the freezing murk of the South Atlantic, it nonetheless remains the case that as the emergency procedures put in place to effect the necessary ship modifications for

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<sup>155</sup> See, e.g., B. Robertson, 'Military Intervention in Civil Disturbance in Great Britain – What Is the Legal Basis?', Revue de Droit Militaire et de Droit de la Guerre, Vol. 29/1-2 (1990) 307.



war duties, inadequate attention was paid in many cases to more global humanitarian concerns such as the principle of distinction.<sup>156</sup>

The practical usefulness of Hague Convention VII may be nearly at an end, yet the recent sale of the QE2 does illustrate one final point: while much 'old' law such as Hague Convention VII may be obsolescent, that is not the same as obsolete, nor does it mean that new uses cannot be found. Convention VII answered needs of its time, and still endures despite the demise of war conducted under sail. In 1982, Britain does seem to have complied with Convention VII requirements to some extent. Most importantly, the British government was at all times legally and politically responsible for the activities of the STUFT, at both domestic and international levels. It would thus appear that the practical and positive contributions long made by instruments such as the 1907 Hague Convention VII are still of relevance today when the time arrives to balance wartime expediencies against the lawful means of human destructiveness.

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<sup>156</sup> See, e.g., J. Cockayne, 'Regulating Private Military and Security Companies: the Content, Negotiation, Weaknesses and Promise of the Montreux Document', J.Confl.Sec.L., Vol. 13 (2008) 429.